

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak
 Andrew Ferguson

**IN THE MATTER OF INSULIN:
CAREMARK RX, ET AL.**

**ORAL ARGUMENT REQUESTED
Docket No. 9437**

**RESPONDENTS EXPRESS SCRIPTS, INC., EVERNORTH HEALTH, INC., MEDCO
HEALTH SERVICES, INC., AND ASCENT HEALTH SERVICES LLC’S MOTION TO
DISQUALIFY COMMISSIONER ALVARO M. BEDOYA**

“An administrative hearing . . . must be attended . . . with the [] appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.” *Texaco, Inc. v. Fed. Trade Comm’n*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965). Here, the basic requirements of due process require Commissioner Bedoya’s disqualification because: (1) he has made repeated (incorrect) prejudgments about Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC’s (“ESI Respondents”)¹ conduct reflecting his actual bias against ESI Respondents with respect to issues in dispute in this action; and (2) his statements and appearances at anti-PBM events violate his legal and ethical duties to

¹ “ESI Respondents” is used for ease of reference and is not an admission or reflection of the corporate realities, functions, or forms of these separate entities.

avoid an appearance of bias. “[A] disinterested observer [would] conclude that [Commissioner Bedoya] has in some measure” prejudged this case, *Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm’n*, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation marks omitted).

Due process requires his disqualification.

I. Commissioner Bedoya’s Bias and Prejudgment Is Shown Through His Public Statements

Commissioner Bedoya has prejudged the facts and law relating to this action. He has repeatedly and wrongly asserted that PBMs “control” drug pricing and patient access to drugs, including insulin. These assertions will be contested in this litigation and ESI Respondents, if given the fair opportunity, will prove that Commissioner Bedoya’s pre-determined conclusions about PBMs are false and that the evidence shows the opposite. But no amount of evidence will suffice in the absence of an impartial adjudicator. Examples of Commissioner Bedoya’s bias that bear directly on the Complaint, include the following:

- In a June 7, 2022, statement, Commissioner Bedoya incorrectly claimed that “nearly everyone is affected by PBM business practices” and “pharmacy middlemen control what medicine [most Americans] get [], and how much [they] pay for it.”²
- In a June 16, 2022, statement, Commissioner Bedoya claimed PBMs are “middlemen who control our access to insulin and, “in the insulin market,” “[i]t appears . . . companies compete to raise [insulin prices].”³
- On September 22, 2022, Commissioner Bedoya stated that “when most people fill a prescription, just one of three [PBMs] mediates what medicine they get, what they pay

² Alvaro Bedoya, Commissioner, Fed. Trade Comm’n, Statement Regarding 6(b) Order to Study Contracting Practices of Pharmacy Benefit Managers (June 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya_Statement_re_PBM_Study_%28FINAL%29_6-7-2022.pdf.

³ Alvaro Bedoya, Commissioner, Fed. Trade Comm’n, Statement Regarding Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-alvaro-m-bedoya-regarding-commissions-policy-statement-rebates-fees-exchange>.

for it, and how they will get it,” all with the goal of “mak[ing] money,” and concluded that “[w]e all know that that’s not what fair markets look like.”⁴

- On June 7, 2023, Commissioner Bedoya stated that “there’s been a lot of assumptions about the economic benefits of rebates and the ostensible and alleged good they do” but they create a “donut hole” that “people who are uninsured” or who “get denied [coverage]” “fall in[to],” which requires them to pay “full freight” on “exorbitantly expensive drug[s] that they need to survive.”⁵
- On October 26, 2023, Commissioner Bedoya stated “PBM[s] serve[] as something of a gatekeeper to [] population[s] of insured [patients],” and it “seem[ed] pretty clear” to him that “the aggressive use of rebates” “drive[s] up the list price” that patients without insurance have to “pay[] at the pharmacy counter.”⁶

These statements by Commissioner Bedoya are factually incorrect and address the contested issues of fact and law that will be litigated in this matter.⁷ Commissioner Bedoya’s stated conclusion from 2022 that PBMs’ conduct reflects a market “[w]e all know” is “not what [a] fair market[] look[s] like” relates to all three counts in the Complaint, each of which alleges that ESI Respondents’ conduct is either an unfair method of competition or an unfair act or practice. More specifically, the allegations in the Complaint mirror a number of Commissioner Bedoya’s statements: that ESI Respondents use the “threat of exclusion” from formularies in a way that has supposedly led to “artificially inflated list prices” that increase costs for consumers, Compl. ¶¶ 5-6.; that PBMs “act as middlemen” that “wield significant influence over which drugs

⁴ Alvaro Bedoya, Commissioner, Fed. Trade Comm’n, Remarks on “Returning to Fairness” to the Midwest Forum on Fair Markets (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

⁵ The Capitol Forum, Transcript of Interview with FTC Commissioner Alvaro Bedoya (June 15, 2023), <https://thecapitolforum.com/resources/transcript-of-interview-with-ftc-commissioner-alvaro-bedoya/>.

⁶ The Capitol Forum, *Fireside Chat with Commissioner Alvaro Bedoya* (Oct. 26, 2023), <https://library.thecapitolforum.com/docs/768k6m9a1tv1>.

⁷ Commissioner Holyoak called Commissioner Bedoya and Chair Khan’s claims regarding PBM overcharges “attempts to mislead the public into thinking that the [FTC Interim PBM] Report draws any conclusion about the prices patients pay for healthcare,” regardless of what the evidence actually shows. Commissioner Holyoak further criticized this FTC’s failure to meet the Commission’s historically “rigorous” standards and exacerbation of “ideological schisms.” Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of the Pharmacy Benefit Managers Report, No. P221200 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-Benefit-Managers-Report.pdf.

patients can access, and at what price[s]” by “leverag[ing]” their lists of preferred pharmaceuticals to secure rebates off list price for their clients, thereby “forc[ing]” [uncovered] consumers to “pay” “artificially inflated,” “higher out-of-pocket costs,” and thus “shift[ing] the cost . . . onto certain insulin patients,” Compl. ¶¶ 4, 5, 30, 38, 100, 113, 200, 259, 269; and that PBMs use negotiating leverage to raise list prices and rebates to increase their own profits rather than to lower prices, Compl. ¶¶ 138-39, 143-44, 177. Each of these allegations will be contested by the ESI Respondents in this litigation and each echoes Commissioner Bedoya’s conclusory statements.

Commissioner Bedoya’s statements demonstrate that he has already made up his mind regarding key questions at issue in this matter; any adjudicative process that involves him will lack the “very appearance of complete fairness” due process requires

II. Disqualification of Commissioner Bedoya is Required Because He Has Impermissibly Prejudged the Facts of This Case

Courts vacate FTC orders when a commissioner’s public statements would lead “a disinterested observer” to conclude the commissioner “ha[d] in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella*, 425 F.2d at 591 (internal citation omitted); *see also Am. Cyanamid Co. v. Fed. Trade Comm’n.*, 363 F.2d 757 (6th Cir. 1966); *Texaco*, 336 F.2d 754. Here, a disinterested observer of Commissioner Bedoya’s multiple statements that PBMs control patient drug access and prices could come to no other conclusion than that he has prejudged the facts and the law as to PBMs.

In *Texaco*, the court vacated an FTC order where then-Chair Paul Rand Dixon gave a speech evidencing his bias and prejudgment and continued to participate in a law enforcement matter related to the subject of his speech. Chair Dixon, speaking before a group of petroleum *retailers* pointed the finger at petroleum *suppliers*, against whom the Commission had a pending

administrative enforcement action. 336 F.2d at 759. Chair Dixon told the retailers, who would benefit from a law enforcement action against the suppliers, “[y]our problems are many, and many of them are the problems of the [FTC] too We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.” *Id.* The court held that “a disinterested reader of Chairman Dixon’s speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.” *Id.* (internal quotations omitted).

Chair Dixon again failed to abide by the requirements of due process in *American Cyanamid*, where the court vacated an FTC order because Dixon had overseen the publication of a report evidencing his bias and prejudgment.⁸ 363 F.2d at 765. The court observed that the report included conclusions that the respondents had “consummate[ed] . . . arrangements” that had “controlled [the] marketing of [the products at issue],” thus “demonstrat[ing] to [the court] that [Dixon] then had formed the opinion that [] prices quoted by petitioners were artificially high” and held that Chair Dixon had already endorsed “conclusions as to facts.” *Id.* at 765-66. “Our system of law has always endeavored to prevent even the probability of unfairness,” and “[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify.” *Id.* at 763, 767; *In re Boston’s Children First*, 244 F.3d 164, 167 (1st Cir. 2001) (whenever the question of “disqualification is a close one, the balance tips in favor of recusal”).

In *Cinderella*, the court again vacated an FTC order because Chair Dixon’s statements gave the appearance of bias. The FTC issued an order holding that a charm school’s advertisements were deceptive because they claimed graduates could become flight attendants.

⁸ As Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, Chair Dixon previously investigated “the same parties” and “many of the same facts and issues” later investigated by the FTC under his direction. 363 F.2d at 763.

That order was vacated on appeal and the court held that Chair Dixon violated due process when he gave a biased speech to the National Newspaper Association, in which he asked: “What standards are maintained on [a newspaper’s] advertising acceptance? What would be the attitude toward accepting good money for . . . [ads claiming one could] becom[e] an airline’s hostess by attending a charm school?” *Id.* at 589-92. The court held that an FTC commissioner may not “make speeches which give the appearance that [a] case has been prejudged” because doing so “may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.” *Id.* at 590.

These three court decisions vacated or set aside FTC orders, holding that Chair Dixon’s bias denied the petitioners due process, and each involved a *single* speech or a *single* writing. Commissioner Bedoya’s conduct is far worse. He has repeatedly and inaccurately asserted that PBMs “control” the drugs patients can access and what they pay for them while blaming PBMs for inflating insulin prices. In *Cinderella*, Chair Dixon made only an oblique reference to facts in dispute in an FTC enforcement matter. The court nonetheless held that it was “reasonable,” given the “timing” of the speech, to conclude that a “disinterested observer would connect [Chair Dixon’s] remarks . . . inextricably with [the pending] case.” *See Cinderella*, 425 F.2d at 592, n.10. Commissioner Bedoya has been far more direct in his remarks, explicitly accusing PBMs of controlling drugs prices and patient access to drugs while multiple investigations of PBMs were ongoing at the FTC. These statements leave any reasonable person with the impression that Commissioner Bedoya has already “adjudged the facts as well as the law” regarding the allegations and has decided claims in this case. *Cinderella*, 425 F.2d at 591 (internal citation omitted).

III. Disqualification of Commissioner Bedoya is Required by the Ethical Standards that Government Law Enforcement Officials and Judicial Officials Must Uphold

Commissioner Bedoya’s continued participation in this matter also violates his ethical duty of impartiality and the FTC’s own ethics guidelines. Federal ethics rules require that all federal officials must “avoid an appearance of loss of impartiality in the performance of . . . official duties,” and an official’s “political . . . association[s] . . . may raise an appearance question” that requires recusal.⁹ The FTC’s own ethics orientation advises personnel to “avoid any actions creating the appearance that they are violating the law or ethical standards” and requires them to “act impartially and not [to] give preferential treatment to any private organization or individual.”¹⁰ An adjudicator’s attendance at even a single event or conference that is “predominantly” in favor of one side of a dispute requires disqualification. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992). Recognizing this ethical obligation, a prior FTC Commissioner recused herself because her participation as an adjudicator “would likely create an undue distraction from the important issues raised” and “would not serve the public interest.”¹¹

Commissioner Bedoya’s attendance at multiple trade group events made up of parties aligned against PBMs precisely illustrates the conduct that warrants recusal under the law as well as under the federal ethics rules and the FTC’s own ethics guidance. For example, on April 27, 2023, Commissioner Bedoya headlined a lobbying convention held by the National Community

⁹ 5 C.F.R. § 2635.501(a); Mem. to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2 (Apr. 26, 1999).

¹⁰ Ethics Orientation for New FTC Employees, at 10-11 (rev. June 2019), https://www.ftc.gov/system/files/ftc_gov/pdf/UD-ieo-for-new-ftc-employees.pdf.

¹¹ *In the Matter of LabMD, Inc.*, Docket No. 9357, Statement of Commissioner Julie Brill (Dec. 14, 2013), https://www.ftc.gov/system/files/documents/public_statements/568831/d09357_statement_of_commissioner_brill.pdf.

Pharmacists Association (“NCPA”), an anti-PBM lobbyist organization.¹² On June 30, 2023, Commissioner Bedoya met with independent pharmacy owners during another event organized by the NCPA.¹³ (Exhibit A).

If an Article III judge engaged in similar conduct, recusal would be required. For judges, “[a]n insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of fair adjudication.” *Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016). The Code of Conduct for United States Judges¹⁴ requires recusal of an Article III judge who appears incapable of impartiality: “[a] judge should avoid impropriety and the appearance of impropriety in all activities” and “[a]n appearance of impropriety occurs when reasonable minds . . . would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.”¹⁵ Commissioner Bedoya should face a no less stringent standard than that applied to a federal judge when he sits as an administrative adjudicator given his authority to make findings of fact and conclusions of law. Based on the conduct described above, Commissioner Bedoya has clearly failed to adhere to analogous standards of judicial ethics and impartiality.

IV. CONCLUSION

ESI Respondents respectfully request that Commissioner Bedoya be disqualified from participating in the Commission’s enforcement action against ESI Respondents.

¹² NCPA, *Comer, Bedoya Speaking at NCPA 2023 Congressional Pharmacy Fly-In* (March 23, 2023), <https://ncpa.org/newsroom/news-releases/2023/03/23/comer-bedoya-speaking-ncpa-2023-congressional-pharmacy-fly>.

¹³ NCPA, *Bedoya Meets With Independent Pharmacy Owners on PBM Issues* (June 30, 2023), <https://ncpa.org/newsroom/news-releases/2023/06/30/bedoya-meets-independent-pharmacy-owners-pbm-issues>.

¹⁴ U.S. Courts, *Guide to Judiciary Policy – Vol. 2: Ethics and Judicial Conduct*, Ch. 2: Code of Conduct for U.S. Judges (rev. March 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

¹⁵ *Id.* at 4.

Dated: October 8, 2024

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Dated: October 8, 2024

Respectfully submitted,

RULE GARZA HOWLEY LLP

By: /s/ Justin T. Heipp
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EXHIBIT A

 **Eric's Rx Shoppe**
June 29, 2023 · 🌐

We had the honor today to host FTC Commissioner Alvaro Bedoya at our pharmacy. The FTC has a 6(b) study ongoing investigating PBMs. Many other community pharmacy owners were present and shared their stories from across the entire State. It was a great event, and we look forward to when this study is completed. Thank you to [National Community Pharmacists Association](#) and [Pennsylvania Pharmacists Association / PPCN](#) for their support in helping to put this event together!



Commissioner Bedoya attends NCPA-organized event at Eric’s RX Shoppe in Horsham, PA, where he participated in a roundtable on “PBM contracting practices” with independent pharmacy owners, staff from both the Pennsylvania Pharmacists Association and Philadelphia Association of Retail Druggists, and NCPA representatives.

**UNITED STATES OF AMERICA
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**IN THE MATTER OF INSULIN:
CAREMARK RX, ET AL.**

**ORAL ARGUMENT REQUESTED
Docket No. 9437**

[PROPOSED] ORDER DISQUALIFYING COMMISSIONER BEDOYA

Upon Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC's Motion to Disqualify Commissioner Alvaro M. Bedoya, having been fully briefed and upon review of all filings, it is hereby:

ORDERED that the petition is **GRANTED**; and it is further

ORDERED that pursuant to Rule 4.17 of the Commission's Rules of Practice, 16 C.F.R. § 4.17, Commissioner Bedoya is hereby **DISQUALIFIED** from participating the above-captioned matter.

Dated ____, 2024.

By the Commission.

April J. Tabor, Secretary

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2024, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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