No. 21-471

In The Supreme Court of the United States

JOHN DOE 1, ET AL.,

Petitioners,

KAREN BURNETT, ET AL.,

Consolidated Plaintiffs-Petitioners,

v.

EXPRESS SCRIPTS INC., ANTHEM, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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Small employers and employees sued under ERISA to recover over *$13 billion* in excessive prescription drug expenses. As the Petition explained, and as *amicus curiae* the Pension Rights Center confirms, the Second Circuit affirmed the dismissal of these claims based on two conclusions of law that easily satisfy this Court's standards for plenary review.

In response to the first question, Respondent Anthem grossly distorts the facts and decisions below, presumably because it knows what the Second Circuit did conflicts with the position of five other circuits. The courts below clearly understood the allegations, including that self-insured ERISA plans hired Anthem as their *agent* to negotiate lower drug prices and that Anthem exercised that discretion by negotiating and renewing a PBM Agreement that permitted Respondent Express Scripts ("ESI") to charge the plans and participants *higher* prices.

Five circuits recognize that a service provider's exercise of discretion over prices paid by plans and participants constitutes a fiduciary act. This commonsense position meets ERISA's functional definition of "fiduciary," which encompasses anyone who exercises discretion over any aspect of the "management" or "administration" of a plan or its assets. 29 U.S.C. § 1002(21).[1]

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[1] Contrary to Anthem's assertion, BIO 16 n.4, Petitioners alleged that Anthem's fiduciary status arises out of control over assets as well as plan administration and management. C.A. Dkt. 94 at 20-28; C.A. Dkt. 205 at 9-11.

In stark contrast, the courts below concluded that Anthem, despite its discretion over prices, had no fiduciary responsibility. They reached this conclusion based on an extra-statutory "business" exception, first applied by the Sixth Circuit, that reflects significant confusion regarding the meaning of *Pegram v. Herdrich*, 530 U.S. 211 (2000).

ESI, for its part, ignores both the second question and the Second Circuit's holding, which was that ESI lacked fiduciary status *despite* having "extraordinarily broad discretion" over prices. App. 11a-12a. ESI offers no response to the fact that this holding deviated from the position of other circuits and misconstrued this Court's precedent. Instead, ESI falsely contends that the Second Circuit resolved a factual dispute on a Rule 12(b)(6) motion and concluded that prices were "fixed." This argument, like ESI's policy and vehicle arguments, is meritless.

Anthem itself sued ESI over the billions of dollars in excessive prices it paid as a result of ESI's exercise of discretion. Petitioners seek the same opportunity to recover their own losses. Although Petitioners contend that both Respondents are liable for these losses, it certainly cannot be the case that *neither* bears any fiduciary responsibility.

The Court should grant the petition to resolve the circuit conflict and eliminate confusion over the meaning of *Pegram* and the "two hats" doctrine.

I. The First Question Warrants Review

A. The Circuit Conflict Is Unavoidable.

The Fourth, Fifth, Seventh, Eighth, and Ninth Circuits recognize that discretion over prices paid by plans and participants makes a third-party service provider an ERISA fiduciary. Pet. 20-22. The Second Circuit disagreed, deepening a conflict first created by *DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743 (6th Cir. 2010).

1. Respondents Ignore the Conflict.

a. Anthem claims there is no conflict because "[n]o circuit has failed to follow this Court's decision in *Pegram*." BIO 12-15. This is a strawman. Petitioners acknowledge that all circuits apply the "two hats" doctrine. The relevant conflict relates to a different question: whether service providers are fiduciaries when they exercise discretion over prices.

b. Anthem dodges this conflict. To the extent Anthem discusses the cases Petitioners cited, it does so only in footnotes and claims they are distinguishable because they "address discretionary acts or control taken *on behalf of ERISA plans*." BIO 15-16 & nn.4-6. But Petitioners allege precisely that: each plan hired Anthem to "*negotiate on its behalf* for lower rates." App. 14a.

c. Both Respondents recite the familiar refrain that different facts justify different results. But they target only immaterial nuances, like whether courts

held that control over prices constituted discretion over plan assets as opposed to plan administration or management. Anthem BIO 15-16 n.4. This distinction is irrelevant because fiduciary status can rest on discretion over the management or administration of plans *or* plan assets. 29 U.S.C. § 1002(21)(A). Anthem also discusses whether conduct in certain cases complied with plan terms or whether it concerned a particular participant rather than all participants. BIO 16 nn.5-6. But a fiduciary owes statutory duties that can be breached regardless of whether plan terms were violated, 29 U.S.C. § 1104, and the exercise of discretion is a fiduciary act whether applied to one or all plan participants. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008).

Respondents cannot avoid the fact that the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits each concluded that service providers act as fiduciaries when they exercise discretion over prices paid by plans or participants.[2] The Second and Sixth Circuits applied the opposite legal conclusion to the *same question*. Pet. 22-26. This is a textbook circuit conflict.[3]

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[2] Two cases concluded that service providers did not breach fiduciary duties. Anthem BIO 16 n.5. But fiduciary status in *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.* still turned on exercising discretion over prices. 474 F.3d 463, 472-75 (7th Cir. 2007). ESI agrees. BIO 14-15. And *Mitchell v. Blue Cross Blue Shield of North Dakota* recognized that a service provider would breach its fiduciary duties by setting unreasonable "allowed charge[s]." 953 F.3d 529, 539-40 (8th Cir. 2020).

[3] Anthem's contention that Petitioners "never before argued that there was any conflict," BIO 2, is puzzling. In the courts

2. Respondents Confirm that the Second and Sixth Circuits Applied a Categorical "Business" Exception.

a. Ironically, Respondents confirm the flaw underlying the Second and Sixth Circuits' position. Respondents insist that *Pegram* and the "two hats" doctrine mean that "ERISA fiduciary duties do not apply to business decisions taken in a corporate capacity." Anthem BIO 12; *accord* ESI BIO 12-13. And they concede that *DeLuca* and the Second Circuit based their holdings on the belief that fiduciary duties do not govern "business dealings" or "corporate business decision[s]." Anthem BIO 7, 10, 18, 21; ESI BIO 16.

This reflects fundamental confusion about *Pegram*. Pet. 26-32. The "two hats" doctrine recognizes that because a single entity may act as a fiduciary for some purposes and a non-fiduciary for other purposes, the "threshold question" is whether it was "performing a fiduciary function[] when taking the action subject to complaint." *Pegram*, 530 U.S. at 226. The answer to that question hinges solely on ERISA's fiduciary definition, which requires evaluating whether conduct entails discretion over the "administration" or "management" of a plan or its assets. 29 U.S.C. § 1002(21)(A).

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below, Petitioners cited cases supporting their fiduciary-status arguments, C.A. Dkt. 94 at 20-26, and the Second Circuit had not yet adopted *DeLuca*'s "business" exception.

b. Respondents—like the Second and Sixth Circuits—wish to bypass this inquiry and categorically exempt "business" activity from even the evaluation of whether it constitutes plan "administration" or "management." Respondents insist that the Second and Sixth Circuits applied ERISA's functional standard. Anthem BIO 18-20; ESI BIO 16. But they identify only summary conclusions; they cannot cite any analysis of whether discretion over prices constitutes "administration" or "management" because each court believed its work was complete upon determining the service provider engaged in "business dealings." Pet. 27, 30-32.

c. Unable to genuinely dispute that the Second and Sixth Circuits skipped the requisite analysis, Anthem doubles down, arguing that every circuit has adopted this "business" exception. BIO 12-15. But the cases it cites merely applied the "two hats" doctrine and the related, long-recognized principle that *employers* are not engaged in plan "administration" or "management" when "they act as employers (e.g., firing a beneficiary for reasons unrelated to the ERISA plan)" or perform the plan sponsor's so-called "settlor" functions, such as "modifying the terms of a plan." *Pegram*, 530 U.S. at 225. To the extent some cases used the phrase "business decision," they did so only as a shorthand reference to an *employer's* employment or settlor functions. None held that business decisions of a service provider are exempt when they entail the administration or management of plans or assets.

d. Judge Kethledge's dissent confirms that *DeLuca* created a circuit conflict. Respondents argue that Judge Kethledge merely focused on a factual dispute about plan language. Anthem BIO 18; ESI BIO 17. But the pertinent question for Judge Kethledge—consistent with the majority of circuits—was whether Blue Cross was performing a "discretionary service[] that directly impact[s] a plan's finances": specifically, whether it was "negotiat[ing] rates for the [p]lan." 628 F.3d at 749. Judge Kethledge recognized that regardless of whether Blue Cross was negotiating on behalf of multiple clients—and regardless of its "business model"—Blue Cross would be a fiduciary if, like Anthem, it negotiated rates on behalf of ERISA plans. *Id.* at 750. Respondents offer no response.

B. Despite Anthem's Distortions, the Courts Below Clearly Understood the Allegations.

Anthem seeks to obscure the circuit conflict by distorting the allegations.

1. Anthem characterizes itself as an insurer that is free to price its insurance offerings. This is a red herring. This case concerns "Administrative Services Only" ("ASO") plans, *which are not Anthem's insurance offerings*. As the district court explained, these ASO plans are "self-funded" by employers, meaning that Anthem does not provide insurance or otherwise cover the cost of health care. App. 14a. Instead, each ASO plan

"pays Anthem * * * to administer the plan." *Id. Accord* App. 5a.

2. Anthem portrays the complaint as alleging "that Anthem could have offered them better pricing if Anthem negotiated for itself differently with Respondent [ESI]." BIO 1. Not so. This case does not concern Anthem's negotiations of prices "for itself." Rather, as the opinions below recognize, each ASO plan pays Anthem "*to negotiate on its behalf* for lower rates with health care providers." App. 14a; *accord* App. 5a. Consistent with this role, Anthem negotiated and renewed a PBM Agreement on each plan's behalf that governed the prices *paid by ASO plans and participants*. Pet. 8-10. As the district court explained, the PBM Agreement governed the "administrative services" ESI would provide to "Anthem, *Anthem's health plans, and Anthem participants*." App. 15a. Likewise, the Court of Appeals described how Anthem permitted ESI to "charge[ ] *Anthem plans* a higher rate for drugs." App. 6a. The courts were clear that these references to "Anthem's health plans" included the ASO plans. App. 14a; App. 5a.

3. Contrary to Anthem's contentions, Petitioners do not claim the sale of a corporate subsidiary is a fiduciary act. Anthem is a fiduciary because it was hired to negotiate prices on the plans' behalf. Anthem did not have to hire ESI or permit ESI to charge excessive prices. But Anthem chose to trade these fiduciary acts in exchange for a windfall for itself (a $4 billion markup of NextRx's sale price). Put simply, the sale of NextRx was not *ipso facto* a fiduciary act; but it became

evidence of a breach of the duty of loyalty in Anthem's exercise of fiduciary discretion over the PBM Agreement.

The courts below understood these claims:

> Plaintiffs argue that Anthem is a fiduciary because Anthem exercised discretion in choosing ESI to provide prescription drug prices and in negotiating the PBM Agreement itself. * * * Anthem had the discretion to use any number of means—purchasing drugs directly, using an in-house PBM, or contracting with a separate PBM—to provide prescription drugs and set prices for those prescriptions. Anthem's choice of ESI—and its alleged delegation of pricing and plan management to ESI—was an exercise of that discretion and gave rise to Anthem's fiduciary duty.

App. 59a; *accord* App. 8a.

The courts below also understood that Anthem leveraged its discretion to obtain a quid pro quo for itself:

> The execution of the PBM Agreement was *a condition precedent* to the signing of the NextRx Agreement. * * * ESI offered to pay $500 million to Anthem * * * in exchange for providing prescription medications to Anthem subscribers at a lower price[.] * * * Conversely, ESI offered to pay a much greater amount for the NextRx companies—$4.675 billion—but allegedly made clear that prescription medication pricing would be higher

> over the life of the Agreement. Ultimately, Anthem opted for the greater upfront payment of $4.675 billion.

App. 15a-16a (citations omitted).

The courts below dismissed the complaint, not because they misunderstood the alleged facts or resolved factual questions, but because of how they applied the law to these well-pleaded allegations.

C. The First Question Is Exceptionally Important.

The Second Circuit's adoption of *DeLuca* has cost small employers and plan participants at least $13 billion in this case alone. And as the Petition detailed, confusion is growing among courts, service providers, plans, and participants.

Anthem responds that there is no confusion because all courts understand that service providers are fiduciaries only when communicating with participants or determining benefit eligibility. BIO 20-21. Anthem is mistaken. ERISA's fiduciary definition covers *any* exercise of discretion over plan "management" or "administration," 29 U.S.C. § 1002(21), and five other circuits interpret this definition to encompass a service provider's discretion over prices. The Second and Sixth Circuits exempt such discretion based on a "business" exception that no other circuit applies.

As the Pension Rights Center explained, this confusion is untenable. PRC Br. 8-10. Nationwide service

providers owe fiduciary duties in five circuits but remain free to self-deal in two other circuits. This confusion will grow as health plan administrators increasingly invoke *DeLuca* in attempts to exempt their "business" activities from ERISA's reach.[4]

II. The Second Question Warrants Review, if Not Summary Reversal

In response to the second question, ESI prematurely contests the merits, misconstrues the opinion below, and raises an unfounded policy concern. Each objection fails.

A. ESI disputes that it exercised discretion and reframes the second question based on the fictitious premise that the Second Circuit held that drug prices were "fixed" by the PBM Agreement. BIO 20-22. But as Petitioners explained, Pet. 18, the Second Circuit rejected ESI's invitation to resolve factual disputes on a Rule 12(b)(6) motion and "fully credit[ed] plaintiffs' allegations that the PBM Agreement provided [ESI] with extraordinarily broad discretion in setting prescription drug prices." App. 11a-12a. *See also* Pet. 10. The Second Circuit held that ESI lacked fiduciary status *despite* these allegations of "extraordinarily broad discretion." App. 11a-12a.

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[4] *See* 2013 WL 9582424, § I.B (Anthem); 2016 WL 1660087, § III.A (Cigna); 2017 WL 5516941, § III.B (UnitedHealth); 2020 WL 1666853, § III.A (Aetna); 2018 WL 2926801, § II.A.1 (four PBMs).

B. ESI offers no response besides disavowing this clear holding. BIO 21. The court explicitly said that "[e]ven fully crediting plaintiffs' allegations that the PBM Agreement provided [ESI] with extraordinarily broad discretion in setting prescription drug prices, at bottom the ability to set such prices is a contractual term, not an ability to exercise authority over plan assets." App. 11a-12a. In other words, the Second Circuit believed that because ESI's discretion over prices was granted by contract, it was not a fiduciary. This contradicts the statutory text and other circuits' views. Pet. 38-39.

C. ESI baldly states that Petitioners do not identify any "valid consideration" under Rule 10. BIO 19. But the Petition details how the Second Circuit's holding conflicts with the views of other circuits based on misunderstanding *Pegram* and extending *DeLuca*'s "business" exception, which itself conflicts with the views of this Court and other circuits. Pet. 38-40. The second question warrants plenary review, if not summary reversal.

D. ESI's slippery slope argument about "upstream service providers," BIO 22, is meritless. What ESI calls "upstream service providers" are health care providers that sell a product or service at fixed prices that are accepted by plan administrators. Such entities would not be fiduciaries because they would not exercise discretion on behalf of plans. By contrast, this case concerns a service provider hired to exercise unfettered discretion to determine—and change *on an ongoing basis*—the prices plans and participants pay for

benefits. There is nothing controversial about applying ERISA's uniform fiduciary definition here.

III. ESI's Vehicle Argument Is Baseless

ESI's jurisdictional objection, BIO 23-24, lacks merit, but in any event makes the case more certworthy, rather than less.

As ESI admits, *Slayton v. American Express Co.* established the Second Circuit's view that a without-prejudice dismissal with leave to amend is appealable once the appellant has disclaimed any intent to amend. 460 F.3d 215 (2d Cir. 2006). It was therefore unnecessary for the court below to "squarely address[]" the point. BIO 24.

The Second Circuit's view is clearly correct, especially because Rule 58 was amended after *Jung v. K. & D. Mining Co.*, 356 U.S. 335 (1958), to provide that "when a district court making a final decision under section 1291 fails separately to document the judgment as Rule 58 prescribes, judgment is deemed entered 150 days thereafter and any appeal taken within that 150-day period is timely." *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1256 (D.C. Cir. 2020) (citing Fed. R. Civ. P. 58(c)(2)(B); Fed. R. App. P. 4(a)(7)). The circuit court opinions on which ESI relies—*WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc), and *Sapp v. City of Brooklyn Park*, 825 F.3d 931, 936 (8th Cir. 2016)—did not consider the effect of the amended rules.

Nonetheless, this case provides an opportunity to resolve the circuit split about "whether and when a without-prejudice dismissal with time-limited leave to amend becomes final under section 1291." *Wolf*, 977 F.3d at 1256; *see id.* at 1271-74 (Millett, J., dissenting) (describing this "longstanding circuit split"). On plenary review, the Court should adopt *Slayton*'s rule that an appellant may "render such a non-final order 'final' and appealable by disclaiming any intent to amend." 460 F.3d at 224.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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