IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0735

FEDERAL INSURANCE COMPANY,

Third-Party Defendant Below,

Petitioner

vs.

DANA MINING COMPANY OF PENNSYLVANIA, LLC,

Defendant Below, Respondent,

and

JENNY M. NEICE, Administratrix of the Estate of Jeremy R. Neice,

Plaintiff Below, Respondent.

REPLY BRIEF OF PETITIONER FEDERAL INSURANCE COMPANY

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INTRODUCTION

It is the considered majority view of the courts of the states of our nation – including Pennsylvania, whose law applies to this case, and West Virginia – that an insurance policy exclusion of coverage in relation to "any insured" is unambiguous and enforceable despite the presence of a "separation-of-insureds" provision. The circuit court below misread a key pair of Pennsylvania cases ("*Politsopoulos*") and misapplied this settled precedent, treating an exclusion of coverage for "any insured" as if it only applied to "the" specific insured seeking coverage.

Indeed, respondents would have this Court instead apply a minority view under which a separation-of-insureds provision rewrites an employer's liability exclusion. They appeal to claimed extracontractual purposes, expectations, accusations of "illusory coverage," and, most of all, the laws of outlier states, in an attempt to avoid the plain language of the policy at issue (the "Policy"), and the plain import of Pennsylvania law. But Pennsylvania has repeatedly rejected the minority view, not only in *Politsopoulos*, but in myriad lower-court cases. This Court should do the same, correct the lower court's plain error of Pennsylvania law, and reverse or vacate the judgment against Federal below.[1]

[1] Federal and Neice agree that oral argument is appropriate here. See Pet'r's Br. 8; Neice Resp. 13. Dana Mining opposes any oral argument, contending that "the dispositive issues have been authoritatively decided" and "the decisional process would not be significantly aided by oral argument." Dana Mining Resp. 10. In light of the nature of the coverage issues and the filings in this appeal, Federal respectfully submits that Rule 19 oral argument would likely assist the Court.

ARGUMENT

I. The Employer's Liability Exclusion Bars Coverage for the Neice Complaint

A. Exclusions for "any insured" and exclusions for "the insured" are fundamentally different

The Employer's Liability Exclusion at issue here repeatedly refers to "any **insured**," not "the **insured**."[2] It states that the Policy "does not apply to," in pertinent part, "any damages, loss, cost or expense arising out of any injury or damage sustained at any time by any...**employee**...of any **insured** arising out of and in the course of...employment by any **insured**; or performing duties related to the conduct of any **insured**'s business." JA 120 (emphases added). It applies "regardless of the capacity in which any **insured** may be liable" and "to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an **employee** or **temporary worker** of...such **insured**; or...any other **insured**...." *Id.* at 121 (emphases added).

The exclusion uses plain language, and this Court should apply it, as other courts applying Pennsylvania law have. "[J]udges applying Pennsylvania law have interpreted policy provisions barring coverage when an individual has a relationship with 'any insured' to mean what they say, regardless of the precise relationship between the injured individual and the insured he or she sues." *Great Lakes Ins. SE v. Wagner Dev. Co., Inc.*, CV 20-553-KSM, 2021 WL 4399677, at *3 (E.D. Pa. Sept. 24, 2021).[3]

As Federal explained in its opening brief, courts in Pennsylvania and nationwide, including this Court, have also repeatedly acknowledged that "any insured" means something

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[2] Bolded terms are defined in the Policy.

[3] Given its admittedly "clear and unambiguous" and "unrestricted" language, *see* Neice Resp. 36, there is no reason to treat the phrase "insured" as encompassing only, as Neice would have it, "the entity in the **Named Insured** Bucket and all other person/entities in that Named Insured's **Relational Insured** Bucket," *id.*

substantially different from "the insured." *See* Pet'r's Br. 9-12; *Spezialetti v. Pac. Employers Ins. Co.*, 759 F.2d 1139, 1141 (3d Cir. 1985) (Pennsylvania law) (holding that the phrase "'the insured[]'...admits of some uncertainty when used in circumstances where the various persons covered by the policy have...joint interests....That deficiency does not exist here where the policy refers to 'any insured,' not 'the insured.'"). Jenny Neice ("Neice") agrees. *See* Neice Resp. 37-38 ("Federal goes to great lengths to convince this Court that there is a meaningful distinction between the phrases 'the insured' and 'any insured'.... Neice has never argued otherwise and agrees that there is an important distinction between those two phrases."). *See also USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, No. 20-1245 (7th Cir. Feb. 25, 2022) ("'Any,' to a reasonable person, does not mean 'the' and is not limited to a particular insured's conduct.").

In particular, courts have held that the use of "any insured" rather than "the insured" ***in an exclusion*** bars coverage for all insureds when the exclusion is triggered. *See* Pet'r's Br. 9-10; *Michael Carbone, Inc. v. Gen. Accident Ins. Co.*, 937 F. Supp. 413, 422 (E.D. Pa. 1996) (New Jersey law) ("[T]he bulk of courts which have addressed the issue have held that an exclusion worded 'any insured' unambiguously expresses a contractual intent to create joint obligations and [to] preclude coverage to innocent co-insureds.") (citing cases); *Nautilus Ins. Co. v. K. Smith Builders, Ltd.*, 725 F. Supp. 2d 1219, 1229 (D. Haw. 2010) ("To give full effect to the terms of the Policy, the court must interpret an exclusion barring coverage to '*any* insured' differently from an exclusion barring coverage to 'the insured.'"); *Evanston Ins. Co. v. OEA, Inc.*, No. CIVS02-1505DFL PAN, CIVS02-1981DFL PAN, 2005 WL 1828796, at *8 (E.D. Cal. July 25, 2005) ("To hold that the term 'any insured' in an exclusion means 'the insured making the claim' would collapse the distinction between the terms 'the insured' and 'any insured' in an insurance

policy exclusion clause, making the distinction meaningless."). And they have so held specifically with respect to ***employer*** exclusions – as recent as last summer. In *Westminster American Insurance Co. v. Security National Insurance Co.*, CV 20-2195, 2021 WL 3630464 (E.D. Pa. Aug. 16, 2021), the court considered whether an employee of a prime contractor (Altman), could assert a claim against a subcontractor (AM Marlin) when Altman was listed as an additional insured on AM Marlin's policy.[4] The policy excluded coverage for bodily injury to an employee of "any insured." The court concluded that the exclusion applied, and the policy did not cover the employee's claims against AM Marlin. *See id.* at *5 ("Under Pennsylvania law, '[an] employee injury exclusion provision applie[s] to additional insureds seeking coverage under the policy, and not just to the primary purchaser of the policy.' Courts have held that the use of 'any insured' language in a policy's exclusion is construed to bar coverage to all insureds when the exclusion is triggered.") (internal citations omitted).

Commentators agree that this approach is sound. *See, e.g.*, Allan D. Windt, Insurance Claims & Disputes § 11:8 (6th ed. 2021) ("Windt") ("Many exclusions eliminate coverage for certain actions taken by 'any' insured. Such an exclusion should be read to eliminate coverage for all insureds as long as the exclusion applies to one insured."); Steven Plitt et al., 13A Couch on Ins. § 197:38 (3d ed. 2021) (noting that in general where a policy precludes recovery as a result of the actions of "the insured," recovery is precluded only as to the insured who committed the act, but where it precludes recovery as a result of the actions of "any insured," the effect of the acts of one insured preclude recovery as to all insureds).

Dana Mining discounts the cases Federal cited in its opening brief on this point because they "apparently did not contain a separation of insureds clause." Dana Mining Resp. 18. But as

[4] Here, Jeremy Neice is situated like the employee; Mepco is situated like Altman; and Dana Mining is situated like AM Marlin.

explained in the next section, in cases containing such a clause, most courts (including Pennsylvania's) have held that an "any insured" exclusion remains enforceable.

B. When an exclusion bars coverage in relation to "any insured," the majority of states – including Pennsylvania and West Virginia – enforce the exclusion even in the presence of a separation-of-insureds provision

With that background, we turn to the recurring question of insurance law this case presents: When a policy contains both an "any insured" exclusion and a separation-of-insureds provision, how do the two provisions interact?

1. The majority view is that "any insured" exclusions are enforceable despite a separation-of-insureds provision

A minority of courts hold, as did the circuit court below, that the separation-of-insureds provision effectively re-writes the "any insured" exclusion. Respondents would have this Court adopt that view. But that is not the majority view, and it is not the law of Pennsylvania (or West Virginia). Rather, "[t]he majority [view] holds that a separation of insureds clause does not prevent an exclusion from barring coverage to ***any insured, even when the particular insured seeking coverage is not himself the employer***." *K. Smith*, 725 F. Supp. 2d at 1229 (emphasis added). As Federal noted in its opening brief, cases to this effect are plentiful.[5]

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[5] *See* Pet'r's Br. 11-13; *Ohio Cas. Co. v. Holcim (US)*, 744 F. Supp. 2d 1251, 1271 (S.D. Ala. 2010) ("[T]he distinction that surfaces time and again in the case law is that separation of insureds clauses affect interpretation of policy exclusions using the term 'the insured' (essentially modifying that term to mean 'the insured claiming coverage'), but have no effect on the interpretation of exclusions using the term 'an insured' or 'any insured.'"); *Evanston*, 2005 WL 1828796, at *8 ("[T]he 'separation of insureds' clause only affects exclusionary clauses referring to 'the insured,' and not 'any insured.'"); *Am. Family Mut. Ins. Co. v. White*, 65 P.3d 449, 456 (Ariz. Ct. App. 2003) ("Most courts that have construed the phrase 'any insured' in an exclusion have found that it bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause. We join that majority."); *Am. Family Mut. Ins. Co. v. Moore*, 912 S.W.2d 531, 534-35 (Mo. Ct. App. 1995) (the "purpose of the severability clause is not to negate the plainly worded meaning of the business exclusion clause," which used the phrase "any insured"); *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 148 P.3d 832, 481 (Okla. 2005), *as corrected* (Oct. 30, 2006) ("The separation of insureds clause has no effect on the clear language of the exclusionary clause....The purpose of severability is not to negate plainly worded exclusions."); *Caroff v. Farmers Ins. Co. of Wash.*, 261 P.3d 159, 162 (Wash. Ct. App. 1999) ("The severability clauses merely announce in

As Windt states:

> [I]t has been held that an 'any insured' exclusion will be treated like a 'the insured' exclusion if the policy contains a severability clause; that is, a provision stating that the 'insurance applies separately to each insured.' ***Such a holding is not justifiable.*** A severability clause provides that each insured will be treated independently under the policy. The fact remains, however, that ***as applied even independently to each insured, an 'any insured' exclusion unambiguously eliminates coverage*** for each and every insured.

Windt § 11:8 (emphases added) (citing cases from twenty-six states[6] in support).

2. Pennsylvania enforces "any insured" exclusions despite a separation-of-insureds provision

That majority view is the law of Pennsylvania. When the Pennsylvania Supreme Court evaluated "the interrelationship between a separation-of-insureds clause and an employer's liability exclusion," it made clear that "neither a separation-of-insureds clause nor its analogue, a severability-of-interests provision,[7] is to be interpreted in a manner that would subvert otherwise clear and unambiguous policy exclusions." *Politsopoulos II*, 115 A.3d at 850.[8] Accordingly, "the appropriate focus…is less upon the specific wording of the separation-of-insureds clause than on the terms of the employer's liability exclusion." *Id.* at 851. In its analysis, the Pennsylvania Supreme Court "parenthetically" noted:

> [I]n terms of "any insured" exclusions, the main controversy appears to center…upon whether such meaning should be narrowed to the

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general language that the policies apply separately to each insured. As such, they do not override the explicit provisions in the…exclusions").

[6] Those states are Alabama, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont, Washington, Wisconsin – and Pennsylvania.

[7] A separation-of-insureds clause/provision is a form of severability clause/provision, and the two categories are treated indistinguishably. *See Mut. Benefit Ins. Co. v. Politopoulos*, 75 A.3d 528, 535 (Pa. Super. Ct. 2013) ("*Politopoulos I*"), *affirmed on other grounds sub. nom. Mut. Benefit Ins. Co. v. Politsopoulos*, 115 A.3d 844 (Pa. 2015) ("*Politsopoulos II*"); *see also, e.g.*, *Michael Carbone*, 937 F. Supp. at 419 (describing a "severability of interests clause" as "another name for a separation of insureds clause").

[8] Neice and Federal are in full agreement that "when the language of an insurance policy is clear and unambiguous, courts must give effect to that language." Neice Resp. 15.

> insured against whom a claim is asserted in light of a separation-of-insureds clause. *See, e.g.*, Allan D. Windt, 3 INS. CLAIMS AND DISPUTES § 11:8 (6th ed. 2014) (framing the different lines of authority). ***The great majority of courts, however, merely apply the rule that a separation-of-insureds clause does not negate the effect of a plainly worded exclusion.*** *Accord id.* (citing cases and explaining that, "as applied even independently to each insured, an 'any insured' exclusion unambiguously eliminates coverage for each and every insured").

Id. at 851 n.5. Accordingly, Neice is wrong when she contends that "Federal does not cite to a single Pennsylvania Supreme Court case that supports its contention that the Employer's Liability Exclusion applies." Neice Resp. 33. Federal is not "urg[ing] this Court to disregard *Politsopoulos*," *id.* at 44, or "to reject Pennsylvania law," *id.* at 33, but to follow it.[9] Indeed, *Politsopoulos II* follows the majority view.

The decisions of other Pennsylvania courts are consistent with the Pennsylvania Supreme Court's understanding. For example, in *McAllister v. Millville Mutual Insurance Co.*, 640 A.2d 1283 (Pa. Super. Ct. 1994), a fire insurance policy contained a separation-of-insureds provision ("[e]ach person…is a separate insured under the policy"), as well as exclusions for "neglect by ***any insured***" and "an act committed by or at the direction of ***an insured*** and with the intent to cause a loss." *Id.* at 1285, 1288 (emphases added). The trial court found the policy ambiguous and allowed recovery by innocent co-insureds, despite the fact that their insured brother had committed arson. But the Superior Court reversed, finding that the trial court's interpretation "tortures the plain and unambiguous language and meaning of the policy and is contrary to the legal standards" of Pennsylvania. *Id.* at 1289. As the court reasoned:

> Notwithstanding the provision which defines each named insured as a "separate insured" under the policy, the policy specifically provides that Millville will not pay for loss resulting from neglect by "any insured" or from the intentional acts of "an insured." The

[9] *Politsopoulos* involved a "the insured" exclusion, and specifically distinguished an "any insured" exclusion. This distinction generally, and *Politsopoulos* specifically, are discussed throughout this brief.

> use of the terms "any" and "an" in the exclusions clearly indicate that the insureds' obligations...are joint, not several. Finding these obligations to be joint, the intentional actions of John...bar any recovery by the appellees.

Id. at 1289.

Other cases applying Pennsylvania law have agreed with *McAllister*'s analysis. In *Travelers Home & Marine Ins. Co. v. Stahley*, 239 F. Supp. 3d 866 (E.D. Pa. 2017), defendants made the same arguments respondents make here: that a severability clause in the Policy, providing that "[t]his insurance applies separately to each '*insured*,'" removed the joint obligations imposed by an intentional-act exclusion relating to "an insured," or, in the alternative, that it made that exclusion ambiguous. The court, citing *McAllister*, noted that "Pennsylvania courts have addressed the effect of a severability clause on exclusions referring to 'any insured,'" and based on those decisions, concluded that "***a severability clause therefore does not modify a policy's exclusion when the exclusion provision applies to 'any insured.'*** Conversely, where a policy exclusion refers to 'the insured,' the existence of a severability clause further supports the interpretation of each insured as separate." *Id.* at 875 (emphasis added). So the court held that "the existence of a severability clause in the Policy does not override the clear and unambiguous language of the intentional act exclusion, and the terms of the Policy preclude coverage to all named insureds under these circumstances." *Id.*; *see also Strouss v. Fireman's Fund Ins. Co.*, No. Civ.A. 03-5718, 2005 WL 418036 (E.D. Pa. Feb. 22, 2005) (citing *McAllister* and reaching the same conclusion); *Kundahl v. Erie Ins. Grp.*, 703 A.2d 542 (Pa. Super. Ct. 1997), *superseded in non-pertinent part by* 40 P.S. § 1171.5(a)(14)(i)(D) (West 2022) (same).

Respondents contend that *McAllister* and *Stahley* are distinguishable because the policies in those cases contained "a severability clause – not a separation of insureds clause." Dana

Mining Resp. 17; *see also* Neice Resp. 33. Under Pennsylvania law, this is a distinction without a difference; cases use the terms interchangeably. *See supra* at 6 n.7. Dana Mining also contends that the distinction between the longer separation-of-insureds provision in the Policy and the shorter provisions at issue in *McAllister* and *Stahley* makes an interpretive difference. Dana Mining Resp. 17. It does not. In *Politopoulos I*, the court stated that the separation-of-insureds provision at issue was "clearer and stronger than a severability clause that simply identifies the insureds as 'several' rather than 'joint,'" 75 A.3d at 536, like the clause in *Pennsylvania Manufacturers' Association Insurance Co. v. Aetna Casualty & Surety Insurance Co.*, 233 A.2d 548 (Pa. 1967) ("*PMA*").[10] Coupled with the policy's use of "the insured" in the relevant exclusion, the court found coverage. But on appeal, the Pennsylvania Supreme Court made clear that "[a]s a general rule, neither a separation-of-insureds clause nor its analogue, a severability-of-interests provision, is to be interpreted in a manner which would subvert otherwise clear and unambiguous policy exclusions." *Politsopoulos II*, 115 A.3d at 850. And it noted "the insignificance of modest variations among severability-of-interests clauses as compared with the importance of clarity in policy exclusions." *Id.* at 851. To the extent the intermediate court (the Pennsylvania Superior Court) below in *Politopoulos I* held differently, its holding is not the law of Pennsylvania.

Respondents also note that *McAllister* and *Stahley* involved exclusions that were not employer's liability exclusions, *see* Dana Mining Resp. 17 n.9; Neice Resp. 33, but they have not

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[10] *PMA* held broadly that, in the words of a later case, "[a]n employer liability exclusion clause precludes coverage for an injury suffered by an employee of any named insured, regardless of whether the employee works for the named insured seeking coverage." *Markel Ins. Co. v. Young*, CIV.A. 11-1472, 2012 WL 2135564, at *5 (E.D. Pa. June 12, 2012) (citing *PMA*, 233 A.2d at 550-51). *Politsopoulos II* later rejected *PMA*'s "less circumspect" approach to construing employer's liability exclusions to the extent that *PMA* "effectively made 'the insured' and 'any insured' interchangeable." *Politsopoulos II*, 115 A.3d at 852 n.7, 853 n.8.

shown why that matters. Respondents have not explained why the principles articulated in *McAllister* and *Stahley* – Pennsylvania cases involving separation-of-insureds provisions and "any insured" exclusions – should not apply equally in cases involving employer's liability exclusions.[11]

In *Politopoulos I*, the Pennsylvania Supreme Court said that "[t]he parties certainly could have fashioned the Umbrella Policy to effectuate the result for which Insurer argues." 75 A.3d at 537-38. ***Here, the parties did just that, by including an endorsement that deliberately substituted an "any insured" exclusion for a "the insured" exclusion.*** *Compare* JA 75 (original "the insured" exclusion" in Federal Policy), *with id.* at 120-21 ("any insured" exclusion ultimately included by endorsement).[12] Indeed, Neice emphasizes this fact. *See* Neice Resp. 35-36. This Court should not rewrite the Policy to give Dana Mining coverage it did not bargain or pay for.

3. *Michael Carbone* supports Federal's position, not respondents'

Dana Mining discusses the *Michael Carbone* case at length. Dana Mining Resp. 18-19. *Michael Carbone* (which applied New Jersey law) addressed the interaction between an "any insured" exclusion and a separation-of-insureds provision. Dana Mining provides a page-long block quote from the opinion, seizing on the opinion's statement that "[i]n cases involving employee exclusions, this interpretation of separation of insureds clauses...is logical because it

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[11] Dana Mining also tries to distinguish the other cases Federal cites (cases that do not involve separation-of-insureds provisions) on the ground that they involve exclusions other than employers' exclusions, *see* Dana Mining Resp. 18, 18 n.10 – an argument that should be similarly rejected.

[12] Consider that even in an out-of-state case where a court agreed with respondents that "a severability clause requires that coverage exclusions be construed only with reference to the particular insured seeking coverage," the court stated that the insurer could have prevailed, regardless of the severability clause, if "instead of excluding coverage for bodily injury expected [by]...'the' insured, the...policies [had] excluded coverage for bodily injury expected...[by] 'an' or 'any' insured"—exactly what the Policy does here. *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894-95 (Minn. 2006).

avoids duplication with workers compensation schemes." Dana Mining Resp. 18 (quoting *Michael Carbone*, 937 F. Supp. at 419). But Dana Mining does not include the portion of the opinion explaining "this interpretation" – a portion that provides important context for the statement it quotes. And it ignores the fact that *Michael Carbone* went on to hold that the distinction between "the insured" and "any insured" was "paramount." 937 F. Supp. at 420.

In the portion of the opinion Dana Mining ignores, before the block quote, the *Michael Carbone* court discusses the New Jersey Supreme Court's opinion in *Maryland Casualty Co. v. New Jersey Manufacturers Casualty Insurance Co.*, 145 A.2d 15 (N.J. 1958). The court notes that in *Maryland Casualty*, the New Jersey Supreme Court "suggest[ed] that had the phrase [in an employee exclusion] been worded 'any insured,' the court would have interpreted the employee exclusion to preclude coverage of any person employed by any insured," and that that remark was "relevant since the exclusion in the Carbone CGL policy is phrased in terms of 'any insured.'" *Michael Carbone*, 937 F. Supp. at 418. And the court notes that *Maryland Casualty*'s key holding was that "a separation of insureds clause modifies the meaning of ***an exclusion phrased in terms of 'the insured.'***" *Id.* (emphasis added). Finally, the court notes that separation-of-insureds provisions were "aimed at clarifying...that the term ***'the insured'*** in an exclusion refers merely to the insured claiming coverage." *Id.* at 419 (internal formatting omitted and emphasis added). ***Only then*** does the court state that "this interpretation of separation of insureds clauses is logical" and directs a "pedantic reading of the exact wording of the exclusion as applied to each separate insured." *Id.* at 419-20.

Further, once the *Michael Carbone* court did so (after the block quote), it concluded that ***a "pedantic" reading of an "any insured" exclusion "reveals that it is not altered or otherwise limited by the separation of insureds clause"***:

> This is because the exclusion excepts losses "arising out of the ownership, maintenance, use or entrustment to others of any...'Auto'...owned or operated by or rented or loaned to *any insured.*'...***Note the exact language. The provision excludes losses caused by an automobile operated by "any insured"; the clause does not say "the insured." The distinction is paramount.*** Had the automobile exclusion used the phrase "the insured," the separation of insureds clause would have altered the meaning of the exclusion....The wording of the exclusion, however, does not except losses arising out of the use of an automobile owned or operated by "the insured"; it excludes losses from the use of an automobile owned or operated by "any insured."...Therefore...the exclusion applies, and Carbone is not covered.

Id. (citing cases).

To the extent Dana Mining reads *Michael Carbone* to hold that the interaction between "any insured" exclusions and separation-of-insureds provisions should be treated differently in policies with employers' liability exclusions than in policies with automobile exclusions, it misreads *Michael Carbone*. Most important, there is no support for that proposition under *Pennsylvania* law – the law that applies here.

Michael Carbone certainly said that "[f]irms need to protect themselves from such liabilities [e.g., a suit by an employee of a subcontractor]," and that "in determining the scope of an exclusion courts may look at how the policy at issue interacts with other available forms of insurance." *Id.* But when it summarized the propositions it took from *Maryland Casualty* and other similar cases, it pointedly did not say that employers' liability exclusions should be given special or different treatment. Rather, it ultimately concluded that because of the policy's use of "any insured" in the exclusion in that case, the separation-of-insureds provision did ***not*** alter the meaning of the exclusion.

4. West Virginia also enforces "any insured" exclusions despite a separation-of-insureds provision

This Court's treatment of these issues under West Virginia law also concords with the majority view and Pennsylvania law as articulated in cases like *McAllister*, *Stahley*, *Strouss*, and *Kundahl*. As Federal noted in its opening brief, just six years ago this Court decided *American National Property & Casualty Co. v. Clendenen*, 238 W.Va. 249, 793 S.E.2d 899 (2016). *Clendenen* involved two policies, each with a separation-of-insureds provision and exclusions that referenced "any insured" or "anyone we protect." First, this Court reasoned that the exclusions were unambiguous, and that the distinction between "the insured," and "any insured" or "anyone we protect," mattered:

> Erie's policy did not limit its...exclusion to only the insureds that actually committed the intentional act by using language limiting coverage for only "the" insured. Rather, Erie excluded coverage to all insureds for intentional or expected acts by "anyone we protect." This distinction is significant as it clearly evidences the insurer's intent...to exclude coverage for all insureds based on the intentional or expected acts of any insured....The same analysis applies to ANPAC's policy [which used the phrase "any insured"].

238 W.Va. at 261; 793 S.E.2d at 911. Second, this Court noted that "the severability clause's command to apply the insurance separately to each insured does not alter the intentional/criminal act exclusions' plain meaning or create ambiguity in its application." 238 W.Va. at 268; 793 S.E.2d at 918. It reasoned that "adopting the minority position would render the 'any' or 'anyone' language in the applicable provisions superfluous, while adopting the majority position would not," and that the "majority position gives meaning to both the exclusion and the severability clause." 238 W.Va. at 267; 793 S.E.2d at 917; *compare* JA 16 (circuit court below contending to the contrary that "the only way to give effect to the Employer's Liability Exclusion Endorsement as well as the Separation of Insureds clause is to find the Employer's Liability Exclusion inapplicable" in this case). This Court noted that "[t]he purpose of

severability clauses is to spread protection, to the limits of coverage, among all of the insureds" – "not to negate unambiguous exclusions." 238 W.Va. at 268; 793 S.E.2d at 918. And it noted that although the claimants "deserve sympathy and respect for their horrific loss":

> [W]e must also be mindful that insurers price policies specifically based on the anticipated risk. Insurers exclude certain coverages which the insurer is either unable or unwilling to write to keep costs low and accurately price insurance products for all policyholders. In this case, the [insureds] paid premiums that were commensurate with their coverage—which excluded coverage for all insureds caused by the intentional acts of any insured.

Id.

C. Respondents' arguments for this Court to discard the majority/Pennsylvania/West Virginia view either have already been rejected or are unconvincing

1. The Policy provisions are unambiguous

Perhaps recognizing the overwhelming authority in Federal's favor, Dana Mining falls back to the position that "[a]t the very least, the Separation of Insureds clause renders the Employer's Liability Exclusion ambiguous." Dana Mining Resp. 13. But courts in Pennsylvania, West Virginia, and nationwide have already repeatedly rejected that argument.

Pennsylvania courts have repeatedly recognized that an "any insured" exclusion, on its own, is unambiguous. *See Ferrino v. Pac. Indem. Co.*, CIV. A. 95-102, 1996 WL 32146, at *3 (E.D. Pa. Jan. 24, 1996) (noting that "*McAllister*; *Spezialetti*...and *Atlantic Mut. Ins. Co. v. Cent*[*er*] *Capital* [] *Corp.*, [CIV. A. No. 91-4636, 1992 WL 97823 (E.D. Pa. 1992)], all hold that policy language referring to 'any insured' or similar language is unambiguous and indicates that the insureds' obligations and interests are joint."). And specifically, they have held that a separation-of-insureds provision does not create ambiguity when applied to an "any insured" exclusion. In *Politsopoulos II*, the Pennsylvania Supreme Court noted that "***a separation-of-insureds clause does not create ambiguity***, but merely spreads protection among insureds,

without negating plainly-worded exclusions." 115 A.3d at 851 (citing *Am. Wrecking Corp. v. Burlington Ins. Co.*, 946 A.2d 1084, 1089 (N.J. App. Div. 2008)) (emphasis added);[13] *see also Strouss*, 2005 WL 418036, at *5 ("[A]n exclusion worded 'any insured' ***unambiguously*** expresses a contractual intent to create joint obligations and [to] preclude coverage to innocent co-insureds, despite the existence of a severability clause...") (internal formatting omitted). Applying West Virginia law, this Court agrees. *See Clendenen*, 238 W.Va. at 265, 793 S.E.2d at 915 (quoting *SECURA Sup. Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn. Ct. App. 2008)) ("'The act of applying the policy separately to each insured does not alter or create ambiguity in the substance or sweep of [an "any insured"/"an insured"] exclusion.'"). So do the courts of other states.[14]

2. Respondents' argument that the separation-of-insureds provision rewrites the exclusion relies on non-Pennsylvania, minority-view cases, and has been repeatedly rejected

Respondents discuss at length a smattering of cases from minority-view jurisdictions to support their argument that "the exclusion still only applies to exclude coverage for claims brought by an employee of the insured against whom suit is brought." Dana Mining Resp. 14.

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[13] Neice approvingly quotes this exact passage in her response. *See* Neice Resp. 16.

[14] *See, e.g.*, *Neff ex rel. Landauer v. Alterra Healthcare Corp.*, 271 F. App'x 224 (3d Cir. 2008) (Massachusetts law) (where policy contained exclusion for abuse or molestation by "anyone," finding that the "separation of insureds provision does not narrow the broad reach of the exclusion" or create any ambiguity); *Vivify Constr., LLC v. Nautilus Ins. Co.*, 94 N.E.3d 281, 288 (Ill. Ct. App. 2018) (exclusion for bodily injury sustained by "[a]ny insured's contractors', subcontractors', or independent contractors' 'employees'" "unambiguously" precludes coverage despite a separation-of-insureds provision); *Oaks v. Dupuy*, 653 So.2d 165, 168 (La. Ct. App. 1995) ("The use exclusion, however, refers to automobiles owned by 'any insured.' That unambiguous language, then, should not be misshaped through an overreading of the [separation-of-insureds] provision noted by plaintiffs. Such tortured constructions, seizing on every word as a possible source of confusion, fail to demonstrate ambiguity and will be dismissed as mere sophistry."); *Caroff*, 261 P.3d at 162 ("The severability clauses merely announce in general language that the policies apply separately to each insured. As such, they do not...make those ["any insured"] exclusions ambiguous."); *Taryn E.F. ex rel. Grunewald v. Joshua M.C.*, 505 N.W.2d 418, 420-21 (Wis. Ct. App. 1993) ("Assuming, without deciding, that the severability clause creates separate policies for each insured, that clause does not render the ["any insured"] exclusionary clauses in the policy ambiguous.").

Federal does not deny that some states have adopted the minority view. But Pennsylvania, West Virginia, and the majority of states have rejected the approach laid out in those cases, and they do not govern here. *See supra.*

All five of the out-of-state cases Dana Mining raises have been disagreed with by at least one other case. Indeed, *Michael Carbone*, a case decided by the United States District Court for the Eastern District of Pennsylvania, expressly declined to follow one of those cases, holding that "the majority view is better reasoned." 937 F. Supp. at 422 (declining to follow *Transp. Indem. Co. v. Wyatt*, 417 So.2d 568 (Ala. 1982)). And in another one of Dana Mining's cases, the judge noted that there were strong arguments in support of the majority view (which he ultimately declined to follow). *See Cyprus Plateau Mining Corp. v. Commw. Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997) (noting that *Spezialetti* and *Michael Carbone* held that "any insured" is unambiguous, and that "Cyprus's interpretation that the term 'any' should somehow be limited to employees of a specific insured is contrary to the ordinary understanding of the term").

As for the minority-view cases Neice references,[15] they, too, are contrary to the governing majority view. Neice contends in a pat footnote that the court's analysis in one of those cases, *James River,* "comports with all controlling tenets of Pennsylvania insurance law." Neice Resp. 33 n.5. Neice provides no support for this conclusion – because there is none. *See supra* § I.B.2.

3. Federal's approach gives effect to both the exclusion and the separation-of-insureds provision; Dana Mining's does not

Dana Mining argues that its approach gives effect to both the exclusion and the separation-of-insureds provision, because "[a] reasonable interpretation of the exclusion could be

[15] *James River Ins. Co. v. Ultratec Special Effects, Inc.*, 449 F. Supp. 3d 1157 (N.D. Ala. 2020); *Taylor v. Admiral Ins. Co.*, 187 So. 3d 258 (Fla. Ct. App. 2006); *Piatt v. Ind. Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 795 (Mo. 2015).

that it applies only to 'any employee' of 'any insured' that is seeking coverage...." Dana Mining Resp. 20. As courts have repeatedly recognized, such an interpretation is not reasonable under Pennsylvania law.

Dana Mining's contention that "[i]nterpreting the Employer's Liability Exclusion in the manner sought by Federal would render the Separation of Insureds Clause meaningless," Dana Mining Resp. 26, is also wrong.[16] Courts that have adopted the minority view and held "that a severability clause renders an 'any insured' exclusion meaningless—have done so on the basis that, otherwise, the severability clause would itself be meaningless. ***That is untrue. A severability clause would still have meaning in a variety of contexts.***" Windt § 11:8. As they have noted, a separation-of-insureds provision "must still be applied to the policy's other exclusions." *Vivify*, 94 N.E.3d at 288. "Following the majority rule...therefore gives meaning to both the word 'any'...***and*** the separation of insureds clause." *Michael Carbone*, 937 F. Supp. at 422-23 (emphasis added); *see also Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 752 (Colo. 1990) (majority view "gives effect to all the policy provisions").

It is, instead, respondents' proposed approaches that would render the Employer's Liability Exclusion meaningless. *See J & J Realty Holdings v. Great Am. E & S Ins. Co.*, 839 F. App'x 62, 64 (9th Cir. 2020) ("applying the Separation of Insureds Clause to limit the universe of 'any insured' to only the party seeking coverage" would "render meaningless other parts of the Employer's Liability Exclusion"). Indeed, this is especially true with Federal's endorsement, which does not simply replace the word "the" with "any", but clarifies that the exclusion applies "regardless of the capacity in which any **insured** may be liable" and "to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an

[16] Neice takes pains to note that the literal terms of the separation-of-insureds provision "remain unchanged" by the exclusion. Neice Resp. 9-10. Federal does not disagree.

employee or **temporary worker** of...such **insured**; or...any other **insured**...." JA 120 (emphases added).

4. *Politsopoulos* supports Federal's argument, not respondents'

Dana Mining contends that the ruling in *Politopoulos I* created a blanket principle, applicable to all policies regardless of their language, that "'if the person injured is not employed by the lone insured as to whom coverage is to be tested, the Employers' Exclusion simply does not come into play.'" *See* Dana Mining Resp. 23 (quoting *Politopoulos I*, 75 A.3d at 537). It further contends the Supreme Court in *Politsopoulos II* "did not find that the Superior Court erred in its analysis of the operation of the separation of insureds clause." *Id.* at 24. But as explained *supra*, the Supreme Court noted the "widely-accepted understanding" that "[a]s a general rule, neither a separation-of-insureds clause nor its analogue, a severability-of-interests provision, is to be interpreted in a manner which would subvert otherwise clear and unambiguous policy exclusions." *Politsopoulos II*, 115 A.3d at 850. And *McAllister*'s holding that an "any insured" exclusion is "unambiguous," even in the presence of a separation-of-insureds provision, 640 A.2d at 1289, has never been overturned. The *Politopoulous I* intermediate-court panel did not overturn *McAllister*'s holding – nor could it, absent an intervening Supreme Court decision. *See Czimmer v. Janssen Pharms., Inc.*, 122 A.3d 1043, 1063 n.19 (Pa. Super. Ct. 2015). Accordingly, there is no basis for Dana Mining's "blanket principle" argument.

Respondents further argue that "the key distinction in this case is that unlike *Politsopoulos*, both Mepco and Dana Mining are named insureds." Dana Mining Resp. 24; *see also* Neice Resp. 29. But they have not shown why that distinction makes a difference, and there is no basis in the Policy to say that it does. Dana Mining says that in *Politsopoulos*, "the separation of insureds clause was inapplicable ***because the property owner was not a named***

insured." *Id.* (emphasis added). But that was not what *Politsopoulos II* concluded. Rather, *Politsopoulos II* concluded that the separation-of-insureds provision should not be "interpreted in a manner which would subvert otherwise clear and unambiguous policy exclusions," 115 A.3d at 850, and expressly distinguished cases involving "any insured" exclusions, *id.* at 851 n.5. The key distinction that ***does*** make a difference under Pennsylvania law is that the Policy contains an "any insured" exclusion, rather than the "the insured" exclusion at issue in *Politsopoulos*. This is a critical distinction that Dana Mining – tellingly – does not mention or address in its brief.

Additionally, respondents' contentions about the separation-of-insureds provision ignore the Pennsylvania Supreme Court's admonition about the insignificance of variations in the wording of those provisions. Dana Mining points out that the *Politsopoulos II* court said that the construction of a separation-of-insureds provision "in conjunction with a particular contractual exclusion turns on the exclusion's precise wording." Dana Mining Resp. 25. This is, of course, true (consider the "any insured"/"the insured" distinction). But Dana Mining then argues that "the Separation of Insureds Clause is more robust than that at issue in *Politsopoulos*." *Id.* That's an argument about the ***separation-of-insureds provision's*** wording, not the ***exclusion's*** wording. ***More importantly, Politsopoulos II rejected respondents' arguments that the "syntax of the Separation of Insureds Clause" is "significant."*** *Id.* Rather, it makes clear the "insignificance of modest variations among severability-of-interests clauses as compared with the importance of clarity in policy exclusions" and the significance of the use of the word "the" as compared to "any." 115 A.3d at 851; *see also Michael Carbone* (holding that an "any insured" exclusion was enforceable where policy also stated that it applied "[a]s if each Named Insured were the only Named Insured"). To the extent respondents argue otherwise, they ignore Pennsylvania law.

Neice, for her part, appears to contend that the mere fact that the separation-of-insureds provision uses the phrase "this insurance applies as if each named **insured** were the only named **insured**" settles the matter, and that such a provision "directs the Court to evaluate coverage under the Policy as though Mepco, the Decedent's employer, does not exist." Neice Resp. 31.[17] But that's not what the Policy says. It remains the case – even after *Politsopoulos* – that, at least where an employer liability exclusion uses the phrase "any insured," "[a] severability clause in an insurance contract does not change the meaning of the word 'insured' in the employer liability exclusion clause to 'insured being sued.'" *Markel Ins. Co. v. Young*, CIV.A. 11-1472, 2012 WL 2135564, at *6 (E.D. Pa. June 12, 2012).

Tellingly, respondents also fail to address the "regardless of" language in the exclusion. The exclusion states that it applies "***regardless of*** the capacity in which any **insured** may be liable" and "to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or suit is brought by an **employee**...of such **insured**; ***or any other insured***...." JA 120-21 (emphases added). Reading the exclusion to exclude coverage only for the insured employer (Mepco) of the injured employee (Jeremy Neice) here would render the "regardless of" language meaningless. If the exclusion applied only to the insured employer (Mepco), the employer's liability would obviously be in its capacity as an employer and not in any other capacity. But the exclusion is not so limited and instead applies "to any insured" regardless of whether suit is brought by an employee of the insured seeking coverage ***or by an employee of "any other insured."***

[17] Nor did the separation-of-insured provision here, as Neice contends, "alter[] the classification of these insureds once Neice filed suit." Neice Resp. 15. The filing of a lawsuit does not change the meaning of a policy.

Finally, Neice cites *Politsopoulos II*'s statement that "other indications and contextual cues appearing in an insurance policy may serve to render the meaning of 'the insured' more apparent." Neice Resp. 45 (citing *Politsopoulos II*, 115 A.2d at 853 n.8). But an "any insured exclusion" is at issue here. And *McAllister* makes clear that an "any insured" exclusion is "unambiguous," even in the presence of a separation-of-insureds provision. 640 A.2d at 1289.

5. To the extent the purposes of the two provisions matter, those purposes support Federal's position, not respondents'

Invocations of the "purpose" of policy provisions do not negate the plain language of a policy and should only be consulted if a policy term is ambiguous. *See, e.g.*, *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (Pennsylvania law) (court "may look to extrinsic evidence of the purpose of the insurance" only "[w]hen a term is ambiguous"). The provisions of the Policy at issue are not ambiguous. *See supra* § I.C.1. But to the extent this Court elects to consider the purposes of those provisions, those purposes support Federal's position, not respondents'.

As other courts confronting this issue have acknowledged, the purpose of a separation-of-insureds provision or severability clause is "to afford each insured a full measure of coverage up to the policy limits, rather than to negate bargained-for and plainly-worded exclusions." *BP*, 148 P.3d at 841; *see also, e.g.*, *Cal. Cas. Ins. Co. v. Northland Ins. Co.*, 56 Cal. Rptr. 2d 434, 442 (Ct. App. 1996) (same); *Nw. G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179, 183 (N.D. 1994) (same). "The severability clause is not denominated a 'coverage provision,' and it would be unreasonable to find...it...to partially nullify existing coverage exclusions." *Argent v. Brady*, 901 A.2d 419, 427 (N.J. App. Div. 2006).

Indeed, the history of separation-of-insureds provisions "makes clear that the 'separation of insureds' clause only affects exclusionary clauses referring to 'the insured,' and not 'any

insured.'" *Evanston*, 2005 WL 1828796, at *8. Before 1955, courts interpreted exclusions concerning "the insured" to preclude coverage for any insured—"a result contrary to the intentions of the insurance companies." *K. Smith*, 725 F. Supp. 2d at 1229. So in 1955, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau added a separation-of-insureds provision to the standard insurance industry form contract – "intended to clarify what insurance companies had intended all along, namely that the term 'the insured' in an exclusion refers merely to the insured claiming coverage." *See State, Dep't of Transp. & Public Facilities v. Houston Cas. Co.*, 797 P.2d 1200, 1205 (Alaska 1990) (Matthews, J., concurring). In light of this history, Neice's contention that "the purpose of a Separation of Insureds Clause is to spread coverage...so that when a claim is made against a single named insured, coverage is analyzed from the perspective of only that named insured" is unconvincing. Neice Resp. 12.

As for the purpose of the Employer's Liability Exclusion, Neice remarks that it is "to prevent the duplication of coverage that would occur when the employee of a named insured, already covered by workers' compensation, sues the named insured under a liability insurance policy." Neice Resp. 24. That's exactly what the Employer's Liability Exclusion does here.[18]

6. There is no "gap" in coverage

Further, there is no "gap" in coverage, as respondents suggest. Dana Mining Resp. 28; Neice Resp. 47. Neice was entitled to seek worker's compensation coverage through Mr. Neice's

[18] Indeed, Federal submits that the purpose of the exclusion endorsement as written – which modified the original "the insured" exclusion – was to ensure that the insured entities collectively bore the risk of liability arising out of hiring employees. To hold otherwise would allow one insured to avoid the exclusionary clause simply by arranging with another named insured to contract for its mining work. *See U.S. Underwriters Ins. Co. v. Congregation B'Nai Israel*, 900 F. Supp. 641 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 685 (2d Cir. 1996) (exclusion in general liability policy, which applied to liability for injury or damage "arising out of operations performed for any insured by independent contractors," unambiguously applied to claim by injured employee of construction company hired to perform building renovations by one of six entities collectively defined as the insured under policy, even though claim was brought against another of the six entities).

employer, Mepco, LLC, under Mepco Holdings, LLC's worker's compensation insurance policy with Brickstreet. And, as a practical matter, Dana Mining and the Mepco entities are one and the same. Indeed, Dana Mining is wholly owned by Mepco Holdings, LLC. Dana Mining did not have any employees, did not own any equipment or personal property, and did not derive any revenue. Dana Mining was merely the "permittee," while Mepco extracted the coal from the Dana Mining-permitted mine based on "common ownership." *See* JA 1559-60, 1644, 1654-55. The lack of liability coverage from Federal in this case is not a "gap," but instead the straightforward consequence of how Pennsylvania law treats the interaction of "any insured" exclusions and separation-of-insureds provisions, the deliberate use of "any insured" rather than "the insured" in the Policy, and the terms of the bargained-for exchange between Federal and Dana Mining.

7. The parties' expectations are irrelevant under Pennsylvania law

Finally, Dana Mining's statement that "finding the Employer's Liability Exclusion inapplicable in the instant case is also congruent with the intentions and expectations of the parties" is wrong on its face. Dana Mining Resp. 28. "[A]n insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous." *McAllister*, 640 A.2d at 1288. The parties' expectations are embodied in their agreement, which included the "clear and unambiguous" exclusion. How could finding it "inapplicable" be "congruent" with those expectations?

Dana Mining's statement that "by Federal's interpretation of the policy, each time an additional named insured is added to the Policy, coverage under the Policy is decreased" is wrong on its face too. Dana Mining Resp. 29. Adding named insureds adds coverage for each such additional named insured – but it also means that a single exclusion, the employer's liability exclusion, reaches those named insureds as well and precludes coverage when there is loss by an

employee of any of those insureds. Of course, a non-employee suing the additional named insured would, subject to the terms and conditions of the Policy, trigger coverage for such new named insured. A non-employee, however, is not excluded as "any employee."

In support of its argument, Dana Mining turns to a non-precedential trial-court opinion, seizing on its statement that "there are two named insureds and it would have been the expectation of each insured that it would be covered if sued for injuries to an employee of the other named insured." *U.S. Steel Corp. v. Nat'l Fire Ins.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 488, at *17 (Ct. Common Pleas Allegheny Cty., Pa.). But *U.S. Steel* involved very different policy language – a "the insured" exclusion, not an "any insured" exclusion. And as a Pennsylvania federal district judge pointed out, in a case that expressly rejected *U.S. Steel*, "the Pennsylvania Supreme Court has held that the reasonable expectations doctrine is meant to protect only non-commercial insureds." *Endurance Am. Specialty Ins. Co. v. H & W Equities Inc.*, No. 1:12-cv-693, 2013 WL 3773420, at *5 (M.D. Pa. July 17, 2013). So the expectations of the parties are irrelevant under Pennsylvania law. In any event, respondents' briefing cites no evidence about the expectations of both parties. Neice can only speculate that Federal's approach "almost surely was not intended." Neice Resp. 47.

8. The exclusion is not void as against public policy

Neice's argument that the exclusion is void as against public policy because it makes the policy provide illusory coverage is unfounded. *See* Neice Resp. 41. Under Pennsylvania law:

> Insurance coverage is considered "illusory" where the insured purchases no effective protection. An insurance policy is not illusory if it provides coverage for some acts; it is not illusory simply because of a potentially wide exclusion. Coverage under an insurance policy is not illusory unless the policy would not pay benefits under any reasonably expected set of circumstances. Contracts are illusory when one party exploits the other; where the contracts are hopelessly or deceptively one-sided.

TIG Ins. Co. v. Tyco Int'l Ltd., 919 F. Supp. 2d 439, 466 (M.D. Pa. 2013) (internal formatting and citations omitted). Neice has not come close to demonstrating that the Policy meets this demanding standard, and there are myriad instances when the Policy would provide coverage for Dana Mining – just not the one presented by the facts here.

9. Neice's "buckets"-based analysis is unfounded in the language of the Policy or in law, and incorrect

Finally, Neice's response repeatedly asks this Court to interpret the policy by treating each entity as "fall[ing] into" one of four "buckets." Neice Resp. 3. She contends that "the Policy separates persons and/or business entities into four buckets" – a "**First Named Insured** bucket," a "**Named Insureds** bucket," a "**Relational Insureds** bucket," and a "**Non-insureds** bucket" – and that "Federal's contractual duties and obligations are determined by the bucket into which a person and/or business entity falls." *Id.* She also contends that "[u]nder the terms of the Policy, the filing of a lawsuit can potentially move insureds from one bucket to another," *id.* at 15, and that "upon the filing of suit, thirty-three named insureds were removed from the **Named Insureds** bucket," *id.* at 17.

Neice's tortuous proposed analytic approach, accompanied by extensive graphical representations, is simply unfounded in either the language of the policy or in governing law. The Policy does not use the word or concept of "buckets" or define it anywhere. It certainly does not "go[] to great lengths to maintain these four distinctions." *Id.* at 15. To the extent Neice suggests that the bolded names of her "buckets" are defined under the policy, they are not. The Policy never once uses the phrase "relational insureds" or "non-insureds."[19] The court below did

[19] *Cf.* Neice Resp. 4 (contending that "the Policy clearly delineates a distinct difference between **Named Insureds** and **Relational Insureds**" and "identifies…several classifications of **Relational Insureds**").

not use Neice's proposed "bucketing" approach.[20] This Court should similarly decline to do so here and should apply the plain and defined meaning of the terms in the Policy.

II. The No-Action Clause Bars Dana Mining's Complaint Against Federal

A. The no-action clause "contracts around" existing procedure

As Federal explained in its opening brief, the circuit court also erred in concluding that West Virginia procedural law negated the parties' bargained-for agreement that Dana Mining would not implead Federal as a third party. In its "no-action clause," the Policy plainly states – regardless of otherwise applicable procedural law – that "[n]o person or organization has a right under this insurance to: join [Federal] as a party or otherwise bring us into a **suit** seeking damages from an **insured**...." JA 83. That is what respondents have done. So their claims against Federal must be dismissed.

West Virginia has a background rule that "[a] declaratory judgment claim with regard to the defendant's insurance coverage may be brought in the original personal injury suit rather than by way of a separate action." Syl. Pt. 4, *Christian v. Sizemore*, 181 W.Va. 628, 383 S.E.2d 810-811 (1989). But that does not prevent insureds and insurers from contracting around that rule in their policy. As Federal noted in its opening brief, under West Virginia law, "[w]here the parties to a contract have specified therein the conditions upon which an action upon the contract may be maintained, such conditions precedent generally must be complied with before an action for breach of contract may be properly brought." *Mimi's Inc. v. BAI Riverwalk, L.P.*, No. 18-0775, 2020 WL 1487804, at *4 (W. Va. Mar. 23, 2020). That principle applies equally to a declaratory-judgment action. *Cf. Batsakis v. FDIC*, 670 F. Supp. 749, 759 (W.D. Mich. 1987) ("the Court

[20] Nor did the court in *James River* "assign[] each of the insureds seeking coverage to their proper bucket." Neice Resp. 31. The court never used the word "bucket" or conducted a "buckets"-based analysis.

declines to thwart the legitimate policies supporting no action clauses by construing the instant [no action] clause in such a restrictive manner as to exclude [from its ambit] actions seeking a declaration as to policy coverage"). Dana Mining provides no response to this argument.

Neice, for her part, contends that "[b]ecause Neice was not a signatory to the Policy, the No-Action Clause simply does not apply to her claims against Federal." Neice Resp. 49.[21] But the Policy states that "[n]o person or organization" (not just Dana Mining) can bring Federal into a **suit** seeking damages from an insured. JA 83. To the extent Neice seeks a declaration about the meaning of the contract, equitable estoppel prevents her from evading the no-action clause. As this Court has recognized:

> Equitable estoppel allows a court to prevent a nonsignatory from embracing a contract, but then turning his, her, or its back on the portions of the contract...that the nonsignatory finds 'distasteful.'...[A] nonsignatory may not cherry-pick beneficial contract terms while ignoring other provisions that do not benefit it or that it would prefer not to be governed by....Stated simply, a nonsignatory who seeks to reap the benefits of a contract must bear its burdens as well.

Bayles v. Evans, 243 W.Va. 31, 41, 842 S.E.2d 235, 245 (2020) (internal formatting omitted).

B. The no-action clause is valid

Failing its argument about procedure, Dana Mining argues that the no-action clause is unenforceable. First, Dana Mining suggests that several Pennsylvania cases have held that no-action clauses do not bar declaratory-judgment actions. *See id.* at 36-38.[22] But Federal is not contending that Dana Mining cannot bring a declaratory-judgment action regarding coverage against Federal at all – just that it cannot bring such an action in this suit, seeking damages from Dana Mining. ***None*** of the cases Dana Mining raises addressed the specific language of the no-

[21] Neice "joined" Dana Mining's complaint.

[22] Relatedly, Dana Mining argues that *Burks v. Federal Insurance Co.*, 883 A.2d 1086 (Pa. Super. Ct. 2005) is distinguishable because it did not involve a declaratory-judgment action. Dana Mining Resp. 36.

action clause here, providing that "[n]o person or organization has a right under this insurance to...join us as a party or otherwise bring us into a **suit** seeking damages from an **insured**." JA 83. Second, Dana Mining cites *Apalucci v. Agora Syndicate*, 145 F.3d 630, 634 (3d Cir. 1998) for the proposition that Federal's coverage denial relieves "the insured" of "strict performance of those provisions intended for the protection of the insurer [if the insurer is in fact obligated to defend the insured]." But this logic would put the cart before the horse. The very question on this appeal is whether Federal had coverage obligations. On Dana Mining's reading, the no-action clause of the Policy would be rendered nugatory any time an insured disputed coverage. *Cf. Commw. ex rel. Kane v. UPMC*, 129 A.3d 441, 464 (Pa. 2015) ("a contract must be interpreted to give effect to all of its provisions" and not "in a manner which results in another portion being annulled").

C. Federal did not waive the no-action clause

Respondents also incorrectly contend that Federal waived the no-action clause. As Federal noted in its opening brief, waiver is "the voluntary and intentional abandonment or relinquishment of a known right...as to leave no opportunity for a reasonable inference to the contrary." *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 970 A.2d 1149, 1156-57 (Pa. Super. Ct. 2009) (internal formatting omitted). Federal raised the no-action clause at the first opportunity, in its motion to dismiss the third-party complaint, which remained pending at the time of summary-judgment briefing.

Neice suggests that Federal's participation "in the continued litigation of this action for nearly nineteen months [is] entirely inconsistent" with the no-action clause. Neice Resp. 50. But Federal had a pending motion to dismiss on the basis of the no-action clause. It had not "opt[ed] not to assert" the no-action clause. *Id.* The court had not ruled on Federal's motion. One can

hardly be said to have "intentionally abandoned" an argument when that argument remains pending before the court.

CONCLUSION

This Court should reverse the judgment against Federal below and hold that (1) Federal has no duty to defend or indemnify Dana Mining in connection with the Neice Complaint, and (2) Dana Mining violated the no-action clause by bringing Federal into this action. If this Court acts solely on the basis of the no-action clause, it should also vacate the circuit court's orders dated March 4, 2020 and August 19, 2021 for lack of jurisdiction.

Dated: March 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **REPLY BRIEF OF PETITIONER FEDERAL INSURANCE COMPANY** was served upon the following parties by U.S. Mail on this 9th day of March, 2022:

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