CASE NO. 21-40157

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALMART INC.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas, No. 20-817
(Hon. Sean Daniel Jordan)

BRIEF OF DUE PROCESS INSTITUTE AND THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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May 17, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Walmart, Inc. v. United States Dep't of Justice, et al., Case No. 21-40157

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

Person or Entity	Connection to Case
Due Process Institute	*Amicus curiae*
Shana-Tara O'Toole	Lead Counsel, *Amici Curiae*
Cato Institute	*Amicus curiae*
Clark M. Neily III	Counsel to *amicus*
Ilya Shapiro	Counsel to *amicus*

Amicus Due Process Institute is a Washington, D.C. nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

Amicus Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Shana-Tara O'Toole
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DATED: May 17, 2021

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INTEREST OF *AMICI CURIAE*[1]

Due Process Institute is a bipartisan nonprofit organization that works to preserve and restore procedural fairness in the criminal legal system through litigation and advocacy.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.

This case raises issues of importance to *amici* because restoring prosecutorial accountability is one of our primary objectives. *Amici* believe that such accountability is possible only where our courts, not the Department of Justice, get to decide what the law is. By restricting access to the courts for litigants who seek to challenge concrete legal interpretations and governmental enforcement threats, the decision below sets a dangerous precedent, ceding power to the executive branch to say what the law is and allowing the government to create its own "common law" of compliance. Such a decision is far out of step with the rest of the country and with numerous decisions of the Supreme Court.

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[1]Counsel for *amici* provided notice to the parties of their intent to file an *amicus* brief on May 11, 2021. The parties have consented to the filing of this brief. Pursuant to Rule 29, no counsel for either party authored this brief in whole or in part. No one other than *amici* and their members made monetary contributions to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As far back as *Marbury v. Madison*, 5 U.S. 137 (1803), it has been "emphatically the province and duty of the judicial department to say what the law is." But what happens if the government uses its enforcement powers to threaten companies and individuals with potentially massive liability unless they "comply" with whatever the government says the law is? And what if the courts refuse to hear such cases unless the company or individual is willing to incur the penalty as the price for bringing the challenge? The result is that such challenges never get brought, the litigants acquiesce to the government's view of "law," and the government gains the practical ability to force "compliance" without any input from courts. Thus, the executive branch—not the judiciary—decides what the law is, contrary to Article III and contrary to our considered system of separation of powers.

That is the dilemma the Court must face squarely here. It is not a new one. Over the past 260 years, the government has tried in various ways to use its enforcement powers to coerce individuals and companies to adhere to its view of the law. Often, and unfortunately, these tactics succeed not because the law compels it, but because most parties cannot afford to challenge the government's view of the law no matter how aggressive or dubious.

But occasionally, a regulated party decides to fight back by challenging what it views as an unreasonable, unfair, or unlawful threat of enforcement. When this

occurs, courts have jealously protected the access of litigants to judicial review and have rejected dubious procedural roadblocks—such as the sovereign immunity claim here—that the government has attempted to place in the way. As the Supreme Court has recognized, any other result would send the wrong message to all parties—but especially the government—that when the government demands compliance with its view of "the law," there is no meaningful option but to capitulate. *E.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967); *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

The ruling below is out of step with these principles. It erroneously allowed the government to insulate its concrete legal interpretations and enforcement threats from judicial review, successfully invoking the doctrine of "sovereign immunity" without a valid basis. Doing so was error because there is no doubt here that the U.S. Department of Justice (DOJ) and the Drug Enforcement Administration (DEA) acted—aggressively—by attempting to force Walmart to accept their view of what the Controlled Substances Act required, invoking a number of concrete (and thus reviewable) legal "rules" with which it wanted Walmart to "comply." The Supreme Court long ago made clear that the Declaratory Judgment Act was adopted precisely to allow the threatened party to gain clarity in this situation, *Abbott Labs. v. Gardner*, 387 U.S. at 152, and Congress's "general consent" to a waiver of sovereign

immunity, *see United States v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983), should have sufficed to defeat any claimed sovereign immunity here.

By holding to the contrary and allowing dubious procedural roadblocks to defeat judicial review, the district court's ruling is out of step with the Supreme Court's threat-of-enforcement precedents, out of step with sovereign immunity law in the rest of the country, and carries dangerous potential consequences if allowed to stand. Meaningful access to the courts in the face of concrete governmental enforcement threats is essential to the rule of law. Denying it, based on groundless procedural arguments, tilts the already-unbalanced scales of power too strongly in favor of the government and enables prosecutors to avoid taking accountability for their enforcement actions. And in the context of this case, it places this Circuit far out of step with the rest of the country in challenges of this sort, paving the way for a variety of problematic consequences. This Court should reverse the district court and vindicate the principle that it is emphatically the province of the judicial branch to say what the law is.

ARGUMENT

I. MEANINGFUL ACCESS TO THE COURTS IN THE FACE OF CONCRETE GOVERNMENTAL ENFORCEMENT THREATS IS ESSENTIAL TO THE RULE OF LAW AND THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS

Although the dispute between Walmart and the Defendants is of relatively recent vintage, federal courts—including the Supreme Court—have frequently

addressed the underlying question it presents: When can a litigant who believes in the lawfulness of its conduct bring an anticipatory legal challenge to an imminent threat of enforcement by the government? A review of the legal landscape demonstrates that our courts have generally balanced the scales far more in favor of judicial review than the district court did here. Courts have seen these challenges as essential because in saying "what the law is," the judicial branch allows a challenger to obtain guidance as to his or her obligations without being forced to choose between exposure to potentially draconian penalties and acceding to the government's potentially erroneous view of the law.

Justice Scalia's opinion for the Court in *MedImmune* addressed a similar situation but in a slightly different context: There, a litigant was seeking an anticipatory declaratory judgment in the face of a *private* threat of enforcement. In finding a right to judicial review even where the threat of enforcement was made by a private litigant, the Court began by discussing what it viewed as the much easier and well-established case, noting that it had repeatedly allowed such challenges to proceed in the face of governmental threats of enforcement:

> Our analysis must begin with the recognition that, where threatened government action is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.

MedImmune, 549 U.S. at 128–29. In making this observation, the Court relied on a number of its prior decisions, including *Steffel v. Thompson,* 415 U.S. 452, 458–

59 (1974), where it had rejected the government's lack-of-standing defense in upholding the use of the declaratory judgment mechanism to challenge the constitutionality of a state law prohibiting handbill distribution, even though the threats of enforcement had stopped Petitioner's purportedly illegal hand-billing. The Court also pointed to *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 386 (1926), brought before Congress's passage of the Declaratory Judgment Act, in which it upheld an injunctive relief suit seeking to prevent the threatened application of a zoning ordinance to Plaintiff's property, even though the Plaintiff had not actually sought approval through the state zoning process. Similarly, the Court cited *Terrace v. Thompson*, 263 U.S. 197, 214 (1923), as another example in which a pre-enforcement challenge had been allowed; there, the Court had permitted a plaintiff who wished to enter lease with an alien in violation of state law to bring suit seeking to enjoin that law, even though the plaintiff had not yet signed a lease in violation of the statute. Finally, the Court also pointed to *Ex parte Young*, 209 U.S. 123 (1908), which had approved a challenge by railroad company shareholders to a Minnesota law regulating railroad passenger and freight charges, despite Minnesota's claim that the Eleventh Amendment prevented relief because any challenge to a threatened state enforcement action is really a suit against the sovereign state. *Id.* at 155–56.

In discussing these various decisions, the Court explained that, despite the different procedural contexts, each case involved the same "dilemma"—in which

"the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease or distribute handbills at the shopping center)." *MedImmune*, 549 U.S. at 129. The Court had rejected the asserted technical defenses in each case (under whatever procedural theory the government put forth) because of the importance of access to the courts and "because the threat-eliminating behavior was effectively coerced." In fact, the Court explained, this governmental behavior—using its enforcement powers to force a litigant to "comply or else"—was "the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 129.

For this last proposition—and of particular relevance to this case—the Court cited *Abbott Labs.*, 387 U.S. at 152. *Abbott Labs.* was a pre-enforcement challenge in which 30 pharmaceutical companies sought a declaratory judgment that the Food and Drug Administration's interpretation of a Congressional statute—which served as a threatened basis for enforcement—was incorrect. The FDA defended, in part, by claiming that its interpretation was not sufficiently final or concrete to be challenged, and that the companies should await an enforcement action in which they could raise these issues as defenses. The Supreme Court rejected that argument, explaining that the FDA's interpretation of the statute "puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* The Court went on to explain that if the companies were permitted to raise the challenge "only as a defense to an action brought by the Government," it "might harm them

severely and unnecessarily." *Id.* at 153. According to the Supreme Court, in such circumstances, "access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." *Id.*

The Court's decision in *Abbott Labs.* thus demonstrates that because pre-enforcement review is essential to prevent challengers from being harmed "severely and unnecessarily," access to the courts is the presumptive rule, "absent a statutory bar or some other unusual circumstance." And this was the rule even before Congress waived sovereign immunity in 1976. But, especially in the face of that waiver, the presumptive "sovereign immunity" rule applied below stands this principle on its head. Under the district court's rule, immunity is the norm unless the challenger can make what it viewed as a substantial additional showing that any threats rose to the level of "agency action," and it rejected the notion that the threats here rose to that level. As a practical matter, imposing such a high bar of "agency action" makes judicial review the exception in these cases and immunity the rule.

This high bar was imposed despite the fact that, because the case arose prior to the waiver of sovereign immunity by Congress, the Court in *Abbott Labs.* found "agency action" under circumstances similar to these here, *id.* at 149–53, and despite the Supreme Court's repeated emphasis that "access to the courts" must be the default rule whenever the agency's threatened actions have created a situation that

will require "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* at 153. Because that is precisely the case here, the district court got the balance exactly backward, bending in favor of a technical claim of sovereign immunity and against allowing access to the courts in the face of serious threats of enforcement. At the most basic level, the district court's ruling contravened a century of Supreme Court precedent, in which the Court has repeatedly ruled in favor of allowing access to the courts for parties facing imminent threats of government enforcement, rejecting a series of similar procedural impediments to that access along the way.

II. THE PRESUMPTION IN FAVOR OF SOVEREIGN IMMUNITY ADOPTED BY THE DISTRICT COURT, IF ADOPTED HERE, WOULD PLACE THIS COURT EVEN MORE OUT OF STEP WITH THE REST OF THE FEDERAL JUDICIARY

Apart from erring in favor of denying access to judicial review rather than allowing it, the court below also interpreted this Court's sovereign immunity jurisprudence in way that will bring it even more out of step with the rest of the federal judiciary. At the outset, the rule the district court applied below is already an outlier—as this Court's interpretation of Section 702 as a limited waiver of sovereign immunity stands alone. In at least eight other circuits, the government's sovereign immunity arguments would have been soundly rebuffed. Those courts all hold that Section 702's sovereign immunity waiver is unconditional, applying in all injunctive and declaratory relief cases regardless of the existence of "agency action."

The leading opinion on this issue was authored by then-Judge Merrick Garland in *Trudeau v. Federal Trade Comm'n,* 456 F.3d 178 (D.C. Cir. 2006).[2] There, the D.C. Circuit considered whether the federal courts had jurisdiction to hear a First Amendment and defamation challenge to an FTC press release, which had claimed that the Plaintiff had made a series of misleading infomercials. Just as here, the district court had held that Section 702's waiver of sovereign immunity required a showing of agency action and that no such agency action existed.

The D.C. Circuit disagreed, finding that the sovereign immunity waiver in Section 702 was not limited solely to cases of "agency action" but instead constituted a general waiver of sovereign immunity for all injunctive and declaratory relief claims against the United States. In so holding, Judge Garland's opinion began with an examination of the statutory language, noting that Section 702 waived sovereign immunity for all "action[s] in a court of the United States seeking relief other than money damages" and thus was not limited to actions brought under the Administrative Procedure Act (APA). *Id.* at 186. The court then examined the legislative history of Section 702, finding that "[t]he Judiciary Committees of both

[2] The government has, on occasion, appeared to acquiesce in the majority rule that the sovereign immunity waiver in Section 702 is a general consent to suit in cases that do not involve money damages. *See Trudeau*, 456 F.3d at 185. Given the one-sided nature of the split here, it remains open to question as to what position the government would take on this issue if the Supreme Court were to review it.

Houses, in their reports on the 1976 amendment, identified as the measure's clear purpose 'elimina[tion of] the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Id.* Given Congress' plain intention not to limit the waiver of sovereign immunity to APA cases, it would make no sense to limit that waiver to cases involving APA gate-keeping terms such as "agency action" or "final agency action"—especially since Congress did not use those terms in Section 702. Instead, Congress repeatedly stated an intention to waive "any" and "all" sovereign immunity claims in cases seeking injunctive or declaratory relief. *Id.*

Most federal circuits agree with that analysis. *E.g., Puerto Rico v. United States*, 490 F.3d 50, 57–58 (1st Cir. 2007); *Treasurer of N.J. v. U.S. Dep't. of Treasury*, 684 F.3d 382, 400 (3d Cir. 2012); *United States v. City of Detroit*, 329 F.3d 515, 520–21 (6th Cir. 2003) (en banc); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 475–76 (8th Cir. 1988); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017); *Delano Farms Co. v. Cal. Table Grape Comm'n,* 655 F.3d 1337, 1344–48 (Fed. Cir. 2011). What's more, the only pertinent Supreme Court discussion of Section 702's sovereign immunity waiver suggests these decisions are correct. *See Mitchell*, 463 U.S. at 227 & n. 32 (noting that although sovereign immunity may have barred injunctive and declaratory relief

suits against the government before 1976, "[i]n 1976 Congress enacted a *general consent* to such suits.") (emphasis added and internal citation omitted).

"The Fifth Circuit appears to be alone in holding to the contrary." *Navajo Nation*, 876 F.3d at 1172 n.36 (citing *Alabama-Coushatta Tribe of Tex. v. United States,* 757 F.3d 484, 489 (5th Cir. 2014)). While a panel of this Court may not undo a circuit precedent, its status as an extreme outlier counsels strongly in favor of construing the "agency action" requirement as being satisfied here. This appears to be exactly what another panel did in *Doe v. United States*, 853 F.3d 792, 799–800 (5th Cir. 2017), in which the Court found the "agency action" requirement met—and sovereign immunity waived—where the Department of Justice was alleged to have "accus[ed] Doe of a crime without providing a public forum in which Doe could seek to vindicate his rights." (Internal quotations and brackets omitted.) In other words, even in the cases that have applied this Court's limitation on Section 702's waiver of sovereign immunity, the Court has broadly construed that term and found the "agency action" element easily satisfied. *See also Alexander v. Trump,* 753 Fed. Appx. 201 (5th Cir. 2018) (*per curiam*) (defining "agency action" "broadly" and finding it to be easily satisfied).

We believe that position is both correct and necessary to ensure that meaningful access to the courts exists in cases of concrete threats of enforcement. Doing so permits suits involving threatened enforcement to move forward in most

cases, vindicating the century of Supreme Court precedent discussed above and narrowing the gap between this Court's jurisprudence and that of the rest of the country.

Here, the district court did the opposite. Not only did it impose the unique "agency action" requirement that exists in this circuit (as it was required to do), but it then created a *de facto* presumption in favor of sovereign immunity and against finding "agency action," ruling that the "agency action" requirement must be construed "strictly in favor of the sovereign" and that any ambiguities must be construed "in favor of immunity." *Walmart Inc. v. U.S. Dep't of Justice*, No. 4:20-cv-00817-SDJ, 24 (E.D. Tex. Feb. 4, 2021). That new gloss on this Court's already unique interpretation of Section 702, if affirmed, would make the Court even more of an outlier, and would further contravene the access-to-courts principles discussed above. Moreover, as explained below, it sets a dangerous precedent, tilting the balance of power too far in favor of the executive branch.

III. IF UPHELD, THE RULE ADOPTED BELOW WILL SET A DANGEROUS PRECEDENT, TILTING THE BALANCE OF POWER TOO FAR IN FAVOR OF THE EXECUTIVE BRANCH

Challenges like the one under review here are already extremely rare and difficult to bring. For fiscal year 2021, DOJ had a budget of more than $30 billion and a staff of approximately 100,000, including more than 12,000 attorneys. When this veritable legal army takes a position as to what the law requires, any litigant

knows that challenging that position will require substantial resources and that it will be an arduous challenge, particularly given the historic deference accorded to DOJ and the ample authority it has been delegated. Thus, when faced with threats like the ones allegedly made to Walmart here, parties almost always acquiesce. Very few have the means and the inclination to bring challenges such as these, and it is not coincidence that, in most of the Supreme Court cases discussed above, the challengers themselves had considerable resources.

But this is also why it is important for the courts to be receptive to these sorts of challenges. Without them, the government has an unchecked ability to create a "common law of enforcement," making one-sided law as to the scope of legal compliance obligations in a host of areas, and even taking aggressive positions about its own jurisdiction to act in these cases. Given the strong incentives to acquiesce, moreover, this "common law of enforcement" is already expansive and with even fewer of these already rare challenges it will become virtually unchecked. One can see this extensive power simply from the pleadings: The DOJ and DEA have a huge swath of executive-branch-made policies that they believe companies must comply with or face enforcement under federal controlled-substance laws. In the face of these "rules" or "guidelines," it is indisputable that many companies throughout the country are already treating those policies as "the law" and tailoring their compliance mechanisms accordingly. These policies are not limited to the Controlled Substances

Act but expand to many other areas of criminal and civil enforcement, such as antitrust, anti-corruption laws, export controls and sanctions laws, and beyond. Thus, in the form of guidance or compliance orders, federal agencies already effectively tell individuals and companies what the law is and threaten massive penalties for noncompliance.

Without the sort of pre-enforcement challenges at issue here, those policies will be in place for many years before they are ever reviewed by the courts. At that point, countless individuals and companies will have built their compliance mechanisms around those policies, and there will be huge reliance interests at stake in any enforcement action. Those reliance interests will, in turn, be cited by the DOJ and DEA as reasons why a court should reject any challenge to its policies. One feeds off of the other: the longer the government fends off judicial review, the more powerful the case against judicial review grows because the "law" has already become "settled" within the relevant community.

The decision below sets a dangerous precedent by strengthening this cycle, adopting a vigorous "agency action" requirement that serves as an easy way for the government to defeat pre-enforcement review. In cases brought under the APA, this is at least balanced by the fact that a challenger will need some showing of "agency action" on the merits to prevail, so the fact that such a requirement exists at the threshold immunity stage may all come out in the wash. But it is important to

remember that the district court's reasoning would also apply to non-APA and constitutional claims, meaning that it would impose this new "agency action" hurdle as part of the sovereign immunity analysis that otherwise would not have existed.

These sorts of procedural impediments are already too easily invoked by courts that are skeptical of the underlying rights at stake. For example, courts that minimize property rights can take an extreme view of what constitutes "final agency action," finding that a "compliance order" issued to a property owner by the Environmental Protection Agency (EPA) was not sufficiently final because no penalties had yet been imposed. *See Sackett v. EPA*, 566 U.S. 120 (2012) (unanimously overturning lower court decisions invoking absence of "final agency action" as reason to reject pre-enforcement challenge to an EPA "compliance order"). Courts averse to Second Amendment rights can create unique standing requirements as impediments to pre-enforcement challenges to gun laws, demanding that the plaintiff show not only a credible threat of prosecution but that he or she had been "singled out or uniquely targeted by the D.C. government for prosecution." *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). The list could go on and on, but the point is that although these sorts of procedural impediments are not new, they impose substantial barriers that further insulate the government's already imposing enforcement powers from meaningful oversight by the courts. This Court should not allow that to occur here.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellant, the Court should grant the relief requested by Plaintiff-Appellant.

Respectfully submitted,

/s/ Shana-Tara O'Toole

DATED: May 17, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court on May 17, 2021, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel, except for Kate Talmor, who I separately and directly served via email.

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/s/ Shana-Tara O'Toole
Shana-Tara O'Toole
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DATED: May 17, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of limitation of Fed. R. App. P. 32(a)(5)-(6) and (7)(B), and 5th Cir. R. 32.1 and 32.2. The brief contains 4,059 words, excluding the parts exempted by Fed. R. App. P. 32(f), and was prepared using Microsoft Word in 14-point Times New Roman proportionally spaced typeface.

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