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

SUPPLEMENTAL BRIEF FOR PETITIONERS

MATTHEW GEREND
BENJAMIN GOULD
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3200
Seattle, WA 98101
(206) 623-1900

JEFFREY LEWIS
KELLER ROHRBACK L.L.P.
180 Grand Avenue,
Suite 1380
Oakland, CA 94612
(510) 463-3900

PETER K. STRIS
Counsel of Record
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
pstris@stris.com

Counsel for Petitioners

(Additional Counsel Listed on Inside Cover)

JOE R. WHATLEY, JR.
WHATLEY KALLAS, LLP
152 West 57th Street,
41st Floor
New York, NY 10019
(212) 447-7060

PAMELA PRESSLEY
CONSUMER WATCHDOG
6330 San Vicente Blvd.,
Suite 250
Los Angeles, CA 90048
(310) 392-0522

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

RULES:

INTRODUCTION

As the government's invitation brief confirms, the following key facts are undisputed:

- Respondent Anthem was hired by self-funded ERISA plans to provide administrative services ("ASO") including pharmacy benefit management ("PBM"). U.S. Br. 2, 4. "Anthem, in turn, contracted with respondent Express Scripts, Inc. ("ESI") . . . to perform the PBM portion of those services." *Id*. at 2.
- Anthem and ESI negotiated an exclusive 10-year PBM Agreement "[a]s a condition of" ESI's purchase of Anthem's in-house PBM companies for $4.675 billion. *Id.* at 7.
- Unlike a "traditional" contract, where a PBM "agrees to provide drugs to the plan at a specified aggregate rate," *id*. at 5 (citation omitted), the Anthem/ESI agreement employed a discretionary "competitive benchmark" standard to be periodically negotiated in good faith, *id.* at 6-7.[1]
- ESI charged amounts that, *according to Anthem*, "exceed[] 'competitive benchmark pricing' by more than $3 billion annually." Pet. 11 (quoting district court); U.S. Br. 8 n.4.
- These excessive charges, Petitioners allege, were "passed on" to them by Anthem, as permitted by its ASO contracts. *Id.* at 8.

---

[1] As the government notes, petitioners allege that ESI paid an additional *$4.175 billion* to Anthem for this discretion. U.S. Br. at 7.

Petitioners sued Anthem and ESI under ERISA, which preempts any state law claims, to prove and remedy this outrageous price gouging.

Respondents successfully moved to dismiss on the grounds that neither was a "fiduciary." According to them, "fiduciary duties under ERISA are not triggered 'when the decision at issue is, at its core, a corporate business decision.'" Anthem C.A. Br. 11-12 (citation omitted). *See also id*. at 20-21 ("[T]he 'conduct at issue' was a 'business decision'" that is "'not subject to fiduciary standards'" because it applies "to all customers and to Anthem itself.") (quoting *DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 747 (6th Cir. 2010)).

As the United States agrees, that position is manifestly wrong:

> The fact that Anthem might combine any such fiduciary functions with other non-fiduciary aspects of its business—such as negotiating the sale of its in-house PBMs, or simultaneously negotiating the price that Anthem would itself pay for prescription drugs for Anthem's insured healthcare plans—would not excuse Anthem from any fiduciary responsibility to petitioners' plans when negotiating prices that those plans would pay. Otherwise, a fiduciary could entirely escape its obligations to ERISA plans simply by combining them with other business functions.

U.S. Br. 13.

Nonetheless, the government offers five reasons to sweep this pernicious error under the rug.

The government leads (Br. 11-16) with the curious position that the Second and Sixth Circuits may not have really meant what they wrote. *See, e.g.*, *id.* at 11 ("The court of appeals' reasoning . . . may be erroneous at least with respect to Anthem. But it also appears that petitioners may misunderstand the court's rationale."). Not so. The court of appeals held *exactly* what respondents argued then and before this Court. *See, e.g.*, Anthem BIO i ("a company hired by an ERISA plan does not act in a fiduciary capacity when making corporate, business-wide decisions about the company's business, such as . . . entering into a contract with a third party service provider").

Second, the government argues in a single paragraph that "[t]he fact that future panels of the Second Circuit will be free to evaluate afresh the questions presented here significantly undermines any need for this Court's review in this case." U.S. Br. 16. But the Sixth Circuit's *DeLuca* decision *is* precedential and has already created considerable confusion. It is routinely exploited by service providers to persuade courts to exempt more and more conduct from ERISA's purview. As the AARP has explained:

> The Court's ultimate decision on whether to apply a general "business" exception to ERISA's statutory "fiduciary" definition could affect not only health benefits, but also retirement benefits, which frequently involve third-party administrator actions that determine investment choices, fees, and a host of other actions historically covered by ERISA.[2]

---

[2] Dara Smith, *Looking Ahead: ERISA and Employee Benefits*, AARP Found. (Sept. 20, 2021), https://bit.ly/3x4z4Vl.

See also Brief of Amicus Curiae Pension Rights Center ("PRC") at 8-10.

Third, the government claims "the court of appeals' decision does not implicate a division of authority." U.S. Br. 16. That is certainly not the prevailing view of regular litigants in this space. In the words of AARP, for example: the Second Circuit's decision "deepens [the] circuit split" first created by the Sixth Circuit in *DeLuca*. AARP *supra* note 2. At a minimum, there is hopeless confusion in the lower courts regarding the proper application of *Pegram v. Herdrich*, 530 U.S. 211 (2000), in this recurring context.

Fourth, the government spends pages (Br. 18-21) arguing that "shortcomings in the record would make this case a poor vehicle," in total disregard of the fact that (i) the decision below was a Rule 12(b)(6) dismissal, (ii) the plausibility of the relevant allegations was *never disputed*, and (iii) those allegations were *fully credited* by the court of appeals before making the *legal* rulings challenged by the petition.

Finally, the government notes "a threshold jurisdictional question that would need to be resolved before the Court could address the merits." U.S. Br. 21. But as petitioners have already explained, that question (on which everyone agrees there is a square circuit split) weighs *in favor* of *certiorari* here. By granting the petition, the Court can resolve that split. If petitioners are right (i.e., there was appellate jurisdiction), the Court would reach the Questions Presented. If ESI is right (i.e., there was *not* appellate jurisdiction), the decision below would be vacated and petitioners could then pursue an appeal.

ARGUMENT

I. The Decision Below Is Clear and Wrong.

The government concedes that under one reading of the decision below—the *only* plausible reading—the Second Circuit's decision was "erroneous." U.S. Br. 11. Because ERISA "defines fiduciary status in 'functional terms,'" Anthem would be a fiduciary if it was "negotiating on the plans' behalf with others (like ESI) to set the price that the plans would pay for prescription drugs." *Id.* at 12-13 (citation omitted).

That is precisely what petitioners allege. Pet. 8-9; Reply Br. 8. *Accord* Pet. App. 59a; Pet. App. 8a. And those allegations were expressly adopted by the court's below: each ASO plan pays Anthem "to negotiate on its behalf for lower rates with health care providers." Pet. App. 14a; *Accord* Pet. App. 5a. Yet the Second Circuit held that Anthem was not a fiduciary.

The government acknowledges the error in this decision: "[t]he court's parenthetical description of *DeLuca* . . . suggests that the court may have concluded that Anthem did not act as a fiduciary in those transactions because they were 'business dealings' 'generally applicable to a broad range of health-care consumers[.]'" U.S. Br. 12 (citation omitted). And the government unambiguously explained that this conclusion is wrong as a matter of law: combining "fiduciary functions with other non-fiduciary aspects of its business" does "not excuse Anthem from any fiduciary

responsibility to petitioners' plans when negotiating prices that those plans would pay." *Id.* at 13.[3]

Despite clearly acknowledging this error, the government suggests that the Second and Sixth Circuits might not have meant what they said. But there is no other plausible reading of these decisions. In holding that Anthem was not a fiduciary when negotiating the PBM Agreement, the Second Circuit cited *DeLuca*'s exception of "business dealings." Pet. App. 10a. That is the *only* authority it cited and the only rationale it provided for its conclusion. *Ibid.*

Likewise, the express language of *DeLuca* confirms that it held that rate negotiations were not fiduciary acts because the "'conduct at issue' clearly falls into the latter category, 'a business decision that has an effect on an ERISA plan[.]'" 628 F.3d at 747. *See also* Pet. 23-25, 30-32; Reply Br. 2-6.

This plain reading of both decisions is consistent with how respondents argued their position throughout the litigation. *E.g.*, Anthem C.A. Br. 11-12; *id.* at 20-21. It is confirmed by respondents' briefs in opposition, which defended the decisions of the Second and Sixth Circuits for holding that fiduciary duties do not govern "business dealings" or "corporate business decision[s]." Anthem BIO i, 7, 10, 18, 21; ESI BIO 16. In fact, Anthem even argued that *every circuit has*

---

[3] Reporters noted how the government's "brief suggests Anthem could face fiduciary liability," including in that it "rejected the idea that Anthem could avoid liability by mixing fiduciary acts with other business activities." Jacklyn Wille, *Skip Anthem, Express Scripts Drug Price Fight, US Tells Justices*, Bloomberg Law (May 25, 2022, 7:58 AM), https://bit.ly/3NNLAiO.

adopted DeLuca's "business" exception. Anthem BIO 12-15; *see also* Reply Br. 4-6.

The government ignores all of this. Instead, it speculates that the Second Circuit's holding "*might* reflect its view that Anthem was . . . furnish[ing] a product" (i.e., a menu of drug prices) rather than performing a discretionary service (i.e., negotiating drug prices on behalf of plans). U.S. Br. 16 (emphasis added). Nothing in the Second Circuit's decision remotely supports this speculative premise. Indeed, the decision expressly contradicts it: the ASO Plans "pay Anthem to administer the plan *and negotiate for lower rates with health care providers*." Pet. App. 5a (emphasis added).

The government also misreads Judge Kethledge's dissent in *DeLuca*. U.S. Br. 15-16. While Judge Kethledge noted BCBSM's belief that it merely provided a "product," 628 F.3d at 749-750, the majority opinion did not adopt that framework. Instead, it held "that BCBSM was not acting as a fiduciary *when it negotiated the challenged rate changes*, principally because those business dealings were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers." 628 F.3d at 747 (emphasis added).

Judge Kethledge disagreed with that analysis. He recognized that "the function of negotiating rates with provider hospitals surely would have been fiduciary in nature had the [p]lan's trustees kept that function in-house," that outsourcing this function to a service provider does not change the fiduciary nature of the conduct, and that "negotiat[ing] rates for the [p]lan" would remain a "discretionary service[] that directly impact[s] a plan's finances" regardless of whether

BCBSM was negotiating on behalf of multiple clients and regardless of its "business model." *Id*. at 749-750.

II. Review Is Urgently Needed.

A. The government does not dispute the exceptional importance of the questions presented. Instead, it urges the Court to ignore them because future Second Circuit panels remain free to reconsider.

But as petitioners and other stakeholders have explained, the Sixth Circuit's precedential *DeLuca* decision had already created a circuit conflict. The Second Circuit's decision deepened that conflict and is evidence of the importance of this Court's review.

Specifically, *DeLuca* fueled confusion regarding the meaning of the "two hats" doctrine and this Court's *Pegram* decision. The Second Circuit endorsed *DeLuca's* mistaken view of *Pegram*. And in so doing, it permitted respondents to avoid any responsibility to the thousands of plans and millions of participants who, by Anthem's own admission, paid billions in excessive drug prices.

The government ignores that large health plan administrators and PBMs routinely invoke *DeLuca's* "business" exception, Reply Br. 11 & n.4, which has caused multiple other lower courts to adopt it. Pet. 34. As the AARP and PRC have explained, there exists growing confusion over whether, and in what circumstances, the entities hired to serve benefit plans of all types owe the duties of loyalty and prudence that Congress intended to impose when entities are entrusted to exercise discretion over employee benefits. AARP *supra* note 2; PRC Br. 8-10; Pet. 33-37.

B. The government's cursory discussion of circuit conflicts reflects two errors. First, it ignores the primary conflict identified in the petition. As the AARP and PRC also recognized, the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have held that service providers hired by ERISA plans act as fiduciaries when exercising discretion over the prices those plans and their participants pay for benefits; the Second and Sixth Circuits reached the opposite conclusion based on an extra-statutory business exception that no other circuit has adopted. *See* Pet. 22-26, Reply Br. 3-4; PRC Br. 6-7, AARP *supra* note 2.[4]

Second, although the government focuses on a related question—whether the circuits are split regarding the existence of the "business" exception, U.S. Br. 16-17—it disregards the circuit tension, if not outright split, on that question. As petitioners previously explained, while multiple circuits have addressed *Pegram* and the "two hats" doctrine, the Second and Sixth Circuits are the only circuits to interpret them as categorically exempting "business" decisions from ERISA's fiduciary definition. Reply Br. 6.

The government circularly claims that *DeLuca* did not adopt a business exception because it instead held that discretionary decisions "'generally applicable to a broad range of health-care consumers'" do not qualify as fiduciary acts. U.S. Br. 17 (citation omitted). But

---

[4] The government attempts to distinguish the opinions of the other circuits by relying on immaterial nuisances, including that some addressed control over the prices of other types of benefits. U.S. Br. 16-17. *But see* Reply Br. 3-4 (responding to analogous arguments by respondents). Critically, the government does not deny that, unlike the Second and Sixth Circuits, these cases recognized that discretion over prices constitutes fiduciary conduct.

that *is the business exception*. The full quote from *DeLuca* is that "BCBSM was not acting as a fiduciary when it negotiated the challenged rate changes, *principally because those business dealings* were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers." 628 F.3d at 747 (emphasis added).

Tellingly, the government elsewhere concedes that such a position is contrary to both the statute and *Pegram*. *See* U.S. Br. 13 (addressing *Pegram*), 15-16 (conceding that a company is "performing a fiduciary function when exercising authority to negotiate with third parties on behalf of ERISA plans," even when it is simultaneously negotiating on behalf of insured and self-insured plans).

Finally, although the government agrees that a "business" exception is contrary to *Pegram*, U.S. Br. 13, it turns a blind eye to the fact that the decisions of the Second and Sixth Circuits flowed directly from misinterpretations of *Pegram* and the "two hats" doctrine. Pet. 26-32; Reply Br. 4-6. Thus, separate and apart from the existence of the circuit conflict, the Court should grant certiorari now to clear up the confusion that has persisted regarding its *Pegram* decision.

III. This Case Is an Excellent Vehicle.

A. The government laments the underdeveloped evidentiary record, focusing on the absence of the ASO contracts between Anthem and the plans. It then questions whether the ASO contracts in fact gave Anthem the authority to negotiate drug prices and PBM agreements on behalf of the plans.

These arguments reflect a total disregard for the procedural posture of this case. Petitioners' claims were dismissed on a Rule 12(b)(6) motion. Petitioners alleged that Anthem had discretion to negotiate drug prices on behalf of plans, including by negotiating PBM agreements.[5]

The courts below never questioned the plausibility of these allegations; indeed, they expressly based their decisions on the alleged fact that each ASO plan "pays Anthem . . . to negotiate on its behalf for lower rates with health care providers." Pet. App. 14a; *accord* Pet. App. 5a. As such, the decisions below were based on the *application of law* to these plausible and undisputed allegations.

The government nonetheless offers the following baseless speculation: "one would anticipate at least some contracts governing Anthem's relationships with ERISA plans" would constrain Anthem's discretion over drug prices. U.S. Br. 19. But as the government elsewhere notes, *id.* at 5-6, Anthem attached limited excerpts from these contracts to its motion to dismiss, none of which in any way contradicts Anthem's alleged discretion.

Distilled to its essence, the government asks the Court to decline review of squarely presented legal questions on the off chance that a major corporate defendant with highly experienced counsel failed to contest the plausibility of Anthem's alleged discretion.

In any event, regardless of what authority was granted to Anthem, the parties do not dispute that

---

[5] Complaint ¶¶ 9, 207(a)-(b), 217, 222, C.A. App. 44, 105, 108, 110.

Anthem in fact exercised discretion to set prices and negotiate the PBM Agreement on behalf of self-funded health plans, Pet. 9-10; Reply Br. 7-8, which the Government concedes is sufficient to establish fiduciary status. U.S. Br. 3.

B. The government concludes by noting a threshold jurisdictional question about which the courts of appeals are "divided." U.S. Br. 21-22 (detailing the circuit conflict). Perplexingly, the government suggests this is a reason for the court to *deny* certiorari.

Instead, the Court should grant the petition to resolve this circuit conflict regarding "whether and when a without-prejudice dismissal with time-limited leave to amend becomes final under section 1291." *North Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1256 (D.C. Cir. 2020); *see id.* at 1271-74 (Millett, J., dissenting) (describing this "longstanding circuit split").

The Second Circuit's view is plainly correct that a without-prejudice dismissal with leave to amend is appealable once the appellant has disclaimed any intent to amend. *See* Reply Br. 12-13. If this Court agrees, there is appellate jurisdiction, and the Court may then consider the Questions Presented. If the court disagrees, it will have resolved an important and recurring question about which the courts of appeals are divided. And absent appellate jurisdiction, the decision below would be vacated and petitioners could then pursue a future appeal.

CONCLUSION

The petition should be granted.

Respectfully submitted.

MATTHEW GEREND
BENJAMIN GOULD
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3200
Seattle, WA 98101
(206) 623-1900

JEFFREY LEWIS
KELLER ROHRBACK L.L.P.
180 Grand Avenue,
Suite 1380
Oakland, CA 94612
(510) 463-3900

JOE R. WHATLEY, JR.
WHATLEY KALLAS, LLP
152 West 57th Street,
41st Floor
New York, NY 10019
(212) 447-7060

PETER K. STRIS
Counsel of Record
RACHANA A. PATHAK
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
777 S. Figueroa Street
Suite 3850
Los Angeles, CA 90017
(213) 995-6800
pstris@stris.com

PAMELA PRESSLEY
CONSUMER WATCHDOG
6330 San Vicente Blvd.,
Suite 250
Los Angeles, CA 90048
(310) 392-0522

Counsel for Petitioners

JUNE 3, 2022