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

BRIEF IN OPPOSITION OF RESPONDENT EXPRESS SCRIPTS, INC.

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QUESTIONS PRESENTED

1. Whether the Second Circuit was correct to conclude that a health insurance company is not acting as a fiduciary to its health plan clients under the Employee Retirement Income Security Act of 1974 ("ERISA") when it enters into an arm's-length transaction with a third-party pharmacy benefit manager ("PBM") to (i) sell a subsidiary business to the PBM and (ii) obtain PBM services at fixed prices.

2. Whether the Second Circuit was correct to conclude that a PBM is not an ERISA fiduciary to the health plan clients of a health insurer when the prices it charges the health insurer for prescription drugs are fixed by the terms of its contract with the health insurer.

RULE 29.6 STATEMENT

Respondent Express Scripts, Inc., is a wholly owned indirect subsidiary of Cigna Corporation, a publicly held company. Cigna Corporation has no parent corporation, and no publicly held company owns 10% or more of Cigna Corporation's stock.

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INTRODUCTION

Respondent Express Scripts, Inc. ("Express Scripts"), respectfully submits this brief in opposition to the petition for a writ of certiorari filed by John Doe 1, John Doe 2, Brian Corrigan, Stamford Health, Inc., Brothers Trading Co., Inc., Karen Burnett, Brendan Farrell, and Robert Shullich (collectively, "Petitioners").[1]

Petitioners devote the bulk of their petition to the first question presented, which asks whether the Second Circuit correctly concluded—via an unpublished summary affirmance—that Respondent Anthem, Inc. ("Anthem"), did not act as an ERISA fiduciary to its health plan clients when it entered into a transaction with Express Scripts in 2009 to (i) sell its in-house subsidiary PBM business to Express Scripts and (ii) receive PBM services from Express Scripts at fixed prices, as agreed by the parties at arm's length and detailed in an agreement. The Second Circuit properly found that Anthem is not an ERISA fiduciary in this circumstance because selling a subsidiary and entering into a business-wide service agreement with a third-party service provider involve corporate business decisions, different from fiduciary decisions concerning ERISA plans.

Petitioners conjure a purported circuit split over the first question presented, but that split is illusory. The courts of appeals do not divide over the legal

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[1] The district court dismissed the claims of Petitioners Burnett and Farrell for lack of standing. Pet. App. 39a. Petitioners neither appealed that dismissal to the Second Circuit nor challenge that dismissal in their Petition.

principles governing ERISA fiduciary status. Instead, they simply apply the same foundational legal principles in different settings. What Petitioners try to paint as a legal conflict is, in reality, nothing more than courts applying settled legal principles to disparate fact patterns.

As an afterthought, Petitioners tack on a second question presented, which asks whether the Second Circuit correctly concluded that Express Scripts did not act as an ERISA fiduciary to Anthem's health plan clients. Petitioners do not even attempt to identify a reason under Supreme Court Rule 10 to grant certiorari on this question. They neither claim a circuit split on this issue nor contend that any important question of federal law is at stake. Rather, Petitioners maintain that this Court should grant review (or even the extraordinary remedy of summary reversal) to correct what they perceive to be an erroneous conclusion relative to certain facts alleged. Because this Court is not a court of error correction, the second question presented is out of place on its face.

In any event, there was no error. The Second Circuit properly affirmed the district court's ruling that Express Scripts was not an ERISA fiduciary in this instance. Petitioners' theory is that Express Scripts became an ERISA fiduciary when it entered into an arm's-length contract with Anthem that set the prices Anthem would pay Express Scripts for prescription drugs—prices that in turn allegedly influenced the prescription-drug costs incurred downstream by ERISA health plans that separately contract with Anthem. This unbounded theory of ERISA fiduciary status would unsettle arm's-length

negotiations between business counterparties and transform doctors, hospitals, pharmacies, and others in the healthcare supply chain into ERISA fiduciaries merely because their pricing arrangements may somehow impact certain individuals who happen to be ERISA beneficiaries. The Second Circuit panel rightly rejected this theory, stating: "We agree with the district court that when a PBM sets prices for prescription drugs pursuant to the terms of a contract, it is not exercising discretionary authority and therefore not acting as an ERISA fiduciary." Pet. App. 11a.

Finally, even if the questions presented might warrant review (they do not), this case would be a poor vehicle to resolve them. After the district court granted Petitioners leave to amend in dismissing their complaint at the pleading stage, Petitioners appealed without ever obtaining a final judgment. Under this Court's precedent, a dismissal with leave to amend is non-final, thereby precluding appellate jurisdiction. This jurisdictional impediment affords yet another reason to deny the petition.

STATEMENT OF THE CASE

A. The Parties

Respondent Anthem is a health benefits company. Pet. App. 5a. It offers health care plans both through employers and directly to individuals. Pet. App. 5a. Anthem also offers "Administrative Services Only" ("ASO") arrangements, in which employers that sponsor a self-funded health plan pay Anthem to administer the plan and negotiate for lower rates with health care providers. Pet. App. 5a.

Respondent Express Scripts is a PBM. Pet. App. 5a. "Generally speaking, PBMs serve as intermediaries between prescription-drug plans and the pharmacies that beneficiaries use." *Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 141 S. Ct. 474, 478 (2020). "When a beneficiary of a prescription-drug plan goes to a pharmacy to fill a prescription, the pharmacy checks with a PBM to determine that person's coverage and copayment information." *Id.* After a pharmacy fills a prescription, the PBM reimburses the pharmacy, and the plan reimburses the PBM. *Id.* The "amount that prescription-drug plans reimburse PBMs is a matter of contract between a given plan and a PBM." *Id.*

Petitioners are (i) ERISA health plans administered or insured by Anthem and (ii) individuals enrolled in Anthem health plans. Pet. App. 5a. None of the Petitioners allege that they or their health plans contract directly with Express Scripts.

B. The 2009 Transaction

In 2009, Anthem (then called Wellpoint) and Express Scripts executed the "PBM Agreement," under which Express Scripts became the provider of PBM services to Anthem for 10 years. Pet. App. 5a. As part of the same transaction, Express Scripts acquired Anthem's in-house PBM, NextRx. Pet. App. 6a.

As the Second Circuit explained, "[t]he signing of the PBM Agreement was a condition precedent to the sale of the NextRx Companies, and the purchase price was linked to the price Anthem would pay for prescription drugs during the term of the PBM Agreement." Pet. App. 6a. During the negotiations for this transaction, "Express Scripts offered to pay

$500 million" upfront and charge Anthem lower prices for prescription drugs over the 10-year contract term. Pet. App. 6a. "Alternatively, Express [Scripts] offered to pay $4.675 billion . . . , but would then charge higher prices for prescription medications during the PBM Agreement." Pet. App. 6a. "Anthem chose the latter option." Pet. App. 6a.

Two provisions of the PBM Agreement—Section 5.4 and Exhibit A—specified the prices Anthem would pay to Express Scripts for prescription drugs. Section 5.4 provides that—subject to Exhibit A—Anthem would pay an amount determined by various specified methods of calculating a drug's price, while Exhibit A sets forth a 10-year schedule of pricing discount guarantees, such that Express Scripts has no discretion to charge prices higher than what the Exhibit A pricing schedule provides. S. App. 28–30[2]; Pet. App. 51a & n.34 ("Section 5.4 of the PBM Agreement lays out additional pricing requirements and limitations" and it thereby "contradicts Plaintiffs' allegations that [Express Scripts] had the discretion to set drug prices paid by Plaintiffs."); Pet. App. 54a ("[T]he Court finds that the prescription drug pricing at issue here was . . . constrained by the more specific requirements of Section 5.4 and Exhibit A of the Agreement.").

Anthem, in turn, sets the prices it charges its client health plans for prescription drugs. Indeed, in Section 2.10 of the PBM Agreement, Anthem expressly "reserve[d] the right" to charge prices to its client plans for prescription drugs that are "different

[2] "S. App." refers to Petitioners' sealed appendix.

from" the prices it pays to Express Scripts for those prescription drugs. C.A. App. 332, 376.[3]

C. The Contract Dispute

Anthem and Express Scripts are currently involved in a separate commercial dispute over the pricing Express Scripts charged Anthem during the term of the PBM Agreement. *See Anthem, Inc. v. Express Scripts, Inc.*, No. 16-cv-2048 (S.D.N.Y.).

In that litigation, Anthem claims that Section 5.6 of the PBM Agreement obligated Express Scripts to accept *new* pricing terms proposed by Anthem that differ from the set pricing terms in Section 5.4 and Exhibit A, and that Express Scripts' refusal to do so constituted a breach of contract and caused Anthem to overpay for prescription drugs.

As the plain text of Section 5.6 makes clear, however, the only obligation Section 5.6 imposed on Express Scripts was to "negotiate in good faith" over pricing terms proposed by Anthem:

> **5.6 Periodic Pricing Review**. [Anthem] or a third party consultant retained by [Anthem] will conduct a market analysis every three (3) years during the Term of this Agreement to ensure that [Anthem] is receiving competitive benchmark pricing. In the event [Anthem] or its third party consultant determines that such pricing terms are not competitive, [Anthem] shall have

[3] "C.A. App." refers to the appendix filed with the Second Circuit at Docket Nos. 64–66 (Apr. 11, 2018).

> the ability to propose renegotiated pricing terms to PBM and [Anthem] and PBM agrees to negotiate in good faith over the proposed new pricing terms. Notwithstanding the foregoing, to be effective any new pricing terms must be agreed to by PBM in writing.

C.A. App. 83 ¶ 136; C.A. App. 341, 424. Section 5.6 obligated Express Scripts to "negotiate in good faith over the proposed new pricing terms" (which Express Scripts did for nearly two years). *Id.*; *see also* Pet. App. 54a n.38 ("Paragraph 5.6 of the PBM Agreement" required "Anthem and ESI negotiate in good faith over proposed new pricing."). But nothing in Section 5.6 obligated Express Scripts to capitulate to Anthem's pricing demands or otherwise to alter the pricing terms specified by Section 5.4 and Exhibit A.

The contract dispute between Anthem and Express Scripts continues to proceed in the U.S. District Court for the Southern District of New York.

D. The District Court Proceedings

Petitioners' operative complaint alleges (among other claims) that Anthem and Express Scripts violated ERISA by causing Petitioners to pay inflated prices for prescription drugs. Pet. App. 4a, 6a. Petitioners allege that Anthem violated its ERISA obligations by choosing in the 2009 transaction to receive a higher upfront payment ($4.675 billion) and higher prescription-drug prices from Express Scripts when it could have chosen a lower upfront payment ($500 million) and lower prescription-drug prices. Pet. App. 8a. As to Express Scripts, Petitioners contend that it violated ERISA by exercising discretion as a PBM over the prices it charged Anthem for pre-

scription drugs, which in turn affected the prices paid by Anthem's client health plans in their downstream arrangements with Anthem. Pet. App. 11a.

On January 5, 2018, the district court (Ramos, J.) granted Respondents' motions to dismiss Petitioners' second amended complaint. Pet. App. 13a. With respect to the ERISA claims, the court held that Petitioners had not plausibly alleged that Anthem or Express Scripts was an ERISA fiduciary.

The district court held that Anthem was not an ERISA fiduciary with respect to its conduct in the 2009 transaction because (i) "the decision to sell corporate assets or divisions is one made in an insurer or employer's business capacity, not its fiduciary capacity, even if a plan is affected by the decision," Pet. App. 60a, and (ii) "a health benefits company setting prices in its role as a health insurer is not acting as an ERISA fiduciary," Pet. App. 65a.

As for Express Scripts, the district court concluded that "Plaintiffs have not sufficiently alleged that [Express Scripts] was a fiduciary" with respect to prescription-drug prices because "the prescription drug pricing at issue here was not subject only to the requirements of Section 5.6, but was also constrained by the more specific requirements of Section 5.4 and Exhibit A of the [PBM] Agreement." Pet. App. 54a. In so ruling, the court cited "[n]umerous" decisions holding that "when a service provider or PBM acts pursuant to the terms of a contract, it does not exercise discretionary authority and does not act as an ERISA fiduciary." Pet. App. 53a (collecting cases).

Although the district court dismissed Petitioners' second amended complaint, it did so without preju-

dice while granting Petitioners' request for leave to file a third amended complaint. Pet. App. 78a–80a.

Petitioners, however, opted not to amend. Instead, they appealed straight to the Second Circuit without obtaining a final judgment from the district court. C.A. App. 741. In their notice of appeal, Petitioners disclaimed any intent to amend, submitting that their disclaimer transformed the district court's dismissal without prejudice into a final appealable decision. C.A. App. 741.

E. The Second Circuit Decision

On December 7, 2020, a panel of the Second Circuit (Winter and Pooler, JJ.) summarily affirmed the district court via an unpublished memorandum disposition. Pet. App. 1a–12a.[4] In response to Petitioners' argument that "Anthem was acting as a fiduciary when it negotiated the agreement to sell the NextRx Companies to Express Scripts for a higher price knowing it would result in Express Scripts charging a higher price for prescription drugs," Pet. App. 8a, the court below held that "the decision to sell a corporate asset is not a fiduciary decision," and that is so "even though [Anthem's] decisions may ultimately affect how much plan participants pay for drug prices," Pet. App. 10a.

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[4] The third panel member, Judge Sweet, died while the appeal was pending. Pet. App. 1a n.1. The agreement of the remaining two panel members enabled them to decide the appeal themselves. Pet. App. 1a–2a n.1; *see Yovino v. Rizo*, 139 S. Ct. 706, 609 (2019) ("[T]wo judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree.").

The Second Circuit also concluded that "Express Scripts was not a fiduciary." Pet. App. 10a. In rejecting Petitioners' argument that Express Scripts had "discretionary authority to set prescription drug prices," the court "agree[d] with the district court that when a PBM sets prices for prescription drugs pursuant to the terms of a contract, it is not exercising discretionary authority and therefore not acting as an ERISA fiduciary." Pet. App. 11a.

Petitioners sought panel rehearing and rehearing *en banc*, both of which the Second Circuit denied on January 26, 2021. Pet. App. 82a.

REASONS TO DENY CERTIORARI

I. The First Question Presented Does Not Warrant Review

Although Petitioners insist that there is a "lopsided circuit split" and "clear circuit conflict" over the legal principles governing ERISA fiduciary status, they do not point to a single court decision ever identifying such a conflict. Pet. i, 3. Nor could they, for there is no genuine conflict. What Petitioners describe as a "conflict" reflects nothing more than courts of appeals applying settled standards of ERISA fiduciary law to varying fact patterns, resulting in fact-dependent outcomes, quite different from any split of authority.

A. The Decision Below Correctly Applied Longstanding ERISA Fiduciary Law

The decision below correctly applied well-settled law regarding ERISA fiduciary status to the particular facts of this case.

This Court has already laid down clear instruction. "In every case charging breach of ERISA fiduciary duty, . . . the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

There are two types of ERISA fiduciaries: (i) named fiduciaries and (ii) *de facto* fiduciaries (sometimes called functional fiduciaries). *Coulter v. Morgan Stanley & Co., Inc.*, 753 F.3d 361, 366 (2d Cir. 2014). A named fiduciary is a fiduciary named in the ERISA plan. 29 U.S.C. § 1102(a). Petitioners do not contend that either Anthem or Express Scripts so qualifies. Nor could they so contend relative to Express Scripts: Section 9 of the PBM Agreement expressly disclaims that Express Scripts has a fiduciary relationship with Anthem or any of Anthem's client health plans. C.A. App. 342, 432 ("Nothing in this Agreement shall be deemed or construed to create a . . . fiduciary . . . relationship between the Parties, including, but not limited to, as between [Express Scripts] and any Plan.").

A person is a *de facto* ERISA fiduciary "with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A)

(emphasis added). "Under this definition, a person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only 'to the extent' that he has or exercises the described authority or responsibility." *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987). In other words, *de facto* "[f]iduciary status under § 1002(21)(A) is not 'an all-or-nothing concept. . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.'" *Kerns v. Benefit Tr. Life Ins.*, 992 F.2d 214, 217 (8th Cir. 1993) (citation omitted).

Notably, the "discretionary act" that gives rise to *de facto* fiduciary status "must be undertaken with respect to plan management or administration." *Coulter*, 753 F.3d at 367. Accordingly, this Court has recognized for decades that a service provider "is not an ERISA fiduciary merely because it administers or exercises discretionary authority over its *own* . . . business." *Pegram*, 530 U.S. at 223 (emphasis added); *accord, e.g.*, *American Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 357 n.2 (2d Cir. 2016) ("'[G]eneral fiduciary duties under ERISA [are] not triggered,' . . . when the decision at issue is, 'at its core, a corporate business decision, and not one of a plan administrator.'") (alteration in original) (quoting *Flanigan v. General Electric Co.*, 242 F.3d 78, 88 (2d Cir. 2001)).

The decision below faithfully heeded and applied this longstanding law governing ERISA fiduciary status. Pet. App. 7a–10a. Drawing on 29 U.S.C. § 1002(21)(A), on *Pegram*, and on prior Second Circuit decisions applying those authorities, the court below correctly concluded that "Anthem did not act

as an ERISA fiduciary when it entered into the NextRx and PBM Agreements, even though its decisions may ultimately affect how much plan participants pay for drug prices," because those decisions were corporate decisions about Anthem's own business, not fiduciary decisions respecting plan management or administration. Pet. App. 9a–10a.

This case thus falls squarely within longstanding law governing ERISA fiduciary status. As explained below, the courts of appeals are not divided on how to apply this established law.

B. No Circuit Split Exists

Petitioners fail to establish any split regarding the law governing ERISA fiduciary status. As courts on both sides of Petitioners' putative "split" recognize, whether an entity is acting as an ERISA fiduciary depends on whether it is exercising authority over a *plan*'s management or administration, versus its *own* business. *Compare, e.g.*, *Peters v. Aetna*, 2 F.4th 199, 231 (4th Cir. 2021) (reasonable factfinder could conclude Aetna was a fiduciary by exercising discretionary control over a specific plan's management), *with DeLuca v. Blue Cross Blue Shield of Michigan*, 628 F.3d 743, 747 (6th Cir. 2010) (defendant not a fiduciary when it negotiated rates for its own business rather than for a specific plan).

The supposed "circuit conflict" Petitioners conjure, Pet. 19, dissolves upon recognizing that different cases involving different facts will predictably reach different outcomes; that is what explains which cases fall on which side of the line traced by Petitioners. According to Petitioners, "exercise of discretion over the prices plans and participants pay for benefits constitutes discretion over the 'admin-

istration' or 'management' of a plan or its assets" in the "Fourth, Fifth, Seventh, Eighth, and Ninth Circuits," but not in the "Second Circuit" or the "Sixth Circuit." Pet. 4 (quoting 29 U.S.C. § 1002(21)(A)). But their account does not withstand scrutiny. Far from setting forth conflicting rules, the cited cases, Pet. 20–32, simply involved different facts.

For instance, in *Peters v. Aetna*, the Fourth Circuit held that a reasonable factfinder could conclude based on the specific evidence there that Aetna exercised "'discretionary authority or discretionary control respecting management of [the Plan]' and had 'discretionary authority or discretionary responsibility in the administration of [the Plan]'" sufficient to be an ERISA fiduciary because it had surreptitiously imposed an administrative fee upon the Plan and its members "without authority under the Plan and in direct violation of the" service agreement between Aetna and the Plan. 2 F.4th at 231 (alterations in original) (quoting 29 U.S.C. § 1002(21)(A)(i), (iii)).

The other cases Petitioners cite similarly involved fact-specific determinations of ERISA fiduciary status, with some finding a defendant to be a fiduciary, and others not, depending on the particular facts of the case. *E.g.*, *Reich v. Lancaster*, 55 F.3d 1034 (5th Cir. 1995) ("The record supports the determination that Lancaster usurped the Trustees' independent discretion and effectively exercised authority and control over management and administration of the plan with respect to the insurance policies in question."); *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 472 (7th Cir. 2007) (Caremark, a PBM, was not an ERISA fiduciary because "[a] thorough review of the contract

provisions" revealed that it lacked discretionary authority over drug prices paid by the Carpenters health plan as "Carpenters agreed to pay set prices for the drugs, prices negotiated with Caremark at arm's length"); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 709 (7th Cir. 1999) ("Health Cost is an ERISA fiduciary" because it was "[a]ssigned whatever legal claims the plan might have" and it "determine[d] in its sole discretion which [claims] are meritorious and what to do to collect them."); *Glanton ex. Rel. Alcoa Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) ("In choosing whether to fill a prescription or shift a participant to a different drug, [AdvancePCS] exercises discretion over the plans' assets.");[5] *Patelco Credit Union v. Sahni*, 262 F.3d 897, 909 (9th Cir. 2001) ("The undisputed evidence of Sahni's control over Plan assets is more than sufficient to establish that he was a fiduciary.").[6]

In sum, none of the Fourth, Fifth, Seventh, Eighth, and Ninth Circuit cases that Petitioners cite establishes a bright-line rule to the effect that a defendant performs a fiduciary act merely by influenc-

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[5] In *Glanton* the Ninth Circuit affirmed the dismissal of the case for lack of jurisdiction because the plaintiff lacked Article III standing, 465 F.3d at 1127, so its merits discussion of fiduciary status is pure *dicta*.

[6] Petitioners also cite *Mitchell v. Blue Cross Blue Shield of North Dakota*, 953 F.3d 529, 539–40 (8th Cir. 2020), which did not address fiduciary status. Instead, the Eighth Circuit there ruled that the defendant did not violate an alleged fiduciary duty by setting a low reimbursement rate. *Id.*

ing the pricing ultimately paid by plans or plan members under a separate contract with an insurer. Instead, each opinion applies long-established ERISA principles to the specific facts at issue in order to determine whether or not a particular defendant acted as an ERISA fiduciary.

Nor do Petitioners identify any conflict with the Sixth Circuit's decision in *DeLuca*. *DeLuca* applied the *same* standard as this Court did in *Pegram* and as other circuits did in the above-cited cases, emphasizing that "courts 'must examine the conduct at issue to determine whether it constitutes "management" or "administration" of *the plan* . . . or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards.'" 628 F.3d at 747 (citation omitted).

Applying this agreed standard, *DeLuca* affirmed that defendant Blue Cross Blue Shield of Michigan was not acting as a fiduciary when it negotiated "system-wide payment schedules" with certain hospitals that "would ultimately raise the costs" paid by the plaintiff self-funded health insurance plan. *Id.* at 744. Those negotiations were "business dealings [that] were not directly associated with the benefits plan at issue," but instead "generally applicable to a broad range of health-care consumers." *Id.* at 747. *Cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659–62 (1995) (state law that required hospitals to collect surcharges from patients covered by commercial insurance but not from patients covered by Blue Cross & Blue Shield did not have an impermissible effect on ERISA plan administration).

Contrary to Petitioners' view, *DeLuca* did not adopt a "categorical 'business' exception" to ERISA fiduciary status. Pet. 26. Rather, *DeLuca* simply found that the defendant's business-wide rate negotiation was not plan management or administration sufficient to trigger fiduciary duties.

Petitioners note that Judge Kethledge dissented in *DeLuca* because he had a different view than the panel majority of the "*factual*" issues in the case based on "'[t]he record here.'" Pet. 24 (quoting *DeLuca*, 628 F.3d at 751 (Kethledge, J., dissenting)). But Judge Kethledge did not point to any circuit split about the governing law, because there is none.

Petitioners also err in claiming that, with the decision below, the Second Circuit "joined" one side or the other of Petitioners' non-existent circuit split. Pet. 3, 18. Petitioners do not argue—because they cannot—that the allegations in this case with respect to Anthem resemble the facts in the Fourth, Fifth, Seventh, Eight, or Ninth Circuit cases they cite.[7] Nor do Petitioners argue—because they cannot—that the Second Circuit here rejected or disagreed with a decision from another circuit. Instead, as explained above, the Second Circuit simply applied the settled standards governing ERISA fiduciary status as articulated in 29 U.S.C. § 1002(21)(A), *Pegram*, and

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[7] Petitioners' allegations with respect to Express Scripts do resemble the allegations in *Chicago District Council*, 474 F.3d 463, in which the Seventh Circuit—like the Second Circuit in the decision below—held that a PBM was not an ERISA fiduciary because the prices it charged and the services it provided were set by contract. *Id.* at 472–77.

court of appeals' decisions applying those authorities. *See* Section I.A, above. The decision below cited *DeLuca* once, as a "*See, e.g.*," citation, because it was factually similar and further confirmed that Anthem was not acting as an ERISA fiduciary here. Pet. App. 10a. This perfect alignment between the Second and Sixth Circuits is by no means indicative of any split relative to other circuits, none of which diverge on corresponding facts.

In sum, Petitioners' claim of a circuit split rings hollow. The different outcomes Petitioners identify are attributable to different facts, not to any legal disagreement over the principles that govern ERISA fiduciary status, as handed down by this Court and long followed across all circuits.

C. No Important Issue Is At Stake

In a header, Petitioners bill their first question presented as "Exceptionally Important," Pet. 33, but they nowhere attempt to explain why, let alone afford persuasive warrant why this Court should grant review despite the absence of any real circuit split.

Instead, Petitioners contend that *DeLuca* has caused "confusion." Pet. 33–37. As explained above, however, what Petitioners call "confusion" is merely courts applying uniform legal standards to differing fact patterns. Indeed, the two district court opinions Petitioners trumpet as evidencing "confusion" actually evince straightforward, consistent application of the same legal principles. *See In re UnitedHealth Grp. PBM Litig.*, 2017 WL 6512222, at *10 (D. Minn. Dec. 19, 2017) (following *DeLuca* in holding that Defendant PBMs' negotiation of business-wide rates with providers is "not a fiduciary function, but rather the administration of a network administrator's

business"); *American Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 50 F. Supp. 3d 157, 169 (D. Conn. 2014) (following Second Circuit precedent in holding that "Defendants' setting of reimbursement rates and policies regarding the extent of coverage . . . are business decisions" that do not trigger ERISA fiduciary duties).

II. Petitioners' Request For Error Correction Of The Second Question Presented Does Not Warrant Review, Much Less Summary Reversal

The second question presented is, if anything, even less deserving of review. It targets the Second Circuit's conclusion that Express Scripts did not act as an ERISA fiduciary. On this point, Petitioners do not even purport to identify any circuit split, important question of federal law, or other valid consideration under Supreme Court Rule 10 that could justify granting certiorari over this particular question. Instead, Petitioners seek review of the second question presented solely to correct a perceived error in the decision below. *See, e.g.*, Pet. 37 ("The Second Circuit[] . . . err[ed] by dismissing all ERISA claims against Express Scripts . . . ."). But error correction does not warrant this Court's review. *See* S. Shapiro *et al.*, *Supreme Court Practice* § 5.12(c)(3) (11th ed. 2019) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.") (quoting Sup. Ct. Rule 10).

In any event, the Second Circuit did not err in concluding that Express Scripts is not an ERISA fiduciary, much less err so clearly as to bring into play the extraordinary remedy of summary reversal.

Both the Second Circuit and the district court agreed that Express Scripts is not an ERISA fiduciary because it does not exercise discretion over the prices that Anthem's client health plans pay for prescription drugs. Pet. App. 10a–12a, 49a–58a. That conclusion is inexorable for at least three reasons.

First, it was *Anthem*, not Express Scripts, that controlled the prices its client health plans paid for prescription drugs. *See* PBM Agreement § 2.10, C.A. App. 332, 376 (reserving the right for Anthem to charge plans prices that are "different" from what Express Scripts charges Anthem). The PBM Agreement governed how much Anthem would pay Express Scripts for prescription drugs. But how much Anthem's client health plans would pay necessarily depended on the *separate* contracts between Anthem and its clients. Thus, even assuming *arguendo* that Express Scripts exercised discretion over pricing (which it did not), it did so with respect to *Anthem*, and not "with respect to a *plan*," as is required for fiduciary status. 29 U.S.C. § 1002(21)(A) (emphasis added).

Second, Express Scripts did not exercise discretion over pricing. Section 5.4 and Exhibit A of the PBM Agreement precisely fixed the pricing that Express Scripts charged Anthem for prescription drugs pursuant to comprehensive, detailed provisions and a 10-year pricing schedule. Pet. App. 51a–54a; S. App. 28–31. PBMs and other service providers are not ERISA fiduciaries when (as here) they charge prices set by the terms of an arm's-length service contract. Pet. App. 11a ("[W]hen a PBM sets prices for prescription drugs pursuant to the terms of a contract, it is not exercising discretionary authority and

therefore not acting as an ERISA fiduciary."); *accord, e.g.*, Pet. App. 53a (collecting cases); *Chicago District Council*, 474 F.3d at 472–73.

Petitioners assert the decision below concluded that "discretionary conduct is not fiduciary conduct if the authority to exercise discretion is granted by contract." Pet. 38. But that misconstrues what the Second Circuit actually held. Per the decision below, Express Scripts was "*not* exercising discretionary authority." Pet. App. 11a (emphasis added). Here, the Second Circuit was incorporating the district court's account, explaining that it agreed "with the district court's finding that Express Scripts was not a fiduciary" because "a PBM does not exercise discretion in setting prices when prices are set according to contractual terms." Pet. App. 10a–11a (citing 285 F. Supp. 3d at 678–81, reprinted at Pet. App. 49a–58a). The district court had exhaustively reviewed the PBM Agreement's pricing provisions "to determine the discretion afforded to [Express Scripts] under its terms." Pet. App. 51a n.34. It found that Express Scripts had *no discretion* because prices for prescription drugs were fixed by the "specific requirements of Section 5.4 and Exhibit A of the Agreement." Pet. App. 54a; *see also* Pet. App. 51a n.34 ("Section 5.4 of the PBM Agreement contradicts Plaintiffs' allegations that [Express Scripts] had the discretion to set drug prices paid by Plaintiffs."). Contrary to Petitioners' account, the PBM Agreement makes clear that Express Scripts had no pricing discretion; that is what both the district court and court of appeals found and relied upon, and Petitioners tellingly have no answer other than to distort the operative premises and reasoning beyond recognition.

Third, if any of Anthem's clients disapproved of the drug pricing provided by Express Scripts to Anthem, they were free to sign their own agreement with a PBM. *See* PBM Agreement § 12.1(a), C.A. App. 344, 436 (Anthem's client plans are free to "enter[] into separate agreements for pharmacy benefit management services on their own behalf"). Because the plans "remained free to . . . contract with an alternative service provider offering more attractive pricing or superior . . . products," Express Scripts "could not have maintained or exercised any 'authority' over the plan and thus could not have owed a fiduciary duty under ERISA." *McCaffree Fin. Corp. v. Principal Life Ins. Co*, 811 F.3d 998, 1003 (8th Cir. 2016).

Accepting Petitioners' theory of ERISA fiduciary status—that anyone who "engaged in discretionary services that had 'a direct impact on the Plan's bottom line'" is "an ERISA fiduciary," Pet. 25—would expose to ERISA liability virtually all doctors, hospitals, pharmacies, and other players in the chain of transactions for healthcare services. These upstream service providers would, under Petitioners' theory, be ERISA fiduciaries because they (like Express Scripts) enter into arm's-length pricing and service agreements with health insurers (such as Anthem) that may in turn affect the downstream prices paid by ERISA plans and beneficiaries for those healthcare services. No limiting principle is discernible that would prevent the entire healthcare industry from potentially becoming ERISA fiduciaries and being sued as such under the boundless theory proposed by Petitioners.

The Second Circuit did not commit any reversible error, let alone provide any basis for this Court's review, by concluding that Express Scripts is not an ERISA fiduciary under the facts of this case and governing law.

III. This Case Presents A Poor Vehicle Because Of A Jurisdictional Issue

Even if the questions presented warranted review (they do not), the Court should still deny the petition because a jurisdictional issue renders it a poor vehicle for resolving the questions presented. Indeed, it is dubious that this Court could reach the merits of either question.

The district court dismissed Petitioners' second amended complaint without prejudice and with leave to amend. Pet. App. 78a–80a. In this posture, the district court's dismissal order was "not final and therefore not then appealable." *Blanco v. United States*, 775 F.2d 53, 56 (2d Cir. 1985) (Friendly, J.).

Nevertheless, Petitioners elected not to amend and instead to notice their appeal to the Second Circuit. C.A. App. 741. In so doing, they expressly disclaimed their intent to amend the complaint, and they submitted that their disclaimer transformed the district court's non-final decision into a final appealable order. C.A. App. 741. Petitioners were relying for that maneuver upon Second Circuit caselaw, which permits an appellant to "render such a non-final order 'final' and appealable by disclaiming any intent to amend." *Slayton v. American Express Co.*, 460 F.3d 215, 224 (2d Cir. 2006).

But *Slayton* appears inconsistent with this Court's decision in *Jung v. K. & D. Mining Co.*,

which holds that, when a district court grants leave to amend, that order does not "constitute the final judgment in the case" and "another order of absolute dismissal after expiration of the time allowed for amendment is required to make a final disposition of the cause." 356 U.S. 335, 337 (1958); *accord, e.g.*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1135–37 (9th Cir. 1997) (*en banc*). Notwithstanding Petitioners' unilateral disclaimer of an intent to amend, they continued to lack the separate "order of absolute dismissal" required by *Jung*. *See Sapp v. City of Brooklyn Park*, 825 F.3d 931, 935–36 (8th Cir. 2016) (holding that court of appeals lacked jurisdiction despite disclaimer of intent to amend due to lack of separate order of absolute dismissal). This jurisdictional impediment renders this case a poor vehicle for resolving any of the questions presented.

Although Express Scripts specifically noted this jurisdictional defect in its briefing below, the panel did not address the issue in the course of summarily affirming. Nor have Petitioners posed this (or, for that matter, even flagged it) as a question potentially worthy of this Court's review. To the extent the Court might ever take up the Second Circuit's view of finality, it should await a case in which the jurisdictional issue has been squarely addressed by that court and then presented for this Court's review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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