UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **Caremark Rx, LLC;** **Zinc Health Services, LLC;** **Express Scripts, Inc.;** **Evernorth Health, Inc.;** **Medco Health Services, Inc.;** **Ascent Health Services LLC;** **OptumRx, Inc.;** **OptumRx Holdings, LLC;** and **Emisar Pharma Services LLC.**	**DOCKET NO. 9437**

ORDER DENYING MOTIONS TO DISQUALIFY CHAIR KHAN

On October 8, 2024, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., Ascent Health Services LLC (collectively "ESI Respondents"), Caremark Rx, LLC ("Caremark") and Zinc Health Services, LLC ("Zinc"), Optum Rx, Inc., OptumRx Holdings, LLC (together, "Optum Rx"), and Emisar Pharma Services LLC ("Emisar") moved to

disqualify Chair Khan from participating in this proceeding.[1] For the reasons explained below, we deny the Motions.[2]

I. The PBM Study

On June 7, 2022, the Commission unanimously voted to launch under Section 6(b) of the Federal Trade Commission Act ("FTC Act") a study concerning prescription drug middlemen. The study sought to examine the role and impact of pharmacy benefit managers ("PBMs") in the U.S. pharmaceutical system and to shed light on several practices that had drawn scrutiny in recent years.[3] As part of this inquiry, the Federal Trade Commission ("FTC" or "Commission") required the six largest PBMs, including the PBM Respondents, to provide information and records regarding their business practices. All of the then-Commissioners issued statements in support of the study.

On January 22, 2024, Senator Charles E. Grassley and thirteen other Senators sent Chair Khan a letter urging that the Commission expedite its Section 6(b) study or issue an interim progress report.[4] Given congressional interest in the timely release of study results, and staff's concerns about the timing of responses from several recipients of the Section 6(b) orders, the Commission authorized the release of an Interim Staff Report detailing staff's initial findings on July 9, 2024.[5] The Interim Staff Report stated that documents and data obtained to date, as well as publicly available information, supported the following preliminary findings: (1) The market

---

[1] *See* Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC's Motion to Disqualify Chair Lina M. Khan ("ESI Motion"); Respondents Caremark Rx, LLC and Zinc Health Services, LLC's Motion for Disqualification ("Caremark/Zinc Motion"); Optum Rx, Inc.'s; OptumRx Holdings, LLC's; and Emisar Pharma Services LLC's Motion for Disqualification ("Optum/Emisar Motion"). For ease of reference, we will refer to these parties collectively as "Respondents" and their motions collectively as "Motions."

[2] Respondents' parallel requests to disqualify Commissioners Bedoya and Slaughter are addressed in separate orders. Commissioners Holyoak and Ferguson are recused from this matter.

Respondents Caremark and Zinc requested leave to exceed the 2,500-word limit in Commission Rule 3.22(c). *See* Caremark/Zinc Motion 3 n.5. Respondents' Motion may exceed 2,500 words. Respondents ESI, Caremark, and Zinc also requested oral argument regarding their Motions. *See* ESI Motion 1; Caremark/Zinc Motion 1. The Commission finds that oral argument is not needed for appropriate consideration of the Motions.

[3] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.

[4] Letter from Sen. Grassley et al. to Chair Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf.

[5] Fed. Trade Comm'n, Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies, Interim Staff Report (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.

.

for pharmacy benefit management services has become highly concentrated, and the largest PBMs are now also vertically integrated with the nation's largest health insurers and specialty and retail pharmacies; (2) As a result of this high degree of consolidation and vertical integration, the leading PBMs can now exercise significant power over Americans' access to drugs and the prices they pay; (3) Vertically integrated PBMs may have the ability and incentive to prefer their own affiliated businesses, which in turn can disadvantage unaffiliated pharmacies and increase prescription drug costs; (4) Evidence suggests that increased concentration may give the leading PBMs the leverage to enter into complex and opaque contractual relationships that may disadvantage smaller, unaffiliated pharmacies and the patients they serve; and (5) PBMs and brand drug manufacturers sometimes negotiate prescription drug rebates that are expressly conditioned on limiting access to potentially lower cost generic alternatives.[6]

II. The Complaint

On September 20, 2024, the Commission issued an administrative complaint that charged the three largest PBMs—Caremark Rx, Express Scripts, and Optum Rx—and their affiliated group purchasing organizations ("GPOs") with allegedly engaging in anticompetitive and unfair rebating practices that, *inter alia*, artificially inflated the list price of insulin drugs, impaired patients' access to lower list price insulin products, and shifted the cost of high insulin list prices from healthy to chronically-ill or otherwise vulnerable patients. *See, e.g.*, Compl. ¶¶ 9–10, 92–95, 113, 119–25, 185–92, 214–33.

According to the Complaint, PBMs administer prescription benefits on behalf of insurance companies, unions, and various types of employers, sometimes collectively referred to as "payers." *Id.* ¶ 28. PBMs assertedly perform several roles for payers, including, *inter alia*, developing drug formularies,[7] creating and managing networks of pharmacies, processing prescription drug claims, and negotiating with pharmaceutical manufacturers for rebates on behalf of their clients. *Id.*[8]

The Complaint alleges that, beginning in approximately 2012, the PBM Respondents began to misuse their influence over drug formularies to demand higher and higher rebates from insulin manufacturers in return for priority placement on formularies or for including the manufacturer on the formulary at all. *Id.* ¶¶ 9, 100–18, 215. Although intuitively one might assume that higher rebates would reduce prices for patients, the Complaint alleges that the opposite is true in pharmaceutical pricing because of the role of list prices. *Id.* ¶¶ 6, 216–17.

---

[6] *Id.* at 2–4.

[7] A "formulary" is a list of drugs covered by a health plan. Compl. ¶ 32. According to the Complaint, a formulary may have multiple tiers that make drugs on "preferred" tiers cheaper for patients. *Id.* The Complaint alleges that a formulary may be more "open," meaning that it covers nearly all medications, or it may be relatively "closed," meaning that it includes only certain drugs, and excludes others, used to treat a certain condition. *Id.* ¶ 33.

[8] For the function of negotiating rebates, the Complaint alleges that each named PBM Respondent has created and now utilizes the services of a GPO with which the PBM is affiliated. Compl. ¶¶ 42–43.

According to the Complaint, PBMs' strategy of seeking high rebates has influenced insulin manufacturers to dramatically increase their list prices in order to offset the increased rebate payments. *Id.* ¶¶ 119, 216. The Complaint alleges that the higher list prices harm consumers whose out-of-pocket costs are based on the list price (not the net price), including, most especially, uninsured and commercially-insured patients. *Id.* ¶¶ 95, 222.

According to the Complaint, the PBM Respondents also allegedly took steps to exclude lower-cost insulin offerings from their formularies. Beginning allegedly in 2017, in response to public criticism, insulin manufacturers explored ways to reduce insulin list prices, including by launching lower list-price, unbranded versions of their products. *Id.* ¶ 132. According to the Complaint, the PBM Respondents systemically disfavored these products on their formularies in favor of high list price, highly rebated insulin products. *E.g.*, *id.* ¶¶ 144, 148, 218–19. This allegedly had various harmful effects, including preventing the expansion of access to insulin for certain classes of patients and impeding entry of new insulin products. *Id.* ¶¶ 148, 151, 222.

Count I of the Complaint alleges that Respondents' conduct in systematically preferring high list price insulin products, with high rebates and fees, while obscuring actual net cost, is an unfair method of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *Id.* ¶¶ 255–61. Count II alleges that the PBM Respondents' systematic exclusion of low list price insulin products from their most-utilized formularies, in favor of identical high list price insulin products, is an unfair act or practice in violation of Sections 5(a) and (n) of the FTC Act, 15 U.S.C. § 45(a), (n). *Id.* ¶¶ 262–67. Count III alleges that the PBM Respondents have created and implemented a system that shifts the cost of high insulin prices to certain patients, a dynamic of which the PBM Respondents are aware. *Id.* ¶¶ 268–74. Count III further alleges that the PBM Respondents' practices cause and are likely to cause substantial injury to consumers by increasing the price of insulin to certain patients. *Id.* ¶ 271. The Complaint alleges that this conduct is an unfair act or practice in violation of Sections 5(a) and (n) of the FTC Act, 15 U.S.C. § 45(a), (n). *Id.* ¶ 274.

III. The Motions

On October 8, 2024, Respondents filed the instant Motions to disqualify Chair Khan. Respondents allege that she has prejudged their conduct and demonstrated actual and apparent bias in violation of due process. Caremark/Zinc Motion 6–9, 10–13; Optum/Emisar Motion 6–10; ESI Motion 1–6. In addition, the ESI Respondents assert that Chair Khan's continued participation in this proceeding would violate standards of ethics applicable to federal employees and federal judges, respectively.[9]

[9] ESI Motion 6–8 & nn.10 (citing 5 C.F.R. § 2635.501(a) and 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)) & 14 (citing 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).

The Respondents' Motions challenge statements and writings of Chair Khan along with her appearances at certain events and her vote to authorize the release of the Section 6(b) study Interim Staff Report. Respondents assert that Chair Khan has shown prejudgment against the PBMs, or an unacceptable appearance thereof, both before and during the pendency of this proceeding. *See, e.g.*, Caremark/Zinc Motion 9. Respondents further assert that Chair Khan's alleged prejudgment extends both to the proceeding as a whole and to certain issues the resolution of which will affect the adjudication of particular counts of the Complaint. Caremark/Zinc Motion 5, 7–8; Optum/Emisar Motion 4–7; ESI Motion 2–4.

IV. Procedure Governing Requests for Disqualification

Requests for disqualification are governed by Commission Rule 4.17, 16 C.F.R. § 4.17, which provides that a participant in a proceeding may seek to disqualify a Commissioner by motion setting forth with particularity the alleged grounds for disqualification, filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification. *See* 16 C.F.R. § 4.17(b)(1), (2). The motion must be addressed in the first instance by the Commissioner whose disqualification is sought. *See id*. § 4.17(b)(3)(i). If the Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission must determine the motion without the participation of such Commissioner. *See id.* § 4.17(b)(3)(ii). Pursuant to this procedure, Chair Khan declined to recuse herself from participation in the matter.[10] The Commission, without the participation of Chair Khan, and with Commissioners Holyoak and Ferguson recused, now assesses the Motions.

V. Legal and Evidentiary Standards for Disqualification

The disqualification of an administrative official acting in a judicial or quasi-judicial capacity is governed by the requirements of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). An administrative adjudicator must be disqualified if "a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs., Inc. v. FTC* (*Cinderella II*), 425 F.2d 583, 591 (D.C. Cir. 1970) (quotation omitted); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *see also Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022) (dictum). Both unfairness and the appearance of unfairness must be avoided. *See Cinderella II*, 425 F.2d at 591.

Administrative adjudicators are presumed to be unbiased. *See Schweiker*, 456 U.S. at 195. A party seeking disqualification of an agency adjudicator based on a public statement has the burden of overcoming that presumption by showing that the adjudicator "is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotation omitted); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (The contention of bias or prejudgment in an administrative adjudication "must overcome a presumption of honesty and integrity in those serving as adjudicators."); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) ("[O]nly in

[10] Chair Khan's statement ("Khan Statement") is hereby placed on the public record as Attachment A to this Order.

the most extreme of cases would disqualification on [a bias or prejudice] basis be constitutionally required."). The test for disqualification may be stated in terms of whether the adjudicator's mind is "'irrevocably closed' on the issues as they arise in the context of the specific case." *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)); *see also Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (A Commissioner's decision not to recuse himself is set aside "only where he has demonstrably made up his mind about important and specific factual questions and is impervious to contrary evidence." (cleaned up)). A "comment is disqualifying only if it connotes a fixed opinion—'a closed mind on the merits of the case.'" *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976) (en banc) (per curiam) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).[11]

VI. Analysis

Respondents' asserted bases for disqualification may be aggregated into several categories, discussed herein. None provides a basis for disqualification.

a. Statements Describing Complaints from Others

Much of Respondents' alleged evidence of bias or prejudgment consists of statements in which Chair Khan relayed the complaints and concerns of consumers and other stakeholders. Respondents quote excerpts of these statements out of context, often omitting key phrases, to suggest that the complaints voiced by third parties were Chair Khan's personal views. Respondents' selective excerpting is highly misleading. A review of the fuller text, provided in the Khan Statement, shows that the Chair was merely describing concerns that others had raised. *See* Khan Statement 3 (discussing having "received complaints" about PBMs);[12] *id.* at 4 (discussing the "many complaints we have received" and what "others have noted" or "suggested");[13] *id.* at 7 (discussing "concerns" about PBMs that the Commission has heard

[11] Although *Haldeman* discusses the disqualification standard for federal judges, comments that will not disqualify a federal judge would not disqualify an administrative adjudicator. *See infra* Section VI.h.

[12] Remarks of Chair Lina M. Khan Regarding the 6(b) Study on Pharmacy Benefit Managers, at 3 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221200khanstatementrepbms.pdf (partially quoted in Caremark/Zinc Motion 5–6).

[13] Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products, at 2 (June 16, 2022), https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-regarding-policy-statement-rebates-fees-exchange-excluding-lower-cost-drug (partially quoted in Optum/Emisar Motion 6; Caremark/Zinc Motion 7). In those same remarks, Chair Khan noted that the practices some have suggested PBMs and other middlemen may engage in "violate the fundamental bargain at the center of the American prescription drug system, which is that brand drugs are given a period of patent exclusivity that is then followed by free and fair competition from generic or biosimilar alternatives at dramatically lower prices." *Id.* Respondents assert that this also indicates prejudgment, Caremark/Zinc Motion 7; Optum/Emisar Motion 6, but saying that consumers have reported that the parties "may" engage in certain practices that violate a "fundamental bargain" is not the same as saying that the parties do engage in practices that violate the

"from patients and medical professionals");[14] *id.* at 7–8 (noting that the "FTC has been flooded with stories" about PBM tactics and discussing "the stories we hear from patients and healthcare workers");[15] *id.* at 9 (relaying "complaints," "allegation[s]," and "concerns" that the FTC has been hearing about PBMs).[16] Recounting the complaints received by the Commission does not disqualify Chair Khan from presiding over this matter. On the contrary, the Commission is "specifically authorized to make public information acquired by it" and, "acting in the public interest, to alert the public to suspected violations of the law." *FTC v. Cinderella Career & Finishing Schs., Inc.* ("*Cinderella I*"), 404 F.2d 1308, 1314 (D.C. Cir. 1968).

Even more misleading is Respondent Optum Rx's assertion that, during an interview on CBS's *Sunday Morning*, Chair Khan "proudly displayed, in her office, an 'Anti-Monopoly' board game with a graphic depicting 'Optum Rx' on a 'Monopoly' card." Optum/Emisar Motion 5–6. As Chair Khan explains, no such Monopoly card exists. The graphic of playing cards with Optum Rx and other PBMs was added by CBS news in a later part of the report. *See* Khan Statement 9. Optum Rx's insinuation that these playing cards were actually part of the game is false, and it is not grounds for disqualification.[17]

---

law. In any case, as explained below, an adjudicator's expression of views about the types of practices that violate the law does not warrant disqualification.

[14] Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference, at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf (partially quoted in Caremark/Zinc Motion 6).

[15] Remarks by Chair Lina M. Khan at the White House Roundtable on PBMs (Mar. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf (partially quoted in Caremark/Zinc Motion 8; Optum/Emisar Motion 7).

[16] Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), https://www.youtube.com/watch?v=-C99FUnGnJU (partially quoted in ESI Motion 3; Caremark/Zinc Motion 5).

[17] The Optum/Emisar Motion also claims that the Commission's issuance of "a press release demonizing PBMs' 'illegal rebate schemes' as 'bribes'. . . leaves no doubt the Commissioners will find Optum Rx's alleged 'high rebates' are 'unfair' in violation of Section 5." Optum/Emisar Motion 6. But the cited discussion of "bribery" in the press release referred to commercial bribery, a potential violation of Section 2(c) of the Robinson-Patman Act, which is not charged in the Complaint in this case. *See* Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs (June 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes ("Paying or accepting rebates or fees in exchange for excluding lower cost drugs may constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, which prohibits compensating an intermediary to act against the interests of the party it represents in the transaction."). The FTC press office's general discussion of commercial bribery under the Robinson-Patman Act, unconnected to any specific respondent, drug, or charge here, does not indicate prejudgment of the Section 5 claims in the present matter.

b. Statements Explaining Commission Scrutiny of PBM Practices

Respondents identify other statements that they assert require disqualification. They cite Chair Khan's statements, long pre-dating the Complaint, made in connection with the Commission's authorization of the Section 6(b) study, in which she called PBMs "powerful intermediaries" that "[i]n many instances . . . practically determine which medicines are prescribed, which pharmacies patients can use, and the amount patients pay at the pharmacy counter."[18] Respondents also point to similar statements in her remarks at an event hosted by the American Economic Liberties Project and the National Community Pharmacists Association on June 22, 2022,[19] in her testimony at the Senate Oversight hearing for the FTC on September 20, 2022[20] and in a YouTube livestream discussion with Senator Bernie Sanders on April 15, 2024.[21] On May 4, 2023, she discussed the Commission examining the practices of potential gatekeepers in various industries, including, in healthcare, "pharmacy benefit managers that are sitting right in the middle and controlling the types of practices independent pharmacies are facing, the medicines consumers are or have not been able to access."[22] On a number of

[18] Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers, No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf (partially quoted in ESI Motion 2; Caremark/Zinc Motion 3, 8; Optum/Emisar Motion 7).

[19] Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf (quoted in Caremark/Zinc Motion 4).

[20] Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of Antitrust Laws," at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (partially quoted in Caremark/Zinc Motion 9; Optum/Emisar Motion 7).

[21] Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), https://www.youtube.com/watch?v=-C99FUnGnJU (partially quoted in ESI Motion 3).

[22] Economic Liberties, 2023 Anti-Monopoly Summit, at 1:22:41, YouTube (May 4, 2023), https://www.youtube.com/watch?v=_MUdBWApI9k&t=3928s (partially quoted in Caremark/Zinc Motion 3).

occasions, the Chair described PBMs as "powerful" [23] and their practices as "opaque," [24] and she has identified various PBM and GPO practices that the Commission was looking into. [25] These statements do not warrant disqualification of Chair Khan from presiding as an adjudicator in the present administrative matter.

First, the aforementioned statements—highlighting the influential role of PBMs in the American prescription drug system and the allegations or practices the Commission was investigating—do not indicate prejudgment concerning whether PBMs or GPOs have actually violated Section 5 with respect to insulin. Rather, these statements explain why the FTC was using its scarce resources to examine PBMs under its Section 6(b) authority and "shine a light" on this complex industry. *See* Khan Statement 4–6. To the extent the statements express a view on market functioning or economics, they do not require recusal. *See Skelly Oil Co. v. Fed. Power Comm'n*, 375 F.2d 6, 18 (10th Cir. 1967), *rev'd in part on unrelated grounds sub nom. In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) ("[A]dvance views on important economic matters in issue" do not require disqualification.).

Moreover, these statements were not presented as firm conclusions but were typically qualified. Chair Khan stated that PBMs "help" determine or "can" determine pricing and access, or that they "practically" determined these things "in many instances." [26] She also stated that the

---

[23] Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers, No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf (partially quoted in ESI Motion 2; Caremark/Zinc Motion 3); Remarks by Chair Lina M. Khan at the White House Roundtable on PBMs (Mar. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf (partially quoted in Optum/Emisar Motion 2).

[24] Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf; Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of Antitrust Laws," at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[25] Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference, at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf (discussing the Commission investigating GPO and PBM practices) (partially quoted in Caremark/Zinc Motion 6); Institute for Local Self-Reliance, Small Business vs. Monopoly Power, at 35:29, YouTube (Mar. 4, 2024), https://www.youtube.com/watch?v=UOMomXHQlYA (discussing the Commission investigating how PBM practices may be diverting patients to higher cost medicines and branded drugs as opposed to generics and biosimilars) (partially quoted in Caremark/Zinc Motion 5).

[26] Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and

Commission would be "scrutinizing"[27] and "looking at"[28] certain practices or allegations. None of these statements indicate that the Chair had "a closed mind on the merits of the case," *Haldeman*, 559 F.2d at 136 (quotation omitted), and would not fairly assess the evidence in this particular matter, involving this particular market (insulin).

Further, to the extent any of the statements may be characterized as expressions of Chair Khan's views about the role of PBMs, based on her experience with the Commission or complaints received or preliminary investigative findings, that would not disqualify her. As the Supreme Court has explained, "the fact that the Commission had entertained [certain] views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' . . . practices." *Cement Inst.*, 333 U.S. at 701. In any ensuing administrative adjudication, respondents may participate in hearings and "point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they th[ink] kept these practices within the range of legally permissible business activities." *Id.*

By issuing a complaint, the Commission necessarily signals that it has found evidence that could support finding a violation, as a complaint may be issued only if the Commission has "reason to believe" that a respondent violated the law. 15 U.S.C. §45(b). And, it does not offend due process for the Commission to explain why the complaint was filed or to publicize the preliminary considerations that support the filing of charges. *See Cinderella I*, 404 F.2d at 1313; *cf. Withrow*, 421 U.S. at 56–57. Here, the at-issue statements are even further removed, as they discuss not the reasons the Commission issued its Complaint but the reasons it authorized an earlier, broader PBM study. Chair Khan's statements explaining the basis for Commission action provide no basis to disqualify her from the case at hand.

Patients, at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), https://www.youtube.com/watch?v=-C99FUnGnJU; Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of Antitrust Laws," at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf; *see also* Khan Statement 3–6.

[27] Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf; Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf; Institute for Local Self-Reliance, Small Business vs. Monopoly Power, at 35:29, YouTube (Mar. 4, 2024), https://www.youtube.com/watch?v=UOMomXHQlYA; Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), https://www.youtube.com/watch?v=-C99FUnGnJU. *See also* Kham Statement 6–9.

[28] Economic Liberties, 2023 Anti-Monopoly Summit, at 1:20:15, YouTube (May 4, 2023), https://www.youtube.com/watch?v=_MUdBWApI9k&t=3928s. *See also* Khan Statement 6.

c. Statements Expressing Views on Policy or Law

The only alleged evidence of prejudgment post-Complaint is Chair Khan's discussion of vertical integration in healthcare markets in an October 4, 2024 "Heart of Healthcare" podcast interview.[29] Respondents Caremark and Zinc assert that, in that podcast, Chair Khan "continued to publicly malign PMBs," but this assertion is unsupported. Caremark/Zinc Motion 9. Respondents cite Chair Khan's response to a question about her "philosophy" on vertical integration and conglomerates. *See* Caremark/Zinc Motion 9 n.35. Although the interviewer prefaced the question with a comment about PBMs and pharmacies, Chair Khan responded by speaking only generally about the legal principles indicating when vertical mergers may become problematic from an antitrust perspective and about vertically integrated middlemen. Not only did she not mention PBMs in her response, but she cited an unrelated acquisition in a different market. *See* Khan Statement 10–11.

"It is well established that the mere fact that [an adjudicator] holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case." *S. Pac. Commc'ns*, 740 F.2d at 990; *see also Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) ("[R]ecusal is not required where the [adjudicator] has definite views as to the law of a particular case.") (quotation omitted). Adjudicators are not disqualified simply because they have expressed those views. *Cement Inst.*, 333 U.S. at 702–03; *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979) (Adjudicators "are free to decide cases involving policy questions on which they previously have expressed a view."). This includes statements concerning whether certain conduct runs afoul of the antitrust laws and expressions of support for government enforcement. *See Cement Inst.*, 333 U.S. at 702–03 (holding that it is not a violation of procedural due process for a Commissioner "to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law"); *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) ("[A] mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute" is not a basis for disqualification.) (quotation and quotation marks omitted). Moreover, "no basis for disqualification arises from the fact . . . that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue." *Skelly Oil*, 375 F.2d at 18. Chair Khan's observations about how vertical mergers can affect competition do not prevent her from serving as an adjudicator here.[30]

---

[29] *See* Caremark/Zinc Motion 9 (quoting The Heart of Healthcare: Competition and Consolidation in Healthcare, Interview of FTC Chair Lina Khan (Oct. 3, 2024), https://podcasts.apple.com/us/podcast/the-heart-of-healthcare/id1575404727?i=1000671636977).

[30] Respondents also take issue with her reference to "work that we've done recently with regards to pharmacy benefits managers." Caremark/Zinc Motion 9. This general statement about Commission activity does not show a closed mind on the merits of the case.

d. Release of Interim Staff Report on the Section 6(b) Study of PBMs

Respondents Optum Rx and Emisar also allege that disqualification is necessary based on the Interim Staff Report from the Section 6(b) study of PBMs. Optum/Emisar Motion 3–4, 8. They argue that the Commission's release of the interim report, before the conclusion of the study, indicates "unacceptable hostility to PBMs" and a "vendetta." *Id.* at 3–4. They also aver that the Interim Staff Report's preliminary findings, as well as the Commission's decision in July 2023 to withdraw some prior research and reports on PBMs,[31] suggest prejudgment in this case. *Id.* at 8.

Nothing in the Interim Staff Report, or in the Chair's recounting of its preliminary findings,[32] indicates that Chair Khan has prejudged this matter. *Cement Institute* is squarely on point. There, the Commission had issued reports under Section 6(b) condemning the industry-wide use of a basing point pricing system to suppress competition, and individual Commissioners provided congressional testimony along the same lines. 333 U.S. at 700. When the Commission then brought an administrative enforcement action against specific companies for using the same basing point pricing system, a respondent argued that the Commission should be disqualified. The Supreme Court rejected the respondent's argument that the Commission had prejudged the issues and that failure to disqualify would violate due process. The Court held that the fact that the Commission had entertained certain views as the result of its prior ex parte investigation did not mean that the minds of its members were irrevocably closed on the subject of the respondents' practices. *Id.* at 701. Moreover, disqualifying Commissioners based on an industry study "would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act" and would render "experience acquired from their work as commissioners . . . a handicap instead of an advantage." *Id.* at 701–02. Here, too, the Interim Staff Report, which in any case reflected the preliminary findings of *staff*, not the Commission,[33] does not indicate that Chair Khan has a closed mind on the merits and should be precluded from adjudicating this case.

Optum Rx and Emisar suggest that there is something improper about the Commission releasing an *interim* report and cautioning against reliance on some older advocacy. Optum/Emisar Motion 3–4, 8. Authorizing release of an Interim Staff Report before conclusion of the study does not show bias or prejudgment. In January of 2024, a bipartisan group of Senators sent Chair Khan a letter urging her to expedite the study and provide an interim

---

[31] Fed. Trade Comm'n Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf; *see also* Press Release, Fed. Trade Comm'n, FTC Votes to Issue Statement Withdrawing Prior Pharmacy Benefit Manager Advocacy (July 20, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-votes-issue-statement-withdrawing-prior-pharmacy-benefit-manager-advocacy.

[32] Press Release, Fed. Trade Comm'n, FTC Releases Interim Staff Report on Prescription Drug Middlemen (July 9, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen.

[33] *See* Khan Statement 10 & n.33.

progress report.[34] The study had been delayed by the slow pace of document and data production by the companies in response to the Section 6(b) compulsory orders.[35] Notwithstanding those delays, the Commission had enough information to provide the public with a material update on the study, and therefore authorized release of the Interim Staff Report.

Nor is any bias or prejudgment evidenced by the Commission's statement cautioning against reliance on certain earlier advocacy statements and reports that no longer reflected market realities. The Commission issued its statement of caution in light of the ongoing Section 6(b) study and significant changes in the PBM industry over the prior two decades, including increased vertical integration and horizontal concentration; the growth of PBM rebates, list prices, and certain types of fees; and the expiration of prior FTC consent orders.[36] The Commission's statement contains no opinions or conclusions about insulin or the charges against Respondents, and it does not indicate that Chair Khan's mind is irrevocably closed as to the merits of the case.

e. Publication as a Law Student

Respondents additionally point to an article, entitled *How to Reboot the FTC*, that Chair Khan wrote as a law student and intern at a nonprofit advocacy organization years ago. *See* ESI Motion 2; Caremark/Zinc Motion 3 n.6; Khan Statement 11–12. Respondents assert that prejudgment is demonstrated by the article's statement that "PBMs joined to pharmacies tend to steer plan members away from independent entities and to their own affiliates, specialty pharmacies in particular."[37] The article further stated that "[t]he conflict of interest can also sap PBMs of the incentive to bargain for lower reimbursement rates and keep drug prices high."[38] These statements express qualified views regarding tendencies and what "can" occur. They do not address PBMs' rebating practices or conduct with respect to insulin, and they do not indicate that Chair Khan has "demonstrably made up [her] mind about important and specific factual questions" in this case and is "impervious to contrary evidence." *Metro. Council of NAACP Branches*, 46 F.3d at 1165 (quotation omitted).

"In each new case the [adjudicator] confronts a new factual context, new evidence, and new efforts at persuasion." *S. Pac. Commc'ns*, 740 F.2d at 991. As long as the adjudicator is capable of refining her views and "maintaining a completely open mind to decide the facts and apply the applicable law to the facts, personal views on law and policy do not disqualify [her]

---

[34] Letter from Sen. Grassley et al. to Chair Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf.

[35] Letter from Chair Khan to Sen. Grassley, at 2 (Feb. 13, 2024), https://www.grassley.senate.gov/imo/media/doc/ftc_to_grassley_-_pbm_6b_study.pdf.

[36] Statement Concerning Reliance on Prior Advocacy, *supra* note 31, at 2–3.

[37] Lina Khan, *How to Reboot the FTC*, Politico (April 13, 2016), https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090/; Khan Statement 12.

[38] *Id.*

from hearing the case." *Id.* Regardless of the views Chair Khan expressed as a law student, "she remain[s] free, both in theory and in reality, to change her mind upon consideration of the suit given her new role and other factors." *FTC v. Facebook, Inc*., 581 F. Supp. 3d 34, 63 (D.D.C. 2022) (quoting *Ass'n of Nat'l Advertisers*, 627 F.2d at 1172) (quotation marks and brackets omitted). Chair Khan's qualified comments in an article that did not concern insulin rebates, written before she was even an attorney, let alone a Commissioner, do not disqualify her from this proceeding.

f. Attendance at Events

Respondents contend that Chair Khan must be disqualified because she attended events they believe reflect an anti-PBM viewpoint. Optum/Emisar Motion 3, 10; ESI Motion 7; Caremark/Zinc Motion 2 & n.4. For example, at one National Community Pharmacists Association event, some participants made negative statements about PBMs. Optum/Emisar Motion 3 (stating that "executives described PBMs as 'bloodsuckers,' [and] wore shirts depicting PBMs as vampires"); ESI Motion 2, 7 (stating that "executives wore obscene clothing vilifying PBMs . . . and praised the trade association for helping guide the FTC's anti-PBM work"); Caremark/Zinc Motion 2 & n.4 (stating that Chair Khan attended "closed events to help fundraise for an anti-PBM lobbying group where organizers vilified PBMs as 'bloodsuckers' and 'vampires'"). In another instance, a White House event "feature[ed] exclusively anti-PBM speakers . . . and co-founder of a direct competitor to PBMs." Optum/Emisar Motion 3; *accord* ESI Motion 2, 7.

To support their argument that attendance at even a single event "predominantly" favoring one side requires disqualification, Respondents point to *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), which involved disqualification of a federal judge.[39] Optum/Emisar Motion 10; ESI Motion 7. However, *School Asbestos Litigation* did not rest simply on the fact that the judge went to an event during a pending litigation, but instead considered the circumstances of and activities at the event. The court noted that:

> [The judge] attended a predominantly pro-plaintiff conference *on a key merits issue*; the conference was indirectly sponsored by the plaintiffs, largely with funding that he himself had approved; and his expenses were largely defrayed by the conference sponsors with those same court-approved funds. Moreover, [the judge] was . . . exposed to a Hollywood-style 'pre-screening' of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial.

977 F.2d. at 782 (emphasis added). Indeed, the court emphasized that it "need not decide whether any of these facts alone would have required disqualification, for . . . we believe that together they create an appearance of partiality that mandates disqualification." *Id.*

[39] As discussed below in Section VI.h, the disqualification standard for an administrative adjudicator is more flexible than the standard that applies to a federal judge.

Unlike *School Asbestos Litigation,* Chair Khan's participation in the meetings cited by Respondents occurred before this case was filed and did not involve the specific issues related to Respondents' practices involving insulin. *See S. Pac. Commc'ns Co.*, 740 F.2d at 991 (stating that the standard is "whether the [adjudicator's] mind is 'irrevocably closed' on the issues as they arise in the context of the specific case"). Chair Khan had no control over other participants' speech or attire, and their views do not necessarily reflect her own. *See* Khan Statement 14 (noting that Chair Khan has attended events by organizations representing a wide range of views). Her mere attendance does not show that her mind is irrevocably closed as to the merits of this case. *See In re Aguinda*, 241 F.3d 194, 204 (2d Cir. 2001) (stating that disqualification was not appropriate even if, among other factors, the event attended by the judge presumably favored one viewpoint).[40]

g. Respondents' Case Law is Distinguishable

Respondents rely on a line of cases involving allegedly disqualifying statements and actions of past Commission Chairman Paul Rand Dixon in an effort to show that Chair Khan should be disqualified here. However, Chair Khan's past statements are demonstrably different in substance and context from the statements and conduct by Chairman Dixon in the *Texaco*, *Cinderella Career and Finishing Schools*, and *American Cyanamid* cases that Respondents cite.

In *Texaco*, while an enforcement matter was pending before the ALJ, Chairman Dixon gave a speech in which he identified by name several companies, including the respondent, as engaging in practices that "plague you [the audience]." 336 F.2d at 759. Chairman Dixon then listed the practices that were the subject of the enforcement proceeding before the ALJ and stated that the Commission would pursue more such cases to vindicate fair competition in the industry. *Id.* In sharp contrast, the only alleged statement Chair Khan has made during the pendency of the action[41] discussed the Clayton Act generally and described in the abstract certain conflicts of interest that "we've heard and seen" can arise in healthcare markets. Chair Khan did not directly address the merits of this proceeding nor promise any sort of enforcement against Respondents or PBMs generally. Indeed, her only mentions of PBMs were (1) to observe that they fall within the FTC's antitrust enforcement purview as opposed to that of the Department of Justice which handles other entities such as insurance companies, and (2) to note the "work we've done recently" that "worri[es]" about whether lower-cost options are getting access to the market as they should be. Such informational statements about Commission business fall within the

[40] Optum Rx also points to the FTC's hiring of an employee who purportedly made anti-PBM statements before working at the FTC. Optum/Emisar Motion 3. However, the relevant inquiry is whether Chair Khan's mind is irrevocably closed on the specific issues in this case, not the opinions of another employee whose prior statements may not reflect Chair Khan's views. *S. Pac. Commc'ns*, 740 F.2d at 991; *see also* Khan Statement 14 n.53.

[41] *See* The Heart of Healthcare: Competition and Consolidation in Healthcare, Interview of FTC Chair Lina Khan (Oct. 3, 2024), https://podcasts.apple.com/us/podcast/the-heart-of-healthcare/id1575404727?i=1000671636977 (cited at Caremark/Zinc Motion 9 & n.35).

heartland of permitted communications and betray no prejudgment against the Respondents in this proceeding.[42] *Texaco* thus does not require recusal.

Cinderella II also is distinguishable. That case involved a speech by then-Chairman Dixon regarding a matter that at the time was pending, not before the ALJ, but before the Commission itself (including Dixon). 425 F.2d at 589–90. The court made clear that its concern was with Chairman Dixon's speaking on "a case awaiting his official action." *Id.* at 591. Moreover, Chairman Dixon's comments in *Cinderella II* betrayed a prejudgment that is absent here.[43] Again, other than the aforementioned October interview, *see supra* n.41 and accompanying text, Respondents do not allege that Chair Khan spoke on an adjudication then pending before her, or publicly expressed a view about insulin at all. *Cinderella II* thus does not require recusal.

In *American Cyanamid*, the Commission's underlying enforcement proceeding dealt with alleged misconduct including price fixing in the sale of tetracycline, an antibiotic. *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 761–62 (6th Cir. 1966). Before taking on the role of FTC Chairman, and while the Commission's complaint against the respondents was already pending, Dixon had served as Chief Counsel and Staff Director of the Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly. *Id*. at 763, 765. In that role, he had played an active part in investigating the very same conduct by the very same parties that was the subject of the then-pending FTC proceeding. *Id.* at 765, 768. The court held that Chairman Dixon should have recused himself from the FTC proceeding. *Id*. at 768. The court reasoned that fundamental fairness requires that "one who participates in a case on behalf of any party . . . take no part in the decision of *that case* by any tribunal on which he may thereafter sit." *Id*. at 767 (emphasis added) (internal quotation omitted).

Unlike in *American Cyanamid*, Chair Khan did not "participate[] in [the] case" now before the Commission. *Id.* As the court explained, the Congressional "hearings were concerned specifically, among other things, with issues which were decided against petitioners by the Commission in the instant case." *Id.* at 765. The court emphasized that the Commission is a fact-finding body and that, as Chairman, Dixon sat as a trier of many of the same facts that he himself had developed as Chief Counsel. *Id.* at 767. Respondents do not allege that the Chair had any

---

[42] *See Cinderella I*, 404 F.2d at 1314 (holding that the Commission is authorized on its own initiative to release information to the public about suspected violations of law). Nor do Chair Khan's conceptual statements about vertical integration show prejudgment, for the reasons discussed on page 11.

[43] In *Cinderella II*, Chairman Dixon publicly importuned newspaper editors not to run ads for various types of patently fraudulent products, such as ads promising that one could "becom[e] an airline's hostess by attending a charm school." 425 F.2d at 589–90. Dixon made the comments while a case for false advertising against respondent's career college and finishing school was pending before him. *Id.* at 589. The court found the connection between the pending case and the comments to be sufficiently close that the speech gave the appearance that "the ultimate determination of the merits [would] move in predestined grooves." *Id.* at 590; *see also id.* at 591 (noting that Dixon showed poor judgment in "directing his shafts and squibs at a case awaiting his official action"). Here, Chair Khan made no comments during a pending adjudication indicating that she had made a decision that the PBMs' conduct was unlawful. *Cinderella II* thus has no application.

role in developing the facts of this proceeding in a legislative capacity or otherwise.[44] Thus, *American Cyanamid* is inapposite.

h. The Federal Ethics Regulations and Judicial Code Do Not Provide a Basis to Disqualify

The ESI Respondents claim in their Motion that government ethics regulations and/or the code of judicial conduct require disqualification of Chair Khan from this proceeding.[45] However, neither of those sources of authority changes our view that Chair Khan may properly participate in the adjudication here. The government ethics regulation at 5 C.F.R. § 2635.501(a) is intended to ensure that an employee takes appropriate steps to avoid participating in particular matters involving specific parties that may cause a reasonable person with knowledge of the relevant facts to question their impartiality. Section § 2635.502(a) of the government ethics regulations addresses (1) financial interests of members of the employee's household, and (2) matters involving persons with whom the employee is in a covered relationship, such as persons with whom the employee seeks a business or financial relationship. No one alleges any financial interest of any member of the Chair's household in this proceeding, nor any covered relationship with any party involved in the matter, so these parts of the rule are not pertinent. To the extent Respondents raise an issue under a final, catch-all clause, which covers other circumstances that raise questions about impartiality, 5 C.F.R. §§ 2635.501(a), 2635.502(a)(3), Chair Khan concluded that none of her prior statements creates the appearance that she lacks impartiality in this matter, *see* Attachment A, and we find that the ethics regulation provides no basis for Chair Khan's disqualification. As we have explained above, a reasonable person would not question Chair Khan's ability to judge this proceeding impartially based merely on her attendance at certain meetings, her factual statements about the Commission's activities, and her statements about the PBM industry that do not judge particular claims or parties, including statements only relaying the concerns that other stakeholders have raised with the Commission. *Supra* at Sections V.a-f. Respondents have failed to demonstrate that the Chair's mind is closed or that a reasonable person would perceive it to be. *See Facebook, Inc.*, 581 F. Supp. 3d at 65.[46]

Further, the ESI Respondents' citation to the code of conduct applicable to federal judges is inapposite. First, the judicial disqualification case on which the ESI Respondents rely, *School Asbestos Litigation*, is readily distinguishable. ESI Motion 7. As discussed above in Section VI.f, in that case a federal judge attended a putative scientific conference at which the speakers were

---

[44] The court explained the limitation of its holding, stating that "[o]ur decision on this issue goes no further than to hold that disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same parties named as respondents before the administrative agency . . . ." *Am. Cyanamid*, 363 F.2d at 768.

[45] ESI Motion 6–8 (citing, *inter alia*, 5 C.F.R. § 2635.501(a); Code of Conduct for U.S. Judges, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf).

[46] As we noted in *Meta Platforms, Inc.*, the district court in *Facebook* found the analysis under the ethics regulation to be subsumed in, and disposed of by, the due process analysis that it had conducted. Order Den. Pet. for Recusal, *In re Meta Platforms, Inc.,* No. 9411, 2023 WL 1861224 (F.T.C. Feb. 1, 2023).

expert witnesses whom the plaintiffs proposed to call at trial. 977 F.2d at 779–80. The conference was organized by plaintiffs' counsel using settlement fund monies that had been approved by the judge without defendants' knowledge. *Id.* at 779. No facts alleged here even approach those presented in *School Asbestos. Cf. United States v. Sampson*, 148 F. Supp. 3d 75, 80, 82 (D. Mass. 2015) (a reasonable person could not question a judge's impartiality in death penalty case when the judge moderated a panel discussion and one panelist later submitted an affidavit before him).

Moreover, the statutory standards that govern the disqualification of federal judges are not designed to, and do not, mirror the due process standard that applies to administrative adjudicators. The latter standard is more flexible, such that a comment that would not disqualify a federal judge would necessarily also not disqualify an administrative adjudicator. *See S. Pac. Commc'ns*, 740 F.2d at 990 n.9 (explaining that, because the statutory requirements for disqualification of federal judges establish a broader standard for disqualification than applies in ensuring the right to a fair trial guaranteed by the due process clause, a determination that a judge is not disqualified for bias "necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case"); *see also N.Y. State Inspection, Sec. & L. Enf't Emps., Dist. Council 82 v. N.Y. State Pub. Emp. Rels. Bd*., 629 F. Supp. 33, 48 (N.D.N.Y. 1984) ("Instead of transplanting standards from the judicial to the administrative context, the court finds that it must evaluate the procedures allegedly employed by the defendants against a more flexible touchstone derived from *Withrow* and its progeny . . . ."); Order Den. Mot. to Disqualify, *In re Intuit Inc.*, No. 9408, 2023 WL 7104051, at *2 n.3 (F.T.C. Oct. 19, 2023); Order Den. Pet. For Recusal, *In re Meta Platforms, Inc.*, No. 9411, 2023 WL 1861224, at *4 (F.T.C. Feb. 1, 2023).

VII. Conclusion

For the foregoing reasons, we find no basis to disqualify Chair Khan from participating in this proceeding.

IT IS HEREBY ORDERED THAT the Respondents' Motions to disqualify Chair Khan are **DENIED**.

By the Commission, Commissioners Ferguson and Holyoak recused, Chair Khan not participating.

April J. Tabor
Secretary

SEAL:
ISSUED: January 14, 2025

Attachment A

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Regarding the Petitions for Recusal from
Involvement in the Matter of Insulin:
Caremark Rx et al.

Commission File No. D09437

January 10, 2025

All three groups of respondents in this matter—(1) Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services LLC (hereinafter "ESI"); (2) Caremark Rx, L.L.C. and Zinc Health Services, LLC (hereinafter "CVS"); and (3) OptumRx, Inc.; OptumRx Holdings, LLC and Emisar Pharma Services LLC (hereinafter "OptumRx") (collectively, "Respondents")—have petitioned to seek my recusal from *In the Matter of Insulin: Caremark Rx et al.*.[1]

Respondents argue that due process necessitates my recusal. In support of their petitions, Respondents cite my vote to authorize the issuance of the Interim Staff Report on PBMs, various public statements I have made, and my attendance at certain events.

A commissioner must recuse from an adjudicatory proceeding where "a disinterested observer" would conclude that the adjudicator "has in some measure adjudged the facts as well as the law of a particular case in advance."[2] Agency officials "are presumed objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[3] A party "cannot overcome this presumption with a mere showing that an official 'has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to

[1] Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., And Ascent Health Services LLC's Motion To Disqualify Chair Lina M. Khan, *In re Insulin: Caremark Rx, et al.*, Docket No. 9437 (Oct. 8, 2024) [hereinafter ESI Petition]; Respondents Caremark Rx, LLC And Zinc Health Services, LLC's Motion for Disqualification, *In re Insulin: Caremark Rx, et al.*, Docket No. 9437 (Oct. 8, 2024) [hereinafter CVS Petition]; Optum Rx, Inc.'s; OptumRx Holdings, LLC's; And Emisar Pharma Services LLC's Motion For Disqualification, *In re Insulin: Caremark Rx, et al.*, Docket No. 9437 (Oct. 8, 2024) [hereinafter Optum Petition].

[2] *FTC v. Facebook, Inc.*, 581 F. Supp. 2d 34, 62 (D.D.C. 2022) (quoting *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)) (internal quotation marks omitted); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) ("Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to recuse himself merely because he holds and had expressed certain views on that general subject. His general tenets are not so case-specific that they would predetermine his position in this particular case . . . .") (citing *Laird v. Tatum*, 409 U.S. 824, 830-36 (1972) (Rehnquist, J., mem. op.))).

[3] *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562 (D.C. Cir. 2007) ("*NIRS*") (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)); *see also United States v. Morgan*, 313 U.S. 409, 421 (1941) ("Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.").

an issue in dispute.'"[4] That is, "[a] party asserting prejudgment must show that the agency official has 'demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence.'"[5]

None of the instances that the ESI, CVS, and OptumRx respondents cite shows that I have prejudged "the facts as well as the law"[6] of the case at hand. Accordingly, I reject Respondents' petitions and decline to recuse myself from this matter.

*

I review in turn each instance that Respondents cite in support of their petition.

a. Interim Staff Report on PBMs

In *FTC v. Cement Institute*, the seminal Supreme Court decision analyzing the recusal of FTC Commissioners, the Commission had published Section 6(b) reports condemning the industry-wide use of a basing point pricing system before it brought an administrative enforcement action against various companies for using this pricing system.[7] One respondent contended that the Commission's Section 6(b) reports, as well as congressional testimony from Commissioners, stated an opinion that the pricing system at issue was equivalent to price fixing in violation of antitrust laws. The Court held that such statements did not evince prejudgment in the particular price fixing case against the respondent, and that the FTC could still fairly adjudicate the case. As the Court reasoned, "if [Respondent] is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease-and-desist order by the Commission . . . ."[8] The Court continued:

> If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. . . . Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire

[4] *NIRS*, 509 F.3d at 571 (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (citing *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) and *Morgan*, 313 U.S. at 421)).
[5] *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (internal quotation marks omitted). Courts also apply the abuse of discretion standard in determining whether a Commissioner should have recused themselves. *Id.* at 1164 (noting that "the court reviews an agency member's decision not to recuse himself from a proceeding under a deferential, abuse of discretion standard").
[6] *Cinderella*, 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).
[7] 333 U.S. 683 (1948).
[8] *Id.* at 701.

the expertness in dealing with these special questions concerning industry that comes from experience."[9]

Here, too, the Interim Staff Report, which in any case reflected the preliminary findings of *staff*, not the Commission, does not indicate that I have a closed mind on the merits and should be precluded from adjudicating this case.

b. Public Statements

Respondents cite a variety of public statements I have made that they claim evince prejudgment. Upon closer examination, many of the statements they quote are selectively excerpted in ways that strip out key context. For example, Respondents repeatedly skip over the fact that in many of the statements they cite I was explicitly paraphrasing complaints or concerns from *others* that the agency had heard, rather than giving my own views.

I address each complained-of statements in chronological order.

At the February 17, 2022, open Commission meeting, I proposed that the Commission use its Section 6(b) authority to issue orders to "large pharmacy benefit managers (PBMs) to study a range of their commercial practices." CVS claims that I said this study was warranted because PBMs have "incentives to drive patients to more expensive drugs that come with rebates instead of the most affordable drugs available." What CVS leaves out is the beginning of that sentence, where I said: "*We have also received complaints that PBMs and pharmacy plans may face* incentives to drive patients to more expensive drugs that come with rebates instead of the most affordable drugs available."[10] (emphasis added). Indeed, this sentence was part of a series of comments I made at the open Commission meeting describing complaints that the FTC had received about PBMs. No part of this statement shows that I have prejudged "the facts as well as the law"[11] of the case at hand.

On June 7, 2022, the Commission unanimously voted out a Section 6(b) study of PBMs.[12] When announcing its release, I explained why I supported the inquiry, stating: "Although many people have never heard of pharmacy benefit managers, these powerful middlemen have enormous influence over the U.S. prescription drug system. This study will shine a light on these

[9] *Id.* at 702 (quoting Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11).
[10] *Compare* Remarks of Chair Lina M. Khan Regarding the 6(b) Study on Pharmacy Benefit Managers at 3 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221200khanstatementrepbms.pdf, *with* CVS Pet. at 5-6.
[11] *Cinderella*, 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)).
[12] The Commission's vote was not only unanimous, but Commissioners Wilson and Phillips, who had raised concerns about the previous version of the 6(b) study at the February 17th open Commission meeting, went out of their way to praise the way the 6(b) study that was voted out on June 7th was crafted. Concurring Statement of Comm'rs Noah Joshua Phillips & Christine S. Wilson Regarding 6(b) Orders to Study Contracting Prices of Pharmacy Benefit Managers (June 6, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/concurring-statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-6b-study.

companies' practices and their impact on pharmacies, payers, doctors, and patients."[13] ESI complains that this statement, as well as a formal statement I issued at the same time—which stated that "PBMs are powerful intermediaries at the center of the U.S. prescription drug system. In many instances, PBMs practically determine which medicines are prescribed, which pharmacies patients can use, and the amount patients will pay at the pharmacy counter"—demonstrate that I have prejudged the issues in this adjudication.[14]

Rather than prejudge the issues in this adjudication, my comments explained why the FTC was using scarce resources to examine PBMs under the agency's Section 6(b) authority. Noting that they are "powerful" and have "enormous influence" does not prejudge facts that would determine whether PBMs have violated the law, as it is not against the law to be powerful and exert influence. And by including the caveat "in many instances," I made clear I was not stating a formal conclusion but was instead explaining why PBMs merited close study.

On June 16, 2022, the Commission issued a Policy Statement Concerning Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products.[15] As with many policy statements previously issued by the Commission, this policy statement explained how certain business practices could violate the law. The Policy Statement was voted out unanimously on a bipartisan basis by the Commission. Optum and CVS accuse me of prejudging this adjudication because, in a statement accompanying the Policy Statement, I stated that "PBMs and other middlemen *may* exclude the lowest-cost generic and biosimilar drugs from patients' formularies entirely to maximize rebates and fees. Such practices violate the fundamental bargain at the center of the American prescription drug system." Once again, petitioners leave out the beginning of that sentence which reads: "*Others have noted that* . . ." (emphasis added) This makes clear that I was not giving my own conclusions, but rather repeating what some market participants have told the FTC. The full statement makes this abundantly clear:

> The policy statement we are voting on today **notes the many complaints we have received** about the rebates and fees that drug manufacturers pay pharmacy benefit managers. Drug manufacturers pay these fees in exchange for having their drugs included on key PBM formularies that determine which drugs are covered by patients' insurance.
>
> **Some have suggested** that these rebates and fees, in turn, encourage drug manufacturers to further increase their pre-rebate list prices in a cycle of ever-increasing list prices and ever-increasing middlemen rebates. **Others have noted** that PBMs and other middlemen **may** exclude the lowest-cost generic and biosimilar drugs from patients' formularies entirely to maximize rebates and fees. Such practices violate the fundamental bargain at

[13] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry.
[14] ESI Pet. at 2. Optum and CVS complain about the second quote. Optum Pet. at 7; CVS Pet. at 8.
[15] Fed. Trade Comm'n, Policy Statement of the Federal Trade Commission on Rebates & Fees in Exchange for Excluding Lower Cost Drug Products (June 16, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products; *see also*, Press Release, Fed. Trade Comm'n, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman That Block Cheaper Drugs (June 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes.

> the center of the American prescription drug system, which is that brand drugs are given a period of patent exclusivity that is then followed by free and fair competition from generic or biosimilar alternatives at dramatically lower prices.[16]

In remarks at a June 22, 2022, event hosted by the American Economic Liberties Project and the National Community Pharmacists Association, I explained that:

> Pharmacy benefit managers ("PBMs") and other intermediaries now play a critical role that have enormous consequences on people's day-to-day lives. Their **decisions help to determine** which medicines are prescribed, which pharmacies patients can use, and the prices that patients ultimately pay at the pharmacy counter. They also **can** determine whether independent pharmacies can compete and thrive, which—given the key role that community pharmacies play in providing efficient and affordable access—is critical. Not only does the PBM industry play a central role in determining which medicines and pharmacies we can access and at what price, the market in which they operate is also extremely opaque and complex. This combination—of, on the one hand wielding extraordinary influence that can have life-and-death consequences, and, on the other, of being extraordinarily opaque and complex, is a combination that's always worth scrutinizing.[17]

CVS complains about the first and second sentences.[18] But as fully set out above, it is clear that that I was again explaining why a close study of PBMs' practices was warranted. The fact that PBMs play a critical role that has enormous consequences does not connote prejudgment of the facts or the law, as it is not illegal to wield "extraordinary influence." Moreover, the statement notes that PBMs' decisions **"help"** to determine which medicines are prescribed, which pharmacies patients can use, and the prices that people pay—not that PBMs dictate those outcomes. Similarly, the statement notes that PBMs **"can"** determine whether independent pharmacies compete and thrive—not that they "do" determine that.

This becomes even clearer in a statement that I made that both Optum and CVS complain about.[19] On September 20, 2022, I testified at a Senate Oversight hearing for the FTC. In the prepared testimony, which was approved by the Commission, I said:

> In June, the Commission authorized a 6(b) study of the contracting practices of Pharmacy Benefit Managers. After seeking and receiving public input from a wide variety of stakeholders, the Commission has issued orders to the largest PBMs to obtain nonpublic information about their operations, including negotiations with manufacturers over

---

[16] *Compare* Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products at 2 (June 16, 2022), https://www.ftc.gov/news-events/news/speeches/remarks-chair-lina-m-khan-regarding-policy-statement-rebates-fees-exchange-excluding-lower-cost-drug, *with* Optum Pet. at 6, *and* CVS Pet. at 7.

[17] Remarks of Chair Lina M. Khan, American Economic Liberties Project and the National Community Pharmacists Association: How Pharmacy Benefit Managers Impact Drug Prices, Communities, and Patients at 1 (June 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Lina-Khan-Economic-Liberties-National-Community-Pharmacists-Association.pdf.

[18] CVS Pet. at 4.

[19] *Id.* at 9; Optum Pet. at 7.

> formulary design and rebates, as well as fees paid to and by pharmacies who contract with PBMs to provide dispensing services. This comprehensive study will shine a light on the opaque operations of these large pharmacy middlemen who can dictate the pricing and access to life-saving drugs for so many Americans.[20]

This discussion of PBMs explains to Congress why the Commission decided to expend the resources to conduct a Section 6(b) study. My references to the market being opaque and complex do not connote prejudgment as to whether PBMs have violated the law; rather, the description further justifies the use of public resources to "shine a light" on this opaque and complex market. Lastly, the statement notes that PBMs **"can"** dictate pricing and access, not that they "do" dictate pricing and access.

At another event, on May 4, 2023, I answered a question about general approaches to determining which matters deserve FTC scrutiny by describing some areas of agency interest:

> And so we're looking very closely at the entire supply chain and identifying what are the actors that may be acting in potentially unlawful business practices here. Earlier we talked about gatekeepers, and I think the current conversation around gatekeepers ends up focusing on digital markets, where, no doubt, we see potential gatekeepers that have emerged. But I think this is something that we're seeing across our economy more generally, be it in agriculture where you have millions of consumers and thousands of farmers that are connected by a handful of meatpackers, a handful of chicken processors. We see it in healthcare, where we see these pharmacy benefit managers that are sitting right in the middle and controlling the types of practices that independent pharmacies are facing, the medicines consumers are or have not been able to access. And so we are looking at magnitude of harm, we're looking at who are the most significant players in the supply chain. Oftentimes, that means looking upstream. And so when you're seeing a lot of prevalent business practices, sometimes that can involve fly-by-night scammers, fraudsters. So we tried to look, at the FTC, at what are the platforms or the intermediaries that are facilitating those business practices, so that we can target at the root cause and be much more effective and efficient with our enforcement.

CVS complains about the language above, but the full context reveals I was discussing what "we're looking" at—rather than weighing in on whether any particular firms had violated the law. The statement goes on to note that "we are looking at magnitude of harm, we're looking at who are the most significant players in the supply chain."[21]

On February 14, 2024, I spoke at the American Medical Association. I again explained the rationale for why the Commission was expending precious agency resources to examine PBM practices:

---

[20] Prepared Statement of the FTC Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, *Oversight of the Enforcement of Antitrust Laws* at 14 (Sept. 20, 2022) (footnotes omitted), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[21] *Compare* Economic Liberties, 2023 Anti-Monopoly Summit, at 1:20:15, YouTube (May 4, 2023), https://www.youtube.com/watch?v=_MUdBWApI9k&t=3928s., *with* CVS Pet. at 3.

> First, we are scrutinizing opaque middlemen across the healthcare supply chain. Today, we are launching an inquiry into how Group Purchasing Organizations and drug wholesalers might be contributing to chronic shortages of generic medications used to treat everything from asthma to seizures to cancer. You all have seen firsthand how these persistent and acute drug shortages can, for very sick patients, mean the difference between life and death. In partnership with the Department of Health and Human Services, the FTC will scrutinize how the business practices of GPOs and other middlemen may be contributing to these dangerous shortages, and I am grateful to have HHS Secretary Becerra and FDA Commissioner Califf as dedicated partners in this important work. Our efforts to scrutinize another set of severely concentrated, vertically integrated middlemen in the pharmaceutical supply chain—pharmacy benefit managers—is ongoing. **We've heard concerns from patients and medical professionals** that the rebates that PBMs demand **may function** as kickbacks that raise costs and limit access to affordable medicines. **We've also heard concerns** about how PBMs **may unfairly discriminate** against independent pharmacies, making it difficult for these pharmacies to stay afloat and depriving communities of access to the high-quality local service they provide.

CVS complains that, above, I stated that "the rebates that PBMs demand *may* function as kickbacks that raise costs and limit access to affordable medicines." CVS, once again, conveniently ignores the *beginning* of that sentence which says "*We've heard concern from patients and medical professionals that . . .*" (emphasis added). When properly quoted and set in context, it is clear I am citing complaints we have heard and doing so in order to explain why the Commission was expending resources to conduct a Section 6(b) study of PBMs and their role in the healthcare marketplace.[22]

On March 4, 2024, I was invited to a White House Roundtable on PBMs and, once again, reported on the factors animating the Commission's decision to conduct the Section 6(b) study of PBMs:

> Our mission at the FTC is to enforce the nation's antitrust and consumer protection laws so that American consumers, workers, and small businesses can thrive. I'm here today to share a few words about the FTC's work to protect the public from powerful corporate middlemen in our healthcare system. **The FTC has been flooded with stories suggesting that these middlemen**— PBMs—engage in tactics that hike the price of drugs, deprive patients of access to certain medicines, and drive community pharmacies out of business.
>
> PBMs say that they help bring down drug costs**. But the stories we hear from patients and healthcare workers** instead describe PBMs as dominant gatekeepers who have outsized power to decide how people do or don't receive the life-saving prescription drugs they depend on. Too often, Americans are price gouged for these medications. As

[22] *Compare* Remarks by Chair Lina M. Khan, American Medical Association National Advocacy Conference at 4 (Feb. 14, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-ama-national-advocacy-conference.pdf, *with* CVS Pet. at 6.

> PBMs have consolidated and vertically integrated, **we hear of a system** where corporate red tape and bureaucracy obstruct patients from getting their medications, sometimes with devastating results. One doctor shared how delays created by a PBM led her patient to develop resistance to an otherwise effective treatment, leading to the needless loss of the patient's eye. A third-generation pharmacist in West Virginia told us that when she needed critical medication during her pregnancy, her health insurer would only provide coverage if she got the medicine from its PBM-affiliated specialty pharmacy—a process rife with so many bureaucratic hurdles and delays that the woman almost lost her pregnancy.[23]

CVS complains about my language above saying "these middlemen – PBMs – engage in tactics that hike the price of drugs, deprive patients of access to certain medicines" but, once again, ignores that the beginning of this sentence says "The FTC has been flooded with stories suggesting that . . . ," making it clear that I was repeating complaints we had received.[24] Similarly, Optum and CVS complain about my saying "Too often, Americans are price gouged for these medications" but, once again, ignore the previous sentence – "[T]he stories we hear from patients and healthcare workers instead describe PBMs as dominant gatekeepers who have outsized power to decide how people do or don't receive the life-saving prescription drugs they depend on." In context, it is clear that I was recounting complaints the FTC had received that were one of the factors which led the agency to initiate a Section 6(b) study on PBMs and the healthcare marketplace.[25]

On March 4, 2024, I spoke at an event hosted by the Institute for Local Self-Reliance and the Small Business Roundtable, and once again, I discussed the FTC's Section 6(b) study on PBMs.

> It's no secret that we're closely scrutinizing the PBMs. **We launched an inquiry** a couple of years ago after hearing an enormous amount from doctors and patients about how the practices of PBMs **may be** diverting patients to higher cost medicines and branded drugs as opposed to generics and biosimilars.

Once again, CVS selectively quotes my comments, noting only that I said that "PBMs may be diverting patients to higher cost medicines and branded drugs as opposed to generics and biosimilars," and ignoring the beginning of that sentence, which made it clear I was talking about the Section 6(b) study and that I was repeating things that the FTC had heard from doctors and patients about what PBMs "may be" doing, not stating my own views.[26]

---

[23] Remarks by Chair Lina M. Khan at the White House Roundtable on PBMs (Mar. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.04-chair-khan-remarks-at-the-white-house-roundtable-on-pbms.pdf.
[24] *Compare id. with* CVS Pet. at 8.
[25] *Compare* White House Roundtable Remarks, *supra* note 23, *with* Optum Pet. at 7.
[26] *Compare* Institute for Local Self-Reliance, Small Business vs. Monopoly Power, at 35:29, YouTube (Mar. 4, 2024), https://www.youtube.com/watch?v=UOMomXHQlYA, *with* CVS Pet. at 5.

On April 14, 2024, CBS' *Sunday Morning* ran a news piece on its broadcast TV channel by reporter Robert Costa.[27] CBS titled the piece "FTC Chair Lina Khan on Playing Anti-Monopoly." In one of the most egregiously false claims that Optum Rx raised in its petition, Optum states that I "proudly displayed, in [my] office, an "Anti-Monopoly" board game with a graphic depicting 'Optum Rx' on a 'Monopoly' card."[28] This is false. At the beginning of the piece, Mr. Costa interviewed me in my FTC office and noted that I have a board game "Anti-Monopoly," which takes the famous "Monopoly" game and restyles it as one critical of monopolies, rather than one where the goal of the game is for the winner to "monopolize" all the streets and businesses on the board. By placing a screen grab of my board game, which appears 42 seconds into the five-minute piece, immediately adjacent to a screen shot that comes *nearly four minutes later*, Optum deceptively makes it appear as if the board game on my coffee table at my office contains playing cards with the names of Optum, ExpressScripts, and CVS. The game on my coffee table has no such cards in it. The graphic with the PBM companies' names on them as playing cards was in fact created by CBS news as part of its reporting later in the piece about a meeting I had held with independent pharmacists. It is quite telling that Optum never makes a claim that I said anything inappropriate during the CBS piece, nor could it, but this sleight of hand in the petition is particularly disturbing, as it is so flatly deceptive.

On April 15, 2024, at a YouTube livestream discussion with Senator Sanders, I said (emphasis added):

> What these PBMs help determine is when you go to the pharmacy, what medicines can you access at the pharmacy**. And we have been hearing at the FTC a whole set of complaints. One of these complaints** is that the medicines that are made available at the pharmacy are not the most affordable medicines for Americans, but it's actually the medicines on which the PBMs are getting the biggest kickback from the drug manufacturer. . . . Technical term is rebate, some people say these may be kickbacks, which is a **really troubling allegation** because the whole point of our drug system is supposed to be that when patents expire, cheaper generics are supposed to come onto the market, and once they're on the market Americans are supposed to be able to get access to those . . . . That's how it's supposed to work . . . . And so **we've heard concerns that** even once you have these generics on the market, that when Americans go to the pharmacy, they only have access to the expensive, branded version and not the generics, and one reason**, some people say**, is because of these rebates and kickbacks at the PBM. So we at the FTC are scrutinizing that.

CVS and ESI selectively quote from my statement above, focusing on the words: "the medicines that are made available at the pharmacy are not the most affordable medicines for Americans, but it's actually the medicines on which the PBMs are getting the biggest kickback from the drug manufacturer," once again ignoring the *beginning* of the sentence where I clearly stated that "*One of these complaints is that . . . .*" Furthermore, when I again referenced the word "kickbacks" in relation to rebates, I prefaced it by saying "*some people say these may be*" kickbacks, again making it clear that that is not my term, but the term used by those who have

[27] CBS Sunday, FTC Chair Lina Khan on Playing "Anti-Monopoly", YouTube (Apr. 14, 2024), https://www.youtube.com/watch?v=EPukULmOC-4&.
[28] Optum Pet. at 5-6.

complained to us. Indeed, toward the end, when I repeat the word "kickbacks," I caveat it by referencing it as something that "some people say."[29]

On January 22, 2024, Senator Grassley and 13 other Senators sent me a letter urging that the Commission expedite its Section 6(b) study or issue an interim report.[30] On February 14, 2024, I responded and noted that "I share your sense of urgency regarding timely completion of the study and welcome this opportunity to provide you an interim progress update on our ongoing study of this industry."[31] Given the public import of the information the Commission had already received, and the fact that several recipients of the Section 6(b) orders (including the petitioners here) were delaying production, the Commission determined to release an interim report on staff's findings. It did so on July 9, 2024.[32] It should be emphasized that the report was a *staff* report, not a report authored by the Commission.[33] Optum claims that there was something nefarious about the release.[34] But given the extraordinary public salience of this information, the over two years of time that had elapsed since the formal initiation of the study, and the slow pace at which recipients of the 6(b) order were providing information, it was understandable that the Commission decided to release an interim report.

On October 4, 2024, I spoke at a "Heart of Healthcare" podcast interview. My questioner asks me about vertical integration in healthcare markets and, although he references PBMs and pharmacies, I responded by discussing only generally the legal principles indicating when vertical mergers may become problematic from an antitrust law perspective. Moreover, I then go on to cite a matter *not* involving a PBM—the *Illumina/GRAIL matter*—as an example of

---

[29] *Compare* Sen. Bernie Sanders, LIVE with FTC Chair Lina Khan, at 9:59, YouTube (Apr. 15, 2024), *https://www.youtube.com/watch?v=-C99FUnGnJU*, *with* ESI Pet. at 3.

[30] Letter from Sen. Grassley to Chair Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf [hereafter "Grassley Letter"].

[31] Letter from Chair Khan to Sen. Grassley (Feb. 13, 2024), https://www.grassley.senate.gov/imo/media/doc/ftc_to_grassley_-_pbm_6b_study.pdf.

[32] Press Release, Fed. Trade Comm'n, FTC Releases Interim Staff Report on Prescription Drug Middlemen (July 9, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen.

[33] As Commissioner Ferguson noted in his statement concurring in the release of this interim report, "It is not a statement or report of the Commission. It is instead the staff's report to the Commission about how it understands our complex healthcare markets in light of the information it has thus far received in response to the 2022 and 2023 Orders." Concurring Statement of Comm'r Andrew N. Ferguson Regarding the Pharmacy Benefit Managers Interim Staff Report (July 9, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/ferguson-statement-on-pharmacy-benefit-managers-report. Optum also objects to the Commission's unanimous vote in July 2023 to withdraw prior staff reports about the PBM industry, Optum Pet. at 8, but, with the agency committing significant resources to a brand new Section 6(b) study of the PBM industry, it was clear that previous staff studies, now outdated, might no longer be relevant and, hence, needed to be withdrawn. Furthermore, at the time, I clearly stated that the old reports "*may* not reflect current market realities," making it clear that I was not making a final determination, but rather prudently noting that, in light of the new pending 6(b) study, the old studies may not reflect current market realities. Fed. Trade Comm'n Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities at 6 (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf. Finally, this approach of withdrawing old studies accorded with the sentiment of key leaders in the Senate. Grassley Letter, n.30 ("We appreciate the FTC's recent withdrawal of prior advocacy statements and studies that no longer reflect current market realities.").

[34] Optum Pet. at 3-4.

problematic middlemen, where the Commission, for the first time in 40 years, successfully challenged a vertical merger as anticompetitive. That merger has nothing to do with PBMs:

> **Q:** I mean, on that note, there's been so much consolidation in health care, as you said, but especially payers becoming more verticalized and owning the pharmacies and the PBMs. And even just like the top payers, the top five that own the vast majority of the market, it's deeper and deeper vertical integration within health care and these conglomerates that are being created. What is like your philosophy on this?
>
> **A:** Yeah, you raise a really good point, which is that in health care markets, we've seen both a lot of horizontal consolidation, but also vertical integration. And being a monopoly is not in and of itself illegal. What can be illegal is whether you used underhanded tactics to become a monopoly, or whether once you're a monopoly, are you engaging in underhanded tactics to keep rivals out? And so are you abusing the dominant position that you've achieved? And so that's ultimately how we're looking at it. I think one really interesting feature of vertical integration is that when you combine it with horizontal consolidation, it can mean that you have these effectively gatekeepers that have potential conflicts of interest, right? Because you have these major entities, and especially when they're middlemen, it means that they're getting to pick and choose, you know, who's getting access to certain markets, who's not getting access to certain markets. And when those middlemen are also vertically integrated, it means that they're competing with the very entities that are dependent on them. And that we've heard and seen can create conflicts of interest, where you have intermediaries that are supposed to be serving these customers, but they're also competing with these customers and clients. And so that can end up distorting the competitive process in ways that we take note of. You know, **one relevant case here was the FTC's suit against the Illumina/Grail acquisition,** where we allege that if this deal went through, these cancer, these next generation cancer screening tests would be delayed in coming to the market, and competitive processes there would be distorted because they'd be bought up by a single company that wouldn't want its rivals to have that same access to those technologies. And so that's partly how we think about it.

CVS complains about my comments regarding "these major entities . . . getting to pick and choose, you know, who's getting access to certain markets, who's not getting access to certain markets." But read in full context, my comment is a general observation about situations when vertical mergers can violate the law. Indeed, I say they "can" create conflicts of interest, not that they "do." This is a far cry from having made any conclusive factual determinations about PBMs' practices relating to insulin, which is at issue in this case.[35]

Finally, Respondent ESI points to a general statement I made in an article in 2016 for *Politico* while a law student.[36] The article, entitled *How to Reboot the FTC*, was a general discussion advancing the agenda of the nonprofit advocacy organization where I was a fellow.

---

[35] *Compare* The Heart of Healthcare: Competition and Consolidation in Healthcare, Interview of FTC Chair Lina Khan at 5:47 (Oct.3, 2024), https://podcasts.apple.com/us/podcast/the-heart-of-healthcare/id1575404727?i=1000671636977, *with* CVS Pet. at 9, n.35.

[36] ESI Pet. at 2.

That agenda sought to highlight areas that the organization felt the FTC should be examining more closely. Toward the end of the article, I highlighted my organization's advocacy that vertical mergers should be more closely examined, as my organization argued that vertical mergers may present competitive concerns. I then gave the PBMs as an example of an industry that merited closer scrutiny:

> Take, for example, the pharmaceutical industry, where the FTC has permitted pharmacies to merge with pharmacy benefits managers, middlemen firms designed to handle the distribution of drugs for large employers, insurance companies and government programs. PBMs joined to pharmacies tend to steer plan members away from independent entities and to their own affiliates, specialty pharmacies in particular. The conflict of interest can also sap PBMs of the incentive to bargain for lower reimbursement rates and keep drug prices high.[37]

Hyperlinked to the "tend to steer" language was an article written by a law professor at UC College of Law San Francisco, Robin Feldman, entitled *Big Pharmacies Are Dismantling the Industry That Keeps US Drug Costs Even Sort-Of Under Control*.[38] The language was "tend to steer" because it reflected the writings of some scholars, such as Professor Feldman, who saw problematic evidence in that industry. The sentence also said that this vertical integration "*can . . . sap*," (emphasis added) again clearly indicating that it was a possibility, not a conclusion, of mine. Furthermore, I said "tend to steer" rather than "do" steer. Finally, this article was written over eight years ago, prior to my role as Chair, and removed from the current market realities. Set properly in context, this paragraph was highlighting that vertical mergers might be problematic from a competition standpoint and referencing articles raising conflict of interest concerns about vertical integration in this industry. This isolated remark does not show, as the legal standard requires, that I have "demonstrably made up" my mind about "important and specific factual questions" and am "impervious to contrary evidence."

In their legal arguments for why the statements above require recusal, all three Respondents cite three instances in which courts held that FTC Chairman Paul Rand Dixon's participation in three separate adjudicative proceedings amounted to a denial of due process for respondents.[39] All of these instances are readily distinguishable from the matter at hand.

In *American Cyanamid Co. v. FTC*, the Sixth Circuit reviewed whether Chairman Dixon's prior role as a congressional staffer investigating the business practices of major drug companies warranted his recusal from a Commission proceeding involving the same conduct by the same firms.[40] The court found that (1) Chairman Dixon's prior work centered on "the same facts and issues"[41] that the Commission was later reviewing—specifically the drug companies' pricing for broad spectrum antibiotics, including tetracycline, and a subsequent agreement

---

[37] Lina Khan, *How to Reboot the FTC*, POLITICO (April 13, 2016), https://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090/.
[38] Robin Feldman, *Big Pharmacies Are Dismantling the Industry That Keeps US Drug Costs Even Sort-Of Under Control*, QUARTZ (Mar. 17, 2016), https://qz.com/636823/big-pharmacies-are-dismantling-the-industry-that-keeps-us-drug-costs-even-sort-of-under-control.
[39] CVS Pet. at 10-12; ESI Pet. at 4-6; Optum Pet. at 8-10.
[40] *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).
[41] *Id.* at 768.

between Pfizer and Cyanamid—and that (2) remarks that Chairman Dixon had made while serving on the congressional committee demonstrated that he had formed conclusions of facts, specifically that tetracycline prices were "artificially high and collusive" and that the particular agreement between Pfizer and Cyanamid involved "improper" conduct.[42] Because the Chairman's prior work on and comments stemming from the congressional investigation "involved the same facts and issues concerning the same parties," the court held that he should have been recused from the subsequent adjudicative proceeding before the Commission.[43]

By contrast, the vast majority of my statements cited by Respondents concern my work at the Commission—spearheading the Commission's 6(b) study initiative, responding to Congress about it, and explaining to the public why I believed this inquiry warranted Commission resources. Unlike Chairman Dixon's statements in *American Cyanamid*, the statements about PBMs that I made in an article I wrote as a law student years before I joined the Commission noted my general concerns about vertical integration in the industry and had nothing to do with PBMs' rebating practices or their conduct with respect to insulin—the core allegations in the complaint at issue here.

In *Cinderella Career & Finishing School, Inc. v. FTC*,[44] the D.C. Circuit reviewed whether statements that Chairman Dixon made while an administrative appeal was pending before the Commission warranted his recusal from the proceeding. Specifically, during the pendency of the administrative appeal in a case alleging false representations and deceptive advertising by Cinderella, Chairman Dixon gave a speech on deceptive advertising in which he used specific behavior by Cinderella as an example of misconduct. The court held that these statements by Chairman Dixon, which were made "after an appeal [was] filed," created "the appearance that he [had] already prejudged the case."[45] In response to arguments that Chairman Dixon's speech did not specifically reference the pending case, the court stated that it was "the *timing* of the speech in relation to the proceedings" that gave a "disinterested observer" a "reasonable inference" to view his remarks as connected to the case.[46] By contrast, I have made no statements concerning PBMs during the pendency of this matter, and those I made before the filing of this instant matter were in relation to the Commission's decision to study PBMs' practices under Section 6(b) of the FTC Act.

In *FTC v. Texaco*,[47] the D.C. Circuit found that Chairman Dixon had to be recused in a matter involving claims that Texaco violated Section 5 of the FTC Act by mandating that their gas station retailers buy only tires, batteries, and accessories ("TBA") from Goodyear. In a speech, Chairman Dixon stated:

---

[42] *Id.* at 765.
[43] *Id.* at 768. Notably the court added, "We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel, as shown by the record in this case, including Appendix E." *Id.*
[44] 425 F.2d 583 (D.C. Cir. 1970).
[45] *Id.* at 590.
[46] *Id.* at 592 n.10 (emphasis added).
[47] 336 F.2d 574 (D.C. Cir. 1964).

> We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases. . . . You know the practices -- price fixing, price discrimination, and overriding commissions on TBA. . . . You know the companies -- Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone. . . . Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry.[48]

The court found problematic Chairman Dixon's pointed language directed at the respondents—naming the exact companies involved—and discussing the lawfulness of the exact practices at issue— describing the practice as a "plague" whose legality the Commission is "challeng[ing]" in the ongoing adjudication—while the adjudication was proceeding.[49] The court mentioned that Chairman Dixon's speech was at the National Congress of National Petroleum Retailers, Inc., but only to make clear that the reference to "you" in his comments was directed at gas retailers who were directly affected by the practices at issue in the adjudicative proceeding.[50] By contrast, nothing I have said shows that I have 'demonstrably made up [my] mind about important and specific factual questions and [am] impervious to contrary evidence."

c. Attendance at Certain Events

Finally, CVS and ESI raise concerns about my appearance at events that they believe are "anti-PBM."[51] They specifically cite my participation in an event with the National Community Pharmacy Association, which they claim reveals my bias against PBMs. Optum similarly claims that I have spoken at "one sided" events and further raises a concern about attendees wearing anti-PBM shirts and buttons and making negative statements about PBMs.[52]

As Chair, I have prioritized engaging with a wide variety of market participants and organizations. The events I attend routinely span a broad spectrum of viewpoints and perspectives. For example, I have participated in events with organizations as varied as the American Medical Association, Y Combinator, the CNBC CEO Council, the Service Employees International Union, private equity firm Lazard, and the National Farmers Union. My appearance at an event hosted by any given organization does not mean that I have adopted its views. For example, I have appeared at events hosted by both the Federalist Society and the American Constitution Society—organizations that have opposing views on a range of topics.

Attendees at any of these events may wear attire that reflects their personal style and views. As a speaker at the event, I have no have no ability to dictate or censor what attendees at

[48] *Id.* at 759.
[49] *Id. at 760.*
[50] *Id. at 759.*
[51] CVS Pet. at 2, 4-5; ESI at 1, 2, 7-8.
[52] Optum Pet. at 3.

an event either wear or say, and their attire or speech does not in any way reflect my own views.[53]

I have been open to speaking and meeting with market participants and members of the public from all walks of life. That is what a good leader of the Federal Trade Commission should do.[54]

In sum, Respondents' petitions seeking my disqualification are without merit: No disinterested observer could reasonably conclude that, based on the instances cited in the Petitions, that I have 'demonstrably made up [my] mind about important and specific factual questions and [am] impervious to contrary evidence."[55] I remain committed to making determinations about this matter and any other enforcement matter on the merits, on a case-by-case basis.[56] Accordingly, I reject Respondents' petitions and decline to recuse myself from this matter.

***

[53] Optum also raises a concern about an attorney that was hired by the FTC who, they assert, had made anti-PBM statements before coming to work at the FTC. Optum Pet. at 3. The views of a particular staff attorney do not reflect my own views. Furthermore, the FTC hires talented staff from across the legal profession, from members of the plaintiff bar to attorneys from large defense firms. During my tenure, the FTC has continued hiring lawyers with a range of legal backgrounds and work experiences.

[54] Even a cursory review of the one case cited by petitioners, *In re Sch. Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992), where a district court judge attended a conference filled with expert witnesses who spoke on the very scientific issues at stake in the ongoing litigation, makes clear that case involved facts very different from the situation of my attendance at these events.

[55] Respondents also argue that, even if I am not disqualified on due process grounds, federal ethics rules require my disqualification or recusal in this matter. I take seriously and have carefully reviewed, in consultation with the FTC's designated agency ethics official, my obligations under federal ethics rules. I have concluded that federal ethics rules do not require my recusal or disqualification. First, I do not have a "covered relationship" with a party or party representative in this proceeding. Second, this proceeding does not affect the financial interests of any member of my household. Finally, to the extent the catch-all provision is interpreted to capture situations outside the scope of possible financial conflicts, none of my prior statements create the appearance that I lack impartiality in this matter.

[56] *See Nominations Hearing Before the S. Comm. on Com., Sci., and Transp.*, 117th Cong. (Apr. 21, 2021) (testimony of Lina M. Khan) ("I would be approaching these issues with an eye to the underlying facts and the empirics, and really be following the evidence.").