No. 26-4035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF UTAH; DIVISION OF CONSUMER PROTECTION,

Plaintiffs-Appellees,

v.

EXPRESS SCRIPTS, INC.; EXPRESS SCRIPTS PHARMACY, INC.; ESI MAIL PHARMACY SERVICE, INC.; OPTUMRX, INC.,

Defendants-Appellants,

and

EXPRESS SCRIPTS ADMINISTRATORS, LLC; ESI MAIL ORDER PROCESSING, INC.; MEDCO HEALTH SOLUTIONS, INC.; UNITEDHEALTH GROUP, INC.; OPTUMINSIGHT LIFE SCIENCES, INC.; OPTUMINSIGHT, INC.,

Defendants.

On Appeal from the United States District Court
for the District of Utah

Case No. 2:25-CV-00088-JNP-DBP (Hon. Jill N. Parrish)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 & 29(a)(4), amicus curiae Public Citizen, Inc. states that it has no parent corporation and that no publicly held corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Appearing before Congress, agencies, and courts on a wide range of issues, Public Citizen works for the enactment and enforcement of laws to protect consumers, workers, and the public. From its inception in 1971, Public Citizen has advocated for strong public health protections and to hold corporations accountable for actions with deleterious impacts on public health. In addition, Public Citizen has frequently appeared as amicus curiae in cases involving significant issues of federal jurisdiction, including questions relating to federal-officer removal jurisdiction.[2] Removal jurisdiction is of particular concern to Public Citizen because it implicates the authority of state courts to provide remedies under state law for actions that threaten

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

[2] *See, e.g.*, *Lopez v. Cantex Health Care Centers II, LLC*, No. 23-2038, 2023 WL 7321637 (10th Cir. Nov. 7, 2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 25 F.4th 1238 (10th Cir. 2022).

public health and safety. Public Citizen is concerned that defendants often improperly invoke removal jurisdiction, including federal-officer removal jurisdiction under 28 U.S.C. § 1442(a)(1), to deny plaintiffs their choice of forum and in an effort to escape liability under state law.

Public Citizen submits this brief because it believes that, if accepted, Appellants' erroneous argument that the act of appealing a remand order automatically stays the effect of that order—regardless of the merits of any appeal or the equities—would encourage gamesmanship and result in unjustified delay for plaintiffs in a wide variety of cases. Further, accepting Appellants' argument as to why § 1442 authorized removal in this case would vastly expand the class of cases removable under that provision, by improperly shifting the court's analysis from the conduct the plaintiff challenges to the injury the plaintiff has suffered.

SUMMARY OF ARGUMENT

The district court correctly rejected the arguments of Appellants (collectively "Express Scripts") as to both the impact of this appeal on its remand order and whether the requirements of § 1442 are satisfied in this case. Express Scripts' contrary arguments are inconsistent with

precedent and the practice of this Court, other courts of appeals, and the Supreme Court.

First, the appeal from the district court's remand order did not automatically stay that order. As reflected in decisions of both this Court and the Supreme Court, the decision whether to grant a stay of a remand order pending appeal is guided by the four equitable factors set out in *Nken v. Holder*, 556 U.S. 418, 434 (2009). As recognized by the majority of courts of appeals to consider the issue, neither of the two Supreme Court cases on which Express Scripts relies, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), and *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), requires the adoption of an "automatic stay" rule in the context of appeals of remand orders. Nor does the text of any relevant statutory provision: While 28 U.S.C. § 1447(d) allows defendants to appeal remand orders rejecting their invocation of § 1442, it does not provide for stays pending appeal as of right in such cases.

Second, as the Supreme Court and this Court have long recognized, the federal-officer removal statute provides jurisdiction only where there is a "close relationship between [a defendant's] *challenged conduct* and the performance of its federal duties." *Chevron USA Inc. v. Plaquemines*

Parish, 608 U.S. ___, 146 S. Ct. 1052, 1061 (2026) (emphasis added). Express Scripts attempts to shift the focus of the statutory "relatedness" requirement, suggesting that it can be satisfied where *un*challenged conduct relates to the performance of federal duties, so long as that unchallenged conduct contributes to the injury giving rise to the plaintiffs' suit. Focusing, however, on the harm suffered by the plaintiffs, as opposed to the acts challenged by the plaintiffs, is inconsistent with both precedent and the text of § 1442. As Appellees explain in their brief, the conduct that they are challenging lacks a relationship with official acts. The district court, therefore, properly remanded the case.

ARGUMENT

I. There is no automatic stay pending appeal of remand orders.

As recognized by this Court's case law and its Rule 8.1, whether an appellant is entitled to a stay pending appeal is governed by an analysis of four factors: "the [appellant]'s likelihood of success on the merits; the threat of irreparable harm if relief is not granted; the absence of harm to opposing parties if relief is granted; and the risk of harm to the public interest." *Wyoming v. U.S. Dep't of Interior*, No. 18-8027, 2018 WL 2727031, at *1 (10th Cir. June 4, 2018) (citing 10th Cir. R. 8.1; and then

Nken, 556 U.S. at 434). "A stay is not a matter of right." *Id.* (quoting *Nken,* 556 U.S. at 433).

This Court has applied this standard in resolving and denying requests to stay remand orders in other cases, including cases where the appellants invoked the federal-officer removal statute. *See, e.g.*, Order, *Lopez v. Cantex Health Care Ctrs. II, LLC*, No. 23-2038 (10th Cir. Sept. 5, 2023); Order, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir. Oct. 17, 2019). And in the context of remand orders appealed pursuant to the Class Action Fairness Act, this Court has expressly rejected the concept of automatic stays, finding that an appeal from a remand order authorized by that statute does not "somehow stay[]" "the jurisdiction of the state court" pending appeal. *Dudley-Barton v. Serv. Corp. Int'l*, 653 F.3d 1151, 1153 (10th Cir. 2011).

A. Notwithstanding this precedent, Defendants argue that any order remanding a removed case to state court is *automatically* stayed pending appeal. They rely on two Supreme Court cases: *Griggs* and *Coinbase*. Appellants' Br. 21. But those cases involve different procedural contexts, and the Court's reasoning in those cases does not apply here.

Griggs addressed the question whether a district court could modify or alter a final judgment while that judgment was on appeal. *Griggs*, 459 U.S. at 57. In holding that the court could not, the Court held that an appeal "divests the [federal] district court of its control over those aspects of the case involved in the appeal" because of the "danger a [federal] district court and a court of appeals would be simultaneously analyzing the same judgment." *Id.* at 58–59. Here, no such conflict exists. For one, the question is not whether the *district* court may analyze anything while the appeal is pending. The district court is done with the case, but for its mailing of the remand order to the state court—what Express Scripts describes as "the execution of the remand order." Appellants' Br. 15. As this Court explained in *Richmond v. Crow*, 61 F.3d 916, 1995 WL 350800, at *2 (10th Cir. June 12, 1995) (unpublished table decision), a request to stay a remand order is thus "a typical request to delay execution on an adverse ruling." That kind of relief is granted not automatically, but rather upon satisfaction of the requirements of Federal Rule of Appellate Procedure 8.

Further, although the state court may consider various issues while the appeal is pending, it will *not* consider the question on appeal: whether

the elements of federal-officer removal jurisdiction were satisfied. What Express Scripts asks is that the state court be barred from addressing other issues—for example, questions about the scope of discovery or the merits. But "[p]roceedings on those questions would not interfere with the appellate court's review of the remand order, nor risk inconsistent judgments." *See California ex rel. Harrison v. Express Scripts, Inc.*, 139 F.4th 763, 771 (9th Cir. 2025), *cert. denied*, 146 S. Ct. 1507 (2026). They can be considered by the state court while this Court considers the § 1442 question.

In *Coinbase*, "[t]he sole question before [the] Court [wa]s whether a district court must stay its proceedings while the interlocutory appeal on arbitrability," authorized by 9 U.S.C. § 16(a), "is ongoing." *Coinbase*, 599 U.S. at 740. Accordingly, "[n]early every paragraph of the *Coinbase* opinion specifically references 'arbitrability' or the provisions of the [Federal Arbitration Act]." *Harrison*, 139 F.4th at 768. The Court concluded that an automatic stay was inherent in that statute because, without it, "Congress's decision in § 16(a) to afford a right to an interlocutory appeal would be largely nullified." *Coinbase*, 599 U.S. at 743. "The reason why parties may prefer to arbitrate as opposed to

litigate claims is due to 'efficiency, less expense, less intrusive discovery, and the like.' The continuation of proceedings in the district court when stays are denied renders those features 'irretrievably lost.'" *Harrison*, 139 F.4th at 770 (quoting *Coinbase*, 599 U.S. at 743). But the fact "[t]hat arbitration is a fundamentally different form of dispute resolution than litigation further demonstrates why *Coinbase*'s logic is inapposite in the federal officer removal context." *Id.* at 769. Such fundamental differences do not exist between federal- and state-court litigation. Further, the predominant concern of the federal-officer removal statute—ensuring a federal forum before imposing liability for action taken at the behest of the federal government—can be accommodated by the return of a case to federal court at the conclusion of an appeal.

For these reasons, nearly every court of appeals to have considered Appellants' argument has rejected it. *See Harrison*, 139 F.4th at 767–72; Order, *Georgia v. Clark*, No. 23-13368, 2023 U.S. App. LEXIS 34018, at *2 (11th Cir. Dec. 21, 2023) ("*Coinbase* was limited to arbitration proceedings, which are not at issue here."); Order, *Cnty. of Westchester v. Express Scripts, Inc.*, No. 24-1639 (2d Cir. Sept. 6, 2024) (denying stay of remand order "because the Appellants are not entitled to an automatic

stay pending appeal under *Coinbase*"); *see also Plaquemines Parish v. Chevron USA, Inc.,* 84 F.4th 362, 378 (5th Cir. 2023) (acknowledging *Coinbase* but applying four-factor standard and vacating a stay pending appeal in a federal-officer removal case); *New Hampshire v. 3M Co.*, 132 F.4th 556, 559–60 (1st Cir. 2025) (recognizing, post-*Coinbase*, that failure to move for stay of remand order pending appeal meant that action returned to state court); *Puerto Rico v. Express Scripts*, 119 F.4th 174, 184 n.3 (1st Cir. 2024) (noting prior order, post-*Coinbase*, denying an emergency motion to stay a remand order pending appeal).[3] These decisions are consistent with the many Supreme Court cases, both pre- and post-*Griggs*, denying requests to stay remand orders while appellate proceedings go forward. *See, e.g.*, *BP P.L.C. v. Mayor & City Council of Balt.*, 589 U.S. 1040 (2019) (mem.) (denying stay pending appeal of order remanding action to state court); Order, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 19A428, 2019 WL 13415345 (U.S. Oct. 22, 2019) (denying motion to recall remand pending appeal);

[3] One court of appeals, in a divided opinion, held otherwise. *See City of Martinsville v. Express Scripts, Inc.*, 128 F.4th 265, 268 (4th Cir. 2025).

Hutchinson v. New York, 86 S. Ct. 5, 6 (1965) (Harlan, J., in chambers) (same).

B. Courts of appeals, including this Court, regularly review remand orders in cases where no stay was in effect. *See, e.g.*, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1246 (10th Cir. 2022). Indeed, the Supreme Court denied a motion for a stay pending appeal in *BP*, 589 U.S. 1040, but later granted a petition for certiorari in that same case, *see* 591 U.S. 1080 (2020) (mem.). Appeals of remand orders offer effective relief, without a stay, due to federal courts' ability to use "informal processes to retrieve improvidently remanded cases from state courts." *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 80 (1st Cir. 2021) (collecting cases). Thus, where no stay is granted and a remand order is later reversed, "the defendants' right to a federal forum [has not been] lost." *Plaquemines Parish*, 84 F.4th at 376; *see also New Hampshire v. 3M*, 132 F.4th at 559–60 (explaining that failure to obtain stay of remand pending appeal does not deprive appellate court of ability to review).

The availability of effective appeal of a remand order without a stay distinguishes appeals in cases such as this one from the appeals in the

qualified immunity and double jeopardy contexts that *Coinbase* deemed "analogous" to arbitrability appeals. 599 U.S. at 746. In those contexts, the appellant is arguing for immunity not from judgment, but *from suit*. Therefore, when a defendant takes an interlocutory appeal "from the denial of a motion to dismiss an indictment based on double jeopardy or from the denial of a motion for summary judgment based on qualified immunity, the central issue in the appeal is the defendant's asserted right not to have to proceed to trial. The interruption of the trial proceedings is the central reason and justification for authorizing such an interlocutory appeal in the first place." *Stewart v. Donges*, 915 F.2d 572, 575–76 (10th Cir. 1990). Absent a stay, then, the asserted right not to be subject to suit would be lost. The federal-officer removal statute, by contrast, does not provide immunity from suit. It simply shifts the forum in which the suit is litigated.

Not only are the policy reasons supporting automatic stays in these other contexts not present in the remand context, but countervailing policy interests cut the other way. Delaying a state court's ability to resume jurisdiction over an improperly removed action implicates federalism concerns not considered in *Griggs* and *Coinbase*, which solely

concerned the interplay between courts within the federal system. As to state court proceedings, "[t]he Supreme Court has repeated 'time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.'" *Harrison*, 139 F.4th at 769 (quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). This admonition reflects the core principle of comity that federal courts should not unnecessarily wrest away state courts' power. *See Elkins v. United States*, 364 U.S. 206, 221 (1960) ("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (explaining that because of the "rightful independence of state governments," federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined"). But "[i]mproper removals based on the federal officer removal statute deprive state courts of jurisdiction over cases that should rightfully be heard in their fora, in violation of comity principles. Automatic stays of litigation based on those improper removals pursuant to *Coinbase* would only exacerbate federal infringement on state courts' rights." *Harrison*, 139 F.4th at 769.

The *Nken* factors grant courts appropriate discretion to balance comity interests. *See id.* (noting that "*Nken*'s discretionary stay power allows federal courts to 'scrupulously confine their own jurisdiction' and ensure they are giving '[d]ue regard for the rightful independence of state governments'" (alteration in original) (quoting *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 764 (9th Cir. 2022))). An inflexible, automatic rule like that proposed by Express Scripts would wrongly impose federal case management preferences onto state courts, which of course remain free to decide whether ongoing proceedings before them should be stayed pending a federal appeal of a remand order, and are best suited to assess whether a stay would be appropriate to conserve their own judicial resources.

In addition, automatic stays pending appeal of remand orders would create incentives for gamesmanship. In its *BP* merits decision, the Supreme Court held that, under its plain text, 28 U.S.C. § 1447(d) allows a defendant that includes the federal-officer removal statute as one of several bases for removing an action to appeal an order remanding that action—even if the defendant does not intend to make a federal-officer removal argument on appeal. 593 U.S. 230, 238–39 (2021). While

recognizing that this interpretation of the statute may encourage defendants to add meritless federal-officer arguments to their notices of removal solely "with an eye to ensuring appellate review down the line if the case is remanded," the Court held that that concern was trumped by the statute's "plain meaning." *Id.* at 246.

Finding a right to an automatic stay would encourage such maneuvers, given the added benefit of guaranteed delay in adjudication it would provide removing defendants—irrespective of the merits of their arguments. Unlike the text at issue in *BP*, there is no argument here that the text of any statute requires such an outcome. *See Harrison*, 139 F.4th at 770 (explaining how *Coinbase*'s proposed solutions to gamesmanship do not carry over from the arbitration context). Application of the *Nken* factors would eliminate any such gamesmanship, allowing courts to consider both the likelihood of success on the merits and the equities more broadly.

II. Removal under section 1442 requires a relationship between official acts and the conduct challenged by the plaintiff, not between official acts and the plaintiff's injury.

Plaintiffs-Appellees explain in their brief that removal was improper under § 1442 because they are not challenging any conduct that

relates to acts that Express Scripts took under federal-officer direction. *See* Appellees' Br. 24–32. In its brief, Express Scripts—in addition to disputing the factual premise of that contention—suggests that removal under § 1442 would nonetheless be appropriate because *unchallenged* action that Express Scripts took under federal direction contributed to the injury for which Plaintiffs-Appellees seek to recover. *See* Appellants' Br. 40–49. That suggestion is incorrect.

As the Supreme Court has recently reaffirmed, the relevant question for federal-officer removal is whether there is "a close relationship between [a defendant's] *challenged conduct* and the performance of its federal duties"—not whether there is a close relationship between the plaintiff's injury and the performance of such duties. *Chevron*, 146 S. Ct. at 1061 (emphasis added). The focus on the "challenged conduct" is consistent with several earlier cases holding that removal under § 1442(a)(1) requires a relationship "between the charged conduct and asserted official authority." *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)); *see Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (holding that removal is available only where the defendant, "in carrying

out the acts that are the subject of the [plaintiff's] complaint, was acting under" a federal agency or officer (cleaned up)); *Maryland v. Soper (No. 1)*, 270 U.S. 9, 32 (1926) (holding that a federal officer could remove a criminal prosecution only if his "acts or his presence at the place in performance of his official duty constitute the basis … of the state prosecution").

This long-recognized principle derives from the statutory text, which "tells us what must relate to what." *Anne Arundel Cnty. v. BP P.L.C.*, 94 F.4th 343, 348 (4th Cir. 2024). Section 1442(a)(1) applies to actions "against or directed to" federal officers or those acting under them "for or relating to any act under color of such office," and allows removal only by such persons. "It is the 'act' for which the defendant is being sued—not the plaintiff's entire civil action in a general sense—that must relate to the asserted federal duty." *Anne Arundel*, 94 F.4th at 348. Or, as the Eleventh Circuit put it, "the act anchoring removal must be defined by the claim brought against the defendant." *Georgia v. Meadows*, 88 F.4th 1331, 1344 (11th Cir. 2023) (cleaned up). Therefore, "to obtain removal under Section 1442(a)(1), a defendant must show it is being sued for an act or acts that it claims were done under—or related

to acts done under—federal authority." *Anne Arundel*, 94 F.4th at 349. Where there is a "mismatch between the business practices that [a defendant] asserts were subject to federal control and supervision … and the business practices of which [the plaintiff] complains," the requirements of § 1442(a)(1) are not satisfied. *Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122, 145 (2d Cir. 2023).

Contrary to Express Scripts' suggestion, that a plaintiff's *injury* may have some relationship with official acts is not sufficient to satisfy the "acting under" and "nexus" requirements. *See District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144, 156 (D.C. Cir. 2023) (rejecting the argument "that the relevant question is not the [plaintiff]'s theory of liability but the harm that gives rise to the relevant damages"); *Anne Arundel*, 94 F.4th at 348–49 (rejecting defendants' argument that the court should "focus on whether the acts that allegedly caused the injuries for which the [plaintiffs] seek to recover were directed by federal officers" (cleaned up)). Focusing on the injury both would lack a basis in the statutory text and would not serve the statutory purpose: providing a federal forum where a defendant faces liability for, or relating to, acts that it took on the federal government's behalf.

CONCLUSION

For the foregoing reasons, Public Citizen respectfully requests that the Court deny Express Scripts' request for a stay and affirm the decision below.

Respectfully submitted,

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July 6, 2026

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f) and the Rules of this Court, it contains 3,557 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Century Schoolbook.

July 6, 2026

s/ Adam R. Pulver
Adam R. Pulver
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2026, I electronically filed the forgoing using the court's CM/ECF system which will send notification of such filing to the following:

July 6, 2026

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Amicus Curiae