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. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ANTHEM, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GLENN M. KURTZ
Counsel of Record
CLAUDINE COLUMBRES
ROBERT E. TIEDEMANN
JESSE L. GREEN
JACKSON HERNDON
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200
gkurtz@whitecase.com

Counsel for Respondent Anthem, Inc.

November 3, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

COUNTERSTATEMENT OF QUESTION PRESENTED

The threshold inquiry for ERISA liability is well-settled under this Court's 2000 decision in *Pegram v. Herdrich*, and has been consistently applied by the circuit courts, including the Second Circuit in this case. In *Pegram*, this Court held that ERISA fiduciaries "may wear different hats" because "a fiduciary may have financial interests adverse to beneficiaries." 530 U.S. 211, 225 (2000). Thus, the threshold question for every ERISA case "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." *Id.* at 226. A plaintiff alleging ERISA claims, therefore, must show that the defendant was acting in a fiduciary capacity when taking the challenged conduct. *Id.*

In this case, the Second Circuit held that Petitioners failed to allege that Respondent Anthem was managing or administering an ERISA plan when it sold its three subsidiaries to Respondent Express Scripts and entered into a ten-year contract with Express Scripts for the provision of pharmacy benefit management services to Anthem. The Second Circuit affirmed the district court's dismissal of Petitioners' ERISA claims against Anthem because Petitioners failed to allege that Anthem was acting in a fiduciary capacity.

The Counterstatement of the Question Presented is:

Did the Second Circuit correctly follow this Court's decision in *Pegram* and the uniform decisions of the circuit courts in finding that 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 selling subsidiaries and entering into a contract with a third party service provider?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Anthem, Inc. does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
I. Factual Background	3
A. The Parties	3
B. The 2009 NextRx Sale And PBM Agreement	4
C. Pricing Review And Dispute	6
II. Procedural History	6
REASONS FOR DENYING CERTIORARI	9
I. The Second Circuit's Decision Does Not Conflict With Any Decision Of Another Circuit Court Of Appeal	9
A. The Circuit Courts Uniformly Apply This Court's Decision In *Pegram*	11
B. The Sixth Circuit's Decision In *DeLuca* Did Not Split With Any Other Circuit	17
II. The Second Circuit's Decision Is Consistent With This Court's Decision In *Pegram v. Herdrich*	19
III. The Second Circuit's Decision Does Not Address A Question Of Great Importance	20
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page(s)

Acosta v. Brain,
910 F.3d 502 (9th Cir. 2018)..................... 14, 22

Adams v. LTV Steel Mining Co.,
936 F.2d 368 (8th Cir. 1991)..................... 14

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004).................................. 20

Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.,
821 F.3d 352 (2d Cir. 2016) 10, 21

Bodine v. Employers Casualty Company,
352 F.3d 245 (5th Cir. 2003)..................... 13

Brotherston v. Putnam Invs., LLC.,
907 F.3d 17 (1st Cir. 2018) 12

Catalfano v. Sears Holding Co.,
2018 U.S. Dist. LEXIS 168176
(N.D. Ill. Aug. 21, 2018)............................ 22

Chendes v. Xerox HR Solutions,
2017 U.S. Dist. LEXIS 172997
(E.D. Mich. Oct. 19, 2017) 22

Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.,
474 F.3d 463 (7th Cir. 2007)..................... 16

Crosswhite v. E. I. Dupont De Nemours & Co.,
1990 U.S. App. LEXIS 26923
(4th Cir. Feb. 12, 1990)............................. 13

DeLuca v. Blue Cross Blue Shield of Michigan,
628 F.3d 743 (6th Cir. 2010)............... 13, 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

DeRogatis v. Bd. of Trs. of the Welfare Fund of the Int'l Union of Operating Eng'rs Local 15, 904 F.3d 174 (2d Cir. 2018) 20

Dzinglski v. Weirton Steel Corporation, 875 F.2d 1075 (4th Cir. 1989) 12

Elmore v. Cone Mills Corporation, 23 F.3d 855 (4th Cir. 1994) 12

Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123 (9th Cir. 2006) 16

Health Cost Controls of Ill., Inc. v. Washington, 187 F.3d 703 (7th Cir. 1999) 16

Henderson v. UPMC, 640 F.3d 524 (3d Cir. 2011) 12

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740 (6th Cir. 2014) 20

In re Calpine Corp. ERISA Litig., 2005 U.S. Dist. LEXIS 9719 (N.D. Cal. Mar. 31, 2005) 22

In re Luna, 406 F.3d 1192 (10th Cir. 2005) 14, 22

Int'l Painters & Allied Trades Indus. Pension Fund v. Clayton B. Obersheimer, Inc., 2013 U.S. Dist. LEXIS 20192 (D. Md. Feb. 13, 2013) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Kalda v. Sioux Valley Physician, Inc.,
481 F.3d 639 (8th Cir. 2007)..................... 14, 22

Kerns v. Benefit Trust Life Ins. Co.,
992 F.2d 214 (8th Cir. 1993)..................... 14

Larson v. United Healthcare Ins. Co.,
2012 U.S. Dist. LEXIS 185564
(W.D. Wisc. Jan. 3, 2012), *aff'd*,
723 F.3d 905 (7th Cir. 2013)......... 10, 13, 17, 22

Lehr v. Perri,
2019 U.S. Dist. LEXIS 62068
(E.D. Cal. Apr. 9, 2019)............................. 22

Mitchell v. Blue Cross Blue Shield of ND,
953 F.3d 529 (8th Cir. 2020).................... 16

Musto v. Am. Gen. Corp.,
861 F.2d 897 (6th Cir. 1988)..................... 21

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001)..................... 15

Pegram v. Herdrich,
530 U.S. 211 (2000)..................................*passim*

Perrone v. Johnson & Johnson,
2020 U.S. Dist. LEXIS 74962
(D.N.J. Apr. 29, 2020)............................... 22

Peters v. Aetna Inc.,
2 F.4th 199, 231 (4th Cir. 2021) 15

Ramos v. Natures Image, Inc.,
2020 U.S. Dist. LEXIS 88181
(C.D. Cal. Feb. 19, 2020)........................... 22

TABLE OF AUTHORITIES—Continued

Page(s)

Reddinger v. Sena Severance Pay Plan,
707 F.3d 702 (7th Cir. 2013) 14

Reich v. Lancaster,
55 F.3d 1034 (5th Cir. 1995) 16

Sengpiel v. B.F. Goodrich Co
156 F.3d 660 (6th Cir. 1998) 13

United Mine Workers of America v. Powhatan Fuel,
828 F.2d 710 (11th Cir. 1987) 15

RULES

Sup. Ct. R. 10 9

Sup. Ct. R. 10(a) 9

Sup. Ct. R. 10(c) 9

INTRODUCTION

The Second Circuit unanimously affirmed the district court's dismissal of Petitioners' ERISA claims against Anthem, then denied *en banc* review. Relying on this Court's decision in *Pegram v. Herdrich*, the Second Circuit held that Petitioners did not allege any act by Anthem taken as an ERISA fiduciary, such as a claim denial or other discretionary decision, in connection with the management or administration of an ERISA plan. Indeed, Petitioners do not allege that Anthem violated any term of their health plans or that Anthem was required to provide them any particular level of pricing. Nor can they, as Petitioners are arm's-length, third party customers who choose whether to purchase Anthem's offerings in the marketplace at Anthem's pricing or to purchase offerings from Anthem's competitors.

Petitioners' allegation is that Anthem could have offered them better pricing if Anthem negotiated for itself differently with Respondent Express Scripts in 2009. Specifically, Petitioners allege that Anthem could have sold its three subsidiaries in 2009 for a lower price, in disregard of its fiduciary duties to stockholders, in exchange for better pharmacy benefit management pricing to itself under a pharmacy benefit management contract (the "PBM Agreement"), which Anthem could then have made available to customers. The Second Circuit properly held that Anthem was not acting in a fiduciary capacity because the corporate acts of selling subsidiaries and entering into a contract for PBM services to Anthem did not constitute management or administration of an ERISA plan. Thus, the Second Circuit held Anthem did not owe ERISA fiduciary duties to Petitioners in connection with these company-wide, corporate decisions.

Petitioners mischaracterize the decision in arguing that the Second Circuit created a "business exception" to ERISA's fiduciary definition. (Pet. 6, 25) The Second Circuit did not create an exception to the definition of an ERISA fiduciary. Rather, the Second Circuit correctly applied the uniform case law from this Court and the other circuit courts that Anthem was not managing or administering an ERISA plan and, therefore, not acting in a fiduciary capacity, when it sold its subsidiaries and entered into the PBM Agreement.

Petitioners also assert a circuit split. Petitioners have never before argued that there was any conflict among any circuits, and their belated position is incorrect. Every circuit that has considered the issue has held that ERISA governs the administration and management of a plan, not corporate transactions and third party services contracts.[1] Petitioners have not, and cannot, cite a single case applying ERISA fiduciary duties to the types of corporate actions here at issue. No circuit has ever found that a party acts in an ERISA fiduciary capacity when selling a subsidiary or entering into a business-wide services contract. Petitioners did not even cite to the Second Circuit the cases they rely on here, which do not address the issue at bar, but rather addressed actions taken in managing or administering an ERISA plan.

The Second Circuit's decision also does not address a question of exceptional importance. The scope of ERISA fiduciary liability is well-established under *Pegram* and has been applied uniformly by the circuit courts. Contrary to Petitioners' unsupported assertion, there is no confusion that ERISA's definition of a

[1] The D.C. Circuit and Federal Circuit have not issued a decision addressing *Pegram*.

fiduciary is functional and that fiduciary duties are triggered only when a party is acting in a fiduciary capacity. Petitioners also are incorrect in asserting that review is warranted because of alleged uncertainty in the market as to whether health insurers can charge exorbitant prices. There is no uncertainty that health insurers can determine the pricing of their offerings because they owe no fiduciary duties when determining the economic terms to offer to their health plan customers. Rather, Anthem and its customers stand at arms-length when negotiating their separate and individual health plan contracts. Consequently, health insurers are free to determine the terms (including pricing) to offer in their health plans, and customers are free to purchase those products from Anthem on such terms or to purchase products from others in the highly competitive industry. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

A. The Parties

Respondent Anthem is one of the largest health benefits companies in the United States, serving more than 38 million members through affiliated health plans. (C.A. App. 44, ¶ 10; C.A. App. 73, ¶ 105)[2] In the relevant time, Respondent Express Scripts provided pharmacy benefit management services related to prescription drug coverage for Anthem as well as other health benefits companies and sponsors of self-funded health plans, including private and public employers. (C.A. App. 45, ¶ 11)

---

[2] "C.A. App." refers to the joint appendix filed with the Second Circuit.

Petitioners are divided into two groups—the Subscriber Plaintiffs and the Plan Plaintiffs. The Subscriber Plaintiffs are four individuals who allegedly "are enrolled in health care plans insured or administered by Anthem" and whose co-insurance payments for prescription medications allegedly are "derived from the prices [that] Express Scripts sets and/or charges Anthem for those prescription medications . . . ." (C.A. App. 42-43, ¶¶ 3-4; *see also* C.A. App. 53, 55-56, 59-63, 65-68, ¶¶ 35-36, 42-44, 52-55, 61-64, 70-73, 78-79) The Plan Plaintiffs are two private employers who brought this action in their capacities as ERISA fiduciaries with respect to the self-funded group health plans they sponsor and for which Anthem administers "certain healthcare benefits," including "prescription medication benefits . . . ." (C.A. App. 44, ¶¶ 8-9)

One of Anthem's lines of business is to provide "Administrative Services Only" ("ASO") plans to self-funded plans sponsored by employers, unions, or other entities pursuant to Administrative Service Agreements ("ASAs"). (Pet. App. 14a)[3] The services that Anthem agrees to perform expressly include both non-fiduciary and fiduciary functions. (C.A. App. 183, 187, 196, 202, 209) Each of the ASAs with Petitioners contains unambiguous, express language that identifies the limited activities where Anthem is acting in a fiduciary capacity and otherwise provides that Anthem is not acting as a fiduciary. (C.A. App. 181-213)

B. The 2009 NextRx Sale And PBM Agreement

On December 1, 2009, Anthem's predecessor, WellPoint, sold to Express Scripts all of the stock of three operating PBM companies—(i) NextRx, LLC,

---

[3] "Pet. App." refers to the appendix filed with the Petition.

(ii) NextRx, Inc., and (iii) NextRx Services, Inc. (collectively, "NextRx")—for $4.675 billion pursuant to a Stock and Interest Purchase Agreement by and between Express Scripts and WellPoint, Inc., dated April 9, 2009 (the "NextRx Agreement"). (C.A. App. 215)

Contemporaneously with the sale of NextRx, Anthem also entered into the PBM Agreement with Express Scripts, pursuant to which Express Scripts agreed to serve as the exclusive provider of PBM services to Anthem for a ten-year period (2009-2019), unless terminated earlier. (C.A. App. 45-46, 79, ¶¶ 12, 120) Section 5.6 of the PBM Agreement requires Express Scripts to negotiate pricing under the PBM Agreement in good faith every three years to ensure that Anthem continues to receive competitive pricing through the term of the PBM Agreement:

> 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 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, ¶¶ 136-37; C.A. App. 341)

C. Pricing Review And Dispute

In late-2014, pursuant to Section 5.6 of the PBM Agreement, Anthem engaged an independent third-party expert consultant, Health Strategy, to determine whether Express Scripts' pricing terms were competitive. Health Strategy determined that Express Scripts' prices to Anthem were some $13 billion in excess of competitive pricing from December 1, 2015 through the remainder of the PBM Agreement term, plus approximately $1.8 billion in excess of market pricing through the post-termination period. Throughout 2015 and 2016, Anthem made multiple pricing proposals to Express Scripts in accordance with Section 5.6, but Express Scripts refused to negotiate in good faith. To the contrary, Express Scripts repudiated its obligation to negotiate in good faith for competitive benchmark pricing. (C.A. App. 46, ¶¶ 13-14; C.A. App. 86-87, ¶¶ 146-47; C.A. App. 90-102, ¶¶ 164-98)

On March 21, 2016, Anthem commenced an action against Express Scripts for, among other things, Express Scripts' breach of the PBM Agreement for failing to negotiate in good faith for competitive benchmark pricing effective as of December 1, 2015. (C.A. App. 90, ¶ 161) The action remains pending in the United States District Court for the Southern District of New York.

II. Procedural History

Two months after Anthem sued Express Scripts, Petitioners commenced their action against both Express Scripts and Anthem. (C.A. App. 1) Petitioners alleged that Express Scripts was an ERISA fiduciary that breached its duties by increasing subscribers' co-insurance obligations for prescription medications and by causing plans to pay excessive and inflated

prices for prescription medications. Petitioners alleged that Express Scripts, "through the exercise of its discretion to set pricing for prescription medications," charged the Petitioners "inflated prices for prescription medications during all or part of the Class Period . . . ." (C.A. App. 49, ¶ 23)

Petitioners also alleged that Anthem was an ERISA fiduciary that breached its duties by purportedly agreeing to pricing under the PBM Agreement in connection with Express Scripts' $4.675 billion purchase of NextRx that allowed Express Scripts "to charge plans and participants prices that grossly exceeded market rates." (Pet. 25)

On April 24, 2017, Anthem and Express Scripts separately moved to dismiss the Complaint. (C.A. App. 11) On January 5, 2018, the district court issued an opinion and order dismissing all claims against both Anthem and Express Scripts. (Pet. App. 13a) For the claims brought against Anthem, the district court noted the applicable law under this Court's decision in *Pegram*:

> Insurers can, of course, be fiduciaries with respect to ERISA health plans. However, it is well-established that decisions about plan content, rather than plan administration, do not give rise to fiduciary duties. While an insurer engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of plan documents, fiduciary duties are not triggered when the decision is, at its core, a corporate business decision. Thus, an insurer's substantive decisions about setting reimbursement rates do not ordinarily trigger fiduciary duties. Similarly, 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; *see also* 48a-49a (internal citations and quotations omitted)).

Applying that law to the allegations in the Complaint, the district court held:

> Anthem's decisions to sell its PBM business and to contract the provision of PBM services out to ESI did not trigger fiduciary duties. Plaintiffs have challenged Anthem's role in setting prices they believe are unfair, not Anthem's use of discretion in construing and applying the provisions of their group health plans and assessing a participant's entitlement to benefits. Plaintiffs do not argue that Anthem's actions misconstrued or interpreted their health plans in a way that benefitted Anthem to the detriment of Plaintiffs. Rather, Plaintiffs argue that they overpaid for prescription drugs, which they attribute, in essence, to the PBM Agreement itself, instead of Anthem's interpretation or application of their particular Anthem health plans. And while Plaintiffs point to Section 5.6 and its mention of "competitive benchmark" prices, Plaintiffs have no right under ERISA to receive "competitive benchmark pricing," or even average pricing, for prescription drugs.

(Pet. App. 61a (internal citations and quotations omitted))

On February 5, 2018, Petitioners appealed the district court's decision to the Second Circuit. On

December 7, 2020, the Second Circuit issued a summary order affirming the district court's decision. The panel found that "the decision to sell a corporate asset is not a fiduciary decision—even if the sale affects an ERISA plan. . . . 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." (Pet. App. 10a)

Petitioners moved for rehearing and rehearing *en banc*, which the Second Circuit denied on January 26, 2021. (Pet. App. 81a-82a) On June 25, 2021, Petitioners filed their petition for a writ of certiorari to this Court. This Court docketed the petition on October 4, 2021.

REASONS FOR DENYING CERTIORARI

A writ of certiorari will be granted "only for compelling reasons." Supreme Court Rule 10. Petitioners fail to identify any compelling reason for this Court to grant certiorari. Contrary to Petitioners' assertions, the Second Circuit's decision: (i) does not conflict with a decision of another United States court of appeals, (ii) is consistent with relevant decisions of this Court, and (iii) does not address an issue of great importance. *See* Supreme Court Rule 10(a), (c).

I. The Second Circuit's Decision Does Not Conflict With Any Decision Of Another Circuit Court Of Appeal

The Second Circuit relied on this Court's decision in *Pegram* that ERISA fiduciaries "may wear different hats" and that the threshold question in analyzing ERISA fiduciary liability is to determine which hat the defendant wore when undertaking the challenged conduct. (Pet. App. 8a-10a) As this Court stated, 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*, 530 U.S. at 226. That is because, under ERISA, a fiduciary "may have financial interests adverse to beneficiaries." *Id.* at 225. Thus, ERISA defines an administrator as a fiduciary "only 'to the extent' that he acts in such capacity in relation to a plan." *Id.* at 225-26 (finding that an ERISA fiduciary "may wear different hats," qualifying as an ERISA fiduciary for certain acts that it takes, while other acts fall outside the scope of its ERISA fiduciary obligations). Accordingly, "[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." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 357 n.2 (2d Cir. 2016) (internal quotation marks and citation omitted). To determine *Pegram's* threshold question, courts look at the challenged conduct and ask: "was the defendant managing the plan, administering it or advising it?" *Larson v. United Healthcare Ins. Co.*, 2012 U.S. Dist. LEXIS 185564, at *12 (W.D. Wisc. Jan. 3, 2012), *aff'd*, 723 F.3d 905, 908 (7th Cir. 2013).

The Second Circuit correctly determined that Anthem was not managing or administering an ERISA plan when selling its PBM subsidiaries or entering into the PBM Agreement. (Pet. App. 10a) Moreover, as the district court held, Anthem's decision to enter into the PBM Agreement with Express Scripts was a corporate action that determined the content of the health plans Anthem offered to the market generally. Anthem did

not owe Petitioners any fiduciary duty to offer a health plan with any particular level of pricing, competitive or otherwise. Rather, like any business, Anthem was free to formulate the terms of the products it wished to sell, and customers were free to accept those terms or reject them. As the district court below correctly held:

> Plaintiffs have challenged Anthem's role in setting prices they believe are unfair, not Anthem's use of discretion in construing and applying the provisions of their group health plans and asserting a participant's entitlement to benefits. Plaintiffs do not argue that Anthem's actions misconstrued or interpreted their health plans in a way that benefitted Anthem to the detriment of Plaintiffs. Rather, Plaintiffs argue that they overpaid for prescription drugs, which they attribute to the PBM Agreement itself, instead of Anthem's interpretation of application of their particular Anthem health plans. And while Plaintiffs point to Section 5.6 and its mention of "competitive benchmark" prices, Plaintiffs have no right under ERISA to receive "competitive benchmark pricing," or even average pricing, for prescription drugs.

(Pet. App. 61a) (internal quotation marks and citations omitted).

A. The Circuit Courts Uniformly Apply This Court's Decision In *Pegram*

Petitioners assert that "the Second Circuit joined the Sixth Circuit on the wrong side of a lopsided circuit split" by creating a "business exception" to ERISA's definition of a fiduciary. (Pet. I, 6) There is no circuit split because the Second Circuit did not create a

"business exception" to the definition of an ERISA fiduciary. Rather, based on *Pegram*—and consistent with the decisions of every other circuit court—the Second Circuit recognized that the definition of a fiduciary is functional and duties are triggered when fiduciaries act in their fiduciary capacity (such as a discretionary determination about whether a member is entitled to certain benefits under the plan). These circuits also recognize that fiduciary duties are not triggered when fiduciaries act in their corporate capacity (such as business decisions taken on behalf of the company). No circuit has failed to follow this Court's decision in *Pegram* or otherwise questioned the legal principle that ERISA fiduciary duties do not apply to business decisions taken in a corporate capacity. Indeed, prior to the Petition, the Petitioners never before claimed any circuit adopted a contrary view.

In *Brotherston v. Putnam Invs., LLC.*, the First Circuit noted that the defendant "wore at least two hats" and decisions "of an employer dealing with its employees" were not subject to ERISA. 907 F.3d 17, 28 (1st Cir. 2018).

In *Henderson v. UPMC*, the Third Circuit found that "when making business . . . decisions" an administrator may "make decisions in its interest, rather than the interest of plan participants." 640 F.3d 524, 527 (3d Cir. 2011).

In *Dzinglski v. Weirton Steel Corporation*, the Fourth Circuit recognized that corporate business decisions are "not fiduciary in nature" and that "[b]usiness decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits." 875 F.2d 1075, 1079-80 (4th Cir. 1989); *see also Elmore v. Cone Mills Corporation*, 23 F.3d 855, 863 (4th Cir. 1994) (finding

actions with respect to plan design "are left to [the defendant's] sound business discretion and are not subject to the fiduciary duties imposed on plan administrators"); *Crosswhite v. E. I. Dupont De Nemours & Co.*, 1990 U.S. App. LEXIS 26923, at *8 (4th Cir. Feb. 12, 1990) ("A business decision made by the [company's executive] committee as directors is not subject to the fiduciary obligations of ERISA.").

In *Bodine v. Employers Casualty Company*, the Fifth Circuit held that ERISA fiduciary duties did not extend to defendant's "business decisions." 352 F.3d 245, 251 (5th Cir. 2003).

In *DeLuca v. Blue Cross Blue Shield of Michigan*, the Sixth Circuit held that "in determining liability for an alleged breach of fiduciary duty in an ERISA case, the courts 'must examine the conduct at issue to determine whether it constitutes "management" or "administration" of *the plan*, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards.'" 628 F.3d 743, 747 (6th Cir. 2010) (emphasis in original); *see also Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665-66 (6th Cir. 1998) (holding that courts distinguish between "actions that constitute 'managing' or 'administering' a plan and those that are said to constitute merely 'business decisions' that have an effect an ERISA plan; the former are deemed 'fiduciary acts' while the latter are not" and finding that "the actions undertaken by [defendant] to implement its business decision were simply not the kind of plan management or administration that trigger ERISA's fiduciary duties").

In *Larson v. United Healthcare Insurance Company*, the Seventh Circuit rejected an ERISA challenge where the plaintiffs were "not challenging individual eligibility and benefits determinations. Instead, the

complaint targets decisionmaking about policy terms" and "decisions about the content of a plan are not themselves fiduciary acts." 723 F.3d 905, 917 (7th Cir. 2013); *see also Reddinger v. Sena Severance Pay Plan*, 707 F.3d 702, 708 (7th Cir. 2013) (relying on *Pegram* in rejecting fiduciary claims based on actions that "were clearly made as business decisions, not as ones made in an ERISA fiduciary role").

In *Kalda v. Sioux Valley Physician, Inc.*, the Eighth Circuit rejected claims that a plan administrator breached its ERISA fiduciary duties by negotiating a merger, finding that "negotiating the merger with [one party] and ultimately declining to pursue an agreement with [another party] were business decisions . . . that did not trigger ERISA's fiduciary provisions." 481 F.3d 639, 646 (8th Cir. 2007); *see also Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993) (finding defendant "acted not as an ERISA fiduciary, but as an insurance vendor making a business decision to retain a slow-paying customer."); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991) ("Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits.").

In *Acosta v. Brain*, the Ninth Circuit reversed the district court's determination that the defendant breached ERISA fiduciary duties, finding that the court must "distinguish between a fiduciary acting in connection with its fiduciary responsibilities with regard to the plan, as opposed to the same individual or entity acting in its corporate capacity. Only the former triggers fiduciary status; the latter does not." 910 F.3d 502, 519 (9th Cir. 2018) (quotation marks and citation omitted).

In *In re Luna*, the Tenth Circuit recognized that "courts must examine the conduct at issue to determine

whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary duties." 406 F.3d 1192, 1207 (10th Cir. 2005) (quotation marks omitted).

In *United Mine Workers of America v. Powhatan Fuel*, the Eleventh Circuit found that the defendant acted in his "capacity as president of the corporation," rather than a fiduciary capacity, when he made the "business decision" to pay expenses other than employees' health insurance premiums "in an attempt to keep the corporation from financial collapse[.]" 828 F.2d 710, 714 (11th Cir. 1987).

In the face of the unanimous law of this Court and the circuit courts that core corporate decisions do not trigger ERISA fiduciary duties, Petitioners attempt—for the first time in this litigation—to manufacture a circuit split by citing a handful of inapposite cases that they never even cited to the Second Circuit. Their failure to cite these cases is unsurprising because none of them support Petitioners' argument. None question that ERISA fiduciary duties do not apply to core corporate actions. Instead, those cases address discretionary acts or control taken *on behalf of ERISA plans or assets*, not business-wide decisions taken *on behalf of the company*, such as allegations of plan administrators misappropriating plan assets,[4] allegations of a breach

[4] *See Peters v. Aetna Inc.*, 2 F.4th 199, 231 (4th Cir. 2021) (finding Aetna acted as a fiduciary when it perpetuated a scheme to "avoid[] payment of [a PBM's] administrative fee by causing . . . the Plan to shoulder that expense and then [pay] the fees out of the Plan to [the PBM]" which was done "without authority under the Plan and in direct violation" of the parties' agreement); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (finding a plan administrator breached his fiduciary duties by,

of health plan terms,[5] and individual claims determinations[6]—matters that each involved the administration or management of an ERISA plan or assets.

Petitioners' allegations are that they purportedly overpaid for the prescription drugs covered by their

---

among other things, collecting his own administrative fees from plan funds, receiving commissions from insurance companies from whom he purchased coverage, and failing to account for checks payable to the plan); *Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995) (finding an insurance agency violated its fiduciary duties when it purchased whole life insurance plans for a health and welfare fund in order to earn commissions equal to as much as 80% of the premiums paid). Here, as the district court found, Petitioners "do not allege that Anthem's fiduciary status arises from control over any plan assets." (Pet. App. 62a-63a)

[5] In *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463 (7th Cir. 2007), the Seventh Circuit affirmed that a PBM, Caremark, was not a fiduciary responsible for negotiating prices with drug retailers on behalf of a union fund, finding that nothing in the plan at issue "required Caremark to pass through any additional cost savings it managed to negotiate with retailers." *Id*. at 472-73. In *Mitchell v. Blue Cross Blue Shield of ND*, 953 F.3d 529 (8th Cir. 2020), the Eighth Circuit rejected the fiduciary claims against an insurer, finding that the insurer's interpretation of an "allowed charge" under the plan was reasonable. *Id.* at 539. Here, as the district court found, Petitioners do not allege any violation of any plan terms. (Pet. App. 64a)

[6]*See Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) (finding a pharmacy benefits management company acted as fiduciary when it made decisions about whether to fill a prescription or shift a participant to a different drug); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 709 (7th Cir. 1999) (finding a plan administrator was a fiduciary to the extent that it had discretion under the plan to determine the merit of the plan's claims for reimbursement from participants who received insurance payments from other sources). Here, Petitioners do not allege any claim determination.

Anthem health plans. But Petitioners do not allege that they were entitled to a certain level of pricing under their health plans or that Anthem misconstrued or violated any term of those plans. Instead, Petitioners base their claims on the PBM Agreement, which sets forth Express Scripts' pricing *to Anthem*, not Anthem's pricing to Petitioners. Petitioners do not cite a single case from any circuit court where a health benefit company's PBM contract or company-wide PBM pricing triggered ERISA fiduciary duties. To the contrary, the cases are uniform that health plans owe no fiduciary duty in setting pricing terms or other plan content offered in the market. *See Pegram*, 530 U.S. at 226 ("[d]ecisions about the content of a plan are not themselves fiduciary acts," but rather are business decisions, not subject to ERISA); *Larson*, 723 F.3d at 908 (affirming dismissal of ERISA fiduciary duty claims as "[s]etting policy terms, including copayment requirements, determines the content of the policy") (emphasis omitted). Accordingly, none of the cases cited by Petitioners conflict with, or are even relevant to, the Second Circuit's determination that a party does not act in a fiduciary capacity when making decisions to sell subsidiaries or enter into a contract with a third party service provider.

B. The Sixth Circuit's Decision In *DeLuca* Did Not Split With Any Other Circuit

Petitioners assert that the Second Circuit joined an alleged circuit split created by the Sixth Circuit's 2010 decision in *DeLuca*. That argument is based on the incorrect premise that the Sixth Circuit categorically excluded "business decisions" from the definition of a fiduciary under ERISA and "did not even consider whether [Blue Cross Blue Shield of Michigan ("BCBSM")] engaged in plan management or administration." (Pet. 31-32) To the contrary, the Sixth Circuit

precisely followed this Court's decision in *Pegram* in finding that to "determin[e] liability for an alleged breach of fiduciary duty in an ERISA case, the courts 'must examine the conduct at issue to determine whether it constitutes "management" or "administration" of *the plan*, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards.'" *DeLuca*, 628 F.3d at 747 (emphasis in original). The Sixth Circuit then held that a health insurer was not administering or managing an ERISA plan when it negotiated rates with various hospitals because such "business dealings were not directly associated with the benefits plan at issue . . . but were generally applicable to a broad range of health-care consumers." *Id*.

Petitioners rely heavily on the dissent in *DeLuca* to question the uniform application of *Pegram* by the other circuits. In addition to the fact that a dissent does not qualify as a split, the dissent did not dispute the well-established law that the definition of an ERISA fiduciary is functional and that a plaintiff alleging ERISA liability must show, as a threshold issue, that the defendant was acting in a fiduciary capacity when taking the challenged conduct. The dissent disagreed with the majority because the dissent believed that there was a factual dispute as to whether the defendant was managing or administrating a plan based on specific terms of the applicable health plan. *DeLuca*, 628 F.3d at 749 ("Whether Blue Cross functioned as a fiduciary when it established and maintained provider networks for Flagstar depends on how one characterizes their agreement."). Here, as the district court noted, Petitioners do not allege that they were entitled to a certain level of pricing under their Anthem health plans, much less that Anthem violated such terms, and instead base their allegations on the

PBM Agreement, which sets forth Express Scripts' pricing to Anthem, not Anthem's pricing to Petitioners. (Pet. App. 61a, 64a) ("Plaintiffs do not allege that Anthem was required to provide them with certain pricing levels for prescription drugs and then violated those requirements. Nor do Plaintiffs allege that Anthem promised them 'competitive benchmark pricing' and either failed to meet this requirement or failed to disclose that it could negotiate for, but could not guarantee, competitive benchmark pricing throughout the pendency of the PBM Agreement.") Consequently, not even the dissent supports Petitioners' arguments here against all the other circuits.

II. The Second Circuit's Decision Is Consistent With This Court's Decision In *Pegram v. Herdrich*

Petitioners also assert that the Second Circuit "misapplied" this Court's decision in *Pegram* because it "did not conduct any analysis of whether Anthem's control over drug prices through the PBM Agreement constituted plan 'administration' or 'management.'" (Pet. 26-28) To the contrary, the Second Circuit correctly applied *Pegram* in finding that the acts of selling subsidiaries and entering into the PBM Agreement are not acts of administration or management of an ERISA plan. (Pet. App. 7a-8a, 10a) (holding "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") The Second Circuit's assessment that Anthem was not acting "in a fiduciary capacity" (*i.e.*, administering or managing an ERISA

plan) when taking the acts challenged by Petitioners is entirely consistent with *Pegram*.[7] 530 U.S. at 226.

III. The Second Circuit's Decision Does Not Address A Question Of Great Importance

The Second Circuit's decision does not address a question of great importance because the scope of ERISA liability has already been established by this Court in *Pegram* and has been applied consistently by the other circuit courts. Petitioners claim, without citation to anything, that there is growing confusion about when ERISA fiduciary duties apply to third parties who provide services to ERISA plans. (Pet. 33) There is no confusion. Third parties remain subject to ERISA fiduciary duties when they take action to administer or manage a plan or its assets. *See, e.g.*, *DeRogatis v. Bd. of Trs. of the Welfare Fund of the Int'l Union of Operating Eng'rs Local 15*, 904 F.3d 174, 192 (2d Cir. 2018) (finding that plan administrators acted as ERISA fiduciaries when issuing communications about pension and survivor benefits under ERISA plan); *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 744 (6th Cir. 2014) (finding that an insurer acted as a fiduciary when determining, individually and selectively, whether to impose or waive a network access fee). But the law is clear that

---

[7] Petitioners claim incorrectly that this Court's holding in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) supports their position that the Second and Sixth Circuit misapplied this Court's *Pegram* decision. (Pet. 29-30) *Davila* addressed whether ERISA pre-empted state court lawsuits concerning mixed eligibility and treatment decisions, and nothing in *Davila* supports Petitioners' position that business-wide acts, such as selling subsidiaries or entering into a third party services or provider contract, qualify as acts of administering or managing an ERISA plan. *Davila* has never been cited for such a proposition.

while a party "engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of plan documents," ERISA fiduciary duties are not triggered "when the decision at issue is, at its core, a corporate business decision." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 357 n.2 (2d Cir. 2016) (internal quotation marks and citation omitted).

Petitioners also assert, again without citation to anything, that review is warranted because of uncertainty in the market as to whether health insurers can charge exorbitant prices. (Pet. 6, 33-35) But pricing is based on the applicable health plan, and health insurers are entitled to determine the terms of their offerings, including pricing, while customers are free to accept or reject those terms. *Musto v. Am. Gen. Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a . . . plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second."). ERISA does not provide Petitioners a right to any specific level of pricing. As the district court correctly found, "Plaintiffs have challenged Anthem's role in setting prices they believe are unfair, not Anthem's 'use or discretion in construing and applying the provisions of their group health plans and assessing a participant's entitlement to benefits,'" and "while Plaintiffs point to Section 5.6 and its mention of 'competitive benchmark' prices, Plaintiffs have no right under ERISA to receive 'competitive benchmark pricing,' or even average pricing, for prescription drugs." (Pet. App. 61a)

Lastly, Petitioners incorrectly claim that there is "confusion" regarding the meaning of *Pegram* and the "two hats" doctrine. (Pet. 34) This Court recognized

Pegram's "two hats" doctrine over two decades ago, and it has been repeatedly and uniformly applied by the circuit courts, as well as numerous district courts in the United States, ever since without any confusion whatsoever.[8]

---

[8] *See, e.g.*, *Larson*, 723 F.3d at 917 (citing *Pegram* and rejecting claim where defendant did not act as a fiduciary); *Kalda*, 481 F.3d at 646 (same); *Acosta*, 910 F.3d at 519-20 (same); *In re Luna*, 406 F.3d at 1204-05 (same); *Perrone v. Johnson & Johnson*, 2020 U.S. Dist. LEXIS 74962, at *52 (D.N.J. Apr. 29, 2020) (same); *Ramos v. Natures Image, Inc.*, 2020 U.S. Dist. LEXIS 88181, at *23 (C.D. Cal. Feb. 19, 2020) (same); *Lehr v. Perri*, 2019 U.S. Dist. LEXIS 62068, at *9-11 (E.D. Cal. Apr. 9, 2019) (same); *Catalfano v. Sears Holding Co.*, 2018 U.S. Dist. LEXIS 168176, at *22-24 (N.D. Ill. Aug. 21, 2018) (same); *Chendes v. Xerox HR Solutions*, 2017 U.S. Dist. LEXIS 172997, at *7, 12, 20 (E.D. Mich. Oct. 19, 2017) (same); *Int'l Painters & Allied Trades Indus. Pension Fund v. Clayton B. Obersheimer, Inc.*, 2013 U.S. Dist. LEXIS 20192, at *18 (D. Md. Feb. 13, 2013) (same); *In re Calpine Corp. ERISA Litig.*, 2005 U.S. Dist. LEXIS 9719, at *12-13 (N.D. Cal. Mar. 31, 2005) (dismissing claim against defendants who "allegedly exercised authority to determine the structure of the Plan" as "plan design . . . does not give rise to fiduciary status under ERISA").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GLENN M. KURTZ
Counsel of Record
CLAUDINE COLUMBRES
ROBERT E. TIEDEMANN
JESSE L. GREEN
JACKSON HERNDON
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819-8200
gkurtz@whitecase.com

Counsel for Respondent Anthem, Inc.

November 3, 2021