NO. 20-1641

In the
Supreme Court of the United States

MARIETTA MEMORIAL HOSPITAL EMPLOYEE HEALTH BENEFIT PLAN, MARIETTA MEMORIAL HOSPITAL, AND MEDICAL BENEFITS MUTUAL LIFE INSURANCE CO.,

Petitioners,

v.

DAVITA INC. AND DVA RENAL HEALTHCARE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Medicare Secondary Payer Act prohibit a group health plan from discriminating against individuals with end-stage renal disease, or taking into account an individual's Medicare eligibility, even if the plan does not expressly state that such individuals will be treated differently?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state that DVA Renal Healthcare, Inc. is a wholly owned subsidiary of DaVita Inc., which has no parent corporation. Berkshire Hathaway owns more than 10% of DaVita's stock.

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INTRODUCTION

This case concerns a narrow question of statutory interpretation involving the anti-discrimination provisions of the Medicare Secondary Payer Act ("MSPA"). The provisions at issue were enacted in their current form more than three decades ago. Yet only in the last year have two circuits addressed the question presented in any depth, and both circuits (the Sixth and Ninth) came to the same key conclusion: the MSPA prohibits a group health plan from discriminating against individuals with end-stage renal disease ("ESRD"), or taking into account an individual's Medicare eligibility, even if the plan does not expressly state that it is doing so. That conclusion flows naturally from the text of the MSPA and accords with the common-sense principles of anti-discrimination law embodied in this Court's precedents. It also fulfills the MSPA's dual purpose of protecting vulnerable ESRD patients from discrimination and preventing private insurers from offloading the expense of dialysis services onto Medicare.

In attempting to justify this Court's review, petitioners seize on the Ninth Circuit's characterization of a portion of the Sixth Circuit's analysis as "incomplete." But that limited disagreement concerns only the Sixth Circuit's independent, alternative holding that certain language in the MSPA could support a disparate-impact claim. That alternative holding, while also well-grounded in the statutory text and relevant precedent, was not essential to the Sixth Circuit's judgment and did not determine the outcome of its

decision. Both circuits reached the same conclusion on the question presented: a plan may be liable for direct discrimination even if its drafters are not so careless as to admit in express terms that the plan singles out ESRD patients or Medicare-eligible participants. Changing circumstances with respect to the COVID-19 pandemic and recent ESRD-related regulatory developments also weigh in favor of allowing more percolation and wider ventilation in the lower courts. Especially at this early juncture, this Court's review is unwarranted.

STATEMENT

A. Statutory Background

Over the last half-century, Congress has developed a unique public-private reimbursement model to address the significant cost of renal dialysis for patients. In 1972, Congress extended Medicare coverage to nearly all individuals with ESRD regardless of age. *See* Pub. L. No. 92-603, § 299I, 86 Stat. 1329, 1463–64 (1972). Medicare served as the "primary payer" of health costs for ESRD patients and other Medicare-eligible individuals. In 1980, as part of a broader effort to counteract rising Medicare spending, Congress enacted the Medicare Secondary Payer Act, which made Medicare a "secondary payer" instead of a primary payer for certain health care costs already covered by private insurance. *See* H.R. Rep. No. 96-1167, at 389 (1980).

In 1981, Congress determined that "most health plans . . . contain[ed] provisions that [were] intended to prevent payment of benefits where the insured is also entitled to [Medicare] benefits." S. Rep. No. 97-139, at 735 (1981). The "precise problem that

Congress sought to ameliorate was that private plans would provide inferior benefits or coverage for medical treatment that also was covered by Medicare." *Bio-Med. Applications of Tenn., Inc. v. Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 281 (6th Cir. 2011). Plans, knowing that ESRD patients were eligible for Medicare, had an incentive to push them towards Medicare—contrary to Congress's intent to make Medicare a secondary payer.[1]

So Congress amended the MSPA to prevent private health plans from foisting ESRD patients onto Medicare. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2146, 95 Stat. 357, 800–01. Under that amendment, if a private health plan covered dialysis, the private plan was required to be the primary payer for the first 12 months (now 30 months) following the patient's diagnosis with ESRD. After that "coordination period," Medicare could take over and become the primary payer. The IRS could deny a health plan's tax deduction "if the plan differentiate[d] in the benefits it provide[d] between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner." Pub. L. No. 97-35, § 2146(b), 95 Stat. at 801. In 1989, Congress strengthened the anti-discrimination provisions by making them enforceable through judicial means and prohibiting plans from "taking into account" a person's eligibility for Medicare due to ESRD status. Pub. L.

[1] Individuals with ESRD are eligible for Medicare pursuant to 42 U.S.C. § 426-1(b) after the first three months of regular dialysis treatment without regard to age.

No. 101-239, § 6202(b)(1)(B), 103 Stat. 2106, 2231 (1989).

The anti-discrimination clauses of the MSPA remain substantively the same today. They provide that a group health plan "(i) may not take into account that an individual is entitled to or eligible for [Medicare benefits due to ESRD] during the [30]-month period which begins with the first month in which the individual becomes entitled to benefits under [Medicare]"; and "(ii) may not differentiate in the benefits it provides between individuals having end-stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner." 42 U.S.C. § 1395y(b)(1)(C). These provisions are enforceable by a private right of action. 42 U.S.C. § 1395y(b)(3).

B. Factual Background

Respondents are leading providers of dialysis treatments in the United States. This case arises from an employee health benefit plan's unlawful discrimination against a plan participant with ESRD, identified as "Patient A" in respondents' complaint. Between April 15, 2017 and August 31, 2018, the costs of Patient A's dialysis sessions were reimbursed by petitioner Marietta Memorial Hospital Employee Health Benefit Plan (the "Plan"), a self-funded plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). App. 4. At that point, Patient A dropped the Plan as a primary insurance provider and switched to Medicare. App. 6.

Patient A's decision to drop the Plan and switch to Medicare is unsurprising in light of the Plan's

design. The third-party administrator for the Plan is petitioner Medical Benefits Mutual Life Insurance Co. ("MedBen"), which touts its ability to reduce the amounts employers spend on dialysis through "proprietary dialysis health plan language." Dist. Ct. ECF No. 62 ¶ 8 (internal quotation marks omitted). In keeping with that aim, the Plan disfavors reimbursement for dialysis in several ways. First, the Plan provides three tiers of reimbursement benefits, with the bottom tier applying to "out-of-network" providers. The Plan classifies *all* dialysis providers as "out-of-network" and thus subject to the lowest reimbursement level. Because of the lack of in-network dialysis providers, Plan participants like Patient A faced higher copayments, coinsurance amounts, and deductibles for their life-sustaining treatments. App. 6. Second, the Plan puts dialysis providers at a disadvantage even relative to other providers in the bottom tier. Whereas most out-of-network providers in the bottom tier are reimbursed at a "reasonable and customary" fee based on industry-wide standards, the Plan caps reimbursement for dialysis at 87.5% of the Medicare rate, which is itself already lower than the "reasonable and customary" industry-wide fee. App. 5 (internal quotation marks omitted). Third, the Plan identifies dialysis as subject to heightened scrutiny, such as "cost containment review" and "claim audit and/or review." App. 6 (internal quotation marks omitted). These inferior benefits for individuals with ESRD naturally incentivize Plan participants like Patient A to switch to Medicare.

C. Procedural History

In December 2018, respondents filed a complaint on their own behalf and on behalf of Patient A, alleging that the Plan treats dialysis providers differently from other medical providers in violation of the MSPA and ERISA. Petitioners moved to dismiss. In September 2019, the district court granted petitioners' motions to dismiss the action with prejudice, holding in relevant part that the Plan had not discriminated unlawfully against individuals with ESRD through its reimbursement system.

The Sixth Circuit reversed. The court identified "the basic question" on appeal as "whether the MSPA prohibits primary plans from discriminating against individuals with ESRD without expressly stating that these individuals will be treated differently." App. 40. As to the non-differentiation provision of the MSPA, the court held that it prohibits both express anti-ESRD discrimination based on an individual's ESRD status and anti-ESRD discrimination based on an individual's ESRD-specific need for renal dialysis or based on any other factor. App. 41. Utilizing similar reasoning, the court also held that respondents had plausibly alleged a violation of the "take into account" provision of the MSPA. App. 41.

Petitioners sought rehearing en banc, which the Sixth Circuit denied with no judge calling for a vote. App. 116–17. Petitioners then moved to stay the mandate pending the filing of a petition for certiorari, arguing that the panel's decision was incorrect and conflicted with the Ninth Circuit's decision in *DaVita Inc. v. Amy's Kitchen, Inc.*, 981 F.3d 664 (9th Cir.

2020). The Sixth Circuit denied the motions to stay, again without a dissent. C.A. ECF Nos. 86, 87.

REASONS FOR DENYING THE PETITION

Petitioners fail to justify this Court's review, let alone its immediate intervention. Petitioners rely mainly on an alleged 1-1 split between the Sixth and Ninth Circuits. Yet any disagreement between those two courts is neither as definitive nor as consequential as petitioners make it out to be. In fact, the Ninth Circuit agreed with the Sixth Circuit's fundamental holding: the MSPA prohibits anti-ESRD discrimination even when that discrimination is not expressly spelled out in the terms of a plan. *See Amy's Kitchen*, 981 F.3d at 671. To the extent that the Ninth Circuit critiqued the Sixth Circuit's analysis, that critique was limited to the Sixth Circuit's holding in the alternative, which was not outcome-determinative, interpreting a separate statutory phrase to permit disparate-impact claims. And both circuits applied the same test, derived from this Court's precedent, to evaluate the disparate-impact theory. A discrepancy in the application of that test to a single phrase in a subsection of a provision of the MSPA is unworthy of this Court's review, especially at this early stage and especially when that issue is not outcome-determinative. Changing regulatory and public health circumstances related to ESRD also weigh in favor of allowing more percolation.

This Court's review is all the more unwarranted because the Sixth Circuit's decision is correct. In analyzing the anti-differentiation and take-into-account provisions, the court hewed closely to the statutory text. The court gave the statute its full and

fair meaning by recognizing that it prohibits not only express discrimination based on the existence of ESRD—a confession of illegality that no plan would be foolish enough to enshrine in so many words in its terms—but also discrimination with respect to the "need for renal dialysis," which widens the scope of liability for disparate treatment, or "in any other manner," which encompasses disparate-impact liability. 42 U.S.C. § 1395y(b)(1)(C)(ii). This Court's anti-discrimination and disparate-impact precedents reinforce these conclusions. Petitioners' heavily purposive arguments to the contrary are unavailing.

I. There Is No Split Worthy Of This Court's Review

A. Petitioners Overstate the Extent of the Disagreement Between the Sixth and Ninth Circuits

Petitioners' primary argument in support of certiorari is an alleged 1-1 split between the Sixth and Ninth Circuits. As petitioners acknowledge, however, the "basic question" the Sixth Circuit addressed was "'whether the MSPA prohibits primary plans from discriminating against individuals with ESRD without expressly stating that these individuals will be treated differently.'" Pet. 13 (quoting App. 40). On that fundamental question, the Circuits agree. *Compare* App. 41 ("In short, a plan may be engaging in unlawful discrimination against individuals with ESRD even if it does not explicitly single these individuals out for differential treatment") *with Amy's Kitchen*, 981 F.3d at 671 ("We do not hold that all facially neutral plans comply with the MSP"). Indeed, the Ninth Circuit emphasized that "[a] facially neutral

provision that, in effect, operated to differentiate 'between individuals having end stage renal disease and other individuals covered by such plan' would not comport with the MSP." *Amy's Kitchen*, 981 F.3d at 671 (quoting 42 U.S.C. § 1395y(b)(1)(C)(ii)). Whether a plan admits on its face that it treats individuals with ESRD differently is therefore not dispositive in either circuit; courts must look beyond the express terms of the plan and consider the effect of the challenged provisions.

Petitioners elide this common ground and highlight the Ninth Circuit's "suggest[ion]" that a portion of the Sixth Circuit's analysis was "incomplete." *Amy's Kitchen*, 981 F.3d at 674. But that section of the Ninth Circuit's opinion refers only to the Sixth Circuit's holding in the alternative that the MSPA allows for disparate-impact liability. *Id.* The Sixth Circuit's primary holding, independently sufficient to support its judgment, was that the Plan discriminated against individuals with ESRD based on "the need for renal dialysis." *See* App. 40–45.

The Sixth Circuit did not base that conclusion on disparate-impact theory. Rather, the court relied on the "well-established principle in antidiscrimination jurisprudence" that a near-perfect overlap between the disfavored activity and the protected class may be evidence of *direct* discrimination. App. 44. After all, few plans will openly admit that they are discriminating against ESRD patients. If plans could circumvent the MSPA by the simple expedient of couching their discrimination in terms of a characteristic that is a near-perfect proxy for ESRD, the statute's protection would not be worth much. In

short, discrimination can be *direct* without being *explicitly* based on the prohibited characteristic. Or, as the Court put this common-sense principle, "[a] tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). That the Sixth Circuit's disparate-impact holding is merely an alternative ground for reversal, and therefore not outcome-determinative, weighs against this Court's review. *See* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006) (noting that the Court is "not particularly interested" in resolving issues that "are not outcome determinative").

The Sixth Circuit expressly identified the disparate-impact theory as an "[a]lternative[]" ground for its decision, based on the separate statutory phrase "in any other manner." App. 45, 47. The court considered whether "even if the Plan has not directly targeted ESRD patients"—which the court had just held the Plan did—the "catch-all provision could support a disparate-impact claim." App. 45. And even on that point, the Sixth and Ninth Circuits agreed that the proper framework to apply in evaluating whether the statute supports disparate-impact liability was this Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). *Compare* App. 46 *with Amy's Kitchen*, 981 F.3d at 672 ("We agree with the Sixth Circuit that the Supreme Court's decision in *Inclusive Communities* provides the appropriate framework for considering whether a statute encompasses a disparate-impact theory."). The courts differed only in the application of that common

framework to one specific phrase in a provision of the MSPA.

Moreover, while the Sixth and Ninth Circuits came to different bottom-line conclusions about whether respondents' allegations stated a claim for violation of the MSPA, these outcomes appear to be attributable at least in part to different factual assumptions. The Sixth Circuit credited respondents' allegation that dialysis is "needed almost exclusively by ESRD patients." App. 42 (internal quotation marks omitted). Taking the facts alleged in the complaint as true and properly construing them in the light most favorable to the plaintiffs at the pleading stage, the court noted that nearly all dialysis users have ESRD and need dialysis treatments with much greater frequency than do the "rare" non-ESRD users, who typically suffer from acute kidney injury. App. 42 In contrast, the Ninth Circuit appeared to make its own quite different factual finding, beyond the four corners of the complaint, that "*[m]any* persons who do not have ESRD receive dialysis as treatment for acute kidney injury." *Amy's Kitchen*, 981 F.3d at 671 (emphasis added); *see also id.* at 669 ("some have ESRD and some do not"). The Ninth Circuit even cited a study indicating that people hospitalized with COVID-19 are at significant risk of developing acute kidney injury. *Id.* at 667.

Whereas the Sixth Circuit's analysis reflects that the proportion of dialysis use by individuals who do not have ESRD is essentially *de minimis*, the Ninth Circuit seems to have assumed that non-ESRD use of dialysis is substantial. These different factual assumptions and emphases further mitigate any

apparent tension between the two decisions. To return to the Court's analogy in *Bray*, a tax on wearing yarmulkes, in other words, might not be a tax on Jews if yarmulkes were also widely worn by non-Jews. Petitioners understandably do not ask the Court to review the Sixth Circuit's factbound decision to credit respondents' allegations that a need for dialysis is a near-perfect proxy for ESRD. But that factual allegation—and the Ninth Circuit's unusual choice to venture outside the pleadings to make its own factual finding about the prevalence of non-ESRD dialysis—accounts for the difference in outcomes.

B. The Issues Would Benefit From More Percolation

Despite petitioners' attempt to manufacture a sense of urgency, there is no need for this Court to grant review immediately, and several circumstances weigh in favor of allowing more percolation. This Court does not typically grant review the moment a circuit split emerges, and for good reason. As commentators have observed, granting certiorari immediately after a 1-1 split arises "eliminates the Court's ability to take advantage of further percolation in the lower courts, limiting its ability to learn more about the underlying issue by allowing other lower courts to make their own independent judgments." Tom S. Clark and Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. of Pol. 150, 152 (2013); *see also California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (agreeing with scholarly commentary that "[a]lthough one of the Court's roles is to ensure the uniformity of federal

law," the Court need not "act to eradicate disuniformity as soon as it appears" (internal quotation marks omitted)). In short, "[t]his Court often speaks most wisely when it speaks last." *Maslenjak v. United States*, 137 S. Ct. 1918, 1932 (2017) (Gorsuch, J., concurring in part and concurring in the judgment).

Petitioners cherry-pick a few exceptions to the rule where the Court granted review of a 1-1 circuit split. Pet. 17–18. But all of these examples involved square conflicts between the circuits' primary holdings, as opposed to a secondary disagreement over an alternative holding, and most involved issues with a heightened need for national uniformity, such as matters touching on foreign relations (*e.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 532 (1995)), fundamental questions of bankruptcy law (*e.g.*, *Union Bank v. Wolas*, 502 U.S. 151 (1991)), issues of preemption and federalism bearing on the constitutionality of state statutes (*e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002)), or issues of constitutional dimension involving state sovereign immunity and interstate compacts (*e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51–52 (1994)). This case, in contrast, centers on a disagreement about an alternative holding regarding a statutory provision that regulates coverage of a single health condition. No wonder, then, that petitioners felt compelled to dismiss the entire notion of percolation. Pet. 16–17.

A cautious approach is especially warranted here in light of changing circumstances, including recent

regulatory developments related to ESRD. For example, the Centers for Medicare & Medicaid Services recently promulgated the Contract Year 2021 Medicare Advantage and Part D Final Rule. 85 Fed. Reg. 33,796 (June 2, 2020). Changes in that rule make it easier for ESRD patients to enroll in Medicare Advantage plans, which are plans offered by private companies that contract with Medicare. Most significantly, the rule removes a preexisting general prohibition on enrollment in Medicare Advantage plans by individuals diagnosed with ESRD. 85 Fed. Reg. at 33,796. The rule also seeks to reduce Medicare Advantage plan costs, making enrollment of ESRD patients more attractive, by expanding Medicare coverage of certain costs associated with kidney transplants. *Id*. at 33,796–97. These changes will likely lead to more individuals enrolling in Medicare Advantage plans instead of employer plans, thus shrinking the universe of individuals that could be affected by this case.

Pandemic-related changes also counsel against review. The Ninth Circuit's analysis rested in part on its finding that COVID-19 may increase the incidence of acute kidney injury and thus expand the proportion of dialysis users who do not have ESRD. *Amy's Kitchen*, 981 F.3d at 667–68. That finding (putting aside the Ninth Circuit's foray beyond the pleadings in making it) may become less relevant as the pandemic dissipates. Time will tell how the changing regulatory circumstances and public health situation bear on the issues presented here, and there is no need for this Court to rush in before the dust settles.

Petitioners seek to create a false sense of urgency by exaggerating the consequences of the Sixth Circuit's decision for group health plans. According to petitioners' overblown rhetoric, plan sponsors are left with only two options: exclude dialysis treatment from coverage or terminate the plan altogether. Pet. 7. This amounts to a complaint that it is simply too expensive for plans to serve ESRD patients while meeting their obligations under the MSPA, even though many plans have done so for many years. Indeed, it is striking how little litigation the MSPA provisions at issue here have given rise to.

Furthermore, separate and apart from the MSPA, several external constraints may restrict plan sponsors from terminating dialysis coverage or eliminating a group health plan altogether. The Affordable Care Act's employer mandate imposes penalties on large employers that fail to provide health insurance. 26 U.S.C § 4980H. To meet the Act's minimum essential coverage requirements, these plans must provide certain "essential health benefits," including coverage of "chronic disease management." 42 U.S.C. § 18022(b). In addition, terminating coverage for dialysis could run afoul of the Americans with Disabilities Act, which prohibits employers from discriminating on the basis of disability with respect to "employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The Equal Employment Opportunity Commission's regulations further provide that it is unlawful for an employer to discriminate on the basis of disability with respect to "[f]ringe benefits available by virtue of employment,

whether or not administered by the [employer]." 29 C.F.R. § 1630.4(a)(1)(vi).

Petitioners suggest that plans that operate across both the Sixth and Ninth Circuits are caught in a "vexatious trap." Pet. 4. But petitioners do not, and cannot, contend that it is impossible for plans to comply with both circuits' rulings. Nor do they explain why, as a practical matter, plans cannot take the approach recommended by the Sixth Circuit—namely, that plans avoid discriminating against individuals with ESRD. There is no "trap" here.

II. The Sixth Circuit's Decision Is Correct

This case is also unsuitable for this Court's review because the Sixth Circuit's statutory analysis is correct. The Sixth Circuit held principally that the Plan violates the MSPA's anti-differentiation provision because the Plan discriminates against individuals with ESRD based on their need for frequent renal dialysis. Because individuals with ESRD are automatically eligible for Medicare (after a three-month period), the Plan also violated the MSPA's "take into account" provision. In the alternative, the court held that the Plan violates the MSPA because its terms have a disparate impact on individuals with ESRD. These holdings are well supported by the relevant statutory text, purposes, and precedent.

A. The Decision Is Consistent With the Text of the MSPA

The anti-differentiation provision of the MSPA states that a group health plan "may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered

by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner." 42 U.S.C. § 1395y(b)(1)(C)(ii). In analyzing this provision, the Sixth Circuit carefully distinguished three different types of anti-ESRD discrimination, each flowing directly from the statutory text: discrimination based on "the existence of [ESRD]," on "the need for renal dialysis," or discrimination "in any other manner." *Id.* As the court observed, the last two clauses demonstrate Congress's awareness that plans might attempt to discriminate against ESRD patients without identifying ESRD explicitly. App. 41–45. The only way to give those clauses independent meaning is to recognize that they expand the MSPA's protections beyond a prohibition of express discrimination. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (canon against surplusage). Where, as here, a plan targets for disfavored treatment dialysis services that are needed almost exclusively by ESRD patients, that is differentiation based on the "need for renal dialysis" under any reasonable understanding of that phrase. And lest there be any doubt, the catch-all phrase "in any other manner," which could hardly be more all-encompassing, prohibits plans from using devices that have the effect of such illegal differentiation.

That concern is far from theoretical. Companies like petitioner MedBen, the third-party administrator for the Plan, have built their business models on advising plans about how to circumvent the MSPA. *See* Dist. Ct. ECF No. 62 ¶¶ 8–9. The three-tiered structure of the statute is designed to foreclose precisely the kind of end-run that petitioners attempted here.

The Sixth Circuit's conclusion that the Plan violates the "take into account" provision is likewise textually sound. That provision states that a group health plan "may not take into account that an individual is entitled to or eligible for [Medicare benefits due to ESRD]" during the 30-month period when the plan is the primary payer. 42 U.S.C. § 1395y(b)(1)(C)(i). The ordinary meaning of the phrase "take into account" is expansive. To "take" something "into account" means to "consider" or "think of" it. *See Account*, Merriam Webster's Online Dictionary, https://www.merriam-webster.com/diction ary/account (last visited Sept. 9, 2021). This means that plans are prohibited from adopting policies that are motivated, even in part, by considerations of Medicare eligibility.

As the Sixth Circuit observed, the regulations implementing the MSPA reinforce this interpretation. App. 52 (citing 42 C.F.R. § 411.108(a)). The regulations indicate that "taking into account" includes "denying or terminating coverage because an individual is entitled to Medicare on the basis of disability without denying or terminating coverage for similarly situated individuals who are not entitled to Medicare on the basis of disability[,]" *id.* § 411.108(a)(4), or "[i]mposing limitations on benefits for a Medicare[-]entitled individual that do not apply to others enrolled in the plan, such as providing less comprehensive health coverage, excluding benefits, reducing benefits, charging higher deductibles or coinsurance, providing for lower annual or lifetime benefit limits, or more restrictive pre-existing illness limitations[,] *id.* § 411.108(a)(5).

Respondents plausibly alleged that the Plan discriminates against ESRD patients, who are legally entitled to Medicare, by reducing their benefits relative to other Plan enrollees. Thus, respondents likewise plausibly alleged that the Plan unlawfully takes into account Medicare eligibility.

B. The Decision Is Consistent With This Court's Precedent

In interpreting the MSPA, the Sixth Circuit did not write on a blank slate. It grounded its conclusions in this Court's anti-discrimination case law. Those precedents provide further support for the Sixth Circuit's holding that the protections of the MSPA extend beyond a prohibition on express anti-ESRD discrimination.

1. As the Sixth Circuit recognized, a central theme of this Court's anti-discrimination jurisprudence is that discrimination often takes more subtle forms. A claim that a policy is discriminatory because it disfavors a certain group does not require that the policy affect only the disfavored group and no one else, let alone that the policy explicitly acknowledge that it is based on the protected characteristic. In the civil rights era, poll taxes and literacy tests were widely recognized as racially discriminatory even when by their terms they applied uniformly to all races. *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965) (literacy test); *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (poll tax). As the Court has explained, discrimination can also be inferred when a policy targets an activity "engaged in *exclusively or predominantly* by a particular class of people." *Bray*, 506 U.S. at 270 (emphasis added).

The Court applied similar reasoning to Minnesota's tax on the use of paper and ink in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Although the state argued that the paper-and-ink tax was "part of the general scheme of taxation," and there was no evidence of discriminatory purpose apart from the structure of the tax itself, the Court concluded that the tax singled out the press for "differential treatment." *Id.* at 581–83; *cf. also Dawson v. Steager*, 139 S. Ct. 698 (2019) (tax benefit for some, but not all, state law enforcement officers discriminated against federal law enforcement officers); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (tax benefit favoring some, but not all, local liquor products discriminated against interstate commerce).

This logic readily extends to the MSPA. In the decision below, the Sixth Circuit credited respondents' allegations that dialysis is needed almost exclusively by ESRD patients and that those patients need it much more frequently than do the rare, non-ESRD users of dialysis. App. 41. Meanwhile, the Plan is clearly structured to disfavor dialysis, singling it out for severely limited reimbursement and heightened claim scrutiny. App. 5–6. As a natural consequence of this structure, individuals like Patient A are incentivized to leave the Plan and switch to Medicare. App. 7. That saves the Plan money and puts the costs on the taxpayers' tab, just as MedBen intended. *See* Dist. Ct. ECF No. 62 ¶ 8.

Putting two and two together, the Sixth Circuit concluded that respondents had plausibly alleged that the Plan discriminates based on the need for dialysis

and impermissibly takes into account Medicare eligibility. That the miniscule fraction of dialysis users who do not suffer from ESRD are also adversely affected does not change the basic equation, just as the fact that non-Jews occasionally wear yarmulkes cannot obscure the reality that a tax on yarmulkes would be a tax on Jews and that a tax on paper and ink is a tax on the press even though the press is not the only user of paper and ink.

2. The Sixth Circuit's alternative holding that the MSPA supports disparate-impact liability also follows from this Court's precedent. As discussed above, the MSPA does not only prohibit discrimination based on the existence of ESRD or on the need for dialysis; the catch-all provision further prohibits plans from differentiating ESRD patients "in any other manner." The Sixth Circuit observed that even if a plan does not directly target ESRD patients by disfavoring the service they depend on much more than anyone else, a plan "may have devised a reimbursement system that has the *effect* of singling out ESRD patients." App. 45 (emphasis added). Based on a close examination of this Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), the Sixth Circuit concluded that the statutory text encompasses this disparate-impact theory of liability.

Inclusive Communities considered disparate-impact liability under the Fair Housing Act. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or

otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'" 42 U.S.C. § 3604(a). Section 805(a) also prohibits people involved in residential real estate transactions from "discriminat[ing] against any person in making available such a transaction." 42 U.S.C. § 3605(a). The Court focused on the meaning of "otherwise make unavailable[,]" which the Court likened to the phrase "otherwise adversely affect" in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. *Inclusive Communities*, 576 U.S. at 534–35 (internal quotation marks omitted). The Court held that this language likewise "refers to the consequences of an action rather than the actor's intent" and "encompasses disparate-impact claims." *Id.* at 534.

As the Sixth Circuit observed, there are multiple important parallels between the catch-all phrase in the MSPA and the provision at issue in *Inclusive Communities*. First, the phrase follows a series of other prohibitions that address disparate *treatment*, which indicates that it captures something different from those prohibitions. *See id.* at 534–35 (identifying the key phrases in the FHA, Title VII, and the ADEA as "[l]ocated at the end of lengthy sentences that begin with prohibitions on disparate treatment"). Second, like the phrase "'otherwise make unavailable,'" the phrase "'in any other manner'" is "exceedingly broad, sweeping in less blatant forms of discrimination." App. 47; *see Inclusive Communities*, 576 U.S. at 534–35 (concluding that the key phrases in the FHA, Title VII, and ADEA "serve as catchall phrases looking to consequences, not intent"). Furthermore, as the Court

recognized in *Inclusive Communities*, the word "otherwise" means "'*in a different way or manner*,' thus signaling a shift in emphasis from an actor's intent to the consequences of his actions.'" *Id.* at 535 (quoting Webster's Third New International Dictionary 1598 (1971) (emphasis added)). This definition closely parallels the virtually identical phrase "in any other manner" in the MSPA, providing further confirmation that the statute allows for disparate-impact claims.

In attempting to distinguish *Inclusive Communities*, the Ninth Circuit emphasized primarily that the text of the FHA refers to "discrimination" whereas the MSPA refers to "differentiation." *Amy's Kitchen*, 981 F.3d at 674–75. Petitioners echo this argument. Pet. 27—28. According to the Ninth Circuit, whereas "the FHA's use of the word 'discriminate' suggested disparate-impact liability to the Supreme Court in light of the identical wording of Title VII and the ADEA," Congress's omission of that word from the MSPA "strongly suggests that it did *not* intend to encompass disparate-impact liability." *Amy's Kitchen*, 981 F.3d at 674 (emphasis in original).

This distinction is puzzling. In the first place, *Inclusive Communities* centered on the phrase "otherwise make unavailable," not on the word "discriminate." *Inclusive Communities*, 576 U.S. at 534 ("Here, the phrase 'otherwise make unavailable' is of central importance to the analysis that follows"). Moreover, the ordinary understanding of "differentiation" is, if anything, *broader* than that of the term "discrimination," which may carry a greater connotation of improper motive or insidious design.

See Bryan A. Garner, Garner's Modern English Usage 288 (4th ed. 2016) (noting that the word "discriminatory" has "extremely negative connotations" and that "discrimination" has "undergone seemingly irreversible pejoration"). The use of the more neutral "differentiate" suggests an expansion, rather than a limitation, of the scope of liability, and an additional reason to conclude that disparate-impact claims are covered.

C. Petitioners' Purpose-Based Arguments Are Unconvincing

Without support from the statutory text or precedent, petitioners are left to lean on even flimsier purposive arguments. *See* Pet. 20–25, 31. Petitioners' central contention on this score is that "the purpose of the MSPA is to protect Medicare," rather than to protect against discrimination. Pet. 31. In petitioners' view, in other words, the MSPA is designed to conserve Medicare's finances rather than to safeguard the interests of ESRD patients. *See* Pet. 25 ("The [Sixth Circuit's] decision transforms the statute . . . from a coordination-of-benefits law designed to protect *Medicare* into an anti-discrimination statute designed to protect *certain providers*") (emphasis in original).

It is well established, however, that a statute can have more than one purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."). Here, the obvious rejoinder to petitioners' simplistic contention is that the MSPA is *both* a coordination-of-benefits measure *and* an anti-

discrimination statute. The MSPA conserves Medicare's finances *by* prohibiting discrimination that would drive ESRD patients off private plans and onto the public fisc. The twin purposes of the statute are two sides of the same coin.

Moreover, while any resort to legislative history is unnecessary in light of the clear statutory text, that history confirms that Congress understood these purposes as interrelated. Early on in the evolution of the MSPA, a Senate report explained that the anti-differentiation provision targeted plans containing any "*discriminatory* provision that reduces or denies payment of benefits for renal patients." S. Rep. No. 97-139, at 736 (emphasis added). That Report also expressed concern that the costs of covering ESRD patients during the coordination period would encourage private employers to engage in "job discrimination" against individuals eligible for Medicare. *Id.* And a later committee report explained that plans would be penalized if they "differentiate[d] directly *or indirectly* on the basis of the existence of [ESRD] or the need for renal dialysis." S. Rep. No. 99-146, at 363 (1985) (emphasis added). Thus, text, precedent, and purpose all point to the same conclusion: the MSPA prohibits the kind of discrimination at issue in this case. That well-reasoned conclusion does not warrant this Court's review.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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