No. 24-813

In the Supreme Court of the United States

CHEVRON U.S.A. INCORPORATED, ET AL.,

Petitioners,

v.

PLAQUEMINES PARISH, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF AMICUS CURIAE EXPRESS SCRIPTS, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Express Scripts, Inc. is a pharmacy benefits manager ("PBM"). PBMs contract with health plans and third-party payors to administer prescription drug benefits. They provide a suite of services to their clients, including developing lists of covered medications (known as formularies). PBMs also negotiate savings on the price of drugs in the form of rebates and pass those savings on to their clients.

PBMs play an important role assisting the federal government in discharging its obligations to provide pharmacy benefits. Express Scripts, for example, administers pharmacy benefits for TRICARE, the DoD's healthcare program for service members, veterans, and their families. Express Scripts also manages the benefits for federal employees enrolled in certain Federal Employee Health Benefits Act ("FEHBA") plans. The Federal Government controls both of those programs through statutory requirements, contractual provisions, regulatory guidelines, and oversight.

In recent years, PBMs have been swept into ongoing political debates about two contentious issues—the cost of prescription drugs (such as insulin) and the opioid crisis. Based largely on misunderstandings about what they do, PBMs have been sued in state courts around the country in litigation over both of those topics.

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[1] In accordance with Rule 37.6, Express Scripts affirms that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici or their counsel made such a monetary contribution.

As a result, Express Scripts believes it can offer the Court a unique perspective on the importance of applying the correct standards for federal-officer removal. Adoption of the Fifth Circuit's standard would create uncertainty regarding the prevailing view among circuit courts that challenges implicating PBMs' services for the federal government belong in federal court, with deleterious consequences for the resolution of important issues affecting federal interests and effective federal contracting. Express Scripts therefore respectfully urges the Court to reverse the Fifth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners persuasively explain why this Court should reverse. Contrary to the decision below, the text and history of the federal-officer removal statute demonstrate that Congress's 2011 amendment expanded the scope of federal-officer removal to be significantly broader than the Fifth Circuit's test.

Express Scripts submits this brief to explain how a contrary holding has the potential to interfere with federal contracting not just in the context of oil refining but in many areas in which the federal government relies on contactors, including in provision of health and pharmacy benefits. To date, most federal courts of appeals have held that cases implicating PBMs' services for the federal government should be in federal court. Those courts have found that claims related to the prices of prescription drugs and to the provision of opioids are inherently intertwined with PBMs' work for the federal government. And each of those courts has correctly understood Congress's

amendment of 28 U.S.C. 1442(a)(1) to add "relating to" in 2011 had the intended effect of expanding federal-officer removal rights to include claims that are "connected or associated" with work for the federal government.

Applying the Fifth Circuit's narrower test—requiring connection to a specific federal directive—would risk injecting uncertainty into a standard intended to remove it. The Fifth Circuit's standard is difficult to apply in practice to the complex relationships by which the federal government engages PBMs. Different contractual requirements, regulations, and oversight standards apply to PBM activities that in some cases are dictated precisely but in other ways are delegated generally to PBMs to bring to bear their accumulated experience and business judgment. Complicating the analysis further is plaintiffs' increasing effort to disclaim certain aspects of federal relationships while retaining challenges to the conduct undertaken.

The resulting potential for confusion among lower courts would have two main negative consequences inconsistent with Congress's intent in enacting the federal-officer removal statute and amending it in 2011. *First*, it would risk sending to state court cases regarding contentious issues on which state and federal interests diverge—exactly the type of cases for which the federal-officer removal statute was passed to ensure a federal forum. *Second*, it would interfere with the federal government's ability to contract efficiently and effectively because the prospect of a slew of state court litigation would incentivize contracts

that involve more rigid government directives that deprive the government of the very expertise it is contracting to obtain.

ARGUMENT

I. There Is Currently a Prevailing View that Claims Against PBMs Related to Prescription Drug Pricing and Opioids Belong in a Federal Forum.

The courts of appeals that have addressed the propriety of federal-officer removal in prescription drug pricing and opioid cases involving PBMs have taken a different approach than the Fifth Circuit. To date, four circuit court decisions have reversed district court orders remanding litigation against PBMs to state court. *See W. Virginia ex rel. Hunt v. Caremark-PCS Health, L.L.C.*, 140 F.4th 188, 199 (4th Cir. June 12, 2025) (removal warranted for insulin pricing claims); *Gov't of Puerto Rico v. Express Scripts, Inc.*, 119 F.4th 174, 185 (1st Cir. 2024) (same); *California v. CaremarkPCS Health LLC*, No. 23-55597, 2024 WL 3770326, at *1 (9th Cir. Aug. 13, 2024) (reversing basis for district court's remand of insulin pricing claims); *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243 (4th Cir. 2021) (removal warranted for opioid claims).[2]

In so holding, each court construed "for or relating to" in Section 1442(a)(1) broadly as requiring only that

[2] One circuit court decision recently came out the other way based on case-specific considerations, including the particular claims at issue and the State's disclaimer. *California v. Express Scripts*, No. 24-1972 (9th Cir. Sep. 9, 2024).

the claims in a complaint be "connected or associated with" a defendant's *work for the federal government*. None has, like the Fifth Circuit, required the additional burden that the challenged conduct result from a particular federal directive. Instead, they have each recognized that the language added in the 2011 Removal Clarification Act dictates use of a "'connection or association' standard" that "is broader than the old 'causal nexus' test." *Arlington County*, 996 F.3d at 256; *see also Puerto Rico*, 119 F.4th at 185 (emphasizing that "the policy favoring removal . . . should not be frustrated by a narrow, grudging interpretation of [it]" and therefore Section 1442 must be "liberally construed . . . to ensure a federal forum in any case where a federal official or private actors acting on that official's behalf may raise a defense arising out of his official duties"); *W. Virginia ex rel. Hunt*, 140 F.4th at 199 (describing Section 1442's "related to" prong as a "fairly low" "bar," in that "a removing defendant need not establish an airtight case on the merits").

Multiple district courts have held likewise that removal is proper in opioid and prescription drug cases involving PBMs. *See, e.g.*, *Mississippi v. Optum, Inc.*, No. 3:24-CV-718-KHJ-MTP, 2025 WL 1622390, at *10 (S.D. Miss. June 9, 2025) ("finding that the PBM defendants have met the "connected or associated" requirement for federal officer removal because "while Mississippi claims to target only the nonfederal side of those negotiations, they still target the negotiations themselves, which relate (at least in part) to the PBM

defendants' work for their federal clients").[3] And, tellingly, the Eastern District of Arkansas relied on the preemptive effect of TRICARE in granting a preliminary injunction against a state law that would have prevented PBMs from owning or operating pharmacies in the state. *Express Scripts, Inc. v. Richmond*, No. 4:25-CV-00520-BSM, 2025 WL 2111057, at *1 (E.D. Ark. July 28, 2025). That decision demonstrates a premise of each of the removal decisions—that claims about (or efforts to regulate) PBMs' provision of pharmacy benefits are "related to" work for the federal government and implicate colorable federal defenses.

II. The Fifth Circuit's Test Would Create Uncertainty Regarding that Prevailing View.

Unlike the circuit courts that have addressed litigation involving PBMs (and most circuit courts generally)[4], the Fifth Circuit applied a narrow test that is

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[3] Other district courts have granted remand motions in similar cases, but they are currently being reviewed on appeal. *See, e.g.*, *Hawai'i ex rel. Lopez v. CaremarkPCS Health, L.L.C.*, No. CV 23-00464 LEK-RT, 2025 WL 1218598, at *1 (D. Haw. Apr. 28, 2025).

[4] Other circuits overwhelmingly have applied some form of a broader "connected to or associated with" standard based on Congress's 2011 amendment. *See Moore v. Elec. Boat Corp.*, 25 F.4th 30, 35 (1st Cir. 2022); *In Re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 470 (3rd Cir. 2015); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d at 296 (5th Cir. 2020); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 944 (7th Cir. 2020); *Bd. of Cnty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1251 (10th Cir. 2022); *D.C. v. Exxon Mobil Corp.*, 89 F.4th 144, 155–56 (D.C. Cir. 2023); *Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th

unmoored from the post-2011 language of the federal-officer removal statute. The Fifth Circuit looked to whether the conduct challenged in the complaints had a "sufficient connection with *directives in their federal refinery contracts*," rather than assessing whether the work was "related to" work for the federal government. Pet. App. 29. As petitioners explain, Pet. Br. 25–32, that standard fails to give full effect to Congress's decision to add "related to" to 1442(a)(1). As even the Fifth Circuit recognized, the amendment was designed to make grounds for federal-officer removal "significantly broader." Pet. App. 12.

Nationwide application of the Fifth Circuit's standard therefore would risk creating uncertainty regarding federal-officer removal for all federal contractors, including PBMs. To be sure, PBMs believe that their work for the federal government is sufficiently connected to federal directives that litigation implicating that work belongs in federal court even under a narrower test. But the Fifth Circuit's standard presents a risk of misapplication by lower courts, particularly because it is difficult to apply to the complex and multi-faceted ways that PBMs contract with the federal government.

For example, Express Scripts' contract under the DoD's TRICARE program explicitly dictates many areas of Express Scripts' responsibilities—including: (1) the formulary it must use; (2) the tiered cost structure it must implement; and (3) a preference for generic

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703, 715 (8th Cir. 2023); *Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619, 624 (6th Cir. 2016); *State v. Meadows*, 88 F.4th 1331, 1348 (11th Cir. 2023).

over branded products—so much so that Express Scripts is "essentially acting as the statutorily authorized alter ego of the federal government." *Cnty. Bd. of Arlington Cnty. v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 253 (4th Cir. 2021). At the same time, the DoD delegates certain aspects of pharmacy benefits administration to Express Scripts—such as negotiating with pharmacies to create a retail pharmacy network—precisely because it has the accumulated expertise the government lacks to perform those aspects efficiently and effectively.

Express Scripts' contracting with FEHBA plans likewise involves a mix of specific directives and reliance on Express Scripts' experience. For example, some FEHBA plans develop their own custom formularies, while others rely on standard formularies developed by Express Scripts. And the system is governed by a set of regulations, guidance, and oversight by the Office of Personnel Management that, while extensive, inherently cannot cover every detail of the complex process of administering pharmacy benefits.

The potential for confusion among lower courts is heightened further by the use of disclaimers in the opioid and prescription drug pricing litigation. In an effort to achieve their preferred forum, plaintiffs have started to insert disclaimers to their complaints that purport to broadly waive any "claim" or "relief" "related to" work for the federal government. Courts of appeals applying a post-2011 "related to" standard mostly have recognized that those disclaimers cannot effectively untangle the inherently intertwined relationship between PBMs' work for the federal government and claims regarding prescription drug pricing

and opioids. *See Puerto Rico*, 119 F.4th 174, 190 (1st Cir. 2024); *Hunt*, 140 F.4th at 194–96 (4th Cir. 2025) (recognizing that, despite the waiver, the "complaint still [sought] to hold the PBM liable for indivisible rebate negotiations which includes federal government work"). But the Fifth Circuit's test would inject additional complexity by requiring courts to compare plaintiffs' attempts to carve out their complaints against specific, and numerous, directives from the federal government to PBMs.

III. The Fifth Circuit's Standard Could Task State Courts with Resolving Issues on which State and Federal Interests Diverge and Disrupt Federal Contracting.

Confusion in lower courts caused by Fifth Circuit's standard would in turn have two main negative consequences.

First, the Fifth Circuit's standard would risk sending to state courts cases in which states may have divergent interests from the federal government—exactly the type of cases for which Section 1442 was designed to ensure a federal tribunal. Indeed, the potential for conflicting state and federal interests—including with respect to a trade embargo related to the War of 1812—is what prompted Congress to pass the predecessor of what is now Section 1442. *See Willingham v. Morgan*, 395 U.S. 402, 405 (1969). And courts considering removal issues have continued to cite avoiding state court decisions on such topics as an ongoing reason that the availability of a federal forum is critical. *In re "Agent Orange" Prod. Liab. Litig.*, 304 F.

Supp. 2d 442, 451 (E.D.N.Y. 2004) (noting the "vagaries and hazards" of applying state tort law with respect to necessary but dangerous military procurement).

The cases against PBMs related to opioids and prescription drug pricing are instructive examples. Both deal with important and topical issues—ensuring affordable access to insulin and other necessary prescription drugs and addressing significant harms from opioid addiction in communities around the country. Unfortunately, legitimate concerns with those issues have led to a flood of misinformation regarding the role of PBMs. Despite courts' recognition that PBMs *lower* drug prices for their clients by "stimulat[ing] price competition in the prescription drug market," *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 987 (10th Cir. 2022), various state and private plaintiffs allege that PBMs have engaged in a scheme to artificially inflate drug prices. And plaintiffs likewise allege that PBMs somehow should have intervened to stop the processing of prescription opioids prescribed by licensed medical professionals and fulfilled by pharmacies.

In response to both sets of allegations, PBMs have explained that their conduct is in part mandated by federal contracts, regulations, and statutes giving rise to preemption and government contractor immunity defenses that courts will have to consider. A federal forum is necessary to weigh and evaluate those defenses against the backdrop of a swirling political controversy in which states have an understandably intense interest. As the circuit courts that have assessed

the propriety of removal to date have noted, a central role of Section 1442 is to ensure well-reasoned and nuanced assessment of those federal defenses by a federal court. *Puerto Rico*, 119 F.4th at 192–93 (litigation in state court "would undercut § 1442(a)(1)'s requirement that federal courts determine whether a defendant acted under a federal officer's authority"); *In re Asbestos Prods. Liability Litig.*, 770 F. Supp. 2d 736, 742–43 (E.D. Pa. 2011) (remand would "deprive the federal officer of the right to have the adequacy of the threshold determination, whether there is federal subject matter jurisdiction under the federal officer removal statute, made by a federal court[]").

Second, the Fifth Circuit's standard would hinder the federal government's ability to delegate to contractors going forward. Federal contractors—including PBMs—would be justifiably wary about contractual relationships with the federal government that could subject them to liability without the benefit of a federal forum to raise valid federal defenses. So, the federal government and its contractors would be incentivized to arrange their relationships in a way that would minimize the possibility of the contractor being deprived of a federal forum in the event of litigation.

Such arrangements would be inefficient and problematic from the federal government's perspective because they would result in contracts that are not the government's preferred structure. It is often advantageous for the federal government to rely on contractors' expertise and discretion in particular areas—that is precisely why the government uses PBMs to administer benefits for TRICARE and FEHBA plans instead of discharging those statutorily mandated

functions directly without leveraging PBMs' experience. Indeed, PBMs can contribute a variety of expertise for the benefit of the government, in areas from negotiating with drug manufacturers to establishing retail pharmacy networks to developing efficient administrative processes for the processing of prescription claims.

Forcing the federal government to take greater control of every detail of administering pharmacy benefits through specific contractual "directives" would result in more costly benefits programs that are simultaneously less flexible and adept at achieving the government's objectives. That, too, is the type of result that the federal-officer removal statute—and Congress's 2011 expansion—were designed to prevent. *Willingham*, 395 U.S. at 406 (recognizing that agents through which the federal government acts must be afforded a federal forum because "if their protection must be left to the action of the State court," then "the operations of the general government may at any time be arrested at the will of one of its members").

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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