No. _____

In the Supreme Court of the United States

LYNETTE DUNCAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID DUNCAN, DECEASED, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case cleanly presents an acknowledged circuit conflict over Article III standing in cases under the Medicare Secondary Payer Act (MSPA). Under the MSPA, a patient may sue her private insurer if it denies coverage, requiring Medicare to pay the patient's bills instead. Medicare gets reimbursed from the plaintiff's recovery. To encourage patients to sue insurers who wrongfully deny coverage and force Medicare to step in, the MSPA provides for double damages. Once Medicare recovers its payments, the plaintiff keeps the remainder.

Most circuits agree that "a plaintiff is injured when a defendant was obligated under law to pay for her medical care but didn't," even if "Medicare paid for her treatment" instead. *Netro* v. *Greater Baltimore Med. Ctr., Inc.*, 891 F.3d 522, 526 (4th Cir. 2018) (cleaned up). That conclusion accords with centuries of precedent holding that a breach of contract opens the courthouse doors, regardless of any other loss to the plaintiff.

Here, however, in a 2-1 decision that acknowledged its departure from other circuits, the Sixth Circuit rejected that longstanding rule. It held that when Medicare has covered a plaintiff's medical bills, the plaintiff lacks Article III standing to sue an insurer who wrongfully denies coverage—a conclusion that, in the Fourth Circuit's words, "essentially render[s] Congress's express provision of the private cause of action null and void." *Id.* at 528.

The question presented is:

Does a person suffer Article III injury-in-fact when an insurer breaches its contractual obligation to pay for the person's medical care?

PARTIES TO THE PROCEEDING

Petitioner is Lynette Duncan (as personal representative of the estate of David Duncan, deceased), who was the plaintiff in the district court and the appellant in the court of appeals.

Respondents are Liberty Mutual Insurance Company (defendant in the district court and appellee in the court of appeals) and the Michigan Department of Health and Human Services (intervenor plaintiff in the district court).

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Duncan v. *Liberty Mut. Ins. Co.*, No. 16-cv-12570 (June 25, 2019)

Duncan v. *Liberty Mut. Ins. Co.*, No. 16-cv-12570 (Mar. 10, 2017)

United States Court of Appeals (6th Cir.):

Duncan v. *Liberty Mut. Ins. Co.*, No. 19-1796 (April 13, 2021)

Duncan v. *Liberty Mut. Ins. Co.*, No. 17-1402 (Aug. 16, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Lynette Duncan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' denial of panel rehearing and rehearing en banc (App., *infra*, 58a) is unreported. The opinion of the court of appeals (App., *infra*, 1a) is reported at 854 F. App'x 652. The district court's decision (App., *infra*, 44a) is unreported but available at 2019 WL 2590749.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2021. On April 26, 2021, Ms. Duncan timely filed a petition for panel rehearing and rehearing en banc,

which the court of appeals denied on June 2, 2021. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after the order's date to 150 days from the date of the lower court judgment. On July 19, 2021 this Court rescinded its March 19, 2020 order, but left the 150-day deadline in place where, as here, the relevant judgment or order was issued before July 19, 2021. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .

Section 1395y(b)(3)(A) of the Medicare Secondary Payer Act, provides, in pertinent part:

> (3) Enforcement
>
> (A) Private cause of action
>
> There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).[1]

[1] The interpretation of Section 1395y(b)(1) and (2)(A) is not implicated here. Those provisions require the relevant private insurer to pay for an insured's care and allow for Medicare to step in and make a payment if the private insurer fails to do so. See *infra* pp. 5-6.

INTRODUCTION

The Medicare Secondary Payer Act (MSPA) is an important federal statute designed to protect Medicare's fisc. App., *infra*, 14a-15a. It does so by empowering individuals to sue insurers who wrongfully deny coverage, requiring Medicare to foot the bill instead. *Id.* at 16a, 18a. When someone sues under the MSPA's private right of action, Medicare gets reimbursed out of the plaintiff's recovery. *Id.* at 18a. So to incentivize people to sue insurers who wrongfully deny coverage and leave Medicare holding the bag, the Act provides for double damages—once Medicare has recouped its payments, the plaintiff keeps the rest. *Ibid.*

Here, the Sixth Circuit "essentially render[ed] Congress's express provision of the private cause of action null and void." *Netro* v. *Greater Baltimore Med. Ctr., Inc.*, 891 F.3d 522, 528 (4th Cir. 2018) (Wilkinson, J.). It held, over a dissent and acknowledging its departure from other circuits, that when Medicare has covered a plaintiff's medical bills, the plaintiff lacks Article III standing to sue an insurer who wrongfully denies coverage. According to the Sixth Circuit, it does not matter that the insurer breached a contractual obligation to the plaintiff to pay her medical expenses. If the plaintiff is not out of pocket (and assuming she received the same treatment she otherwise would have), she suffered no Article III injury. App., *infra*, 28a-30a.

That conclusion directly contradicts the rule in the Fourth Circuit. Confronting materially identical facts, that court asked a "simple question: Is a plaintiff injured when a defendant was obligated under law to pay for her medical care but didn't? The sound answer is yes," even if "Medicare paid for [the patient's] treatment." *Netro*, 891 F.3d at 526. The other circuits to address the issue agree. See, *e.g.*, App., *infra*, 43a n.3 (White, J., dissenting).

These courts correctly recognize the age-old rule that losing the benefit of one's bargain gives rise to a cognizable injury. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("[C]ourts historically presumed that the plaintiff suffered a *de facto* injury merely from having [his contractual] rights invaded."). And when someone suffers a "harm traditionally recognized as providing a basis for a lawsuit in American courts," Congress may properly provide them a statutory cause of action. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2206 (2021); see *id.* at 2205-2206. That is just what Congress did in the MSPA.

In holding to the contrary, the Sixth Circuit deeply undermined the statute. Congress enacted the MSPA to "reduce Medicare's exploding costs." App., *infra*, 14a. And beneficiary suits under the private right of action are a primary means of accomplishing that goal. See, *e.g.*, *Stalley* v. *Catholic Health Initiatives*, 509 F.3d 517, 524-525 (8th Cir. 2007). Yet beneficiaries may sue under the private right of action only when Medicare has covered their expenses—the precise circumstance where the Sixth Circuit says they lack standing. So under the Sixth Circuit's rule, beneficiaries are simply left out of the equation, directly contrary to Congress's intent and at great consequence to MSPA.

The decision below thus entrenches a square and recognized circuit split (*infra* pp. 8-12), dramatically weakens an important cost-control tool enacted by Congress (*infra* pp. 12-15), and defies centuries of precedent establishing that breach of contract itself gives rise to injury-in-fact (*infra* pp. 15-18). This case, moreover, offers an ideal vehicle to address the question presented. *Infra* p. 18. The Sixth Circuit's "sweeping constitutional decision" of "staggering reach" (*Netro*, 891 F.3d at 528) warrants review from this Court.

STATEMENT

A. Statutory Background

For many years, when an individual had insurance coverage from both Medicare and a private insurer, "Medicare paid first and let the private insurer pick up whatever medical expenses remained. Medicare was the 'primary' payer and the private insurer was the 'secondary' payer." *MSPA Claims 1, LLC* v. *Tenet Fla., Inc.*, 918 F.3d 1312, 1316 (11th Cir. 2019). But in 1980, "seeking to reduce Medicare's exploding costs," Congress enacted the MSPA, "which reversed the roles." App., *infra*, 14a. Now, when coverage overlaps, Medicare serves only as the secondary payer; the private insurer must serve as primary payer. *Id.* at 14a-15a; see 42 U.S.C. 1395y(b)(1).

If a primary payer fails to pay an insured's medical expenses, however, Medicare may step in and make what's called a "conditional payment." *Bio-Med. Applications of Tenn., Inc.* v. *Cent. States Se. & Sw. Areas Health & Welfare Fund*, 656 F.3d 277, 286 (6th Cir. 2011); 42 U.S.C. 1395y(b)(2). These payments are "'intended to minimize patient anxiety about the source of payment and to avoid delays in reimbursement for'" medical expenses. *United States* v. *Baxter Int'l, Inc.*, 345 F.3d 866, 892 (11th Cir. 2003) (quoting H.R. Rep. No. 97-208, pt. 2, at 956 (1981)).

When Medicare makes a conditional payment, the government may seek reimbursement directly from the primary payer. App., *infra*, 16a. But Congress understood that "the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses." *Stalley*, 509 F.3d at 524-525. So Congress also "created a private cause of action for double damages when medical bills are improperly denied by primary payers and instead paid by Medicare." App., *infra*, 36a (White, J., dissenting); accord App., *infra*,

16a; see 42 U.S.C. 1395y(b)(3)(A). In cases under the private right of action, Medicare is subrogated to the private plaintiff's recovery—it gets repaid from the plaintiff's winnings. See App., *infra*, 18a-19a; 42 U.S.C. 1395y(b)(2)(B)(iv).

The MSPA's provision of double damages thus is "not a windfall to the private plaintiff," App., *infra*, 18a, but rather "a necessary incentive for private plaintiffs to pursue enforcement of their rights against primary payers, to the benefit of Medicare," *id.* at 36a (White, J., dissenting). Otherwise, "because Medicare would be entitled to collect the bulk, if not all, of the recovery," the plaintiff would have little reason to sue. *Ibid.* In short, to protect Medicare's fisc, Congress gave individuals a cause of action through which to assert their private contractual rights against insurers.

B. Facts And Procedural History

1. In 2013, petitioner's husband, David Duncan, suffered a severe brain injury in a car accident. Two years later, he died from his injuries. Duncan had no-fault insurance coverage with Liberty Mutual. He was also enrolled in Medicare. Under the MSPA, that made Liberty the primary insurer and Medicare the secondary. But when Duncan sought coverage for his medical bills under his no-fault policy, Liberty denied coverage, requiring Medicare to step in and pay for Duncan's treatment. The parties agree that Duncan was never required to pay these medical expenses. See App., *infra*, 2a-3a.

Duncan's estate sued Liberty in state court, challenging Liberty's denial of no-fault insurance coverage, and a unanimous jury found that Liberty had wrongly denied coverage. *Id.* at 5a. It is now undisputed that Liberty breached its contractual obligation to cover the medical bills that Medicare ultimately paid on Duncan's behalf.

After the verdict, but before judgment was entered, the state court permitted the estate to assert a claim against Liberty under the MSPA's private right of action. *Id.* at 5a-6a. The MSPA claim sought double damages for Liberty's wrongful denial of coverage that had required Medicare to conditionally pay Duncan's medical bills. *Id.* at 6a.

After the MSPA claim (a federal claim) had been asserted, Liberty removed the case to federal court, where the district court dismissed for lack of standing. *Id.* at 6a, 12a-13a. In an earlier appeal, the Sixth Circuit remanded for further fact-finding about whether the estate had suffered an injury-in-fact. See *Duncan* v. *Liberty Mut. Ins. Co.*, 745 F. App'x 575, 578 (6th Cir. 2018). On remand, the district court found no injury, because Medicare had paid Duncan's medical expenses, meaning the estate had suffered no monetary loss from Liberty's breach of contract. App., *infra*, 13a-14a. Ms. Duncan appealed again.

2. This time, the Sixth Circuit panel majority agreed with the district court. It held that because the estate did not allege "any financial harm" from Liberty's denial of coverage, or that "the quality or quantity of medical services . . . was decreased because it was Medicare, instead of Liberty . . . , paying the bills," the estate "failed to establish that it suffered any injury." *Id.* at 29a. The majority acknowledged that the Fourth Circuit reached the opposite conclusion in the same context. *Id.* at 24a-25a.

Judge White dissented. She would have held that "Duncan's loss of the benefit of his bargain with Liberty Mutual is a cognizable injury-in-fact." *Id.* at 39a. Judge White explained that no case prevents "Congress [from] constitutionally authoriz[ing] a private plaintiff to recover double damages for breach of contract in order to increase the likelihood that a governmental agency will be reim-

bursed for conditional payments." *Id.* at 40a. She accordingly agreed with the Fourth Circuit's conclusion (and the conclusion of multiple other circuits) that "a plaintiff suffers a recognizable injury-in-fact where defendant was legally obligated to pay for plaintiff's care and refused to do so." *Id.* at 43a n.3 (describing decisions from other circuits).

Ms. Duncan timely filed a petition for panel rehearing and rehearing en banc, which the court of appeals denied.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT OVER THE QUESTION PRESENTED

As the decision below recognized, the Sixth Circuit's position is directly at odds with that of other circuits. Whereas the Sixth Circuit finds no standing without monetary loss, other circuits recognize that an insurer's contractual breach itself constitutes Article III injury, whether or not the plaintiff is out of pocket. The Sixth Circuit is not likely to correct its misguided approach on its own—this is its third decision to have reached that holding, and the court denied Ms. Duncan's petition for rehearing. This Court's intervention is accordingly necessary to bring uniformity to this important question of federal law.

A. The Sixth Circuit itself recognized that the Fourth Circuit took the opposite position in this exact context. App., *infra*, 25a. As Judge Wilkinson wrote for that court, it's a "simple question: Is a plaintiff injured when a defendant was obligated under law to pay for her medical care but didn't? The sound answer is yes." *Netro*, 891 F.3d at 526. It did not matter that "Medicare paid for treatment that [the patient] received." *Ibid.* The breach of the defendant's "obligat[ion] under law to pay for her medical care" was enough for standing. *Ibid.*

Under the Fourth Circuit's rule, Ms. Duncan indisputably would have had standing here. A state court jury verdict demonstrates that Liberty was obligated under law to pay for Duncan's medical care. And it is irrelevant that Medicare actually footed the bill for the treatment. The conflict between the Fourth and Sixth Circuits is thus square, acknowledged, and outcome determinative.[2]

The Eighth Circuit has reached the same conclusion as the Fourth. In *Stalley* v. *Catholic Health Initiatives*, the plaintiff argued that the MSPA was a qui tam statute, meaning *any* person could assert "the public's rights" to recoup conditional Medicare payments. 509 F.3d at 527. In rejecting that argument, the Eighth Circuit held, contrary to the Sixth Circuit here, that "[o]ur study of the Medicare Secondary Payer statute convinces us that Congress contemplated that Medicare beneficiaries could recover double damages to vindicate their private rights when their primary payers fail to live up to their obligations, even if Medicare has made a conditional payment of the beneficiaries' expenses." *Ibid.*[3]

The Eleventh Circuit explicitly "endorsed that holding," explaining that "the Eighth Circuit allowed Medicare beneficiaries to access [the MSPA's] private right of action, even when those beneficiaries' medical bills had already been paid by Medicare." *MSP Recovery Claims,*

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[2] The Sixth Circuit suggested that *Netro* found standing solely on the theory that the MSPA partially assigns the government's claim to the plaintiff. App., *infra*, 25a. That is incorrect; the primary basis for standing was the breach of the defendant's payment obligation. *Netro*, 891 F.3d at 526.

[3] This conclusion was neither dictum nor drive-by holding. "To understand whether Stalley's argument [was] correct," the court "ha[d] to determine how the Medicare Secondary Payer statute as a whole was meant to work and how the private right of action fits within that framework." *Stalley*, 509 F.3d at 523; see also *id.* at 527.

Series LLC v. *ACE Am. Ins. Co.*, 974 F.3d 1305, 1313 (11th Cir. 2020) (citing *Stalley*, 509 F.3d at 524-525; *Netro*, 891 F.3d at 528), cert. denied, 141 S. Ct. 2758 (2021).

In dictum from a different Eleventh Circuit case, Judge Thapar also appeared to endorse this view. He illustrated the MSPA's function with this example: "say that Medicare pays for the accident victim's medical expenses, but the other driver's car insurance, despite having an obligation to pay, does not. In that case, . . . the accident victim may sue [the insurer] under the MSP Act and, if successful, recover on her own behalf." *MSPA Claims*, 918 F.3d at 1316 (Thapar, J., sitting by designation).

The Second Circuit has likewise opined (in dicta) that an insured would have standing in this context. *Woods* v. *Empire Health Choice, Inc.*, 574 F.3d 92, 97 (2d Cir. 2009) ("Woods's evidence, even if considered, can establish only that he has standing to pursue an action to recover the amounts he alleges to have been improperly paid by Medicare for medical care that he personally received."); *Manning* v. *Utilities Mut. Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001) ("The MSP creates a private right of action for individuals whose medical bills are improperly denied by insurers and instead paid by Medicare . . . .").

B. Acknowledging its divergence from the Fourth Circuit, the Sixth Circuit reached a different conclusion. App., *infra*, 24a ("Not all circuits agree with [the Sixth Circuit's conclusion about] standing in cases involving MSPA's double-damages provisions. In *Netro* . . . , the Fourth Circuit found standing for the purposes of an MSPA claim . . . ."). In the Sixth Circuit's view, Ms. Duncan lacked standing because she did not allege "any financial harm" from Liberty's denial of coverage, or that "the quality or quantity of medical services . . . was decreased

because it was Medicare, instead of Liberty . . . , paying the bills." *Id.* at 29a-30a.

In other words, the court did not believe that "Duncan's loss of the benefit of his bargain with Liberty Mutual" sufficed for Article III injury. See *id.* at 39a (White, J., dissenting). As Judge White noted in dissent, no case prevents "Congress [from] constitutionally authoriz[ing] a private plaintiff to recover double damages for breach of contract in order to increase the likelihood that a governmental agency will be reimbursed for conditional payments." *Id.* at 40a. Yet the Sixth Circuit panel majority thought some additional loss (either in money or in the quality of medical treatment) was necessary.

Although the decision below was unpublished, this misguided view has become deeply entrenched in the Sixth Circuit. The decision below is now that court's third decision holding that "a plaintiff does not satisfy the elements of standing simply by showing that the insurer failed to make payments on his behalf," and requiring the plaintiff to demonstrate some kind of additional tangible loss. *Duncan*, 745 F. App'x at 578 (cleaned up); *Gucwa* v. *Lawley*, 731 F. App'x 408, 414 (6th Cir. 2018) (same); App., *infra*, 28a-30a.[4]

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[4] Ms. Duncan explicitly requested in her petition for rehearing that the panel publish its decision. Reh'g Pet. 11 n.1. The panel elected not to do so, even though the decision plainly met the Sixth Circuit's criteria for publication. See 6th Cir. I.O.P. 32.1(b)(1)(A)-(D) (publication is warranted where, *e.g.*, the decision "[c]reates . . . a conflict of authority . . . between this circuit and another" or "[i]s accompanied by a . . . dissenting opinion"). If anything, then, the court's refusal to publish "in itself is yet another disturbing aspect of the [Sixth] Circuit's decision, and yet another reason to grant review." *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari); cf. *ibid.* ("The Court of Appeals had full briefing and argument . . . . It analyzed the claim in a 39-page opinion written over a dissent . . . . [T]his decision should have been published.").

District courts in the Sixth Circuit indeed treat that view as settled circuit law. See, *e.g.*, *Taylor* v. *Encompass Prop. & Cas. Ins.*, No. 2:19-cv-11897, 2021 WL 755481, at *3 (E.D. Mich. Feb. 5, 2021) ("Because Plaintiff did not allege personal financial loss in the complaint, he has not established standing.") (citing *Gucwa*, 731 F. App'x at 413); *Osborne* v. *Metro. Gov't of Nashville*, No. 3:18-cv-00390, 2018 WL 9811900, at *3 (M.D. Tenn. Sept. 13, 2018) ("'a plaintiff does not satisfy the elements of standing simply by showing that the insurer failed to make payments on his behalf'") (quoting *Duncan*, 745 F. App'x at 578), *aff'd sub nom. Osborne* v. *Metro. Gov't of Nashville & Davidson Cty.*, 935 F.3d 521 (6th Cir. 2019); *Michaud* v. *Progressive Marathon Ins. Co.*, No. 2:19-cv-89, 2019 WL 7582842, at *4 (W.D. Mich. Sept. 30, 2019) (plaintiff lacked standing because Medicare covered his bills and thus he did not suffer "his own financial harm") (citing *Gucwa*, 731 F. App'x at 413).

The rule in the Sixth Circuit is accordingly clear: contrary to the view of other circuits, the insurer's breach of its obligation to cover the patient's treatment is not enough for standing; some kind of additional harm is necessary. And in denying rehearing en banc in this case, the Sixth Circuit confirmed that its divergence from other circuits will persist absent action from this Court. This Court's review is warranted to resolve the split.

II. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT AND FREQUENTLY RECURS

In the words of the Fourth Circuit, accepting the Sixth Circuit's view "would essentially render Congress's express provision of the private cause of action null and void," a "sweeping constitutional decision" with "staggering reach." *Netro*, 891 F.3d at 528. The Fourth Circuit was not exaggerating. The MSPA is an important cost control tool enacted by Congress, and the private right of action

is its primary means of enforcement. By denying standing to anyone whose bills are covered by Medicare, the Sixth Circuit essentially eliminated patient suits under the private right of action, severely undermining Congress's statutory scheme.

The panel majority believed its decision would not have this effect. App., *infra*, 26a. It thought plaintiffs would still have standing where Medicare had *not* paid the plaintiff's bills—for example, because treatment occurred "in facilities that do not accept Medicare" or "Medicare might not cover a treatment" the insured needed. *Ibid.* But as Judge White recognized in dissent, the private right of action is not available *unless Medicare has paid the insured's expenses*. *Id.* at 37a-38a; *DaVita, Inc.* v. *Marietta Mem'l Hosp. Emp. Health Ben. Plan*, 978 F.3d 326, 337 (6th Cir. 2020) ("[T]he MSPA does require a conditional payment by Medicare before [someone] may sue under the private cause of action."). So the only patients who could ever sue under the private right of action are the very people that, under the Sixth Circuit's rule, lack standing.

The majority also suggested that patients who receive inferior care because "[Medicare] was paying the bills" might have standing. App., *infra*, 30a. But the majority offered no support for the idea that providers may legally or ethically provide patients worse care if Medicare is paying. So under that view, a patient would presumably have to show that her *provider* breached its legal and ethical obligations—a nightmare of proof that would probably require expert testimony—before she could sue her *insurer* for denying coverage. That dramatically alters the MSPA's incentive structure, and it is no substitute for the private right of action as enacted by Congress.

Nor does the possibility of provider suits—brought by medical providers who received less from Medicare than

they would have from the private insurer—salvage the statute. App., *infra*, 26a-27a. Even under the majority's view, providers can sue only for the *difference* between Medicare's reimbursement and what they would receive from the private insurer. *Ibid.* But the MSPA requires a successful provider-plaintiff to reimburse Medicare the entire amount Medicare paid. *Ibid.* So even with double damages, the underpayment would have to be enormous for the provider to have any incentive to sue; otherwise, "Medicare [will] be entitled to collect the bulk, if not all, of the recovery through reimbursement." *Id.* at 36a (White, J., dissenting).[5]

Here again, Congress's chosen incentive structure would be altered and undermined. Congress enacted the private right of action to empower *insureds* to sue. See *Stalley*, 509 F.3d at 524-525 ("the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses"); *Netro*, 891 F.3d at 527 (discussing "Congress's intent to authorize Medicare beneficiaries to collect funds paid by Medicare on their behalf" because the beneficiary "is the person closest to the event that made [the defendant] responsible for reimbursing Medicare"). Congress surely did not think provider suits alone could solve the problem of "Medicare's exploding costs." App., *infra*, 14a. The Fourth Circuit is accordingly correct that the Sixth Circuit's position would effectively nullify the private right of action.

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[5] Say Medicare reimbursed $5,000, but the provider could have gotten $7,000 from the insurer. Under the Sixth Circuit's rule, the provider suffered $2,000 in cognizable harm. Even with double damages, Medicare would be entitled to the provider's entire $4,000 recovery.

That is a big deal not only because it undermines the will of Congress, but also because this issue arises in virtually every MSPA action brought by an insured. As noted, an insured may sue under the private right of action only if Medicare has covered her bills. *Supra* p. 13. That means insureds suing under the private right of action will rarely, if ever, suffer the type of loss that would satisfy the Sixth Circuit's rule. So unless the insurer's contractual breach suffices for Article III injury—consistent with centuries of precedent establishing that a breach of contract itself opens the courthouse doors—insureds simply cannot bring suit under the MSPA. That "sweeping constitutional decision" of "staggering reach" requires this Court's intervention. *Netro*, 891 F.3d at 528

III. THE SIXTH CIRCUIT'S RULE IS WRONG

Review is also warranted because the decision below is incorrect. The reason is simple: virtually all courts have agreed for centuries that breach of contract supplies injury-in-fact regardless of the plaintiff's monetary loss. See, *e.g.*, *Springer* v. *Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 292-293 (6th Cir. 2018) (Thapar, J., concurring) (collecting authority); *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 798 (2021) (recognizing "that the fact of breach of contract by itself justified nominal damages" for purposes of standing analysis, even "absent evidence of other damages"); *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) ("'Private rights' have traditionally included . . . contract rights. In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.") (citations omitted); *Katz* v. *Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012) ("The invasion of a common-law right (including a right conferred by contract) can constitute an injury sufficient to create standing.") (citing

Ala. Power Co. v. *Ickes*, 302 U.S 464, 479 (1938)); *Servicios Azucareros de Venezuela, C.A.* v. *John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012) ("Injuries to rights recognized at common law—property, contracts, and torts—have always been sufficient for standing purposes."); *Clinton* v. *Mercer*, 7 N.C. (3 Murr.) 119, 120 (N.C. 1819) (sustaining a breach of contract claim even when "no real loss be proved"); *Marzetti* v. *Williams*, 109 Eng. Rep. 842, 845 (K.B. 1830) ("It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages."); accord *Wilcox* v. *Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 182 (1830); *Parker* v. *Griswold*, 17 Conn. 288, 302-304 (Conn. 1845).[6]

And the concrete injury conferred by a contractual breach is equally present when a party vindicates its contractual rights via a statutory cause of action. In the ERISA context, for example, every circuit to consider the issue has held that "the denial of plan benefits is a concrete injury for Article III standing even when patients were not directly billed for their medical services . . . [and]

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[6] Some courts and commentators have nonetheless suggested that *Spokeo* altered this deeply rooted principle. See, *e.g.*, *Patel* v. *Univ. of Vt.*, No. 5:20-cv-61, 2021 WL 4523683, at *5-6 (D. Vt. Oct. 1, 2021) ("The court follows *Spokeo* and *Thole* in requiring allegations of concrete injury" beyond breach of contract.); *Svenson* v. *Google Inc.*, No. 13-cv-04080-BLF, 2016 WL 8943301, at *10 (N.D. Cal. Dec. 21, 2016) (breach-of-contract plaintiff "still must show the fact of injury in order to have Article III standing"); F. Andrew Hessick, *Standing & Contracts*, 89 Geo. Wash. L. Rev. 298, 313 (2021) ("The logic of *Spokeo*—that standing cannot rest on violations of legal rights that do not result in factual harms—extends to suits alleging breach of contract."). This case presents an ideal opportunity for the Court to nip that untenable view in the bud.

'were never at imminent risk of out-of-pocket expenses.'" *Springer*, 900 F.3d at 287.

As Judge Thapar explained in concurrence in that context, "Congress can create civil remedies for private rights. Here, ERISA does not give Dr. Springer his rights; the health plan does. ERISA merely provides a mechanism through which Dr. Springer can enforce those underlying, bargained-for rights." *Id.* at 292. Thus, the same breach of contract that "traditionally . . . provid[ed] a basis for a lawsuit in American courts" suffices to show Article III standing for a statutory cause of action. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2206 (2021).

The same is true under the MSPA. In this case, for example, a jury found that Liberty breached its contractual obligation to pay for Duncan's medical treatment. That is an injury that traditionally opened the doors to American courts. See *supra* pp. 15-16. The MSPA, in turn, provides a cause of action through which Duncan's estate can enforce those contractual rights. That should be the long and the short of it—because the contractual breach supplies injury-in-fact, the MSPA may properly provide a cause of action to redress that injury. See *TransUnion*, 141 S. Ct. at 2205-2206 (explaining that Congress may afford a statutory cause of action to plaintiffs who have suffered a "harm traditionally recognized as providing a basis for a lawsuit in American courts").

No case "support[s] the proposition that Congress may not constitutionally authorize a private plaintiff to recover double damages for breach of contract." App., *infra*, 40a (White, J., dissenting); accord *TransUnion*, 141 S. Ct. at 2204-2207. The fact that "a third-party, here, Medicare, stepped in to alleviate the harm resulting from the breach of contract does not erase" the contractual breach that

supplies injury-in-fact. App., *infra*, 41a (White, J., dissenting). The Sixth Circuit's contrary conclusion was wrong.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT

This case ticks all the boxes for plenary review: there is an acknowledged circuit split, on a question of "staggering reach" (*Netro*, 891 F.3d at 528), where the decision below was plainly incorrect. The only remaining question is whether this case is a suitable vehicle. It is.

Indeed, the Court will not find a better vehicle to resolve the split over the question presented. The question whether breach of contract suffices for standing was indisputably outcome determinative. It was the only basis for the Sixth Circuit's decision (*e.g.*, App., *infra*, 35a ("Because we hold that Lynette Duncan lacked standing to bring her only claim that would trigger federal jurisdiction under the MSPA, we need not reach the merits of her MSPA claim.")), and the court explicitly acknowledged that the case would have come out differently under the rule from other circuits (*id.* at 24a-25a).

The underlying facts, moreover, are entirely settled. A state court jury determined that Liberty breached its contractual obligation to pay for Duncan's treatment. *Id.* at 5a. And the parties agree that Medicare covered Duncan's medical bills. The outcome here accordingly turns on a pure legal question: does the breach of Liberty's contractual obligation to pay for Duncan's medical treatment supply injury-in-fact. "The sound answer is yes." *Netro*, 891 F.3d at 526. That important question deserves the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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