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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the joint petition of Marietta Memorial Hospital Employee Health Benefit Plan (the "Plan"), Marietta Memorial Hospital ("Marietta Hospital") and Medical Benefits Mutual Life Insurance Co. ("MedBen" and, with the Plan and Marietta Hospital, "Petitioners") remains accurate.

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JOINT REPLY BRIEF FOR PETITIONERS

Dialysis coverage provisions that comply with the Medicare Secondary Payer Act in the Ninth Circuit are now actionable in the Sixth Circuit. The brief in opposition tries in vain to reconcile the directly conflicting rulings that the two courts have issued. The purported consensus does not exist. The two circuits have reached diametrically opposite conclusions, which respondents DaVita, Inc., and DVA Renal Healthcare, Inc. (collectively, "DaVita") barely acknowledge. The resolution proposed by DaVita – that employer group health plans simply accede to the Sixth Circuit approach – would be fine for DaVita, but would require the plans, to the detriment of the millions of working families that they protect, to curtail coverage of other vital medical procedures in order to service the preemptive needs of dialysis providers. Resp'ts Br. at 16.

On the merits, the DaVita brief likewise provides no sound reason to accept the circuit split as the new normal. The Sixth Circuit decision hardly "flows naturally" from the text of the Medicare Secondary Payer Act ("MSPA"). *Id.* at 1. Instead, the majority opinion departs from Supreme Court guidance on statutory interpretation and fundamentally reshapes the MSPA. Tellingly absent from the DaVita brief is any reference to Judge Eric E. Murphy's well-reasoned dissent in the Sixth Circuit, which the Ninth Circuit decision amplifies, based on the literal text of the MSPA and customary norms of statutory interpretation.

A. The split between the Sixth and Ninth Circuits is definitive and consequential.

DaVita's suggestion that the Sixth Circuit and Ninth Circuit decisions can coexist ignores the actual content of both opinions. "[T]he basic question" at issue in the Sixth Circuit was "whether the MSPA prohibits primary plans from discriminating against individuals with ESRD without expressly stating that these individuals will be treated differently." App. 40. The Sixth Circuit held that "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." App. 41. The Sixth Circuit arrived at this holding by relying on *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015), and reading a "disparate impact" standard into the MSPA. App. 45-48; 53-54. The Sixth Circuit concluded that "[d]iscovery [would] permit DaVita the opportunity to demonstrate" an MSPA violation. App. 53.

In stark contrast, the Ninth Circuit in *Amy's Kitchen* affirmed the dismissal of all claims asserted by DaVita under the MSPA and Employee Retirement Income Security Act of 1974 ("ERISA"). *DaVita Inc. v. Amy's Kitchen, Inc.*, 981 F.3d 664, 679 (9th Cir. 2020). The Ninth Circuit rejected DaVita's argument that a plan violates the MSPA's "take into account" and "differentiation" provisions by allegedly paying less for dialysis than for other treatments. *Id.* at 670-671.

Tactfully describing the Sixth Circuit majority's contrary reasoning in *Marietta Memorial* as "incomplete," the Ninth Circuit held instead that the MSPA does not support disparate-impact claims. *Id.* at 674. In doing so, the Ninth Circuit specifically addressed the Sixth Circuit's overall interpretation of the MSPA, and held that "[n]ot every list of actions followed by a broad catch-all clause means that Congress intended to encompass a disparate-impact theory[,]" and "*Inclusive Communities* requires both a more detailed study of the statutory text and a consideration of other relevant factors." *Id.*

Squarely at odds with the Sixth Circuit, the Ninth Circuit determined that, because the Amy's Kitchen Plan "provides identical benefits, including dialysis benefits, to all insured persons, the Plan does not run afoul of the MSP[A]." *Id*. at 671. Under this holding, the Marietta Plan would not violate the MSPA, and the district court's decision would have survived.

DaVita nonetheless asserts that "both circuits . . . came to the same conclusion," (Resp'ts Br. at 2) but pointedly does not claim that the Ninth Circuit decision was "correct" or "consistent with the text of the MSPA" or "consistent with this Court's precedent" – the accolades that it gives to the Sixth Circuit majority opinion. *Id.* at 1, 16, 19.

The Ninth Circuit decision, moreover, mirrors Judge Eric E. Murphy's dissenting opinion in the Sixth Circuit – which DaVita fails to address in any

fashion. Judge Murphy concluded that: (1) "a plan that uniformly offers the same benefits to all groups does not violate" the "differentiation clause" of the MSPA and (2) the "take-into-account clause" of the MSPA "bar[s] only group health plans that contain terms *expressly targeting* Medicare-eligible individuals who are eligible because of their end stage renal disease." App. 70-71; 83-84 (emphasis in original). "This reading follows from the relevant text, context, regulations, and precedent" related to the MSPA. *See* App. 70. In Judge Murphy's view in the Sixth Circuit, as in the Ninth Circuit's view in *Amy's Kitchen*, the Marietta Plan would not violate the MSPA, and the district court's decision was correct.

A comparison of the decisions plainly establishes a split between the Sixth Circuit and the Ninth Circuit as to: (1) whether the MSPA allows disparate impact claims; and (2) whether a group health plan that provides uniform reimbursements of all dialysis treatments (a) "take[s] into account" the fact that a plan participant with end stage renal disease is eligible for Medicare benefits; and (b) "differentiate[s]" between such individuals and others with the benefits that it provides.

DaVita disclaims any formal circuit split, but ultimately concedes that "the Sixth and Ninth Circuits came to different bottom-line conclusions about whether respondents' allegations stated a claim for violation of the MSPA." Resp'ts Br. at 11. DaVita recognizes that the Sixth and Ninth Circuits disagree on the application of *Inclusive Communities*. *Id.*, 10-11. These

acknowledged conflicts are not incidental asides or "alternative" holdings in the appellate opinions. They constitute the very basis of the two courts' divergent views. The split between the Sixth and Ninth Circuits is pronounced and real.

Nor do any differences in the factual allegations or purported assumptions "account[] for the difference in outcomes," as DaVita claims. Resp'ts Br. 11-12. The facts alleged in both actions are virtually identical. *Amy's Kitchen* deals with "Patient 1," an employee of Amy's Kitchen with ESRD enrolled in Amy's Plan (an ERISA employee benefit plan) (*see* 981 F.3d at 668). This action deals with "Patient A," who was enrolled in the Marietta Plan (also an ERISA employee benefit plan). *See* Resp'ts Br. 4. Further, both the Amy's Kitchen Plan and the Marietta Plan provided the same coverage to all persons receiving dialysis treatment, and in both cases DaVita claimed (through assignment) that the plans violated the MSPA.

There is no material factual distinction between the two cases. The only alleged difference to which DaVita points is the way in which the Sixth and Ninth Circuits describe who receives ESRD benefits. Resp'ts Br. 11. Yet, despite characterizing it differently, both courts ultimately agreed that not all persons receiving dialysis have been diagnosed with ESRD. *Compare* App. 42 *with Amy's Kitchen*, 981 F.3d at 671. Regardless, neither the Sixth Circuit nor the Ninth Circuit based their decisions on these purported assumptions. DaVita provides no proof for the proposition that this

alleged factual assumption could account for the circuit split.

B. DaVita sings the praises of percolation but is actively shutting down the only other pending cases on the subject matter of this petition.

DaVita extols the virtues of "allowing more percolation and wider ventilation in the lower courts." Resp'ts Br., 2. Aside from reciting this abstract proposition, however, DaVita does nothing to explain any practical need for "percolation" of the issues in this case or any specific issues that "percolation" or "wider ventilation" would clarify. Notably, DaVita also fails to advise the Court of any other pending or anticipated cases in which to "percolate" the issues that divide the Sixth and Ninth Circuits. Nor does DaVita provide any citation to any other case that concerns the issues over which the Sixth and Ninth Circuits have reached an impasse.

Moreover, DaVita does not practice what it preaches. Ironically under the circumstances, DaVita is hastening to pull the plug on any further "percolation" and close the "window" to any further development of the issues that this petition concerns in two related cases: *Star Dialysis, LLC, et al. v. WinCo Foods Employee Benefit Plan, et al.*, No. 1:18-cv-00482 (D. Idaho Oct. 30, 2018), and *DaVita Inc v. Virginia Mason Memorial Hospital, et al.*, No. 2:19-cv-00302 (W.D. Wash. Mar. 01, 2019).

According to the electronic dockets, DaVita is currently in the process of settling both actions. The *Star Dialysis* court has stayed all court deadlines pending settlement discussions between the parties at the parties' request (*see* ECF No. 93), and DaVita has undertaken to halt further proceedings in the *Virginia Mason Memorial Hospital* case on the basis of a "confidential Settlement, Release, and Waiver Agreement" and consent decree. *See* ECF No. 59.

DaVita has not pointed to any other relevant action in the lower courts that would inform this Court on the MSPA and ERISA issues that Petitioners present. In the absence of any other pending cases, there would be nothing to gain from delayed review and resolution of the split between the Sixth and Ninth Circuits.

DaVita also entirely ignores the fact that "percolation" does not provide the same benefit to questions of federal statutory interpretation – like those at issue in this action – as it may afford to other issues. This Court has granted review of fresh or limited circuit splits to review federal statutory interpretation questions. Pet'rs Br., 15-20. In fact, DaVita admits that review of 1-1 splits can be had when there are "square conflicts between the circuits' primary holdings." Resp'ts Br., 13. Because a "square conflict" exists between the Sixth Circuit's and Ninth Circuit's primary holdings (*see* Section A, *supra*; Pet'rs Br., 12-20), these issues are ripe for review by DaVita's own admission.

The COVID-19 pandemic, which DaVita invokes in defense of maintaining the dysfunctional status quo, is actually even more reason for prompt review and settlement of the important health insurance questions that this case presents. Resp'ts Br., 14-15. The threat to public health that has beset all Americans gives added importance to predictability and clarity in health care regulations and their application to providers, insurers, insureds, third-party administrators and employer health care plan sponsors.

The same is true for DaVita's unsupported suggestion that proposed changes to Medicare will somehow result in less individuals relying on employer health care plans. *Id.*, 14. Instead, achieving uniformity in the application of the MSPA is an important issue affecting all dialysis patients and their families, who are among the 157 million Americans who employer group health plans currently cover. Under these circumstances, further delay would be detrimental, as the only possible result would be the spread of confusion and inconsistency in the application of the MSPA.

C. The Sixth Circuit majority's opinion exceeds the text and purpose of the MSPA.

The Sixth Circuit majority's holding that uniform application of dialysis benefits could violate the MSPA needs correction because it deviates from precedent and the MSPA and its sole purpose. The primary and

central purpose of the MSPA is to protect Medicare finances. Pet'rs Br., 22-25. DaVita provides no reliable authority to support its assertion that prohibition of discrimination is a "twin purpose" of the MSPA. Resp'ts Br., 25.

As to this point, Judge Eric E. Murphy's dissent is instructive. Judge Murphy understood that the MSPA is *not* an antidiscrimination law; it is a coordination-of-benefits measure that "lacks the defining features of the specific antidiscrimination laws that the Supreme Court has read to impose disparate-impact liability." App. 76 (Murphy, J., concurring in the judgment in part and dissenting in part) (citing *Inclusive Communities*, 576 U.S. at 530-40). He reasoned that the "take into account" provision does not include the "any other manner" language relied upon by the majority, or any other "results oriented" language that this Court requires for disparate impact liability. App. 77 ("The differentiate clause [of the MSPA] contains no similar 'results-oriented' verb.") (citing *Inclusive Communities*, 576 U.S. at 535). The Ninth Circuit reached the same conclusion. *See* Section A, *supra*.

Critically, as both Judge Murphy and the Ninth Circuit recognized, ***every other court to consider this issue has determined that the MSPA does not bar a plan that offers uniform benefits to all enrollees***. App. 82 (Murphy, J.) ("As far as I am aware, every district court to consider this question has interpreted this clause as I do.") (collecting cases); *Amy's Kitchen*, 981 F.3d at 675 ("[U]ntil just a couple of months ago, no court had held that the MSP[A]

encompasses a disparate-impact theory of liability.") (citing *Nat'l Renal All., LLC v. Blue Cross & Blue Shield of Ga., Inc.*, 598 F. Supp. 2d 1344, 1354-55 (N.D. Ga. 2009)).

Judge Murphy and the Ninth Circuit read the applicable statutory provisions accordingly. They reason from their literal texts and reach logical conclusions based upon their plain meaning, as this Court mandates. *See Clayton v. Bostock Cnty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). The Sixth Circuit decision runs afoul of this bedrock principle.

D. A decision by this Court would determine the outcome of this litigation.

Finally, DaVita mistakenly argues that a decision from this Court would not be outcome determinative. Resp'ts Br., 7-10. In support of this proposition, DaVita suggests that the Sixth Circuit's holding was "merely an alternative ground for reversal." *Id.*, 10. That claim, however, ignores the fact that this petition seeks review of both the Sixth Circuit's reading of a disparate impact claim into the MSPA *and* its application of this Court's precedent to its interpretation of the MSPA, which go hand in hand.

Should this Court reverse the Sixth Circuit decision, and adopt the reasoning of Judge Murphy and the Ninth Circuit, DaVita's remaining claims in the district court will not survive and there will be no need for the further discovery ordered by the Sixth Circuit. The Sixth Circuit ruled *not* that the Petitioners had violated the MSPA, but rather that, under the majority's interpretation of the MSPA (which erroneously imputes disparate impact liability to the statute), DaVita's claims could survive a motion to dismiss. *See* App. 53. If this Court rejects the Sixth Circuit's interpretation of the MSPA and reverses its decision, none of DaVita's claims can survive dismissal. A decision will, therefore, be outcome determinative.

CONCLUSION

The brief in opposition downplays the stark reality of what has happened this year to the laws that govern employer group health plan coverage of dialysis treatment. The Sixth and Ninth Circuits have come to fundamentally different conclusions on three key dispositive issues that will have a vital effect on the health insurance economy of the entire nation, including employer group health plans, millions of working families who the plans cover, dialysis patients within the scope of the plans and the Medicare system itself. For these reasons, and those set forth in the Petition, this case presents exceptionally important questions

on which lower courts completely disagree and is an ideal vehicle for their resolution.

Respectfully submitted,

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