No. 21-7142

In the Supreme Court for the United States

C. HOLMES,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF SOUTH CAROLINA, INC.; J. DOE #1 THROUGH J. DOE #X; SCOTT MCCARTHA; MS. SHIPMAN

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Mary Agnes Hood Craig
COUNSEL OF RECORD for
Blue Cross and Blue Shield of South Carolina, improperly identified as Blue Cross Blue Shield of South Carolina, Inc.

HOOD LAW FIRM, LLC
172 Meeting Street/Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630
Email: Info@hoodlaw.com

QUESTIONS PRESENTED FOR REVIEW

Respondent Blue Cross Blue Shield of South Carolina would restate the questions presented by the pending Petition for a Writ of Certiorari as follows:

I. As a threshold issue of jurisdiction, is there any case or controversy left for federal court consideration where the plaintiff/petitioner already has filed a voluntary dismissal of her underlying claims in the District Court?

II. Is there any compelling reason to grant a writ of certiorari to review the decision of the Court of Appeals that correctly applied well settled law to deny the petition for leave to appeal under 28 U.S.C. § 1292(b) because the District Court did not certify the interlocutory order?

III. Is there any compelling reason to grant a writ of certiorari to review the interlocutory decision of the District Court that correctly applied well settled law to deny the Petitioner's objection to the Magistrate Judge hearing dispositive motions and making a report and recommendation because the District Court acts as the ultimate decisionmaker under the provisions of 28 U.S.C. § 636 and Rule 72, Fed. R. Civ. P.?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Blue Cross Blue Shield of South Carolina discloses that it is not a publicly held entity; there is no parent corporation; and there is no publicly held company owning 10% or more of Respondent's stock.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases **Page**

Statutes and Rules

THE RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 636 - Jurisdiction, powers, and temporary assignment

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial1 relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 1292(b) - Interlocutory decisions

> (b)When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 72(b), Fed. R. Civ. P. - Magistrate Judges: Pretrial Order

> (b) Dispositive Motions and Prisoner Petitions.
>
> (1) *Findings and Recommendations.* A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.
>
> (2) *Objections.* Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.
>
> (3) *Resolving Objections.* The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

U.S. Dist. Ct. D. S.C. Local Rule 73.02: Assignment of Duties to Magistrate Judges.

> (2) Automatic References. The clerk of court shall assign the following matters to a full-time magistrate judge upon filing:
> ****
> (e) All pretrial proceedings involving litigation by individuals proceeding pro se.

STATEMENT OF THE CASE

The Plaintiff, proceeding pro se, filed a complaint in the United States District Court for the District of South Carolina, attempting to state a federal claim for alleged RICO violations[1] and state law causes of action for negligence, violation of the S. C. Unfair Trade Practice Act[2], and unjust enrichment against the named defendant Blue Cross Blue Shield of South Carolina, Inc.[3], and several unidentified John Does. Neither the insufficiency of her complaint nor the lack of merit to her claims are at issue at this stage of the litigation. Rather, the issue that the Plaintiff/Petitioner is attempting to pursue through the appellate courts involves her contention that she has a constitutional right to have all matters in her case handled by an "Article Three[4]" judge without any report and recommendation by a magistrate judge.

---

[1] Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961–1968.

[2] S.C. Code Ann. §§ 39–5–10 et seq.

[3] Blue Cross and Blue Shield of South Carolina has been improperly identified as Blue Cross Blue Shield of South Carolina, Inc.

[4] U.S. Const. Art. 3.

Consonant with Rule 72 of the Federal Rules of Civil Procedure, the District of South Carolina's Local Rule 73.02(2)(e) provides that, "All pretrial proceedings involving litigation by individuals proceeding pro se" are automatically assigned to a full-time magistrate judge. From the very beginning – literally in the opening paragraph of her complaint, the Plaintiff/Petitioner has objected to a magistrate judge being involved in her case: "[P]laintiff does not consent to a magistrate and respectfully makes this motion for no magistrate judge involvement in this matter of great public importance." [See ECF No. 1 Complaint filed 1/2/2020, App.5.]

After the Respondent BCBC filed a Rule 12(b)(6) motion to dismiss[5] and a *Roseboro*[6] order was served upon the Plaintiff/Petitioner, she filed an "appeal" of the *Roseboro* order with a "MOTION for DE NOVO Determination by article III Judicial Officer." [ECF No. 21, 22, filed 8/31/20, App. 31, 39.] On September 14, 2020, the motion was denied by the Honorable Molly H. Cherry, U.S. Magistrate Judge by text order noted on the docket: "Text Order denying in part Motion for De Novo Determination (ECF No. 22). To the extent Plaintiff objects to assignment of a U.S. Magistrate Judge to her case, the assignment is automatic pursuant to Local Rule 73.02(B)(2)(e), D.S.C., such that her Motion is DENIED." [See Entry No. 25 on Docket Sheet, App. 2.] The Plaintiff/Petitioner thereupon appealed the magistrate judge's decision to the District Court. [ECF No. 28 filed 10.8.20, App. 47.] The Honorable

[5] ECF No. 17, filed 8/19/2020, App. 11.

[6] *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). ECF No. 19, filed 8/20/20, App. 26.

Bruce Howe Hendricks, entered a text order on December 11, 2020, finding no merit to the appeal:

> TEXT ORDER denying ECF No. 21 and 28 : Plaintiff has appealed the Magistrate Judge's entry of a Roseboro order and a text order, and she has moved for a de novo determination by an Article III judge. In addition, she has requested that all time limits be held in abeyance. As the Magistrate Judge has previously explained to Plaintiff, however, to the extent she objects to the assignment of a United States Magistrate Judge, such assignment is automatic pursuant to the Local Civil Rules for the District of South Carolina, and the Court finds no merit to Plaintiff's objection. In addition, it appears that Plaintiff has been given sufficient extensions of time in this case, and the Court finds no reason to simply hold all time limits in abeyance indefinitely. Overall, the Court finds no merit to Plaintiff's appeals of the Magistrate Judge's orders, and the Court denies her appeals in full.

[See Entry No. 35 on Docket Sheet, App. 2.] Plaintiff/Petitioner filed a motion for reconsideration[7], which was denied by Judge Hendricks by text order of March 25, 2021:

> TEXT ORDER denying 54 Motion for Reconsideration. *** After review, the Court finds no merit to Ms. Holmes' motion for reconsideration, which simply repeats the same arguments and seeks the same relief the Court previously denied. Nowhere in her motion does Plaintiff point to any intervening change in controlling law, any new facts or evidence not available previously, or any clear error of law or manifest injustice to warrant the extraordinary remedy of Rule 59(e) relief. Accordingly, Plaintiff's motion for reconsideration is denied.

[See Entry No. 72 on Docket Sheet, App. 4.]

Thereafter, the Plaintiff filed a petition in the Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1292(b), seeking permission to file an interlocutory appeal from the orders of December 11, 2020, and March 25, 2021. [CTA4 No. 2, App.

[7] ECF No. 54 filed 1/22/21, App. 70.

89.] By order No. 21-155, filed on June 29, 2021, the Court of Appeals for the Fourth Circuit denied the Plaintiff/Appellant/Petitioner's petition:

> C. Holmes petitions for permission to appeal under 28 U.S.C. § 1292(b) the district court's orders denying her motion for a de novo determination by an Article III judge and denying reconsideration. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292. Fed. R. Civ. P. 54(b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949). In order to be reviewed, the interlocutory orders must be certified by the district court in accordance with 28 U.S.C. § 1292(b). Because the district court did not certify the orders, we deny Holmes' petition for permission to appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

[Attachment A in Appendix to Petition.] Petitioner filed a petition for rehearing with the Fourth Circuit, on July 6, 2021, which was denied by October 4, 2021. [Attachment C in Appendix to Petition.]

Most notably, a critical filing completely ignored by the Petitioner is the voluntary dismissal of the underlying action she herself filed with the District Court on July 21, 2021. [ECF No. 92, App. 85.]

Notwithstanding that she already had voluntarily dismissed her action, the Petitioner proceeded to file an untimely petition for a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit refusing to grant a petition for permission to appeal under 28 U.S.C. § 1292(b). The Court has allowed the untimely timely filing and docketed the petition. The Respondent Blue Cross and Blue Shield of South Carolina submits this response in opposition on the grounds that: (1) the petition is moot because the petitioner has voluntarily dismissed underlying action;

and (2) there is no compelling reason to warrant this Court's review of the interlocutory decisions of the courts below.

ARGUMENT

I. THE APPEAL IS MOOT BECAUSE THE PLAINTIFF HAS ALREADY FILED A VOLUNTARY DISMISSAL OF THE UNDERLYING ACTION.

Under Article III, the power of federal courts extends only to "Cases" and "Controversies." *Chafin v. Chafin*, 568 U.S. 165, 171-72 (2013). The "case-or-controversy" requirement applies to all stages of federal proceedings – from trial through appeals. *Id.* at 172. There is no case or controversy and a suit becomes moot, when there is no longer a live issue or the parties no longer have any legally cognizable interest in the outcome. *Id.* More specifically, an appeal becomes moot when the underlying action is voluntarily dismissed. *Cheesboro v. Bloom*, 23 F. App'x 111, 112 (4th Cir. 2001); see also *United States v. Goldston*, 440 F. App'x 657, 659 (10th Cir. 2011).

The Plaintiff/Petitioner filed a voluntary dismissal with the District Court on July 21, 2021. Since there is no longer any case or controversy, the petition should be denied.

II. THERE IS NO COMPELLING REASON TO WARRANT THE SUPREME COURT GRANTING A PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISIONS OF THE COURTS BELOW.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. There is no compelling reason to grant the petition for writ of certiorari to review the decision of the Court of Appeals because the Fourth Circuit

has not entered a decision in conflict with any decision of this Court on any other United States court of appeals on the jurisdictional limits of Section 1292(b). Likewise, in the alternative, there is no compelling reason to grant immediate review of the interlocutory decision of the District Court because the law is longstanding and well settled on the assignment of dispositive motions to magistrate judges to issue reports and recommendations to district judges.

A. The law is well settled that a Court of Appeals does not have any jurisdiction to permit an appeal from interlocutory order under the provisions of 28 U.S.C. § 1292(b) unless the district court has certified its order for immediate appeal.

While 28 U.S.C. §1291 grants the federal courts of appeal jurisdiction to review final decisions of the district courts, 28 U.S.C. § 1292 provides an avenue for permissive appeals of interlocutory orders under specified conditions, including orders with involve controlling questions of law:

> **(b)** When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order ...

28 U.S.C. § 1292(b).

This grant of appellate jurisdiction provides for both the district judge and the Court of Appeals to independently exercise judgment and discretion. *Milbert v. Bison Lab'ys, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958). However, the Court of Appeals' exercise

of its discretion is predicated on the district court first exercising its discretion to grant certification:

> The parties agree—as do we—that our jurisdiction to hear an interlocutory appeal under 28 U.S.C. § 1292(b) derives from a district court's certification of an order. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 n.10, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996); *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 46, 47 n.4, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475–76, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); 16 C. Wright, A. Miller, & E. Cooper, Fed. Practice & Proc., § 3929, at 438–39 (2016).

Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730, 732 (7th Cir. 2016).

"[A] party must obtain certification from *both* the district court *and* the court of appeals to bring an interlocutory appeal:"

> To resolve this issue, we must look to 28 U.S.C. § 1292(b), which sets forth the procedural requirements for bringing an interlocutory appeal. "Section 1292(b) provides for interlocutory appeals from otherwise not immediately appealable orders, if conditions specified in the section are met, *the district court so certifies, and* the court of appeals exercises its discretion to take up the request for review." *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 74 n. 10, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996) (emphasis added). Thus, a party must obtain certification from both the district court and the court of appeals to bring an interlocutory appeal.

City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001). Under Section 1292(b), a Court of Appeals may accept jurisdiction on an interlocutory order certified by district court. *United States v. Stanley*, 483 U.S. 669, 677 (1987) (Court of Appeals' jurisdiction confined to certified order). However, the Court of Appeals cannot grant permission to appeal without the requisite certification by the district court. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 624 (7th Cir. 2010); *see also Gialde v. Time, Inc.*, 480 F.2d 1295, 1300 (8th Cir. 1973) ("Both

the required court certification and the consent of the Court of Appeals in the exercise of its discretion to an interlocutory appeal appear to be prerequisites to such an appeal.").

The court records indisputably show that the District Court did not certify its orders under §1292(b), and thus, the Court of Appeals properly followed the statute and all the well-settled precedent in denying permission for an interlocutory appeal. Accordingly, there is no compelling reason for this Court to grant a writ of certiorari to review the Court of Appeals' decision.

B. The law is well settled that dispositive motions may be assigned to a magistrate judge for report and recommendation since the district court is the ultimate decisionmaker.

To the extent that the Petitioner is seeking review of the district court's orders refusing her demand for an Article III judge to hear all dispositive motions without any report and recommendation from the magistrate judge, there still is no compelling reason to warrant review of such interlocutory decision because the law is well settled.

The Federal Magistrate's Act, as amended, 28 U.S.C. § 636 authorizes assignment of pretrial motions, including dispositive motions to a magistrate judge. On dispositive motions, the magistrate judge is authorized to conduct hearings and submit a report and recommendation for de novo determination. As this Court previously has noted, legislative history shows that Congress was fully aware of the constitutional provisions of Article III and met constitutional requirements by placing the ultimate adjudicatory determination with the district court judge. *United States*

v. Raddatz, 447 U.S. 667, 676 (1980) ("Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions. See S.Rep., at 6; H.R.Rep., at 8."). The Court has held that since the district court judge acts as the ultimate decisionmaker, assignment of dispositive motions to a magistrate judge does not violate Article III or due process. *Id.* at 680-81, 684.

CONCLUSION

WHEREFORE, based on the foregoing, the Respondent Blue Cross Blue Shield of South Carolina respectfully submits that the petition should be denied on the jurisdictional ground that any appeal has been rendered moot by the Plaintiff/Petitioner's voluntary dismissal of her underlying claims. In the alternative, the petition should be denied because there is no compelling reason to grant a writ of certiorari to review the decisions of Court of Appeals or the District Court which rest on longstanding, well-settled law.

Respectfully submitted,

HOOD LAW FIRM, LLC
172 Meeting Street/Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630
Email: Info@hoodlaw.com

/s/ Mary Agnes Hood Craig
Mary Agnes Hood Craig
COUNSEL OF RECORD
Blue Cross and Blue Shield of South Carolina, improperly identified as Blue Cross Blue Shield of South Carolina, Inc.

March 21, 2022

Certification of Compliance

In compliance with Sup. Ct. Rule 33.2, the above signing Counsel of Record for Respondent certifies that this Brief in Opposition does not exceed the 9000 word limit.