
No. 25-2529

IN THE
**United States Court of Appeals
for the Eighth Circuit**

EXPRESS SCRIPTS, INC., *et al.*,

Plaintiffs-Appellees,

v.

RODNEY RICHMOND, in his official capacity as
President of the Arkansas State Board of Pharmacy, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Nos. 4:25-cv-00520, 4:25-cv-00524, 4:25-cv-00561 & 4:25-cv-00598
(Hon. Brian S. Miller)

**BRIEF OF NATIONAL COMMUNITY PHARMACISTS ASSOCIATION
AND ARKANSAS PHARMACISTS ASSOCIATION AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

Robert T. Smith
Timothy H. Gray
KATTEN MUCHIN ROSENMAN LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006
202-625-3500
robert.smith1@katten.com
timothy.gray@katten.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Consistent with Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that the National Community Pharmacists Association and the Arkansas Pharmacists Association each has no parent company, and no publicly traded company owns ten percent or more of any of *amici*'s stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE**

Amici curiae represent the interests of independent community pharmacies. The National Community Pharmacists Association represents the interests of the owners, managers, and employees of over 18,900 independent community pharmacies across the country. Its members employ over 205,000 individuals on a full- or part-time basis and dispense roughly 40% of the nation's retail prescriptions. The Arkansas Pharmacists Association was founded in 1882 and represents over 2,300 members consisting of pharmacists, pharmacy students, and other members of the industry located within Arkansas.

This litigation involves a challenge to Act 624, a provision of Arkansas law that seeks to address the inherent conflict of interest—and resulting harms to plans, patients, and pharmacies—arising when pharmacy benefit managers (PBMs) own and operate their own pharmacies. Because PBMs can influence—and even control—from which pharmacies patients may receive their prescriptions and the amount of reimbursement those

* All parties consent to the filing of this brief. No counsel for any party authored this brief in whole or in part. No party, person, or entity except *amici* made a monetary contribution specifically for the preparation or submission of this brief.

pharmacies receive (whether the amount given to their own affiliated pharmacies or competitors), PBMs have exploited these and other levers to favor their own pharmacies over unaffiliated ones. Act 624 targets the root of this conflict of interest in a facially non-discriminatory manner. *Amici* therefore have a strong interest in the outcome of this case.

BACKGROUND

States have faced a crisis of access to pharmacy care within their borders, and according to numerous independent studies, PBMs are the chief culprits. See Fed. Trade Comm’n, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies* (July 2024).¹ In the last few decades, the business practices of PBMs have shuttered countless pharmacies—including hundreds of pharmacies in rural communities. E.g., Abiodun Salako, *et al.*, *Update: Independently Owned Pharmacy Closures in Rural America, 2003-2018*, RUPRI Center for Rural Health Policy Analysis (July 2018).²

¹ https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf

² <https://rupri.org/wp-content/uploads/2018-Pharmacy-Closures.pdf>.

PBMs are not benefit plans. Rather, benefit plans hire PBMs as service providers that sell plans access to prescription drugs. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 83-84 (2020). PBMs deliver this access by contracting separately with pharmacies to create networks through which plan beneficiaries can fill their prescriptions. *Id.* at 88-92.

There is no federal law that regulates PBMs directly. And the practice of pharmacy, including licensure and ownership, is an area of traditional state regulation.

So nearly all states have enacted laws regulating PBMs and their relationships with pharmacies – with Arkansas at the vanguard in policing PBM abuses. The Supreme Court has already upheld some of Arkansas’s earlier efforts. *Id.*

Yet vertically integrated PBMs are large, powerful, and resourceful. Appellees are the three largest PBMs – CVS Caremark (CVS), Express Scripts Inc. (ESI), and OptumRx (Optum), which together cover nearly 80% of all Americans with prescription drug benefits – and their trade association, the Pharmaceutical Care Management Association (PCMA). *See* FTC, *supra* n.1, at 13. CVS, ESI, and Optum are also vertically integrated; they own their own

affiliated pharmacies, which are some of the largest in the United States. *Id.* at 15-18.

The business model of these PBMs involves maximizing the difference between what they charge plans and what they pay pharmacies for access to prescription drugs. Known as a spread-pricing model, this incentivizes PBMs to engage in business practices that can harm plans, patients, and pharmacies. In the absence of federal and, until relatively recently, state regulation, PBMs have done just that.

Unsurprisingly, pharmacies are particularly hard-hit by PBMs' abuses. Given PBMs' colossal market power, unaffiliated pharmacies have little to no leverage when negotiating with them—even large chains like Walgreens and Walmart. *See, e.g.,* Nathan Layne, *Walmart has a drug problem*, Business Insider, Aug. 18, 2015.³ Refusing to accept a PBM's contract could mean the inability to serve millions of patients, including virtually all patients in an independent pharmacy's local community. As a result, PBM-pharmacy contracts have generally granted PBMs unilateral authority to dictate the amount of reimbursement paid to pharmacies, allowing PBMs to reimburse

³ <https://www.businessinsider.com/r-wal-marts-drug-problem-pharmacy-business-drags-on-profit-2015-8>

pharmacies less than any pharmacy can purchase drugs at wholesale. *Rutledge*, 592 U.S. at 83-84; FTC, *supra* n.1, at 53-59.

In 2015, responding to “concerns that the reimbursement rates set by PBMs were often too low to cover pharmacies’ costs, and that many pharmacies, particularly rural and independent ones, were at risk of losing money and closing,” Arkansas enacted Act 900. *Rutledge*, 592 U.S. at 84. Act 900 “requires PBMs to compensate pharmacies at or above their acquisition costs.” *Id.* at 91; Ark. Code Ann. § 17-92-507. PCMA challenged that law as preempted by ERISA but a unanimous Supreme Court disagreed in *Rutledge*.

Still, direct rate regulation could not prevent PBMs from padding their profit margins through more pernicious practices. Vertically integrated PBMs have leveraged their market power to capture for themselves larger shares of the retail pharmacy market by giving preferential treatment to their own affiliated pharmacies. They have deliberately limited access to their pharmacy networks—not out of considerations of safety or costs to their prescription-benefit-plan clients, but to ensure patients use pharmacies that PBMs own and control. One tactic is to impose stringent accreditation requirements, above and beyond a state’s, as a precondition for participating in PBM networks. And with restrictions like these imposed on the front end,

PBMs have implemented higher reimbursement rates for their own pharmacies on the back end.

In 2018, Arkansas enacted additional legislation—the Arkansas Pharmacy Benefits Manager Licensure Act—to police these practices. Ark. Code Ann. § 23-92-506 (barring, *inter alia*, elevated accreditation standards and reimbursing affiliated pharmacies at higher rates). But PBMs have found new ways to evade these efforts.

As one Arkansas legislator observed: “Every time we try to come up with legislation to make sure that we protect the consumers, the businesses, and specifically our end-user, which are our constituents, from being gouged,” efforts are frustrated, and “the game seems to evolve differently.”

Hearing Before the Arkansas Senate Insurance and Commerce Committee, Apr. 8, 2025 (“Senate Hearing”), at 11:09:38-11:11:15, <https://tinyurl.com/fkphttee>.

Another observed: “No matter how many times we have erred on the side of [PBMs] to be good actors, they have proven themselves—through the thousands of complaints that I have personally filed in the last twelve months—that they have no respect for this body.” *Arkansas House Session* (Apr. 3, 2025) (“House Session”), at 3:51:57-3:52:12, <https://tinyurl.com/4b88v7ar>.

Through their vertically integrated structure, PBMs have continued to steer patients to PBM-affiliated pharmacies by offering lower copayments and other inducements—and this is particularly true for more-costly specialty medications. See Fed. Trade Comm’n, *Specialty Generic Drugs: A Growing Profit Center for Vertically Integrated Pharmacy Benefit Managers*, at 2 (Jan. 2025).⁴ PBMs have accomplished this by prohibiting unaffiliated pharmacies from distributing “specialty drugs,” which are typically higher-cost (and higher-margin) drugs that require special handling, and by simultaneously expanding the designation of “specialty drugs” to include non-specialty medications that have been on the market for a long time but are extremely profitable for PBMs to dispense through their affiliated pharmacies. E.g., Marty Schladen, *Report: “Specialty” drugs are by far the most expensive, but classification seems arbitrary*, Ohio Capital Journal, May 15, 2023.⁵

⁴ https://www.ftc.gov/system/files/ftc_gov/pdf/PBM-6b-Second-Interim-Staff-Report.pdf.

⁵ <https://ohiocapitaljournal.com/2023/05/15/report-specialty-drugs-are-by-the-most-expensive-but-classification-seems-arbitrary/>

As a result, PBMs have required patients to obtain these drugs through mail-order pharmacies owned by the PBMs. *E.g.*, Joseph Walker, *Generic Drugs Should Be Cheap, but Insurers Are Charging Thousands of Dollars for Them*, Wall Street Journal, Sept. 11, 2023.⁶ For these reasons, the Centers for Medicare and Medicaid Services has expressed concern that PBMs are using pharmacy contracts “in a way that inappropriately limits dispensing of specialty drugs to certain pharmacies.” *Medicare Program; Contract Year 2019 Policy and Technical Changes*, 82 Fed. Reg. 56,336, 56,410 (Nov. 28, 2017).

Although PBMs’ practices may cost beneficiaries less out of pocket in the form of lower copayments and coinsurance, PBMs make up for this by charging plans substantially more, which ultimately increases the costs of prescription drug benefits for everyone. According to the Federal Trade Commission, the three largest PBMs reimbursed their affiliated pharmacies *more than 100 percent over their estimated acquisition cost* on 63 percent of the specialty medications they dispensed, and 22 percent of the time those PBMs reimbursed their affiliated pharmacies at a *markup of more than 1,000 percent*. FTC, *supra* n.4, at 2; *see* Walker, *supra* n.6. Thus, as the First Circuit

⁶ <https://www.wsj.com/health/healthcare/generic-drugs-should-be-cheap-but-insurers-are-charging-thousands-of-dollars-for-them-ef13d055>

recognized, “[w]hether and how a PBM actually saves an individual benefits [plan] money with respect to the purchase of a particular prescription drug is largely a mystery to the benefits [plan].” *PCMA v. Rowe*, 429 F.3d 294, 298 (1st Cir. 2005) (citation omitted).

As Arkansas recognizes, though, costs to plans are only part of the picture. The harms to businesses and Arkansans from PBM practices are systemic and severe. Of particular concern are their effects on community pharmacies, which, for many Americans, are their most accessible form of healthcare. See Reed Abelson & Rebecca Robbins, *The Powerful Companies Driving Local Drugstores Out of Business*, N.Y. Times, October 19, 2024.⁷ “In some rural and medically underserved areas, local community pharmacies are the main healthcare option for Americans, who depend on them to get a flu shot, an EpiPen, or other lifesaving medicines.” FTC, *supra* n.1, at 1.

Indeed, the Arkansas Senate heard compelling testimony on the harms of local pharmacy closures. The President and CEO of CARTI, a nonprofit cancer care provider, testified to the need for local patient care coordination, which is impeded by PBMs’ practices. *Hearing Before the Arkansas House*

⁷ <https://www.nytimes.com/2024/10/19/business/drugstores-closing-pbm-pharmacy.html>.

Insurance and Commerce Committee, Apr. 2, 2025 (“House Hearing”), at 12:18:30-12:25:47, <https://tinyurl.com/2c23k6bv>. A mother whose child suffered adverse effects from critical medication that was not properly delivered by a PBM-affiliated pharmacy testified that a local pharmacy is essential to ensuring reliable care. Senate Hearing at 10:48:40-10:51:24. And a pharmacist explained how his patients had been ill-served by PBMs’ practices, including a mentally ill patient who was sent medication from a PBM-affiliated pharmacy without prior proper consultation with the patient’s legal guardian. *Id.* at 11:24:08-11:26:37.

Arkansas legislators correctly determined that their piecemeal efforts to police abusive practices could not keep up with PBMs’ strategies to maximize profits at the expense of Arkansas’s priorities: “When you have someone who sets the price also act[ing] as your competitor, they have zero incentive to listen to our laws, they have zero incentive to abide by them, and they currently operate by a catch-me-if-you-can mentality.” House Session at 3:56:17–3:56:41. Act 624 was their rational response. Instead of continuing to play “Whac-A-Mole,” as one legislator put it, Arkansas rationally pulled the plug on the game. Senate Hearing at 11:45:39-11:45:56.

ARGUMENT

Act 624 does not violate any provision of the Constitution. The Arkansas Legislature and the Governor rationally concluded that PBMs' ownership of pharmacies was the root cause of PBM practices that persisted in harming Arkansans' access to pharmacy care after PBMs had evaded other regulatory efforts. Act 624 was enacted to solve the problem by banning PBMs, wherever they are headquartered, from holding pharmacy licenses in Arkansas directly or through affiliates—stripping PBMs of the ability to both make and take payment terms and conditions.

In response, PBMs filed multiple lawsuits to enjoin enforcement of Act 624. Taking a kitchen-sink approach, they invoked a hornbook's worth of federal constitutional provisions, federal doctrines, and federal statutes that they insisted constrained Arkansas's authority to restrict ownership of State pharmacy licenses. These included allegations that Act 624 violated the Commerce, Privileges and Immunities, and Equal Protection Clauses; that it was a bill of attainder; that it was a Fifth Amendment taking; and that it was preempted under the Supremacy Clause by ERISA, Medicare, and (in ESI's case) TRICARE.

The district court rejected all but two of the PBMs' claims. Importantly, it recognized that Act 624 was a rational and good-faith exercise of the Arkansas Legislature's authority to regulate. It "was not enacted in a wholly arbitrary manner"; "the legislature believed that Act 624 would support patient access to prescription drugs and pharmacy services at fair prices"; and the legislature enacted it to "facilitate [] support for patient access." App.788 (R.Doc.73, at 14).

The district court nonetheless held that Arkansas was barred from enacting the law under the dormant Commerce Clause because some lawmakers' "rhetoric" "tainted" it and thereby rendered it "unconstitutional." *Id.* It further held that Act 624 was, in narrow application to pharmacies participating in TRICARE, preempted by that federal military-benefits program. App.782-84 (R.Doc.73, at 8-10).

As to the dormant Commerce Clause, the district court held first that Act 624's impermissibly protectionist purpose was evident on the face of the statute: "[S]ection one of Act 624 specifically states that its purpose is to eliminate plaintiffs' 'business tactics that have driven locally-operated pharmacies out of business.'" App.779 (R.Doc.73, at 5). It found that "[t]his phrase 'artlessly discloses [the state's] avowed purpose to discriminate

against interstate goods.’” *Id.* (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)). Although it acknowledged Arkansas’s “argu[ment] that it is merely targeting a form of business structure,” it found this “only be a half-truth because the statute discloses that the state is also attempting to protect ‘locally operated pharmacies.’” *Id.*

The district court found further support for its conclusion in the public remarks of a handful of lawmakers. Although correctly observing that “legislative history” is a disfavored method of “interpreting the meaning of statutes,” it nonetheless explained that “the Eighth Circuit” has cited “statements by lawmakers” as a method for “determin[ing] the intent of state legislatures in Commerce Clause cases.” App.779-80 (R.Doc.73, at 5-6) (citing *IESI AR Corp. v. Nw. Ark. Reg’l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006)). It declined to provide examples of the rhetoric that “tainted [it] . . . so much as to render it unconstitutional” but concluded that “a review of Act 624’s legislative history indicates that it overtly discriminates against out of state companies” and was “‘brimming with protectionist rhetoric.’” App.780, 788 (R.Doc.73, at 6, 14) (quoting *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995)).

The district court also held that TRICARE's statutes and implementing regulations preempt Act 624 to the extent it applies to pharmacies' participation in TRICARE's national pharmacy-benefits program. It concluded that Act 624 is "explicitly preempted by TRICARE's 'health care delivery' provision because Act 624 prohibits PBM-owned pharmacies from delivering healthcare to Arkansas patients" and "implicitly preempted . . . because [it] impedes the TRICARE program's ability to accomplish the purposes for which Congress enacted it." App.782-84 (R.Doc.73, at 8-10).

As explained below, the district court was mistaken in both respects. Act 624 does not violate the dormant Commerce Clause. It is a facially neutral, otherwise constitutional statute with no "discriminatory purpose," either on its face or as betrayed by certain lawmakers' "rhetoric." Nor does the TRICARE program preempt Act 624. That program does not extend to licensure-ownership restrictions, and Act 624 does not interfere with the purpose of providing national mail-order prescription-drug benefits.

I. Act 624 does not violate the dormant Commerce Clause.

The district court held that Act 624 is unconstitutional under the "dormant" Commerce Clause – a doctrine based on the negative implication of Congress's express constitutional authority to regulate commerce

between and among the States. “This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

Importantly, “the dormant Commerce Clause is implicated by burdens placed *on the flow of interstate commerce*—the flow of goods, materials, and other articles of commerce across state lines.” *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009) (citing *Oregon Waste Sys., Inc. v. Dept. of Envotl. Quality*, 511 U.S. 93, 98 (1994)); accord *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 590 (8th Cir. 1998).

Because it operates in derogation of traditional State regulatory power, the doctrine is carefully cabined. “[T]he Commerce Clause ‘was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.’” *Paul’s Indus. Garage, Inc. v. Goodhue Cnty.*, 35 F.4th 1097, 1099-100 (8th Cir. 2022) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997)).

States thus retain “broad power” to legislate and regulate, even in ways that may “bear adversely upon interstate commerce.” *H.P. Hood &*

Sons, Inc. v. Du Mond, 336 U.S. 525, 531–32 (1949). The dormant Commerce Clause is not “a roving license . . . to decide what activities are appropriate for state and local government to undertake.” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 380 (2023) (Gorsuch, J., plurality op.).

The district court held that Act 624 represented overt, purposeful discrimination “against plaintiffs *as out of state companies*” — an effort by the State to “discriminate against *interstate goods*.” App.779 (R.Doc.73, at 5) (quoting *Dean Milk*, 340 U.S. at 354 (emphasis added)). The problem, the court concluded, was that “Act 624 is tainted by its protectionist rhetoric so much as to render it unconstitutional under the Commerce Clause.” *Id.*

There are several problems with the district court’s reasoning. Separately or together, they compel reversal.

A. Act 624’s stated purpose is to preserve local *operation* of pharmacies—not ownership; the Act does not discriminate against out-of-state entities *because* they are out-of-state entities; and it does not affect the flow of interstate commerce.

“Under the dormant Commerce Clause, a law is subject to strict scrutiny if it overtly discriminates against interstate commerce—either facially or through a discriminatory purpose or a discriminatory effect.” *Entergy Arkansas, LLC v. Webb*, 122 F.4th 705, 711 (8th Cir. 2024) (quotation

marks omitted). The question, however, is not whether a law discriminates *for any reason* against economic interests that happen to be out of state, but whether it “discriminate[s] against plaintiffs *as out of state companies*.” *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003) (emphasis added).

“‘[D]iscrimination’ means ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000) (quoting *Oregon Waste*, 511 U.S. at 99). The PBMs, in other words, must show that the Arkansas Legislature’s “purpose in enacting [Act 624] was to discriminate against out-of-state economic interests.” *Just Puppies, Inc. v. Brown*, 123 F.4th 652, 669 (4th Cir. 2024). And they must show that Act 624 impairs the operation of “a national market for goods and services.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 514 (2019).

The first problem with the district court’s reasoning is that it misconstrued the statute as nakedly protecting local economic interests, when it does no such thing. The district court took the reference to “local[] . . . pharmacies” to be *prima facie*—if not dispositive—evidence of discriminatory purpose. But Act 624 itself has no “protectionist rhetoric.” Its

reference to “local” interests does not implicate *economic* interests. Rather, it pinpoints one aspect of the harm Act 624 seeks to remedy: the closure of “locally-operated” — not locally *owned* — pharmacies, and the concomitant loss of many Arkansans’ physical access to trustworthy, close-to-home pharmacy care. Operation and ownership are critically different. The district court’s reasoning misguidedly equates them. But out-of-state companies like Walgreens and Kroger both already *own* numerous “locally-operated” pharmacies, and they are unaffected by Act 624.⁸

Properly understood, the statute reflects the State’s fundamentally non-protectionist objective: It promotes the health and welfare of citizens living in communities whose locally *operated* pharmacies face closure because of abusive practices that flow directly from pharmacy-owning PBMs’ inherent conflicts of interest. The statute is not a giveaway to local economic interests.

⁸ See Walgreens, *Stores in Arkansas*, <https://www.walgreens.com/storelistings/storesbycity.jsp?requestType=locator&state=AR> (dozens of locations across 46 cities); Kroger, *Pharmacies in Arkansas*, <https://www.kroger.com/stores/pharmacy/ar> (26 pharmacies across 13 cities)

Indeed, Act 624 is facially *indifferent* to economic interests. Rather, it makes clear that pharmacy ownership *by PBMs*, irrespective of in-state or out-of-state status, has a deleterious effect on Arkansas communities.

The statute itself does not, therefore, “artlessly disclose[] [an] avowed purpose to discriminate against interstate goods,” as the district court found. App.779 (R.Doc.73, at 5) (quoting *Dean Milk*, 340 U.S. at 354). It forbids vertically integrated PBMs from having interests in certain State-regulated businesses in Arkansas regardless of where those PBMs are located. In no sense does it discriminate against out-of-state “goods” (or services) at all. Cf. *Red River*, 146 F.3d at 590.

Conversely, Act 624 does not prohibit out-of-state pharmacy owners from doing anything *because* they are located out of state. As noted, Walgreens is a major out-of-state pharmacy chain that already owns numerous pharmacies that operate in Arkansas. As the district court recognized—and legislators repeatedly emphasized—Walgreens is not vertically integrated with a PBM, which means it is not subject to Act 624. Other non-PBM-owned, out-of-state chains, like Kroger, are not affected either. But the district court’s misapprehension of the statute’s text led it to

gloss over this critical indication that the statute is not unconstitutionally protectionist.

B. Certain lawmakers’ “rhetoric” cannot and should not render an otherwise valid, constitutional statute unconstitutional.

The district court found that Act 624, an otherwise valid exercise of State regulatory authority, was “tainted by its protectionist rhetoric so much as to render it unconstitutional.” App.788 (R.Doc.73, at 14). As discussed, however, nothing on the face of Act 624 suggests an attempt to discriminate against pharmacies with out-of-state owners, let alone do so *because* their owners are located out-of-state. Rather, the “rhetoric” the district court appeared to find persuasive refers to examples of public statements by lawmakers (and legislative witnesses) that the PBMs included in their complaints; these statements refer to the fact that many pharmacy-owning PBMs are not incorporated or headquartered in Arkansas.

The district court appropriately signaled some skepticism about the use of legislative history to reach a judicial determination of the true purpose of a state statute. App.779 (R.Doc.73, at 5). Such skepticism is well warranted. “[E]vidence of individual legislators’ motives . . . is often less reliable and therefore less probative than other forms of evidence bearing on legislative

purpose.” *Am. Trucking Ass’ns, Inc. v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021). After all, “[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 254 (2022) (quoting *United States v. O’Brien*, 391 U.S. 367, 384 (1968)).

Still, “the Supreme Court has not laid out a specific test for determining discriminatory purpose,” *Hazeltine*, 340 F.3d at 596, and in the absence of formal guidance, many circuits, including this one, have looked, *in part*, to legislative history to inform the inquiry into legislative intent. *E.g.*, *SDDS*, 47 F.3d at 268.

Whatever the propriety of this practice—in effect, divining the actual, collective, legislative motivation for the enactment of a law—it cannot be the case that the “rhetoric” of some lawmakers may, by itself, render unconstitutional an otherwise constitutional exercise of State authority over a core State responsibility like pharmacy licensing. Assume that this law is enjoined, but the Arkansas Legislature passes an identical statute in its next legislative session. This time, however, the handful of lawmakers quoted in the PBMs’ complaints have retired. Is the statute constitutional now? How

much “rhetoric” suffices to transform a statute that the Constitution allows into one that it does not?

Allstate Ins. Co. v. Abbott, 495 F.3d 151 (5th Cir. 2007), a case on all fours with this one, illustrates the proper approach to materially similar litigation. There, Texas enacted a statute that “restrict[ed] the right of an auto insurer to own and operate auto body shops in Texas.” *Id.* at 154-55. A leading national insurance firm, Allstate, challenged it as a violation of the dormant Commerce Clause. The State, meanwhile, “argue[d] that the bill grew out of concerns for customer welfare, particularly that Allstate’s dual role as insurer and body shop owner would create a conflict of interest and an incentive to short change customers.” *Id.* at 156.

There, as here, the plaintiff “relie[d] heavily on [] legislative statements” to “assert[] that economic protectionism was the predominant motivation for the legislation.” *Id.* at 160. The Fifth Circuit disagreed.

“[T]he stray protectionist remarks of certain legislators,” the Fifth Circuit held, were “insufficient to condemn th[e] statute.” *Id.* at 161. “[T]he Legislature,” the court continued, “heard extensive testimony from various witnesses on the legitimate consumer protection concerns sought to be remedied by [the law].” *Id.* “For instance, legislators heard from several

witnesses that vertical integration in the insurance business would create an inherent conflict of interest and an irresistible opportunity for insurers to engage in predatory practices.” *Id.* at 161. That was enough to reject Allstate’s challenge.

The same outcome is compelled here. Like the Texas law in *Allstate*, Act 624 targets *kinds of* ownership, not *out-of-state* ownership. *E.g.*, House Hearing at 11:28:43-11:29:10 (“If you’ve got a company that’s vertically integrated and controls the purchase and the selling price . . . I think this industry is unique in that.”).

Furthermore, in *Allstate*, as here, “much of [the] evidence of ‘discrimination’ towards out-of-state companies” was, properly understood, “simply evidence of a legislative desire to treat differently two business forms” —in that case, “independent auto body shops on the one hand and insurance-company-owned auto body shops on the other—a distinction based not on domicile but on business form.” 495 F.3d at 161.

The district court cited *Allstate* but did not address its reasoning. App.776 (R.Doc.73, at 2). Instead, it relied on *SDDS* for the proposition that the “legislative history” of Act 624 was “brimming with protectionist

rhetoric.” App.780 (R.Doc.73, at 6) (quoting *SDDS*, 47 F.3d at 268). But the contrast between that case and this one is instructive.

In *SDDS*, a ballot “initiative was drafted to defeat a specific ‘out-of-state dump’ by requiring an additional approval, and the referendum [at issue in the case] concern[ed] that very approval for the same ‘out-of-state dump.’” 47 F.3d at 268. As a result, the law in question overtly targeted a specific out-of-state economic interest *because* it was out of state, and the law explicitly stated that it sought to prevent the *flow of out-of-state goods* from entering the state.

Against that backdrop, this Court highlighted the “protectionist rhetoric” around the ballot initiative’s passage: a “state-sponsored pamphlet . . . exhorted voters to vote against the ‘out-of-state dump’ because ‘South Dakota is not the nation’s dumping grounds,’ and ‘[a] “NO” vote [would] . . . keep [] imported garbage out of South Dakota.’” *Id.* The references to the economic interest being “out-of-state” were not incidental to the challenged government action; they were *central* to that action.

But this case is nothing like *SDDS*. As noted, the law is facially neutral to whether PBMs or pharmacies are owned by out-of-state interests; it is

merely aimed at eliminating a conflict of interest that is impeding Arkansans from accessing their pharmacy benefits.

This case better resembles *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste Management District*, 433 F.3d 600 (8th Cir. 2006). In that case, the fact that “some board members expressed the opinion that IESI was ‘a big company from out of state’” did “not demonstrate a discriminatory purpose”; “[a]t most, [those statements] show[ed] concern for solid waste management and the legitimate interest in maintaining an in-District landfill.” *Id.* at 604. “[T]he District’s stated purpose for the regulation [was] to allow it ‘input and decision-making authority regarding the transfer of solid waste either into or out of the boundaries of the District’ – a wholly legitimate interest.” *Id.* And here, the district court recognized that Act 624 was motivated by a wholly legitimate interest: it “would support patient access to prescription drugs and pharmacy services at fair prices” and “facilitate [] support for patient access.” App.788 (R.Doc.73, at 14).

Considered in the proper context, the statements the PBMs identify show that lawmakers and witnesses spoke at length about the clear-and-present harms stemming from *conflicts of interest*, not out-of-state ownership. *E.g.*, House Session at 3:56:17–3:56:41 (noting that a PBM “who sets the price

also acts as your competitor”). The fact that major pharmacy-owning PBMs are located outside of Arkansas was not lawmakers’ motivation; it merely underscores those profit-maximizing PBMs’ lack of concern for the well-being of Arkansas’s citizens and communities.

Legislators thus stressed PBMs’ distance — literal and figurative — from the people and places their abusive practices were harming. *E.g.*, Senate Hearing at 10:26:03–10:26:15 (“PBMs are steering patients to out-of-state mail-order pharmacies that they own or are affiliated with. These pharmacies often have no relationship with the patient or prescribing doctor. It’s not personal care; it’s just a business model.”). Thus, legislators “show[ed] concern for [affordable and accessible pharmacy care] and the legitimate interest in maintaining [local, physically accessible pharmacies].” *IESI AR Corp.*, 433 F.3d at 604.

This does not support a claim under the dormant Commerce Clause. It is what statehouses do every day — protect their citizens in a facially neutral manner from business practices that are impeding the health and safety of their citizens.

II. Act 624 is not preempted by TRICARE, and the district court's reasoning would result in preempting *all* state regulation of pharmacy practice.

The district court concluded that the TRICARE statute and enabling regulations preempt Act 624 as applied to ESI's affiliated pharmacies because ESI has a federal contract to provide nationwide mail-order pharmacy services to TRICARE beneficiaries. App.782-84 (R.Doc.73, at 8-10). This overreads federal law to intrude deep into an area of traditional state concern. It is also so fundamentally wrong that this Court may address the scope of TRICARE preemption even though Arkansas neglected to do so in its opening brief.⁹

⁹ Although courts are generally guided by the party-presentation principle, that principle is “supple, not ironclad,” *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020), and it may be subordinated where, as here, the issue involves an obvious error or implicates “substantial public interests,” *Continental Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 984 (8th Cir. 1988) (en banc) (considering an argument first raised only by *amicus*), including “federalism,” *Adkisson v. Jacobs Eng'g Group, Inc.*, 36 F.4th 686, 697 (6th Cir. 2022); accord *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1967) (extending the exclusionary rule to the States based on an argument raised only by *amicus*); see also *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality op.) (similar).

The party-presentation principle has doubtful application here in any event. *Amici* did not unilaterally inject TRICARE preemption into this case; ESI raised it as a claim for relief; and the district court passed on the merits of that claim. As a result, this Court is “not limited to the particular legal [arguments] advanced by the parties, but rather retains the independent

TRICARE preempts State and local laws “relating to health insurance, prepaid health plans, or other health care delivery or financing methods” to the extent: (1) “inconsistent with a specific provision of [a] contract” between the Secretary of Defense and an entity administering the program or “a regulation promulgated by the Secretary” under the program, or (2) “necessary to implement or administer the provisions of [a] contract or to achieve any other important Federal interest.” 10 U.S.C. § 1103(a). No decision of this Court interprets the scope of this provision, but it plainly does not preempt Act 624.

To start, State laws like Act 624, which regulate the licenses of healthcare providers, do not “relat[e] to health insurance, prepaid health plans, or other health care delivery or financing methods.” *Id.* The object of TRICARE’s preemption provision is state or local laws that bear on the delivery of health *benefits* – whether by “insurance, prepaid health benefits,” or other “financing methods” – not the regulation of healthcare *providers*. *Id.*

power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). And if there is any doubt, the Court could direct the parties to file supplemental briefing on the point, ensuring that the parties fully address the issue.

The district court disagreed, holding that TRICARE preempts Act 624 as law that relates to “health care delivery” because it “prohibits PBM-owned pharmacies from delivering healthcare to Arkansas patients.” App.783 (R.Doc.73, at 9). But that isolated focus on just three words in the statute is wrong for at least three reasons:

First, the district court’s narrow view violates established canons of statutory construction. Under *ejusdem generis* and *noscitur a sociis*, the phrase “or other health care delivery or financing methods” must be interpreted to mean other laws relating to the delivery or financing of “health insurance” or “prepaid health plans.” *E.g., Fischer v. United States*, 603 U.S. 480, 486-87 (2024). Indeed, the presence of the word “other” demands application of these canons, *id.* at 486, which teach that the “general phrase,” health care delivery, is “given a more focused meaning by the terms linked to it.” *Id.* at 488. If it were otherwise, and “health care delivery” were broad enough to capture laws relating to both the delivery of benefits and the regulation of healthcare providers, then *any* law relating to healthcare in general would fall within the ambit of health care delivery—rendering superfluous the provisos relating to health insurance and prepaid health benefits. The Supreme Court has cautioned against an “unbounded interpretation” of a

catchall phrase that would “render superfluous the careful delineation” of the more-specific provisions in a statute. *Id.* at 493. But that is exactly what the district court did here.

Second, the Secretary of Defense has already drawn the same distinction between providers and benefits. Whereas medical providers and pharmacies are subject to state licensing laws “in each state in which the individual renders services” to TRICARE beneficiaries, 32 C.F.R. § 199.6(c)(2)(i), (d)(3), the Secretary has made clear that TRICARE preempts all State laws relating to the delivery of healthcare benefits, *id.* § 199.21(o)(2). And if this were not enough, the Secretary has emphasized that “[p]harmacies must meet the applicable requirements of state law in the state in which the pharmacy is located.” *Id.* § 199.6(d)(3).

Third, the district court’s overreading of TRICARE’s express preemption provision would lead to limitless preemption of state laws in areas of traditional state concern where TRICARE does not regulate—a result that, in the ERISA context, the Supreme Court has described as “‘unsettling.’” *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., NA, Inc.*, 519 U.S. 316, 330 (1997) (citation omitted).

To the extent ESI argues that TRICARE reaches state laws that regulate healthcare providers because such regulations could be said to ultimately “relat[e] to” the delivery of TRICARE benefits, 10 U.S.C. § 1103(a), this Court should reject that limitless conception of “relating to” for the same reasons the Supreme Court has rejected that argument under ERISA. *Dillingham*, 519 U.S. at 329. Under that view, “the words ‘relate to’ would limit nothing,” and there would be no end to “ERISA’s pre-emptive reach.” *Id.* As a result, the Supreme Court has rejected the “pre-emption of traditionally state-regulated substantive law in those areas where ERISA has nothing to say,” including “medical-care quality standards” like state licensing laws. *Id.* at 329-30. And for similar reasons, this Court has held that neither ERISA nor Medicare Part D preempts state laws bearing on what drugs a pharmacy may or may not dispense under its state license. *PCMA v. Wehbi*, 18 F.4th 956, 968 973-74 (8th Cir. 2021).¹⁰

The district court’s logic would create a different rule for TRICARE. A doctor could continue to provide medical services to TRICARE beneficiaries

¹⁰ For these reasons, the district court properly rejected the PBMs’ alternative claims of preemption under ERISA and Medicare Part D. App.784-86 (R.Doc.73, at 10-12).

even after a state board of medicine determined he was no longer fit to render care to patients. And pharmacies could operate without regard to *any* state-law requirements, including safety requirements for handling and dispensing drugs, because those too would “relat[e] to” “health care delivery” and be rendered unenforceable. That cannot be right. *Cf. Wehbi*, 18 F.4th at 972 (rejecting overbroad conception of Medicare Part D preemption after noting that “the practice of pharmacy is an area traditionally left to state regulation”).

Contrary to the district court’s view, nothing in Act 624 would “impede[] the TRICARE program’s ability to accomplish the purposes for which Congress enacted it.” App.783-84 (R.Doc.73, at 9-10). Congress sought to create a “uniform program of medical and dental care,” 10 U.S.C. § 1071, through, among other things, a “national mail-order pharmacy program,” *id.* § 1074g(a)(2)(E)(iii). Act 624 is no obstacle to these goals. As a TRICARE benefits provider, ESI remains free to contract with non-affiliated pharmacies to provide mail-order pharmacy services to TRICARE beneficiaries in Arkansas. It can fulfill its contractual obligations while still complying with state and federal law; it just needs to use unaffiliated pharmacies. Nothing in TRICARE requires the use of a *single* national

network of *affiliated* mail-order pharmacies; it simply requires a national mail-order pharmacy benefits program. The district court conflated Act 624's (permissible) interference with ESI's preferred way of doing business for (impermissible) interference with the objectives and interests of TRICARE.

For these reasons, the district court erred in its reliance on *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam), which has nothing to do with TRICARE, for the proposition that “[s]ubjecting [TRICARE] to [Act 624’s] license requirements would give the State’s [pharmacy] board a virtual power of review” over federal contracting decisions. App.784 (R.Doc.73, at 10) (quoting and altering *Leslie Miller*, 352 U.S. at 190). As noted, TRICARE *requires* pharmacies to “meet the applicable requirements of state law in the state in which the pharmacy is located,” 32 C.F.R. § 199.6(d)(3), so the reasoning in *Miller* cannot support preemption.

Finally, to the extent ESI attempts to justify preemption based on potential transaction costs and inefficiencies resulting from compliance—*e.g.*, from using subcontractors to serve Arkansas patients—that cannot move the needle. By its nature, a state licensing regime imposes costs and inefficiencies. But the “case for federal pre-emption is particularly weak where” Congress is aware “of the operation of state law in a field of federal

interest,” such as state pharmacy licensing laws, “and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” *PhRMA v. McClain*, 95 F.4th 1136, 1144 (8th Cir. 2024) (citation omitted). In any event, Act 624 permits ESI to continue existing specialty pharmacy services under limited-use permits, Ark. Code Ann. § 17-92-416(d), and in the context of this pre-enforcement challenge, ESI has not proven that this permit process is an obstacle to the TRICARE program.

CONCLUSION

The Court should reverse the judgment of the district court.

Dated: November 4, 2025

Respectfully submitted,

/s/ Robert T. Smith

Robert T. Smith

Timothy H. Gray

KATTEN MUCHIN ROSENMAN LLP

1919 Pennsylvania Avenue, NW

Suite 800

Washington, DC 20006

Tel.: 202-625-3500

Fax: 202-298-7570

robert.smith1@katten.com

timothy.gray@katten.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that this brief is in compliance with the type form and volume requirements. Specifically, the brief is proportionately spaced; uses a Roman-style, serif typeface (Book Antiqua) of 14-point; and contains 6,496 words, exclusive of the material not counted under Rule 32(f) of the Federal Rules of Appellate Procedure.

/s/ Robert T. Smith

Robert T. Smith

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2025, I electronically transmitted a copy of the foregoing Brief to the Clerk of the Court using the Electronic Case Filing (ECF) system for filing. Service will be accomplished electronically through the ECF system to all registered participants.

/s/ Robert T. Smith
Robert T. Smith
Counsel for Amici Curiae