No. 21-508

IN THE

Supreme Court of the United States

In re William J. French and Sandra M. French

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, MILWAUKEE DIVISION

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

In 1996 Congress enacted Internal Revenue Code ("Code") Subchapter C—Long-Term Care Services and Contracts, which entitles purchasers of Qualified Long-Term Care Insurance ("QLTCI") Contracts to receive federal income tax benefits if their contracts comply with the Code. To prevent economic discrimination against QLTCI policyowners, the Code limits an issuer to one QLTCI policyowner class.

In violation of that term, Defendants below ("NML") created numerous classes and used, and continues to use, them to profit from discriminatory rate increases it imposed on its QLTCI policyowners.

Petitioners detailed these facts and the governing law in a Motion for Partial Summary Judgment ("PSJ Motion") filed on July 15, 2021. In response, on July 21, 2021, NML filed a motion to hold the PSJ Motion in abeyance ("Abeyance Motion"). Two days later, on July 23, the court granted the Abeyance Motion, denied and dismissed the PSJ Motion *sua sponte* and without decision, and prohibited Petitioners from filing a similar dispositive motion until it decided a pending dilatory motion previously filed by NML.

The question presented is whether the District Court exceeded its authority and clearly abused its discretion by ordering that the PSJ Motion, which confirms that NML's Scheme invalidated its purported QLTCI Contracts, be denied and dismissed, permitting the Scheme to continue undisturbed.

PARTIES TO THE PROCEEDINGS

The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners and Petitioners Below

William J. French and Sandra M. French, *pro se*

Respondents Below

Honorable Brett H. Ludwig, Federal District Court for the Eastern District of Wisconsin, Milwaukee Division

Respondent's Counsel

Defendants Below

Northwestern Mutual Life Insurance Company and Northwestern Long-Term Care Insurance Company

RELATED PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

William J. French and
Sandra M. French

Plaintiffs

v. Case No., 2:20-CV-01090

Northwestern Mutual Life Ins. Co. and
Northwestern Long-Term Care In. Co.,

Defendants.

&

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN RE WILLIAM J. FRENCH AND SANDRA M. FRENCH

Petitioners,

Original Proceeding from the United States District Court for the Eastern District of Wisconsin, Milwaukee Division

Case No. 2:20-cv-09010

Petition for Writ of Mandamus

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The Court of Appeals' August 20, 2021, Order is reproduced at Appendix Item 1.

The District Court's July 23, 2021, Order is set forth at Appendix Item 2.

JURISDICTION

The District Court has original jurisdiction of this action pursuant to 28 U. S. C. § 1331, which provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This action presents Federal Questions arising under the Internal Revenue Code of 1986, including 26 U.S.C. §§7702B, et seq. 4980 et seq. and 816(e)[1] as well as Internal Revenue Service Regulations 26 CFR §§801—3(e) and 7702B and the Federal Common Law.

The District Court also has original jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1453 and 1711–1715, because this action involves approximately 170,000 policyowners residing across the county with claims similar to those of Petitioners, and the amount in controversy, as measured by their aggregate claims, is well in excess of $1 billion, exclusive of interest and costs.

This Court and the Court of Appeals for the Seventh Circuit have jurisdiction pursuant to 28 U.S.C. §1651.

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[1] The Tax Reform Act of 1984 renumbered Section 801(e) of the Code of 1954 as §816(e) without change in substance and it is hereinafter referred to as §816(e).

RELIEF SOUGHT

Petitioners seek a writ of mandamus under 28 U.S.C. § 1651(a) and Federal Rule of Appellate Procedure 21, ordering that: (1) the District Court's July 23 Order be vacated; (2) the case be returned to the District Court with instructions to the Chief Judge to reassign it to a new judge who will treat it with impartiality and diligence; (3) Petitioners be permitted to refile their motion for partial summary judgment; (4) the motion be determined in accordance Rule 56, as construed by this Court, and (5) such other relief as the Court determines to be just and proper.

STATUTORY PROVISIONS INVOLVED

The principle statutory provision involved is Code §7702B(g)(2)(A)(i)(I), the Code's "Guaranteed Renewal Provision." It provides as follows:

> The term "guaranteed renewable" may be used only when the insured has the right to continue the long-term care insurance in force by the timely payment of premiums and when the insurer has no unilateral right to make any change in any provision of the policy or rider while the insurance is in force, and cannot decline to renew, except that rates may be revised by the insurer on a class basis.

ARGUMENT

I. STATEMENT OF THE CASE

A. The Parties

In 2007 each Petitioner ("Petitioners") purchased an RS.LTC.(1101) Qualified Long-Term Care Insurance ("QLTCI") Contract ("Contract") from Northwestern Long-Term Care Insurance Company, a wholly-owned subsidiary of Northwestern Mutual Life Insurance Company (collectively "NML"). On April 12, 2018, NML advised them that the Texas Department of Insurance ("TDI") had granted it permission to increase the annual premiums on its QLTCI Policies that its Texas Policyowners, including Petitioners, purchased. Believing they were part of a national QLTCI class, and not a Texas subclass, Mr. French ("Petitioner") doubted that NML had the right to impose a rate increase other than on the basis of a national QLTCI class. When his research verified that NML had no authority to create any class or sub-class or to otherwise unilaterally alter the Contract, Petitioners filed this action in July 2020.

B. The District Court's July 23 Order

On July 15, 2021, pursuant to Rule 56 Fed.R.Civ.P., Petitioners filed a Motion for Partial Summary Judgment ("PSJ Motion") based principally on documents that NML provided either to Petitioners or to state regulators. In response, on July 21, NML filed a motion ("Abeyance Motion") seeking to hold the PSJ Motion in abeyance pending the court's decision on

NML's previously filed Motion for Judgement on the Pleadings ("JOP Motion").

Two days later, on July 23, the court gave the JOP Motion priority over the PSJ Motion, denied and dismissed the PSJ Motion, took the JOP Motion "under advisement" and ordered the parties to "halt any litigation of this matter" until it rendered a decision on the JOP Motion ("July 23 Order"). No authority is cited in the Order.

C. The Order of the Court of Appeals

The Court of appeals for the Seventh Circuit denied the Petition, without comment.

II. Governing Law

A. Introduction

The Complaint alleges that the Internal Revenue Code ("Code") and the Contract limit an issuer of QLTC Contracts to one nationwide QLTCI class. Because this limitation is fundamental to the Code's QLTCI Consumer Protection Provisions, the Code provisions and IRS regulations are analyzed first. The Petition next reviews NML's numerous classes and why they void its QLTCI Contracts. Finally, it shows why the writ of Mandamus should issue.

B. Law defining a QLTCI Contract's Terms

To be sold in the United States, a QLTCI Contract must comply with the Code, IRS Regulations and any "more stringent" LTCI Regulations of the state of issue. Code §4980C(f). The Contracts are governed by identical federal and state laws based principally on the National Association of Insurance Commissioners' ("NAIC") Model LTCI Act ("Model Act") and Model LTCI Regulation ("Model Regulation"), in which consumer protection policies are deeply engrained. The Regulation provides that rate increases on a QLTCI Contract be made "on a class basis." In August 1996 Congress incorporated many of these provisions into the Health Insurance Portability and Accountability Act ("HIPAA"), creating 26 U.S.C. Subtitle F, Chapter 79, Subchapter C—Long-Term Care Services and Contracts ("QLTCI Provisions").

Most significant, is Model Regulation Sec. 7.A.(2), the "Guaranteed Renewal Provision" ("GRP"), which, at Code §7702B(g)(2)(A)(i)(I), provides:

> The term "guaranteed renewable" may be used only when the insured has the right to continue the long-term care insurance in force by the timely payment of premiums and when the insurer has no unilateral right to make any change in any provision of the policy or rider while the insurance is in force, and cannot decline to renew, except that rates may be revised by the insurer *on a class basis*.

(Emphasis added.)[2]

The states and the District of Columbia (the "States") also incorporated many NAIC QLTCI Provisions into their regulations. For example, the Texas Legislature provided:

> The amendments and additions to Subchapter Y are necessary to: (1) ensure, in accordance with the [Texas] Insurance Code ("TIC"), Article 3.70-12 §§3(d) and 7, that consumer protection standards for long-term care insurance contracts sold in Texas are no less favorable than standards adopted in nationally recognized model laws and regulations; ...

See 21 TexReg 11728. In Texas, the GRP, became TAC §3.3807.

C. NML's Three-Part Contract

NML's QLTCI Contract consists of a Policy Form, an Outline of Coverage ("Outline"), and a Long-Term Care Insurance Potential Rate Increase Disclosure Form ("Rate Increase Disclosure"). The latter two originated in the Model Regulation and are part of the Contract pursuant to Code provisions or State Regulations. Code §§4980C(c)(1)(A)(vi) and 4980C(c)(1)-

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[2] *See also* 26 CFR §1.7702B2(b)(4)(ii)(C) (requiring "classwide" premium increases on QLTCI Policies); Congress also extended protection to pre-January 1, 1997, (HIPAA's effective date) contracts if they were "issued on a guaranteed renewable basis" and provided "for a *classwide* increase or decrease in premiums," putting them on a par with post-January 1, 1997, contracts.). (Emphasis added.)

(B)(ii) (Outline); TAC §§3.3832(a) (Outline) and 3.3829(b) ("Rate Increase Disclosure"). The Code further provides that "the Contract shall be treated as a guaranteed renewable contract subject to the rules of [Code] §816(e)." See also 26 U.S.C. 7702(b)(1)(F) (requiring the Contract to meet the Consumer Protection Provisions of Code §7702B(g)).

NML's Policy Form states, "This policy with the application and attached endorsements is the entire contract between the Insured and the Company...". However, as observed above, the Outline and the Rate Increase Disclosure are also part of the Contract. *See also Plumb v. Fluid Pump Serv's,* 124 F.2d 849, 861 (7th Cir. 1997):

> It is fundamental insurance law that '...statutory provisions enter into and form a part of all contracts of insurance to which they are applicable and, together with settled judicial constructions thereof, become a part of the contract as much as if they are incorporated therein.'

Quoting 2, Couch on Insurance, Russ, L. & Segalla, T., §19-1, at 19-2 (3rd ed. 1996).

D. The Code's Term "On a Class Basis" Permits Only One Class

The Policy Form provides that, "This policy is intended to be a qualified long-term insurance contract under section 7702B of the [IRC] of 1986." The intent referred to is that of Congress, the Contract's

principal author. *Hofkin v. Provident Life & Acc. Ins. Co.*, 81 F.3d 365, 369 (3d Cir. 1996) (where a statute defines policy language, the intent of the legislature controls).

The Code's term "on a class basis" is singular. *Niz-Chavez v. Garland,* 593 U.S. ___; 141 S. Ct. 1474 (2021). There, the Court held that the word "a" when followed by a singular noun in the phrase "a notice," means "a single document." Slip Op. at 4-9. The statutory contexts of the terms "a notice" in *Niz-Chavez* and "on a class basis" in the GRP, are identical for in each, Congress followed the word "a" by a singular noun. In the Code, the word "a" is followed by the noun, "class," not by its plural, "classes," and the word "class," is followed by the adjective, "basis," not by its plural "bases." These singular terms confirm that only one class is permitted. *Id.* at 8.

The statute leaves "no room for a grammatical construction that would convert the singular into a plural." *Gibbons v. Malone,* 703 F.3d 595, 600 (2d Cir. 2013). *See also Coleman v. Labor & Indus. Rev. Com'n of Wi.*, 860 F.2d 3d 561, 473 (7th Cir. 2017) ("The point is clear: in this particular statute, Congress used the singular when it meant one party, and it used the plural when meant all parties.");[3] IRS Notice 97-31 (requiring a QLTCI contract to comply with *exact language,* (including punctuation), format, and *content, of the statute*). IRS 1997 CB at 7 (emphasis added).

[3] Neither the Code, nor any IRS Regulation nor any State LTCI statute or regulation, use the term "by class," presumably because it is inherently ambiguous.

E. The Policy Form Requires the Term "on a class basis"

The Policy Form also provides that it must contain the terms required by Congress and the States. It states that "[a]ny provisions of this policy which, on the Date of Issue on that Date, are in conflict with the statutes of the State of Issue on that Date, *are amended to conform to such statutes*." (Emphasis added). As the GRP's terms, as enacted by Congress and adopted by the States, are the same, NML's QLTCI Contracts must use the term "on a class basis" as a matter of law and of contract.

Significantly, the Policy Form's term, "are amended," is self-effectuating. Properly construed, it requires that the term "on a class basis" be returned to the Policy Form to replace NML's fugitive "by class" substitute, restoring the Policy Form to the terms Congress intended. Nevertheless, NML's rate increase applications misled regulators into permitting it to impose rate increases on its illusory contracts.

F. The Outline Permits Only One Class

The Outline, states: "Premium. Right to Change Premium. The Company has the right to change premiums *on a class basis*." (Emphasis added). It describes the term Congress specified as an "important feature[] of the policy," *id.* at ¶ 16. Code §§4980C-(c)(1)(A)(vi), 4980C(c)(1)(B)(ii), TAC 3.3832(a). Consistent with the GRP and the Policy Form, the Outline states that an issuer "cannot change any of the terms of the policy on its own," other than premiums, which

can be changed only on "a class basis." *Id.* at ¶ 18.

G. The IRS Regulations Permit Only One Class

As further protection against economic discrimination, the IRS requires that rate changes be uniform classwide and based on the collective experience of all of the issuer's QLTCI policyowners. 26 CFR §1.801—3(d). This regulation has long required that premiums be based on an insurer's experience by "policy type." *Grp. Life & Health Ins. Co. v. U. S.*, 434 F.2d 115, 118 (5th Cir. 1970) (insurer must adjust rates for the "whole class of policies.").[4]

H. The States Adopt the Term "On a Class Basis"

The LTCI regulations of the States and the District of Columbia (the "States) also adopt the term "on a class basis." For example, the Texas legislature required the TDI to comply "with all applicable federal law... including HIPAA, in fashioning the state's LTCI Contract rules."[5] 21 TexReg 11730.

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[4] Consistent with Code §7702B(g)(2)(A)(i)(I), IRS Reg. §1.801—3(d) provides that reserves for guaranteed renewable policies must be calculated on a single guaranteed renewable class basis, *i.e., based on the policy type,* which is how NML calculates its QLTCI reserves. *See* NML May 24, 2017, letter to the TDI (advising that "The Additional Reserves ... due to asset adequacy *testing are calculated in aggregate for the product line and are not attributed to specific contracts or forms.*"). (Emphasis added).

[5] *See* 26 CFR §1.7702B2(b)(4)(ii)(C) (extending protection to pre-January 1, 1997, (HIPAA's effective date) contracts if "issued on

I. The Code Preempts Less Stringent State Rules

As further policyowner protection, Congress defined who, other than itself, may alter the required policy terms and the criteria for doing so—only States and only if the state rule *is more stringent* than the Code's term. Code §4980C(f) (emphasis added). "Where Congress explicitly enumerates certain exceptions ... additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc., v. Andrews,* 534 U.S. 19, 28 (2001). Here, where the Code and the Contract forbid any unilateral change to any provision of the policy, such evidence is inconceivable.

J. The Rate Increase Disclosure Requires Non-Discriminatory Rate Increases

The Rate Increase Disclosure provides that "rates may go up based on the experience of all policyowners with *a policy similar to yours.*" (Emphasis added). This anti-discrimination term ensures that policyowners receive equal treatment if rates are altered. A "similar policy," (i.e, "policy similar") is defined as one of three QLTCI policy types: non-institutional, institutional and comprehensive. See TAC §3.3804(18) and (30). As all of NML's policies are comprehensive, all are "similar" and premium increases must be based on their similar NML policies, and none other.

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a guaranteed renewable basis" and provide "for a *classwide* increase or decrease in premiums.").

III. NML's Breaches of the Contract

A. NML's Scheme

Issuers of QLTCI policies seek profits either from rate increases or from policy lapses. Policies with the highest premiums provide the greatest returns and create the largest reserves, but their more comprehensive coverage poses greater risks of significant claims, risks that increase as policyowners age.[6] After a period of premium payments, LTC insurers are content to let the more expensive policies lapse because reserves held for them, for the most part, flow to the insurer, converting potential claims into windfall profits. Referring to this tactic, the Treasury Department's Federal Insurance Office, notes that: "Lapsed policies allow insurers to accumulate capital without the payment of claims reducing the potential solvency impact of claims that are made." NML also increased the potential for lapsation by imposing premium increases of 10%, 20% and 30% on "subclasses" of policyowners, increases not justified by any Code or Contract term.

[6] NML faced no such threat. In fact, the number and size of claims it received from 2002 to 2018 were well below the number and size it originally anticipated, permitting its QLTCI reserves to grow well beyond expectations, as Connecticut's Regulators confirmed.

B. NML's Unilateral Alterations to the Contract

For its Scheme to succeed, NML realized that in the Policy Form it must substitute its plural term "by class" for the singular term, "on a class basis." But if Congress had intended insurers to so easily avoid the Code's terms, the GRP would not provide that "an insurer has no unilateral right to make any change in any provision of the Policy," and the Contract would not state that the Policy cannot "have its term, other than premiums, changed by the Company." *Id.* at 8. *Botany Mills v. U.S.*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"). Contract terms that forbid unilateral alterations are rare for even without that term, a unilateral alteration renders the policy illusory.[7] *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 340 (1956) ("a unilateral announcement of a change to a contract would of course be a nullity...").

C. NML's Regulatory Filings Disclose Only One Class

Before selling a QLTCI Contract, an issuer must submit to state regulators an actuarial memorandum ("ActMemo) confirming that the Contract complies

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[7] *See e.g., Harris v. Tap Worldwide, LLC*, 248 Cal. App. 4th 373, 385 (2016) (a contract is unenforceable as illusory if one party has an arbitrary right to modify it.); *Nagle Heat. & Air Cond. Co. v. Heskett*, 585 N.E.2d 866, 868 (1990) ("A contract cannot be unilaterally modified.") *citing* 17A C.J.S. Contracts §410.

with federal and state statutes and regulations. Thus, to ensure approval of its purported QLTCI Contracts, NML's Policy Forms, marketing materials and regulatory filings needed to conceal its classes. The GRP, permitting only one class, necessitated this.

On March 2, 2001, NML submitted to the TDI an application for approval of its proposed RS.LTC.(1101) Policy. Its cover letter falsely described the Policy as a tax-qualified [LTCI] policy, under the requirements of HIPAA, and "designed to follow all of the requirements of the NAIC [LTCI] Model Act and Regulation. Over the following months, NML submitted additional ActMemos, each of which falsely stated, "One underwriting class exists for all policies issued."[8] In a January 2008 ActMemo, NML again falsely represented that "One underwriting class exists for all policies issued," and concealed its classes. Finally, its Rate Increase Filings from late 2016 to mid-2019, falsely claim that "One underwriting class exists for all policies issued."

Further, the Policy Form is required to state whether NML had "a right to change premium [sic] and if such right exists, [to] describe clearly and concisely each circumstance under which [sic] premium may change." Code §4980C(c)(1) (incorporating Model Regulation 1993, Sec. 23.3(d)). While it disclosed that

[8] NML's "one class" claim strongly suggests that it knew all along that only one class was permitted. For, if its many classes are lawful, why do its submissions conceal the existence of all but one? *Cf. Panter v. Marshall Field & Co.*, 646 F.2d 271, 292 (7th Cir. 1981) (once a partial disclosure is made, a full disclosure is required "to avoid making such statements misleading.").

it may alter premiums, NML did not "clearly and concisely" describe any such circumstance, much less one in which discriminatory rate increases are based on multiple classes.

Finally, NML's QLTCI Brochure purports to describe the Policy's terms but likewise alters the rule of law. It defines "guaranteed renewability" to mean that "premiums will only be changed if all policies of the same *form* in your class are changed." (Emphasis added). As insurers may have many policy "forms" of QLTCI Contracts, that term, if permitted by law, would have allowed many, easily manipulable, classes, contrary to 26 CFR §1.801—3(d). It requires that rates be changed based on the "type of policy," i.e., the issuer's entire QLTCI class of business, precluding manipulation by multiple policy forms.[9]

D. NML Confirmed Its Multiple Classes

NML used its multiple classes in connection with its rate increase program, as its former Assistant General Counsel ("AGC") has confirmed. In letters to Petitioners, he admitted that "over the life of the Policy," NML assigned policyowners to many classes, as follows:

> The classes that exist for the RS series are determined by the various policy characteristics

[9] IRS Reg. 1.801—3(d), promulgated in 1960, uses the term "classes" when referring collectively to several guaranteed renewable contract *types*. However, when referring to one guaranteed renewal contract *type*, Congress uses the singular term "class." *See* Code §7702B(g)(2)(A)(i)(I).

> that premiums could vary by [sic]. The list below summarizes these various policy characteristics and the resulting policy classes are defined by the mutations of them, which results in many subsets-of-classes.

In an October 8th letter, NML revealed its definition of the term "class," as follows:

> Class means those items which are used to determine the insured's premium rate at issue; almost any policy characteristic at the time of issue such as age, state, series, benefit period, underwriting rating classification, and the optional additional benefits which are included may be used to further differentiate actuarial supportable classes.

Initially, NML claimed that its classes were authorized by Texas law, but when questioned, changed it to claim that they were based on "generally accepted actuarial principles." Although no law permits multiple classes, NML created so many "classes" or "subsets of classes" that their permutations exponentially exceeded its 94,920 RS.LTC Policyowners, emasculating the Code's one class requirement.

Finally, NML confirmed that it used its classes in connection with the rate increases it imposed on Petitioners, as follows:

> The classes that were used to determine the premium rate increases approved by the TDI for the policies included in the Texas RS rate

> increase filing are based on the policy characteristics of the state of issue, policy series, issue age, and benefit period.[10]

Having benefitted from its misrepresentations to policyowners and regulators, NML cannot change course. Under the law of "quasi estoppel" courts ask (1) whether the party against whom estoppel is asserted is taking a position that is "clearly inconsistent" with an earlier position; (2) whether that party persuaded a court or agency in the earlier proceeding to adopt the inconsistent position; and (3) whether the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *In re Airadigm Commc'ns, Inc.*, 616 F.3d. 642, 661 (7th Cir. 2010) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 750-751 (2001). See also 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (1981) (observing that the rule applies where a "party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding.") (Citations omitted.)

Plainly, NML seeks to derive an unfair advantage or impose an unfair detriment on its QLTCI Policyowners. But its conduct is untethered to any rule of law.

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[10] NML's Answer admits that the AGC's letters "speak for themselves," and denies Petitioners' "characterizations" of them only to the extent that they "differed in any respect" from the letters. It thereby admits the accuracy of the letters' statements to the extent accurately alleged. NML's Answer does not identify any discrepancy in Complaint's quotations.

Rejecting a similar approach in *Bostock v. Clayton Cnty. Ga.*, 590 U.S, __, 140 S. Ct. 1731 (2020), the Court, stating:

> Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges, we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

E. NML Breached the Rate Increase Disclosure's Terms

NML did not comply with the Rate Increase Disclosure either. It provides that "your rates may go up based on the experience of all policyowners with a policy similar to yours." But, as NML advised State Regulators:

> we have not relied on our own internal claims experience to develop the morbidity assumptions used in this rate increase filing. Instead,

> we have relied on the 2014 Milliman Guidelines (as described in NML's Actuarial Memorandum) for our current morbidity assumptions and attribute all credibility to those assumptions.

NML thus admitted that at least a portion of its rate increase was based on undefined policies, with undefined terms, issued by unidentified insurers to unidentified policyowners with undefined experiences, none of which the Code or the Contract permit. Further, its discriminatory surcharges, which by definition, assess similarly situated policyowners different rates for the same services, are unmoored to the Code or the Contract. *Am. Tel. and Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 224 (1998) ("the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services.").

F. NML Closes the RS.LTC.(1101) Policy Block

An issuer signals its intent to force policy lapsation when it closes a policy block. NML has a long history of doing just that. By closing a block, an insurer causes premiums to decline and claims, as a percentage of premiums, to increase. Claim increases and premium decreases may result from two factors: (1) when a policyowner goes on claim his or her premium payments stop; and (2) when a policy block is closed, new policyowners, who would replace such lost premiums, are not recruited. Expenses thus increase as

revenues decline, a tactic used to create the impression that a rate increase is necessary.

NML's Comprehensive QLTCI Policy Blocks		
Date	Policy ID	Action
Mar. 2002	RS.LTC.(1101)	Introduced
May 2002	RR.LTC.(0798)	Closed
Aug. 2008	RS.LTC.(0708)	Introduced
Aug. 2008	RS.LTC.(1101)	Closed
July 2010	TT.LTC.(1010)	Introduced
Apr. 2011	RS.LTC.(0708)	Closed
Nov 2012	TT.LTC.(1013)	Introduced
Mar. 2013	TT.LTC.(1010)	Closed
Mar. 2014	UU.LTC.(1014)	Introduced
Jan. 2015	TT.LTC.(1013)	Closed
July 2016	UU.LTC.(0916)	Introduced
Sept.2016	UU.LTC.(1014)	Closed

NML's QLTCI Contracts and the dates of their block introductions and closings are itemized in Table A.

Closing a block does not necessarily mean a product is unprofitable. However, the opposite is strongly suggested where the insurer has an ulterior profit motive to do so and also has available a new—and similar—policy ready to absorb demand otherwise lost by closing a block. Successive rate increases drive additional lapsation, causing premiums to fall and provoking further rate increases on the

remaining policyowners. The industry refers to this as a "policy death spiral."

In April 2011, shortly after introducing its TT.LTC.(1010) Policy, NML closed the RS.LTC Policy Block. Thereafter, claims as a percentage of premiums increased. Yet, NML advised regulators that it "remain[ed] in the market and currently sells similar long-term care insurance." In March 2013, shortly after introducing the TT.LTC.(1013) Policy, NML closed its TT.LTC.(1010) policy block. NML complained of "higher anticipated higher lifetime loss ratios" but "remain[ed] in the market and currently sells similar long-term care insurance."

IV. The Filed Rate Doctrine Is Inapplicable

NML's JOP Motion implies that regulators, when approving its rates also approved its unilateral policy alterations, including its many classes. But it is self-evident that state regulators have no authority: (1) to approve unilateral alterations to contract terms required by Congress; (2) to permit issuers to create classes, or (3) to apportion rates or alter rate setting methods contrary to the Code. Nor did NML request any regulator to do so.[11] *FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 62 (2d Cir. 2006) (filed rate doctrine inapplicable where no tariff filed).

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[11] *See* TDI "Note to Filer," stating that "TDI has approved a cumulative rate increase of 62% for forms R.S.LTC.(1101) and (RS.LTC.0708)"; TDI "Filing at a Glance" note to file confirming approval and closing file. Nothing in the TDI's file hints that it saw, much less approved, NML's classes.

"[T]hat the so-called 'filed-rate' procedure is applicable to changes in contracts ... proves only that contracts may be changed, *not that they may be changed unilaterally*." *Mobile*, 350 U.S. at 340 (emphasis added); *Cent. Office Tel., Inc.*, 524 U.S. at 230-231 ([filed rate] doctrine does not shield one from "claims based on the filed tariff itself."); *Brown v. MCI WorldCom NetworkServs*, 277 F.3d 1166, 1171 (9th Cir. 2002) (doctrine inapplicable where charge not authorized by tariff); *Whitaker v. Frito-Lay, Inc.*, 88 F.3d 952, 961 (11th Cir. 1996) (doctrine inapplicable to rates void per se under a statutory or regulatory scheme); *Taffet v. Southern Co.*, 930 F.2d 847, 857 (11th Cir. 1991) (doctrine inapplicable where rate-making process fraudulently subverted); *Gelb v. Am. Tel. & Tel. Co.*, 813 F.Supp. 1022, 1024 (SDNY 1993) (doctrine "inapplicable were conduct involves universal fraud and concealment of rates").

"This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." *Maslin Indus., U.S., Inc. v. Primary Steel*, 497 U.S. 116, 126 (1990) citing *Keogh v. Chicago and NW. R. Co.*, 260 U.S. 156, 163 (1922). See also *Arizona Grocery Co. v. Atchison, T. & SFR Co.*, 284 U.S. 370, 384 (1932) (filed tariffs prevent rate discrimination).

Unilateral alterations to the rate and to the terms that determine it are prohibited. *Cent. Office Tel.*, 524 U.S. at 223-224 (doctrine applies to rates and to any term that might affect the rates). In *Richmond, Pwr. and Light v. FPC*, 481 F.2d 490, 492 (D.C. Cir. 1972) the court, citing *Mobile*, held that,

> These [common law] principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner. In either case the contract is binding, and a unilateral filing is ineffective to change it.[12]

Id. at 497.

Nor may regulators accept filings inconsistent with the Contract. *Richmond*, 481 F.2d 492 (if a utility, subsequent to entering into a contract unilaterally files a new rate inconsistent with its contract, the newly filed rate is a nullity and does not abrogate the contract) citing *Mobile; City of Cleveland v. FPC*, 525 F.2d, 854-855 (D.C.Cir. 1976) (same) citing *Mobile*; *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1003-1004 (D.C.Cir. 1975) (same) citing *Mobile*.

Finally, even if accepted for filing, a contract with terms contrary to those chosen by Congress, is not "properly filed." *See e.g., Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) ("straightforward principles underlie the 'filed rate doctrine,' which forbids a regulated entity to charge rates for its services other than those properly filed..."); *McCray v. Fidelity Nat. Title Ins. Co.*, 682 F.3d 229, 239 (3d Cir. 2012) (in the

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[12] As *Richmond* observes: "The rule of *Mobile* "is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with *contractual obligations* are valid; rate filings inconsistent with *contractual obligations* are invalid." *Id.* at 493 (emphasis added).

insurance context, noting that the doctrine only applies to rates "properly filed."). Preserving the integrity of the Code requires nothing less.

V. The Petitioners' Dispositive Motion

A. Petitioner's Stroke

Encouraged by *Niz-Chavez's* incisive analysis, Petitioner determined to file the PSJ Motion to present *Niz-Chavez* to the court in a proper context. Consistent with Rule 1, Fed.R.Civ.P., the supporting memorandum stated that by construing the term "on a class basis" consistent with the construction of the term 'a notice' in *Niz-Chavez*, the court would "significantly advance, if not totally resolve, this case." Unfortunately, before its filing, Petitioner experienced a stroke, which, together with a transient ischemic attack[13] that followed shortly thereafter, prevented him from ensuring that the Motion was in proper order or recognizing its deficiencies, as he advised the court. Nevertheless, he felt that the *Niz-Chavez* decision was so significant that every effort should be made to bring it properly to the court's attention. But even as problems with the initial PSJ filing became apparent,

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[13] "A transient ischemic attack (TIA) is a temporary period of symptoms similar to those of a stroke. It usually lasts only a few minutes and doesn't cause permanent damage. Often called a ministroke, a [TIA] may be a warning. About 1 in 3 people who has a [TIA] will eventually have a stroke, with about half occurring within a year after the [TIA]." See https://www.mayoclinic.org/diseases-conditions/transient-ischemic-attack/symptoms-causes/syc 2035-5679.

Petitioner's attempts to amend it were so problematic that NML did not even respond.[14]

Petitioner was certainly justified in believing that the court would welcome, when considering the motions that would come before it, a comprehensive analysis of *Niz-Chavez,* NML's admissions, the rules governing QLTCI Contracts, as well as necessary corrections to prior filings. *Cf. Mendoza v. Microsoft, Inc.,* 1 F.Supp.3d 533, 541 (WD Tex. 2014) (striking a Notice of Supplemental Authority "would prevent courts from learning of changes to controlling authorities — surely a perverse result."); *Sisk v. Abbott Labs.,* 1:11 CV 159, 2012 WL 1164559, at *1 (W.D.N.C. Apr. 9, 2012) (suggesting that "a party may not inform the court of subsequent authority is nonsense-cal."). Courts also invite dueling motions. *Ivory Edu. Inst. v. Dept of Fish and Wildlife,* 239 Cal.Rptr.3d 606 (Ct. of Ap. 2nd Div. 2018) (parties directed to file competing dispositive motions). While not immediately successful, he provided a coherent and comprehensive analysis to the court on July 15.

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[14] As the description of these events in the July 23 Order is inaccurate and incomplete, clarification is required. Between the time of his stroke at the end of February and mid to late June 2020, as the difficulties it caused slowly subsided, Petitioner was driven by two thoughts: first, strokes and TIAs often reoccur, and second, no other policyowner appeared to be aware of NML's Scheme. It therefore seemed essential that the court receive an accurate, detailed and up-to-date description of NML's Scheme, as soon as possible, to ensure that if Petitioner proved unable to proceed, the facts would be available to someone who could.

B. Petitioners' July 15, 2021, Motion for PSJ.

That analysis, Petitioner's third corrected Memorandum in support of the PSJ Motion, struck a nerve. Even if the prior filings had not, it triggered Rule 56 Fed.R.Civ.P., which "mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

As observed in *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994):

> The Supreme Court has instructed us that the purpose of Rule 56 is to "enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. Nat. Wildlife Fed.*, 497 U.S. 871, 888 (1990).

Citing *Celotex*, 477 U.S. at 322, the court emphasized that Rule 56 mandates the entry of summary judgment against a party who fails to show the existence of an element essential to its case and on which it will bear the burden of proof at trial.

NML's documents provided to Petitioners or to regulators, confirm that no issue of material fact exists, and that Petitioners are entitled to judgment as a

matter of law. NML's mailings are replete with false statements or omit to disclose material facts. The Contract contains the term "by class," which NML used in place of the Code's term "on a class basis." Its ActMemos falsely claim one class exists. Its two letters to Petitioners identify its classes and confirm their use in connection with its rate increases. The Answer admits the accuracy of these letters. Confirming the invalidity of NML's QLTCI Contracts, these documents attest to a Scheme that nullifies its Filed Rate defense—for a valid contract rate presupposes a valid contract.

By piercing NML's pleadings, the PSJ Motion shifted the burden to NML, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), requiring it to show that a genuine factual issue existed.[15] *See Celotex*, 477 U.S. at 324 (a principal purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses..."); But NML's Abeyance Motion raises no factual issue.[16]

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[15] While Rule 56(d) permits the non-moving party to request discovery, that avenue is foreclosed by the parties' agreement to stay discovery and NML's failure to request it.

[16] The Abeyance Motion asserts that, to save time and expense, a decision on its pending JOP Motion should precede consideration of the PSJ Motion. As support, it claims that the Complaint alleges that NML's rate increase was "properly applied for, vetted and approved by the appropriate regulatory agency." App. at 5. In fact, the Complaint alleges that NML falsely advised regulators that it had only one class ¶138, and concealed its multiple classes ¶120. It neither alleges that the rate increase was "unfair" as NML claimed, it alleges that it's "alterations" ¶1, "rate increases" ¶6, and "classes" at 30, were "unlawful"; nor does it use the terms "properly applied for" or "vetted," while the

NML's failure to comply with Rule 56(e) required the court, either to grant the PSJ Motion or "issue any other appropriate order. Rule 56(e)(3) and (4). Although not automatic, for the court must evaluate the "merits and [to] determine whether [Petitioners were] entitled to judgment as a matter of law," *Standard Gen. L.P. v. The Travelers Indem. Co. of Conn.*, 261 F.Supp.3d 502, 506 (S.D.N.Y. 2017) citation omitted, the PSJ Motion clearly met the requirements of Rule 56. Nevertheless, the court issued an order that protects and prolongs NML's Scheme.

VI. The July 23 Order

A. The Court Grants NML's Expedited Motion

Two days after receipt of the Abeyance Motion, the court issued the July 23 Order, which confirmed that Petitioners' intended to oppose the Abeyance Motion and stated that the "case should proceed in an orderly and logical way consistent with the parties' discussion at the scheduling conference." Order at 1. Nevertheless that Order: (1) summarily granted the Abeyance Motion contrary to Civil Local Rule 7(h)(2), which permits at least 7 days to respond; (2) denied and dismissed, *sua sponte*, the PSJ Motion as "premature";

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term "unfair" is used only regarding claims under the Texas Unfair and Deceptive Trade Practices Act, ¶¶ 166, 185, 186. Moreover, on the JOP Motion the Complaint's allegations that are to be accepted as true. *Adams v. City of Indianapolis*, 742 F.3d 720, 727 (7th Cir. 2014).

(3) revised the Parties' "limited agreement" ("Agreement") set forth in the Joint Rule 26(f) Conference Report,[17] from one that stayed "Rule 26(a)(1) initial disclosures" until it decided the JOP Motion, to one that precluded Petitioners—and only Petitioners—from filing a dispositive motion until it rendered that decision; (4) took NML's JOP Motion "under advisement," and (5) directed the parties "to halt any litigation of this matter" until it decided the JOP Motion (the "July 23 Order"). *Id.* 1 and 2. Plainly, this is not "an appropriate order."

B. A Decision on the PSJ Motion Was Most Expedient

In *Gallup v. Caldwell,* 120 F.2d 90, 93 (3d Cir. 1941), Petitioner alleged ownership of certain shares of stock, a fact not recorded on the company's books. The court held that if record ownership was a prerequisite to the action, "then *it is expedient* that the point be decided preliminarily," as the alternative—expensive and burdensome proceedings—would prove a "needless waste of the court's time" if Petitioner could not prove that element, citing Rule 1 Fed.R.Civ.P. (emphasis added).

Gallup exemplifies the logic of Rule 56(e). Just as NML's classes invalidate its purported QLTCI

[17] The Report states that: "The parties have agreed that discovery should be stayed pending resolution of defendants' Rule 12 motion for judgment on the pleadings. The parties respectfully request that the Court approve *this limited discovery stay, which allows the parties to present, and the Court to resolve legal issues that could materially impact the scope of the case.*" (Emphasis added.)

Contracts and rate increases, they eviscerate its Filed Rate defense. While nothing gives a JOP Motion priority over the PSJ Motion, Rule 56(e) strongly suggests that the latter, which addresses all of the issues, has priority over the former.

C. The July 23 Order Ignores NML's On-Going Scheme

In addition to the duties under Rules 56(a) and (e), federal courts have a general duty to decide matters presented to them. *Cf. Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69 (2013) ("federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant").

The PSJ Motion certainly warrants careful consideration. The evidence Petitioners amassed, even without discovery, in support of the Motion reveals a continuing, nation-wide, scheme to defraud. At the Scheme's apex, NML sent hundreds of letters to State regulators presenting and defending its rate increase requests and encouraging their rapid approval. When approved, it sent thousands of additional letters to policyowners falsely advising of its reasons for its rate increases. It is both incredible and reprehensible that the principal contrivance of NML's Scheme is a type of health insurance contract.

If presented to a court by the Attorney General of the United States these facts undoubtedly would permit, if not demand, injunctive relief pursuant to 18 U.S.C. §1345, to prevent further injury to policyowners. The statute properly presumes that no adequate remedy

at law exists. The urgency being manifest, most federal courts would grant such relief. Certainly, none would indefinitely postpone the relief requested, much less deny it *sua sponte*, in preference to a dilatory motion by a proven swindler. Yet, even though private parties cannot proceed under §1345, granting the PSJ Motion based on these facts is salutary, if only because "sunlight is the best of disinfectants."[18]

VII. Reasons for Granting the Petition

A. Governing Standards

The common-law writ of mandamus is codified at 28 U. S. C. § 1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This "drastic and extraordinary" remedy is reserved for extraordinary causes. *Ex parte Fahey*, 332 U. S. 258, 259-260 (1947). A "clear abuse of discretion" constitutes such a cause. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953).

Issuance requires three preconditions to be satisfied: (1) there must be no other adequate means to attain the relief desired; (2) a "clear and indisputable"

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[18] Lewis D. Brandeis, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT, Ch. 5 "What Publicity Can Do," at 92 (Frederick A. Stokes Company 1914).

entitlement to the writ must be shown, and (3) the writ must be appropriate under the circumstances. *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 403 (1976), citing *Schlagenhauf v. Holder*, 379 U.S. 104, 112, n.8 (1964).

That no other adequate means to obtain the relief requested exists in these circumstances is confirmed by §1345, which dispenses with the need to prove that no adequate remedy at law exists. Plainly, once an on-going fraudulent scheme comes to light, Congress intends that it be stopped in its tracks. Rule 56 fully confirms Petitioners' entitlement to the relief requested, and the writ is plainly appropriate as it is the only way NML's Scheme can be brought to a quick end and its victims compensated.

Moreover, mandamus is most frequently used where there has been a usurpation of judicial power or a clear abuse of discretion, *Bankers Life*, 346 U.S. at 383, and may also be used to "compel [a district court] to exercise its authority when it is its duty to do so." *Kerr*, 426 U.S. at 402 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21,26 (1943). The writ is plainly appropriate where a lower court denies and effectively dismisses a motion that it is required to decide, especially one that concerns an on-going, nation-wide, fraudulent scheme involving the subversion of federal law and ensnares thousands of victims and causes billions of dollars in losses. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). In *La Buy*, after reviewing Rule 53(b) the Court stated:

> The exceptional circumstances here warrant the use of the extraordinary remedy of

> mandamus. [Citations omitted.] [As we have previously pointed out] "... [W]here the subject concerns the enforcement of the ... [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. [W]ere the Court "... to find that the rules have been practically nullified by a district judge it would not hesitate to restrain [him]... ."

Id., 352 U.S. at 256.

B. The Court Clearly Abused Its Discretion

In the face of admitted facts that confirm NML's violations of federal and state statutes and regulations for over a generation, the July 23 Order represents nothing less than an impermissible breakdown in the rule of law. Under Rules 56(a) and (e) the court had no discretion to refuse to decide the PSJ Motion. Further, it clearly abused its discretion when it: (1) denied to Petitioners Due Process of law by preventing them from responding to NML's deceitful Abeyance Motion; (2) preferred the Abeyance Motion's unsworn, false assertions over the Complaint's well-grounded allegations, which on a JOP motion are taken as true; (3) denied and dismissed the PSJ Motion, *sua sponte*, contrary to Rules 56(a) and (e); (4) revised *sua sponte* the Parties' "Limited Agreement" to prohibit Petitioners' from filing additional dispositive motions, even though the Agreement preserves their right to do so;

and (5) by indefinitely "halted any litigation of this matter," in a manner that perpetuates NML's Scheme as it chills the rights of its victims.

C. Reasons Why the Writ Should Issue

The writ should issue because the District Court and the Court of Appeals declined to address on several levels, NML's violations of federal and state statutes and regulations intended to protect QLTCI Policyowners. Issuance of the Writ would affirm that: (1) courts will expeditiously review and, if appropriate, terminate on-going, nationwide, fraudulent schemes; (2) the Code's remedies for protecting the federal fisc from such schemes are adequate; and (3) the Code provisions adequately protect QLTCI consumers. These are matters of national concern, as NML sold approximately 100,000 RS.LTC Contracts and similar number of a second purported QLTCI policy without the least concern for the law or its policyowners, a nonchalance that remains on full display.

The writ should also issue due to the overarching need to critically analyze and, if appropriate, terminate, NML's Scheme, the importance of which cannot be exaggerated. NML's illusory contracts, false marketing materials and deceptive regulatory submissions deceived regulators and policyowners for a generation in order to permit its receipt of profits from lapsed policies and hundreds of millions of dollars in annual premiums on void contracts. Given the nature and extent of NML's Scheme a more "clear and indisputable" right to, and need for, issuance of the writ

is not imaginable. *Bankers Life*, at 384; *La Buy*, at 256.

Finally, the writ should issue because this case presents the first opportunity since HIPAA's enactment in1996 for the Court to consider the unique provisions of the Code that Congress enacted to protect QLTCI Policyowners, and to provide appropriate guidance to regulators, issuers, policyowners and lower courts.

IX. Conclusion

Petitioners request that the Court issue appropriate orders permitting the impartial and expeditious resolution of the case.

Respectfully Submitted,

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