

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-1641

MARIETTA MEMORIAL HOSPITAL EMPLOYEE HEALTH BENEFIT PLAN, ET AL.,
PETITIONERS

v.

DAVITA INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE
IN ORAL ARGUMENT AS AMICUS CURIAE, FOR DIVIDED ARGUMENT,
AND FOR ENLARGEMENT OF TIME FOR ARGUMENT

Pursuant to Rule 28 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in the oral argument in this case; that the time allotted for oral argument be enlarged to 70 minutes; and that the time be allotted as follows: 20 minutes for petitioners, 15 minutes for the United States, and 35 minutes for respondents. Petitioners consent to this motion. Respondents take no position on the motion.

This case concerns provisions in the Medicare Secondary Payer (MSP) statute, 42 U.S.C. 1395y(b), addressing end-stage renal disease (ESRD). Individuals who are diagnosed with ESRD can be eligible for Medicare regardless of age. 42 U.S.C. 426-1. When an individual becomes eligible for Medicare on the basis of ESRD while also covered by a group health plan, the MSP statute provides for a 30-month coordination-of-benefits period in which the group health plan is the individual's primary insurance and Medicare is available as a secondary payer (if the individual enrolls in Medicare) for expenses not covered by the primary plan. 42 U.S.C. 1395y(b) (1) (C) and (2) (A). The MSP statute provides that, during the 30-month period, a group health plan "may not take into account that an individual is" eligible for Medicare because of ESRD. 42 U.S.C. 1395y(b) (1) (C) (i). The MSP statute also provides that a group health plan "may not differentiate in the benefits it provides between individuals having [ESRD] and other individuals covered by such plan on the basis of the existence of [ESRD], the need for renal dialysis, or in any other manner." 42 U.S.C. 1395y(b) (1) (C) (ii).

The question presented here is whether respondents have stated a claim for a violation of the MSP statute's prohibitions against "tak[ing] into account" ESRD-based Medicare eligibility and "differentiat[ing] in the benefits" provided to individuals with ESRD and those without ESRD, 42 U.S.C. 1395y(b) (1) (C) (i) and

(ii), by alleging that petitioners' group health plan provides benefits for outpatient dialysis that are designed to cause individuals with ESRD to leave the plan and enroll in Medicare.

The United States has a substantial interest in the resolution of that question. The Secretary of Health and Human Services is charged with administering the Medicare program and has adopted regulations to implement the MSP statute, including the provisions at issue here. See 42 C.F.R. 411.160 et seq. The United States also has a right to reimbursement from any recovery a private plaintiff obtains in a suit brought under the MSP statute. See 42 U.S.C. 1395y(b) (2) (B) and (3) (A).

The United States has participated in oral argument as amicus curiae in prior cases involving federally funded healthcare programs, such as Medicare and Medicaid. See, e.g., Gallardo v. Marstiller, No. 20-1263 (argued Jan. 10, 2022); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015); Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627 (2013). The United States' participation in oral argument could materially assist the Court in its consideration of this case.

Respectfully submitted.

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Solicitor General
Counsel of Record

JANUARY 2022