No. 14-554

IN THE

Supreme Court of the United States

IN RE: MANAGED CARE LITIGATION

MEDICAL ASSOCIATION OF GEORGIA,
CALIFORNIA MEDICAL ASSOCIATION,
CONNECTICUT STATE MEDICAL SOCIETY,
STEPHEN D. HENRY, M.D.,
JAMES G. SCHWENDIG, M.D.,
CARMEN KAVALI, M.D.,

Petitioners,

v.

WELLPOINT, INC.

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Controversy in This Case Is Alive and Well 1

II The Eleventh Circuit's Decision Plainly Contradicts This Court's Precedents 5

III. The Decision Below Will Have a Lasting Effect on an Important Industry 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. McCurry,
449 U.S. 90 (1980) 6

American Express Co. v. Italian Colors Restaurant,
133 S. Ct. 1740 (2011) 5, 6

Camreta v. Greene,
131 S. Ct. 2020 (2011) 3, 4

Catalano, Inc. v. Target Sales, Inc.,
446 U.S. 643 (1980) 8

Deakins v. Monaghan,
484 U.S. 193 (1988) 4

Lawlor v. National Screen Service Corp.,
211 F.2d 934 (3rd Cir. 1954) 6, 7

Lawlor v. National Screen Service Corp.,
349 U.S. 322 (1955) 6, 7, 8

Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,
473 U.S. 614 (1985) 5, 6, 7

Oregon Bureau of Labor & Industries ex rel. Richardson v. U.S. West Communications, Inc.,
288 F.3d 414 (9th Cir. 2002) 4, 5

Palmer v. BRG of Georgia, Inc.,
498 U.S. 46 (1990) 8

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,
364 U.S. 656 (1961) 8

TABLE OF AUTHORITIES—CONTINUED

Page(s)

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 4

United States v. Socony–Vacuum Oil Co.,
310 U.S. 150 (1940) 8

United States v. Topco Associates, Inc.,
405 U.S. 596 (1972) 8

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 9

Zenith Radio Corp. v.
Hazeltine Research, Inc.,
401 U.S. 321 (1971) 7, 8

INTRODUCTION

WellPoint does not shy away from the consequences of the Eleventh Circuit's decision here: nearly one million doctors have lost the ability to file an antitrust claim against most of the nation's largest insurers in perpetuity—even if that claim is based on "new, overt acts"—as long as a single district judge in Florida determines that the claim has some historical connection to events that predate the settlement agreements in *Managed Care*. This holding plainly violates a number of this Court's precedents and if left uncorrected will have serious effects on one of the nation's most important industries.

I. The Controversy in This Case Is Alive and Well.

WellPoint urges this Court to deny certiorari on the theory that the district court's vacatur of contempt sanctions eliminates any live interest in obtaining review, mooting the case. Yet WellPoint, represented by the very same counsel opposing certiorari here, recently told that Eleventh Circuit in a Rule 28(j) letter and at oral argument that the decision below is controlling precedent and that the Petitioner's only remedy is in *this Court*.

As the Petitioners have explained, the Eleventh Circuit is currently considering *Musselman v. Blue Cross & Blue Shield of Alabama*, No. 13-14250-AA (11th Cir.), in which Judge Moreno held that a settlement agreement in *Managed Care*, which is materially identical to WellPoint's, prohibited the plaintiffs from asserting claims against insurers (including WellPoint) for allocating geographic markets

among themselves, even though claims of market allocation were not at issue in *Managed Care*. Pet. 25.[1] After the Eleventh Circuit issued its opinion in this case, WellPoint filed a Rule 28(j) letter in *Musselman*, citing the majority's opinion as authority that claims of market allocation were barred because they "could have been asserted" in the earlier litigation. App. 115a–117a. Then, at oral argument, WellPoint's counsel—the same counsel that just argued to this Court that the Eleventh Circuit's decision "would have no practical effect," Opp. 12—told the *Musselman* panel,

> [The Eleventh Circuit's decision] is a boulder in the way of their argument here. That case is directly on point and it's binding on this court. . . . If the appellants think that [it] was wrongly decided, their remedy is to ask the United States Supreme Court to hear it.

Musselman Oral Argument at 13:40, 14:26. WellPoint has told the Eleventh Circuit one thing and told this Court the opposite.[2]

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[1] The *Musselman* plaintiffs are seeking to join an ongoing multidistrict litigation against the Blue Cross and Blue Shield Association and its members, *In re Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, No. 2:13-cv-20000 (N.D. Ala.). Judge Moreno held that the plaintiffs could not join that suit because they had released their claims. *Musselman v. Blue Cross & Blue Shield of Ala.*, No. 13-cv-20050 (S.D. Fla.), Docket No. 66.

[2] Although WellPoint is not listed on the electronic docket in *Musselman*, it is an appellee, as its counsel confirmed in the appellees' brief (filed February 28, 2014).

Moreover, WellPoint misrepresents the effect of the district court's vacatur of sanctions, asserting that "the decision on review has been vacated in full." Opp. 9. Although the district court vacated the Petitioners' sanctions, it did *not* vacate the injunction on which those sanctions were based, or the order interpreting that injunction to prohibit the Petitioners from pursuing their claims against WellPoint.[3] The nearly one million physicians bound by the *Managed Care* settlement, including the Petitioners, have a live interest in that injunction and its interpretation. That interest is especially important now because the injunction, as interpreted by the district court and the Eleventh Circuit, exposes the Petitioners to contempt sanctions if they appeal the dismissal of their antitrust claims in *WellPoint*, which they intend to do, and which they would have the undisputed right to do but for the injunction. Vacating the contempt penalties without vacating the underlying injunction leaves petitioners subject to the very same prospective restrictions against pursuing antitrust claims as before. Therefore, Petitioners retain a live stake in that prospective rule. *Camreta v. Greene*, 131 S. Ct. 2020, 2033–34 (2011).

Perhaps WellPoint means only that *it* no longer has any stake in defending the lower court's decision because the immediate monetary penalties have been vacated. If so, the situation here resembles *Camreta*, where the plaintiff ceased to have a live interest in the litigation, even though the defendant retained a concrete interest in overturning the Ninth Circuit's

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[3] *Managed Care*, Docket No. 6480 (vacating only the order granting sanctions).

constitutional holding because it would have limited his future conduct. And if that is what WellPoint means, then vacating the contempt sanctions alone is not enough to protect the Petitioners from the effects of an unreviewable decision, which include a potential effect on the *Musselman* case and a definite effect on the Petitioners' right to appeal the district court's decision in *WellPoint*. If the Eleventh Circuit's opinion is unreviewable, this Court should grant certiorari and vacate the Court of Appeals and district court decisions entirely. "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication. . . . Vacatur then rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation.'" *Camreta*, 131 S. Ct. at 2035 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950); *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).[4]

Just as Judge Moreno's vacatur of contempt sanctions does not moot the case, neither does the dismissal of the Petitioners' antitrust claims in the *WellPoint* case, as WellPoint suggests. Opp. 12–13. Regardless of how the district court rules on the remaining claims in *WellPoint*, the Petitioners will appeal the court's dismissal of their antitrust claims to the Ninth Circuit, which has held that dismissal does not moot a case when an appeal is available. *Or. Bu-*

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[4] When the district court enjoined the Petitioners from pursuing their antitrust claims, there was no way for them to obtain review from the Eleventh Circuit without being held in contempt. Pet. 5–6.

reau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 416–17 (9th Cir. 2002). (WellPoint ignores this fundamental issue entirely.) If the Eleventh Circuit's order remains in place, however, the Petitioners will violate Judge Moreno's injunction the minute they file their notice of appeal, subjecting them to sanctions again. Because the Eleventh Circuit's decision effectively prohibits the Petitioners from taking an appeal to the Ninth Circuit, it is flatly wrong for WellPoint to say that a decision on the merits here would have no practical effect.

II. The Eleventh Circuit's Decision Plainly Contradicts This Court's Precedents.

The questions presented in this case are important and timely. The Eleventh Circuit's opinion condones a release of claims for WellPoint's *future* violations of the antitrust laws; this Court "would have little hesitation in condemning [such an] agreement as against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Just two years ago, this Court reaffirmed that principle in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), making it as timely and relevant as ever. WellPoint does not seriously try to defend the Eleventh Circuit's holding that a party can release claims for future violations of the antitrust laws, instead citing a handful of opinions holding that a plaintiff may not bring claims based on a defendant's continuation of conduct that has previously been held to be lawful. Opp. 19–20. WellPoint does not explain why these decisions are relevant; neither the district court nor the Eleventh

Circuit ever held WellPoint's conduct to be lawful. Therefore, the public policy against prospective waivers of antitrust liability, which this Court described in *Mitsubishi Motors* and *Italian Colors*, applies with full force. It is important for the Court to reaffirm the prohibition against agreements to immunize future antitrust violations, especially when there is a grave risk that such immunity will now be sought and obtained in class action settlements, waiving antitrust protections of which absent class members are unaware. Pet. 23–24.[5]

Moreover, the Eleventh Circuit's holding here is identical to the Third Circuit's holding in *Lawlor v. National Screen Service Corp.*, 211 F.2d 934 (3d Cir. 1954), which this Court reversed unanimously. Pet. 15–18 (discussing *Lawlor*, 349 U.S. 322 (1955)). WellPoint argues that the cases are nevertheless distinguishable because *Lawlor* focused on *res judicata*, while the case here involved a release. The distinction makes no difference; the release bars claims that "are, were, or could have been asserted" as of the effective date of the settlement, App. 5a, and *res judicata* bars parties from relitigating claims "that were or could have been raised" in a prior action, *Allen v. McCurry*, 449 U.S. 90, 94 (1980). WellPoint does not explain why the analysis in *Lawlor* should be any different than the analysis here, or how the Eleventh Circuit's reasoning can be squared with this Court's

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[5] WellPoint has no response to Judge Martin's statement in dissent that the class notice in *Managed Care* would not have alerted absent class members that they were giving up antitrust claims based on WellPoint's future conduct. Pet. 23–24; App. 42a.

holding that the antitrust laws do not permit a defendant to gain "a partial immunity from civil liability for future violations."[6] *Mitsubishi Motors*, 473 U.S. at 637 n.19 (citing *Lawlor*, 349 U.S. at 329). Nor does WellPoint address the Petitioners' explanation that the language of the Third Circuit's opinion in *Lawlor* makes clear that this Court in *Lawlor*, and the Eleventh Circuit here, addressed the identical legal issue but arrived at opposite conclusions. Pet. 16–18.

The Eleventh Circuit's decision contradicts *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), for a similar reason: the release in this case applied to causes of action that "are, were, or could have been asserted" when the settlement became effective, App. 5a, and *Zenith* held that an antitrust cause of action does not accrue—that is, it cannot be asserted—until "a plaintiff is injured by an act of the defendants." 401 U.S. at 338. WellPoint's strategy for distinguishing *Zenith* is to emphasize that the release applies to claims "in any way related to any of the facts, acts, events, transactions, occurrences," et cetera, in *Managed Care*, hoping that the Court won't notice that it omits the settlement's limit on released claims to those that "are, were, or could have been asserted" as of the effective date of the settlement. Opp. 17. Given this limit, it is impossible to reconcile the Eleventh Circuit's opinion with *Zenith*.

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[6] Nor is there any meaningful factual distinction between the two cases. Both involved allegations of new acts taken in furtherance of an ongoing conspiracy that pre-dated the plaintiffs' complaint. Pet. 15–17.

Finally, WellPoint claims that there is no circuit split here, but without even suggesting how the Eleventh Circuit's decision can be squared with precedent from the Third, Fifth, Sixth, and Eighth Circuits, which it does not discuss at all. Opp. 19. Even if it were true that there is no circuit split for the Court to resolve, the Eleventh Circuit's clear contradiction of *Lawlor* and *Zenith* deserves not a denial of certiorari, but a per curiam reversal. When the Eleventh Circuit issued an opinion in *Palmer v. BRG of Georgia, Inc.* that squarely conflicted with this Court's opinions in *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150 (1940), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), this Court issued a per curiam reversal, citing the "plainly incorrect" decisions of the courts below. *Palmer*, 498 U.S. 46, 49 (1990) (per curiam).[7] *Lawlor* and *Zenith* are no less important than *Socony–Vacuum* and *Topco*, and the Eleventh Circuit's mistake here should not be allowed to cause havoc in the enforcement of the antitrust laws any more than its mistake in *Palmer* would have.

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[7] Similarly, this Court issued a per curiam reversal without identifying a circuit split in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), a case in which the Ninth Circuit held, in conflict with the reasoning of a number of this Court's opinions, that an agreement to fix credit terms was not a *per se* violation of the antitrust laws. In the antitrust case *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, the Court granted certiorari "[b]ecause of petitioner's claim that this holding is contrary to controlling decisions of this Court" and issued a per curiam reversal. 364 U.S. 656, 659 (1961).

III. The Decision Below Will Have a Lasting Effect on an Important Industry.

What WellPoint downplays as a "single settlement agreement, binding only the parties to that agreement," Opp. 21, binds nearly a million physicians and is materially identical to other settlement agreements that these same physicians executed with most of the nation's major insurers.[8] In its sheer scope, this case is on par with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which involved a certified class of 1.5 million retail workers. The reach of the Eleventh Circuit's decision is nationwide, and it has already affected subsequent litigation in California (*WellPoint*) and Alabama (*Musselman*). Moreover, the immunizing effect is perpetual. It is not hyperbole to say that as a result of the Eleventh Circuit's decision, almost any antitrust suit by physicians against one of these insurers is subject to review by a single district judge in the Southern District of Florida, who has taken an extremely broad view of the release in *Managed Care* and will have the power to order the suit dismissed on pain of sanctions.

Moreover, this is no esoteric or hypothetical dispute; it involves live, important questions about the ongoing relationship between most of the nation's doctors and most of the nation's largest insurers, a relationship that comes into play every time an insured patient receives medical care. The Eleventh Circuit's decision affects a significant portion of the

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[8] These insurers include Aetna, Cigna, Humana, and most of the Blue Cross and Blue Shield insurers. Pet. 3 n.2.

healthcare industry, which itself represents a sixth of the nation's economy. WellPoint cannot plausibly claim that the questions in this case are unimportant.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[9] Beyond its practical importance to the nation's healthcare system, this case is legally important because it presents the same issue as *Lawlor*, in which this Court granted certiorari "because of the importance of the question thus presented in the enforcement of the federal antitrust laws." 349 U.S. at 326.

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