NO. 21-40157

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALMART INC.,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; ACTING ADMINISTRATOR D. CHRISTOPHER EVANS; ATTORNEY GENERAL MERRICK GARLAND,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Texas
(Case No. 4:20-cv-817)
(District Judge Sean Daniel Jordan)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANT AND REVERSAL

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May 14, 2021

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* supporting parties' due-process rights by opposing unjustified expansion of sovereign immunity. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994 (2020); *Cap. Ventures Int'l v. Republic of Argentina*, 652 F.3d 266 (2d Cir. 2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

At first blush, this case appears to present solely a question about what constitutes agency action for purposes of this Court's sovereign-immunity jurisprudence. But nested within this broader legal question are two others. First, does the Fifth Amendment's Due Process Clause limit how far this Court's case law extends? Second, should this Court reconsider its outlying interpretation of the Administrative Procedure Act's sovereign-immunity waiver?

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

The Drug Enforcement Administration—through the Department of Justice—told Walmart to comply with its interpretation of the Controlled Substances Act. If Walmart ignored the DEA's demand, legal action would follow. These threats were "statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The threats therefore were "agency action" under this Court's sovereign-immunity jurisprudence.

Under the District Court's opinion, the government can threaten sanctions against a company for declining to follow incorrect interpretations of federal law. And there is no way for that company to challenge the incorrect interpretation in a declaratory-judgment proceeding. This means that companies face an impossible choice. They must either comply with the agency's incorrect statutory interpretation or risk jail and monetary penalties if courts eventually bless the agency's erroneous interpretation. This is the antithesis of due process of law.

The central tenant of due process is notice of what the law requires. When an agency makes non-binding statements about companies' obligations under federal law that conflict with the statute's plain

language, the companies lack that notice. The District Court's erroneous application of this Court's precedents raises precisely the due-process concerns identified by the Supreme Court in inadequate notice cases.

This Court could eliminate these due-process problems by correctly interpreting the APA's sovereign-immunity waiver. Other circuit courts do not require agency action to find that Congress waived sovereign immunity when it amended the APA. That approach reflects the APA's text and history. This Court's jurisprudence, on the other hand, is unmoored from the APA's text and history. There is no reason for this Court to continue as the outlier circuit. If the panel declines to grant Walmart relief under circuit precedent, the Court should hear the case *en banc* so it can overturn the incorrect precedent.

ARGUMENT

"To maintain a suit in district court against the United States," including its agencies and officers, "a plaintiff must bring claims under a statute in which Congress expressly waives the United States' sovereign immunity." *Ortega Garcia v. United States*, 986 F.3d 513, 522 (5th Cir. 2021) (citation omitted). Because Walmart sued federal agencies and officers in their official capacity, it must show that Congress

"unequivocally" waived the United States's sovereign immunity. *United States v. Bormes*, 568 U.S. 6, 9 (2012) (quotation omitted).

Everyone agrees that the APA waives sovereign immunity for some claims. *See* 5 U.S.C. § 702. This Court, however, disagrees with its sister circuits about the scope of that sovereign-immunity waiver. Under Fifth Circuit precedent, there are two requirements for showing that a suit falls within Section 702's waiver. "First, the plaintiff must identify some agency action affecting him in a specific way, which is the basis of his entitlement for judicial review." *Cambranis v. Blinken*, 994 F.3d 457, 462-63 (5th Cir. 2021) (cleaned up). "Second, the plaintiff must show that he has suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (cleaned up).

I. THE DEA TOOK AGENCY ACTION UNDER THE APA.

The District Court held that the DEA did not take agency action sufficient to waive sovereign-immunity under this Court's precedent. That holding was erroneous because, under the APA, "agency action" differs from "final agency action." Although Walmart makes several

arguments about why the DEA took agency action, this brief focuses on why the DEA's threats to Walmart—made through the Department of Justice—satisfied the definition of "agency action." Because the DEA took agency action, the District Court had jurisdiction to consider the merits of Walmart's suit.

Under the APA "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). And a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). The DEA's enforcement threats were designed to interpret the CSA for a particular party—Walmart. The threats therefore were agency action that permitted Walmart to sue under this Court's precedent.

The District Court acknowledged that the DEA's threats "to sue Walmart were made in the context of settlement negotiations between the parties." ROA 604. Yet the District Court held this was not a rule because the DEA might not sue or might change positions during litigation. *See id.* Those facts, however, are irrelevant for APA purposes.

The definition of rule quoted above does not require that the agency issue a binding declaration of policy. That is what final agency action entails. Rather, all that was required for agency action was for the DEA to make a statement to Walmart about its interpretation of the CSA intending for Walmart to act on that statement. That happened here. The DEA's threat was therefore "an agency statement" to Walmart that was "designed to implement[or] interpret" the CSA. 5 U.S.C. § 551(4). That is agency action, *id.* § 551(13), sufficient to satisfy this Court's precedent. *See Cambranis*, 994 F.3d at 462-63. Thus, the District Court erred by holding that the DEA did not take agency action.

II. THE DISTRICT COURT'S APPLICATION OF THIS COURT'S PRECEDENT VIOLATED WALMART'S DUE-PROCESS RIGHTS.

A. The Due Process Clause Guarantees Fair Notice Of What Conduct Is Illegal.

The Supreme Court has long recognized the importance of fair notice under the Due Process Clause. It explained that "[e]very man should be able to know with certainty when he is committing a crime." *United States v. Reese*, 92 U.S. 214, 220 (1875). In the early-20th century, the Court described the fair notice requirement as "the first essential of

due process of law." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (citing *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 634, 638 (1914)).

The Court continued recognizing the importance of fair notice during World War II. It explained that "[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition." *Screws v. United States*, 325 U.S. 91, 103-04 (1945) (plurality). The next decade, the Court reiterated that a statute that fails to give "fair notice that his contemplated conduct is forbidden" violates the Due Process Clause. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

The trend continued at the end of the 20th century. The Court said that "the fair notice requirement" ensures individuals are not placed "at peril of life, liberty or property" because they must "speculate as to" a law's "meaning." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (quotation omitted).

For 150 years the Supreme Court has repeatedly returned to the idea of fair notice. Each time, the Court has explained why this fair-notice requirement is critical to due process of law. But in defiance of this

history, the District Court's order divorced due process from whether the DEA's threats were agency action. This it could not do.

B. The Declaratory Judgment Act Protects Due-Process Rights By Permitting Parties To Know Their Legal Obligations.

The Declaratory Judgment Act "provide[s] a means to grant litigants judicial relief from legal uncertainty in situations that ha[ve] not developed sufficiently to authorize traditional coercive relief." *Tex. Emp'rs Ins. Ass'n v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988) (*en banc*); *see Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167-68 (7th Cir. 1969) ("primary purpose of the [Declaratory Judgment] Act is to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued" (quotation omitted)). It therefore "offers" parties the ability "to avoid inequities which might result from a delay in assessing the parties' legal obligations." *Venator Grp. Specialty, Inc. v. Matthew/Muniot Fam., LLC.*, 322 F.3d 835, 839-40 (5th Cir. 2003) (citing 28 U.S.C. § 2201).

The Supreme Court's decision in *Califano v. Sanders*, 430 U.S. 99 (1977) shows the interaction between the Declaratory Judgment Act and

APA. There, a social-security claimant sought review of the Secretary's decision not to reopen his claim. The Court held that the district court lacked jurisdiction over the case because the APA does not independently give courts statutory jurisdiction to hear cases. *Id.* at 104-07. The Court reasoned that Congress's amendment of 28 U.S.C. § 1331(a) in the 1970's evidenced Congress's intent not to confer jurisdiction through the APA. *Califano*, 430 U.S. at 105-06.

If the APA does not give district courts jurisdiction to review agency action, how can a social-security claimant seek judicial review of an agency decision? The answer, the Court said, was another statute—42 U.S.C. § 405(g). *See Califano*, 430 U.S. at 107-09. But the Court also recognized that parties can bring APA claims absent a grant of specific statutory authority like Section 405(g).

In fact, the APA itself singles out one statute as granting district courts authority to hear challenges to agency action. It provides that APA proceedings "includ[e] actions for declaratory judgments." *Califano*, 430 U.S. at 101 n.1 (quoting 5 U.S.C. § 703). This means that the Declaratory Judgment Act enlarges remedies when parties challenge agency conduct.

Without the Declaratory Judgment Act, the government could threaten to violate the APA while knowing that its threats were unreviewable by a federal court. It could make arbitrary and capricious decisions that jeopardize due-process rights. For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives could tell a Federal Firearms Licensee that it cannot sell guns to redheads; if the FFL sells to a redhead, the ATF will revoke the license. What pre-enforcement recourse does the FFL have? The Declaratory Judgment Act permits it to seek review in federal court.

The ability to sue protects due-process rights. It ensures that a federal court can review executive action to see if the action complies with applicable law and regulations. The Declaratory Judgment Act therefore is critical to protecting due process of law. But under the District Court's order, the Declaratory Judgment Act cannot protect parties' due-process right to seek review of an agency's conduct.

C. Forcing Walmart To Guess At The Meaning Of Federal Law Infringes On Its Due-Process Rights.

The District Court held that Walmart could not sue under the Declaratory Judgment Act to clarify its obligations under the CSA. That means that Walmart still does not know its obligations under the CSA.

And others in the pharmacy industry are similarly left in the dark about what they must do to comply with federal law. This lack of clarity eliminates "the first essential of due process of law." *Gen. Const. Co.*, 269 U.S. at 391.

The DEA knows that it botched the response to the opioid crisis. So how to save face? The answer is a game of misdirection. Rather than take responsibility for its missteps, the DEA is trying to shift responsibility to pharmacists who fill prescriptions issued by state-licensed and DEA-registered doctors. It has accomplished this goal by creating new requirements, for pharmacies and pharmacists, out of thin air. These obligations effectively require pharmacists and pharmacies to second-guess every opioid prescription.

For example, the DEA instructed Walmart that it could not fill opioid prescriptions without written documentation of how it resolved any red flags. That documentation requires pharmacists to decide whether the doctor wrote the prescription in the ordinary course of medical treatment. Yet under controlling regulations, pharmacists can decline to fill a prescription only if they "know[]" that it was written

outside the ordinary course of medical treatment. *See* 21 C.F.R. § 1306.04(a). Mere suspicion is not enough.

This DEA-created requirement also poses serious risks to Walmart and other pharmacies. State regulatory agencies have told Walmart that neither it nor its pharmacists may second guess the prescribing doctors' decisions. Doctors and patients have also objected to pharmacists second-guessing doctors' decisions because it interferes with the doctor-patient relationship.

Of course, the DEA knew not to implement its instructions through notice-and-comment rulemaking or other final agency action. Formally requiring Walmart to comply with its made-up requirements would ensure defeat. Walmart could then challenge the final agency action under the APA. Because the DEA's instructions conflict with the CSA and its regulations, a court would likely set aside the DEA's instructions.

But the District Court held that the DEA could accomplish its goal of forcing Walmart's hand by telling it to comply with the made-up requirements or face significant financial penalties. "[T]here is no reason to exalt form over substance." *Seth B. ex rel. Donald B. v. Orleans Par.*

Sch. Bd., 810 F.3d 961, 970 (5th Cir. 2016). The District Court's elevation of form over substance created serious due-process problems.

Walmart must decide whether to follow the DEA's instructions on filling prescriptions. If it does, it could face enforcement action by state regulators or suits by doctors and patients. In those proceedings, Walmart cannot raise a federal-preemption defense. A state court would roundly reject that argument because the CSA and its implementing regulations do not support the DEA's guidance. If, however, a federal court allowed this pre-enforcement challenge and ruled in the DEA's favor, Walmart would have a viable federal-preemption defense. But if the court held that Walmart need not follow the DEA's guidance, then Walmart would know to keep operating under the CSA's plain language.

Either way, Walmart would know its legal obligations. This ability "to know with certainty" what is legal and illegal is at the core of the Due Process Clause. *See Reese*, 92 U.S. at 220. The failure to give Walmart such certainty falls short of the Fifth Amendment's requirements. The District Court should have weighed these due-process concerns when applying this Court's case law about whether the DEA took agency action sufficient to waive sovereign immunity. Given these due-process

problems, the District Court erred by dismissing the action for want of jurisdiction.

III. THE PANEL SHOULD REQUEST *EN BANC* REVIEW IF WALMART CANNOT PREVAIL UNDER FIFTH CIRCUIT PRECEDENT.

As described above, the panel can reverse the District Court's order and remand for merits adjudication under Fifth Circuit precedent. But if the panel disagrees and thinks that the District Court correctly applied this Court's precedent, it should request *en banc* review. This would allow the Court to join its sister circuits' interpretation of the APA's sovereign-immunity waiver.

This Court has acknowledged that "at least two" circuits think the APA waives sovereign immunity "for all actions seeking equitable, nonmonetary relief against an agency, even if there has been no 'agency action' within the meaning of the APA." *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017) (citations omitted). *Doe*, however, understated the weight of authority holding that Section 702 waives the United States's sovereign immunity to challenges like Walmart's. At least eight circuits have so held.

The second sentence of Section 702 provides that actions not seeking "money damages and stating a claim that an agency . . . acted or

failed to act . . . shall not be dismissed" because "it is against the United States." 5 U.S.C. § 702. The Ninth Circuit has explained that this language supports a broad waiver of sovereign immunity. *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017).

The Ninth Circuit's decision is correct. The sentence does not include the term "agency action." This Court's precedent, however, reads that term into the statute. Those decisions require agency action to effectuate Section 702's sovereign-immunity waiver. It is normally wrong to "read into statutes words that aren't there." *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020); *see Env't Integrity Project v. EPA*, 969 F.3d 529, 541 (5th Cir. 2020) (recognizing courts should apply the "*casus omissus pro omisso habendus est* canon" (citations omitted)).

True, the first sentence of Section 702 mentions agency action. But as the Seventh Circuit has explained, "[t]he first and second sentences of § 702 play quite different roles." *Michigan v. U.S. Army Corps of Eng'rs.*, 667 F.3d 765, 774 (7th Cir. 2011) (quotation omitted). Whereas the first sentence "supplies a right to seek review of agency action," the second sentence "provides a waiver of sovereign immunity." *Id.* (citation

omitted). This Court's precedent is thus anti-textual and the Court should abandon it.

Because Section 702's language is clear, the analysis should end there. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted). But looking beyond the APA's text confirms that it waives sovereign immunity for suits seeking declaratory relief.

The Federal Circuit took a deep dive into the APA's history. Originally, it "provided a cause of action for review of certain actions of federal agencies and officials." *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011). But it did not "waive sovereign immunity for either causes of action" like those "brought under other laws, such as a particular statute or the Constitution." *Id.* So even some actions that the APA authorized were dismissed for want of jurisdiction. *Id.*

Congress did not like this outcome. So in 1976 it amended the APA. Among the amendments was the second sentence of Section 702. *Delano Farms*, 655 F.3d at 1344. This addition sought to allow declaratory-judgment actions—like the one that Walmart filed here. *See id.* at 1344-45 (citing S. Rep. No. 94-996, 4 (1976)). In other words, the 1976 APA

amendments "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity." *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) (citations omitted).

"When Congress acts to amend a statute," courts "presume it intends its amendment to have real and substantial effect." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004)); *see Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 169 (5th Cir. 2000) (citation omitted). Yet this Court's interpretation of Section 702's second sentence fails to give effect to the 1976 APA amendments. Rather, the construction harkens back to the APA's original language which did not waive sovereign immunity for claims like those Walmart asserts here.

The APA's legislative history also supports finding that agency action is unnecessary to trigger Section 702's sovereign-immunity waiver. *See Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013). As the Third Circuit explained, the legislative history shows that the 1976 APA amendment removed "technical barriers to the consideration on the merits of citizens' complaints against the Federal

Government, its agencies, or employees." *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 397 (3d Cir. 2012) (quoting H.R. Rep. No. 94-1656, 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123).

The First Circuit also explained how the legislative history supports the majority rule. The 1976 APA amendment "strengthen[ed]" the Government's "accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus." *Massachusetts ex rel. Dep't of Pub. Welfare v. Departmental Grant Appeals Bd. of U.S. Dep't of Health & Hum. Servs.*, 815 F.2d 778, 782 (1st Cir. 1987) (quoting H.R. Rep. No. 94-1656 at 5, 1976 U.S.C.C.A.N. at 6125 (emphasis removed)).

True, this Court rarely resorts to legislative history. It prefers to rely on a statute's plain language and statutory history. As described above, both the plain language and statutory history contradict Fifth Circuit precedent. But sometimes the Court consults legislative history to confirm a statute's meaning. *See Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985). That legislative history also supports the

other circuits' interpretation of Section 702 and conflicts with this Court's precedent.

One circuit thinks that this Court's construction of the APA is so far afield from the APA's text and history that little analysis is necessary to reject that construction. *See Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (citations omitted). This flippant analysis is unsurprising because the Fifth Circuit's decision stands out like a sore thumb from the well-reasoned opinions of other courts of appeals.

* * *

This Court is "always chary to create a circuit split." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 358 (5th Cir. 2021) (quoting *Alfaro v. Comm'r*, 349 F.3d 225, 229 (5th Cir. 2003)). It should be just as wary of maintaining a circuit split when every other circuit to consider the issue has gone the other way. *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 289 (5th Cir. 2020) (*en banc*) (overturning prior precedent to "align with sister circuits"). So if the panel does not grant Walmart relief under existing Fifth Circuit precedent, it should request that the case go *en banc* to align the Fifth Circuit with the other circuits.

CONCLUSION

This Court should reverse the District Court's order and remand for prompt merits adjudication.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,706 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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May 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021 I served all counsel of record via the Court's CM/ECF system except for Kate Talmor who was served via email.

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