No. 21-471

In The
Supreme Court of the United States

JOHN DOE I, et al.,

Petitioners,

v.

EXPRESS SCRIPTS, INC., et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* PENSION RIGHTS CENTER IN SUPPORT OF PETITIONERS

NORMAN STEIN, *Of Counsel*
PENSION RIGHTS CENTER
1050 30th Street NW
Washington, D.C. 20007
(205) 410-0989

TERESA S. RENAKER
Counsel of Record
RENAKER HASSELMAN SCOTT LLP
505 Montgomery Street,
Suite 1125
San Francisco, CA 94111
(415) 653-1734
teresa@renakerhasselman.com

Attorneys for Amicus

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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I. INTEREST OF *AMICUS CURIAE*[1]

The Pension Rights Center is a national nonprofit consumer organization that has been working for more than four decades to protect and promote the retirement security of American workers, retirees, and their families. The Center advocates for laws and regulations that expand employer-provided retirement plans and make them fairer, more adequate, and secure; it also helps individuals obtain retirement benefits they have been improperly denied and works to preserve pension protections conferred by Congress in the landmark private pension law, the Employee Retirement Income Security Act of 1974 ("ERISA"), including protections to ensure that participants in retirement plans are charged no more than reasonable fees for the services provided to them.

Although the factual context for this case is the pricing of prescription drugs charged to participants in employer-sponsored health benefit plans, the holdings in the case foreshadow broad-ranging and damaging impacts for participants in employee benefit plans of all types, including retirement plans. More particularly, we fear that if left unreviewed, the decision below may result in impaired retirement accumulations for millions of American workers and their families. The

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that counsel of record received timely notice of the intent to file this brief and all counsel consented. *Amicus* states that no party's counsel authored this brief in whole or in part, and no one other than *amicus* and its counsel contributed money intended to fund the preparation or submission of this brief.

decision, if neither reversed nor limited, will contribute further confusion to an already confounding regulatory landscape for retirement as well as health care plans. Our brief focuses, then, in illustrating some of the potential impacts of the decision below on retirement plan benefits and their administration and on the regulation of fiduciary conduct under the statute.

II. SUMMARY OF ARGUMENT

The centerpiece and nerve center of ERISA's "comprehensive and reticulated" statutory scheme is its provisions defining and regulating fiduciary behavior. Under that statutory scheme, a person is a fiduciary to the extent it has discretionary authority or control of a plan's management or administration, or exercises control over plan administration or management or the disposition of a plan's assets. ERISA § 3(21), 29 U.S.C. § 1002(21). Under this language it is unquestionably clear that an entity or person that has discretion to negotiate on behalf of a plan or determine the prices which a plan will pay for products or services is an ERISA fiduciary.

The Second Circuit's decision below has added unnecessary and unwarranted complexity to the analysis of fiduciary status in these circumstances, holding that a person is not a fiduciary if the source of its authority to negotiate or set prices is derived from a business relationship. This holding finds no basis in the words of the statute and it undermines the statutory scheme that Congress created when it enacted ERISA nearly half a century ago.

Moreover, the holding poses a threat not only to participants in ERISA health benefit plans similar to those considered in this case but also to the retirement income security of the millions of Americans who rely on employer-sponsored retirement savings plans. The Second Circuit decision is thus both wrong and enormously consequential. For these reasons, the Court should grant the Petition for Writ of Certiorari.

III. ARGUMENT

A. The Second Circuit Holdings Are an Unwarranted Expansion of the "Two-Hat" Doctrine and Undermine ERISA's Most Fundamental Protections.

Enacted in 1974, the Employee Retirement Income Security Act created a new legal category, the ERISA fiduciary,[2] covering, among others, persons and entities who have discretionary authority or control over the administration and management of an employee benefit plan or exercise authority or control over plan management or the disposition of plan assets.[3]

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[2] *See* ERISA § 3(21), 29 U.S.C. § 1002(21); ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). *See generally, Symposium: ERISA at 40: What Were They Thinking*, 6 DREXEL L. REV. 257, 359-384 (2014) (oral history panel on "ERISA and the Fiduciary").

[3] The definition of ERISA fiduciary includes people or entities to the extent they "exercise any discretionary authority or discretionary control respecting management of [a] plan," "exercise any authority or control respecting management or disposition of its assets," or "ha[ve] any discretionary authority or discretionary responsibility in the administration of [a] plan." *See* ERISA § 3(21), 29 U.S.C. § 1002(21). A person also is a fiduciary

ERISA fiduciaries are tasked with enforceable responsibilities to, among other things, act "solely in the interest of the participants and beneficiaries" of employee benefit plans, and with the care, skill, prudence and diligence of a prudent actor. ERISA § 404(a), 29 U.S.C. § 1104(a).[4] The defendants/respondents, if acting in a fiduciary capacity, unquestionably violated their statutory duties – Anthem, by taking what amounts to a kickback from Express Scripts in exchange for permitting Express Scripts to charge the plan and its participants above-market costs for prescription drugs; and Express Scripts by forcing the plan and its participants to pay such above-market rates.

Anthem and Express Scripts, however, seek to find refuge from fiduciary status in the shadows of the judicially validated "two-hat" doctrine, which says a person or entity, even if an ERISA fiduciary for some

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to the extent they provide a plan with investment advice for a fee. *Id.* ERISA requires every plan to name at least one fiduciary (the named fiduciary), ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), but people can also become fiduciaries because the functions they perform bring them within the fiduciary definition (functional fiduciaries).

[4] In addition, a fiduciary may not cause a plan to engage in certain prohibited transactions, ERISA § 406(a), 29 U.S.C. 1106(a), or "(1) deal with plan assets in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interests of the plan or its participants or beneficiaries, or (3) receive any consideration from his own personal account from any party dealing with such plan in a transaction involving the assets of the plan," ERISA § 406(b), 29 U.S.C. § 1106(b).

purposes, is not subject to fiduciary duties unless the relevant conduct occurs while acting in a fiduciary capacity.[5] *See* Dana Muir and Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 349 (2014). Thus, for example, when a plan sponsor amends the benefit structure of a pension plan, *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999); or a physician makes a mixed medical/plan eligibility decision for a physician-owned HMO, *Pegram v. Herdich*, 530 U.S. 211 (2000); or a plan sponsor decides to sell a division and transfer pension obligations and assets to the plan of the purchaser, *Flanigan v. General Electric*, 242 F.3d 78 (2d Cir. 2001), they are acting in a settlor capacity rather than a fiduciary capacity. Even if such actions may adversely impact plan participants, they are not made with respect to the discretionary management or administration of a plan.

Anthem claims that despite being a fiduciary for some purposes, it acted in non-fiduciary status under the two-hat doctrine because it was engaged in a

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[5] The doctrine is often referred to as the settlor/fiduciary doctrine, but that is simply one strand of the doctrine, referring to when an employer adopts, amends, or terminates a plan, i.e., acting as a settlor. But the two-hat doctrine refers to any situation in which a person acts in a non-fiduciary capacity, even though the person's behavior affects a plan or even though the person may sometimes act in a fiduciary capacity with respect to a plan. A variant of the two-hat doctrine occurs when a party claims to wear *only* a non-fiduciary hat. This is apparently the status claimed by Express Scripts in this case.

business transaction rather than discretionary plan management when it sold its pharmaceutical benefits manager business to Express Scripts.[6] And Express Scripts, in turn, claims non-fiduciary status because it engaged in a business decision when it entered and exercised rights under a contract that allowed it unfettered discretion to determine the price at which Anthem-administered health care plans and their participants would purchase prescription medication.

This Court, however, has recognized that a single actor can act in both a fiduciary and a non-fiduciary capacity. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996). Anthem may have acted in a non-fiduciary capacity when it sold its pharmaceutical benefits manager to Express Scripts; but it also acted as a fiduciary of the plans it administered when, as part of the sale, it received a $4 billion premium for entering into a 10-year contract with Express Scripts, authorizing Express Scripts to sell medication to the plans at inflated prices chosen by Express Scripts. And Express Scripts, given discretionary authority to set the prices at which prescriptions would be sold to the plan and its participants, acted as a fiduciary when it exercised that discretion.[7] This would be the holding in circuits that

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[6] Anthem's position also seems based on its view that its setting of drug prices before the sale of its PBM subsidiaries to Express Scripts was a business function, not a fiduciary function, which is essentially the same argument made by Express Scripts.

[7] Here the Second Circuit incorrectly focused on the source of Express Scripts' fiduciary control rather than the control itself. A person becomes a fiduciary when it has discretionary control or authority over plan administration or management or when

have spoken to similar issues, other than the Sixth[8] and now Second Circuits. *See, e.g.*, *Reich v. Lancaster*, 55 F.3d 1034 (5th Cir. 1995); *Patelco Credit Union v. Sahni*, 262 F.3d 897 (9th Cir. 2001). In the Second Circuit's view of this case, an entity's discretionary decision-making in the management or administration of an ERISA plan can be exempted from the high standards of behavior expected of an ERISA fiduciary. This is not what Congress intended when it enacted ERISA and "established standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans," ERISA § 2, 29 U.S.C. § 1001b. Those standards have repeatedly been characterized by our courts as "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982) (J. Friendly); *see also Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 333 (3d Cir. 2019) (quoting *Donovan*); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) (quoting *Donovan*); *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002) (quoting *Donovan*); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (quoting *Donovan*). And with those standards,

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it exercises control or authority over plan management or the disposition of its assets. ERISA § 3(21), 29 U.S.C. § 1002(21). Compare this to the situation in which a plan sponsor decides to terminate a plan. The termination decision is a settlor function, but the steps taken to accomplish the termination are nonetheless fiduciary functions. *See* Letter from Dennis M. Kass, Assistant Secretary, Department of Labor, to John N. Erlenborn (March 13, 1986), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/03-13-1986.

[8] *DeLuca v. Blue Cross Blue Shield of Michigan*, 628 F.3d 743 (6th Cir. 2010).

Congress intended to protect plan participants against conflicts of interest, wrongdoing, and imprudent decision-making of those people entrusted with discretionary management and administration of their plans or disposition of plan assets. In the case here, defendants-respondents, despite their exercise of discretionary authority over the administration and management of ERISA plans, were able to extract rents from those plans at the cost of the plans' participants. The contractual and business-purpose artifices erected by defendants to shield them from fiduciary requirements should not be given judicial legitimacy.

B. The Second Circuit Decision Threatens Employee Benefit Plans Beyond the Specific Facts of this Case, Including Retirement Plans.

The Second Circuit decision is not only wrong as a matter of law, but it will serve as an invitation for vendors of various administrative services and investment products, and the plan decision-makers who hire them, to increase their profits at the expense of the plan participants whose exclusive interests they are supposed to serve. The decision will impact not only future situations that closely resemble the circumstances of this case – a pharmaceutical benefits manager being allowed to set above-market prices for prescription drugs purchased by an employer-sponsored health benefit plan – but also a plethora of other situations in which third parties provide a wide variety of services to other types of employee benefit plans, including retirement

plans. For example, a firm that sponsors several retirement plans for its employees might enter into a contract with a third party to provide payroll services at a discounted rate at the same time it enters into a long-term contract in which the third party will also provide administrative services to the firm's retirement plans, with the third party given discretion to set the price for the services to the plan. Or in a multiple-employer plan or pooled employer plan,[9] the plan fiduciary might negotiate a contract with a third party that binds all the plans it administers. Are firms acting in a business capacity rather than a fiduciary capacity when they enter these contracts, regardless of their impact on the plan and its participants? Are the third-party service providers acting in only a business capacity when they exercise their discretion to set prices they will charge the plans and their participants? The decision below suggests that the answer to these questions may be, surprisingly, yes, to the great detriment of the millions of Americans whose economic security is tightly tied to the performance of their retirement and health plans.[10]

The Court should thus grant the Petition for the Writ of Certiorari not only because of the Circuit

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[9] The "Setting Every Community Up for Retirement Enhancement" (SECURE) Act of 2019, Pub. L. 116-94, Division O, §§ 101, 104 (December 20, 2019) established a new type of multiple employer plan, the Pooled Employer Plan, and increased tax credits for small employers, to encourage small employers to sponsor retirement plans for their employees.

[10] *See generally*, GAO, *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* (2006), *available at* https://www.gao.gov/assets/gao-07-21.pdf.

conflict identified by the Petitioner, but also because of the economic significance of the issues presented to millions of Americans.

CONCLUSION

The Court should grant the writ of certiorari, not only to resolve a conflict among the circuits and clarify an integral part of ERISA's regulatory structure to protect plan participants, but also because of the enormous financial consequences for the millions of Americans who rely upon employer-provided health and retirement plans.

RESPECTFULLY SUBMITTED this 3d day of November, 2021.

NORMAN STEIN, *Of Counsel*
PENSION RIGHTS CENTER
1050 30th Street NW
Washington, D.C. 20007
(205) 410-0989

TERESA S. RENAKER
Counsel of Record
RENAKER HASSELMAN SCOTT LLP
505 Montgomery Street,
Suite 1125
San Francisco, CA 94111
(415) 653-1734
teresa@renakerhasselman.com

Attorneys for Amicus