No. 18-1592

In The
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

DANIEL RIVERA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Allstate's Petition for Certiorari ("Pet.") demonstrated that the Seventh Circuit's opinion is inconsistent with this Court's authority on supplemental jurisdiction set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and its progeny.

Allstate also identified three circuit splits created by the Seventh Circuit's opinion that this Court should resolve. First, the Courts of Appeals are split on

whether they can exercise supplemental jurisdiction when a jurisdiction-conferring claim fails due to a lack of standing. Second, they are split on whether federal courts can decide state-law claims that turn on issues already decided in the course of rejecting the jurisdiction-conferring federal claim. Third, they are split on whether a federal claim dismissed before trial can provide a basis for supplemental jurisdiction when a plaintiff is found to lack standing on a separate federal claim.

Plaintiffs' Brief in Opposition ("Opp.") argues there are no conflicts, but their arguments are unavailing. Their principal argument is that, in this case, the federal courts never had original jurisdiction because Plaintiffs lacked standing to purse their Fair Credit Reporting Act ("FCRA") claim. But that argument ignores how the test for standing changes over the course of an action. At the pleadings stage, an allegation suffices to confer standing. At trial, however, standing requires evidentiary proof. It was only at that stage that Plaintiffs failed to prove their contention that they suffered injury-in-fact when they were unable to rebut the reason for their termination to prospective employers. The district court *did* have subject matter jurisdiction at the beginning of the case and, thus, could properly exercise supplemental jurisdiction under 28 U.S.C. § 1367(a).

If after trial Plaintiffs' FCRA claim had failed on the merits, there would have still been federal jurisdiction under Article III, so the court would have had supplemental jurisdiction over their state-law claim. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970). Here, after trial Plaintiffs failed to prove

injury so they had no standing, which, according to the Seventh Circuit, meant there was never any subject matter jurisdiction under Article III and, thus, no supplemental jurisdiction. What Plaintiffs fail to explain is why courts may exercise supplemental jurisdiction in the first instance, but not in the second. Certiorari should be granted to resolve this question.

Equally misguided is Plaintiffs' argument that their age discrimination claim cannot provide original jurisdiction because it was only added by amendment. That argument conflicts with overwhelming authority that amendments to complaints can cure jurisdictional defects that existed when a case is initiated. In fact, the Fifth Circuit has held that a district court can decide state-law claims based on a jurisdiction-conferring federal claim that was added by amendment and dismissed before the court exercised supplemental jurisdiction. *Target Strike, Inc. v. Marston & Marston, Inc.*, 524 F. App'x 939, 943-44 (5th Cir. 2013). This provides a further conflict that should be resolved by this Court.

THE WRIT SHOULD BE GRANTED

I. In Determining When Courts May Exercise Supplemental Jurisdiction, Standing Should Be Treated The Same As Federal Question Jurisdiction.

1. Plaintiffs do not dispute that a federal court may exercise supplemental jurisdiction if the federal claim giving rise to original jurisdiction is "substantial" even if the federal claim is then dismissed. *Compare* Pet. 13 *with* Opp. 15-17. What Plaintiffs ignore is that the test for standing at the

outset of the case is not the test for standing at trial. Pet. 7, 13-14; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

2. Plaintiffs do not dispute that their claims would have survived a standing challenge at the outset of trial. Pet. 14-15. Until they failed to prove their injury at trial, there was a colorable basis for Plaintiffs to assert standing under FCRA. Had Allstate moved to dismiss for lack of standing, Plaintiffs would have asserted, as they did in the Seventh Circuit, that "if they had the summaries [of investigation required by FCRA], they could defend themselves to potential employers who knew of Allstate's publication." Because they were "hampered from defending themselves before Allstate or potential employers[,]" they could not find new jobs, which "constitutes actual, concrete, and particularized harm." The Seventh Circuit rejected that argument because, at trial, Plaintiff "failed to identify any prospective employer that refused to hire them based on the" statements that they purportedly needed to defend against.[1] App. 26a.

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[1] Plaintiffs assert that Allstate was somehow dilatory in asserting that they lacked standing. (Opp. 5.) However, it would have been futile to do so in the district court. The jury found that Plaintiffs suffered special damages based on their assertion that they were unable to find work following their termination from Allstate and the publication of allegedly defamatory statements. The injury they asserted for FCRA was identical: that Plaintiffs were not told the basis for their termination and, thus, could not refute the reason. In a subsequent Motion for Judgment as a Matter of Law, Allstate argued that the evidence failed to prove special damages, but the motion was denied. Had Allstate asserted the identical argument as to why Plaintiffs lacked standing under FCRA, it too would have been rejected.

3. Because they fail to acknowledge the distinction between standing at the outset of a case and at trial, Plaintiffs' original jurisdiction argument only highlights how much the Seventh Circuit departed from the norm. The cases Plaintiffs cite on pages 16-17 of their Opposition are cases in which the jurisdictional defect was present at the outset of the case. *Rainero v. Archon Corp.*, 844 F.3d 832, 841 (9th Cir. 2016) (plaintiff failed to allege an amount in controversy sufficient for diversity jurisdiction); *Bigelow v. Mich. Dep't of Nat. Res.*, 970 F.2d 154, 156 (6th Cir. 1992) (case not ripe for failure to exhaust state inverse condemnation proceedings); *Musson Theatrical, Inc. v. Federal Exp. Corp.*, 89 F.3d 1244 (6th Cir. 1996) (no federal question jurisdiction because there was no claim for federal common law fraud); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1071 (5th Cir. 1984) (insufficient amount in controversy); *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 221 (5th Cir. 2012) (plaintiff that failed to secure a bond could not assert a Miller Act claim, so no federal question jurisdiction at the outset); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976) (absence of standing "should have been apparent on the basis of the pleadings at an early stage in the proceedings").

Those cases are fully consistent with this Court's supplemental jurisdiction jurisprudence in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), and *Rosado v. Wyman*, 397 U.S. 397 (1970). This Court's precedents establish the substantiality test, permitting the exercise of supplemental jurisdiction when the federal claim is "substantial," *i.e.*, unless it

is "obviously without merit" or previous decisions "inescapably render the claims frivolous." *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974). In each of the cases Plaintiffs cite, the federal claims were "insubstantial."

4. None of Plaintiffs' cases speaks to the question presented here: whether federal courts can exercise supplemental jurisdiction where standing ***is present*** at the outset, but fails for proof at trial. Where, as here, Plaintiffs' FCRA claim was substantial when pleaded and only failed at trial, principles of "judicial economy, convenience and fairness to litigants" favor the exercise of supplemental jurisdiction over state-law claims. *Carnegie-Mellon*, 484 U.S. at 350 n.7 (factors generally favor declining supplemental jurisdiction if federal claim is dismissed before trial); *Rosado*, 397 U.S. at 403-04 & n.4 (recognizing courts should exercise jurisdiction when they have "invested substantial time" toward resolving the case).

5. The Seventh Circuit's interpretation cannot be squared with those precedents. By equating a dismissal for failing to prove standing at trial with a failure to have standing at the outset of the case, the Seventh Circuit has imposed a unique rule in cases where a court loses jurisdiction due to a lack of proof of standing at trial.

6. For this same reason, the Seventh Circuit's opinion also conflicts with its own precedent and decisions of the Fourth and Eighth Circuits that permit the exercise of supplemental jurisdiction to decide state-law claims that turn on an issue decided in the course of rejecting a jurisdiction-conferring claim. *Wright v. Associated Ins. Companies Inc.*, 29

F.3d 1244 (7th Cir. 1994); *Borzilleri v. Mosby*, 874 F.3d 187, 193 n.2 (4th Cir. 2017); *Ivy v. Kimbrough*, 115 F.3d 550, 552–53 (8th Cir. 1997). Plaintiffs purport to distinguish those decisions on the basis that the courts possessed original jurisdiction. Opp. 18-19. The same is true here.

Because the Plaintiffs had standing at the pleadings stage, *i.e.*, the FCRA claim was not insubstantial, this Court should grant certiorari to ensure that the traditional test for supplemental jurisdiction is applied when a plaintiff has, but later loses, standing after trial.

II. The Seventh Circuit's Opinion Conflicts With The Sixth Circuit's Opinion In *Gucwa*.

Plaintiffs contend that the Sixth Circuit's opinion in *Gucwa v. Lawley*, 731 F. App'x 408 (6th Cir. 2018), "did not state, much less decide, that supplemental jurisdiction is permitted in the absence of standing. . . ." Opp. 22. That is precisely what *Gucwa* decided.[2]

In *Gucwa*, the district court dismissed a plaintiff's federal claims for lack of standing and then proceeded to decide the merits of his state-law claims. 731 F. App'x at 411-15. On appeal, as in this case, the plaintiff argued for the first time that the federal court

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[2] Plaintiffs urge this Court to disregard the conflict between the Seventh Circuit's decision and *Gucwa*, because the latter is unpublished. Opp. 21. But unpublished cases can be cited as authority, as *Gucwa* has been. *See, e.g.*, *Duncan v. Liberty Mut. Ins. Co.*, 745 F. App'x 575, 578 (6th Cir. 2018) (citing *Gucwa* for its post-*Spokeo* standing analysis); *Netro v. Greater Balt. Med. Ctr., Inc.*, 891 F.3d 522, 535 (4th Cir. 2018) (Traxler, J., dissenting) (same).

lacked supplemental jurisdiction to decide the state-law claims. *Id.* at 416.

The Sixth Circuit rejected that argument for two reasons: (1) the argument was waived because the plaintiff did not assert it in the district court; and (2) "the interests of judicial economy and avoiding multiplicity of litigation favored deciding the straightforward state law issues at hand." *Id.* at 416 (internal quotations omitted). Plaintiffs discuss the waiver holding (Opp. 22-23), but ignore that *Gucwa* applied the standard for exercising supplemental jurisdiction derived from *Gibbs*, *Carnegie-Mellon*, and *Rosado*. To claim *Gucwa* did not hold that a court can exercise supplemental jurisdiction despite a lack of standing is wrong.

III. The Addition Of The ADEA Claim Cured Any Jurisdictional Defect And Permitted The Courts To Exercise Supplemental Jurisdiction.

1. Even if the failure to prove standing at trial deprived the courts of subject matter jurisdiction for the initial complaint, Plaintiffs' dismissed ADEA claim provides a sufficient federal question to permit the exercise of supplemental jurisdiction. *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 781 (Fed. Cir. 1996) (assertion of Lanham Act claim that was dismissed before trial permitted court to exercise supplemental jurisdiction), *as amended on rehearing*, 104 F.3d 1296 (Fed. Cir. 1996). The Seventh Circuit's holding is inconsistent with *Gaia* and, as we discuss below, a Fifth Circuit decision that is directly on point.

2. Plaintiffs filed a First Amended Complaint seven months after their initial complaint to assert

their claim under the Age Discrimination in Employment Act ("ADEA"). That claim remained in the case for more than a year-and-a-half before it was dismissed. Even after that, when Plaintiffs filed a Second Amended Complaint to conform to evidence at trial, they included the ADEA claim and asserted that the district court had original jurisdiction over both the FCRA and ADEA claims.

3. Despite what they asserted below, Plaintiffs now contend that the ADEA claim cannot confer original jurisdiction because it was not in their initial complaint. That squarely conflicts with authority from this Court and numerous circuit courts that recognize amended complaints can cure jurisdictional defects that existed at the time of filing. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989) (amendment to drop a non-diverse party cures lack of diversity jurisdiction); *T Mobile Ne. LLC v. City of Wilmington*, 913 F.3d 311, 328-29 (3d Cir. 2019) ("an amended complaint relates back and can cure insufficient pleading of subject matter jurisdiction"); *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1070 (9th Cir. 2019) ("[W]hen a plaintiff voluntarily amends his or her complaint after removal to assert a federal claim, that amendment cures any jurisdictional defect and establishes federal subject-matter jurisdiction."); *LeBlanc v. Cleveland*, 248 F.3d 95, 99 (2d Cir. 2001) ("subject matter jurisdiction is 'cured' by an amendment, courts regularly have treated the defect as having been eliminated from the outset of the action"); *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1202 (5th Cir. 1997) ("the district court acquired jurisdiction . . . when the plaintiffs amended their federal complaint to include an implied cause of action

under federal law"); *see also In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928-29 (8th Cir. 2005) (because amended complaint supersedes prior complaint, "federal courts must resolve questions of subject matter jurisdiction by examining the face of the amended complaint"). This rule applies even if the amended complaint asserts a new basis for jurisdiction. *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 887 (3d Cir. 1992).

4. That the ADEA claim was later dismissed does not change this rule. Dealing with a scenario nearly identical to this case, the Fifth Circuit has held that a federal claim added through amendment but later dismissed voluntarily provides sufficient jurisdiction to permit the exercise of supplemental jurisdiction. *Target Strike, Inc. v. Marston & Marston, Inc.*, 524 F. App'x 939, 943 (5th Cir. 2013).[3]

In *Target Strike*, a plaintiff filed an action in state court asserting purely state-law claims. After the case was removed to federal court, the plaintiff asserted a Lanham Act claim. *Id.* at 942. The Plaintiff voluntarily dismissed the federal claim and moved to remand the state-law claims to state court. *Id.* The district court denied the motion to remand and later granted summary judgment on the state-law claims. *Id.*

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[3] Plaintiffs might argue, as they do about *Gucwa* (Opp. 21), that *Target Strike* should be disregarded because it is an unpublished decision. *Target Strike* has been cited by other courts. *See, e.g.*, *Janvey v. Romero*, 817 F.3d 184, 189 n.4 (5th Cir. 2016); *Brilinski v. Merit Energy Co., LLC*, No. 14-cv-10015, 2015 WL 418091, at *5 (E.D. Mich. Jan. 30, 2015).

Recognizing that it was dealing with "an unusual situation" where the case had no federal claim "when removed to the federal court nor when final judgment was entered[,]" the Fifth Circuit nonetheless held that the addition of the Lanham Act claim cured any jurisdictional defect and permitted the exercise of supplemental jurisdiction. *Id.* at 943. After litigating the claim in federal court for more than a year, principles of economy, convenience, fairness, and comity supported the district court's exercise of supplemental jurisdiction. *Id.* at 943-44.

Target Strike is indistinguishable from this case. In both, a federal claim was asserted through amendment and provided original jurisdiction for the exercise of supplemental jurisdiction. Thus, like *Gaia*, it is in conflict with the Seventh Circuit's opinion.

IV. Allstate Does Not Seek To Curtail Federal Courts' Discretion To Exercise Supplemental Jurisdiction, But Seeks To Preserve That Discretion.

Plaintiffs inexplicably claim that Allstate seeks to curtail district courts' discretion to decline to exercise supplemental jurisdiction. Opp. 31-33. Nothing is further from the truth.

At Plaintiffs' urging, the district court exercised supplemental jurisdiction and decided the state-law claims. On appeal, the Seventh Circuit initially decided the defamation claims – on the same basis as it decided the FCRA claims. It was only then that Plaintiffs argued that, due to the lack of standing, the federal courts could not exercise discretion and decide the state-law claims. Agreeing with Plaintiffs, the Seventh Circuit then withdrew its original opinion

and issued the new opinion that decided only the FCRA claim and dismissed the entire case for lack of subject matter jurisdiction. App. 3a-4a, 27a-29a.

If any parties are seeking to curtail the discretion of federal courts, it is Plaintiffs. That is the foundation of their Petition for Rehearing and Brief in Opposition to Certiorari. Plaintiffs' argument is that, once standing is found lacking, federal court are stripped of discretion to decide to exercise supplemental jurisdiction.

Nothing in Allstate's arguments compel a federal court to hear state-law claims. That remains a decision left to the discretion of the court. In this case, however, the Seventh Court wrongly concluded it had no discretion.

CONCLUSION

The petition for a writ of certiorari should be granted or summary reversal ordered.

Respectfully submitted.

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October 31, 2019