No. 16-1409

In The Supreme Court of the United States

SAMANTHA MILBY,

Petitioner,

v.

MCMC LLC,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

MATTHEW W. BREETZ
Counsel of Record
MICHAEL D. RISLEY
MICHAEL E. KLEINERT
STITES & HARBISON, PLLC
400 West Market Street
Suite 1800
Louisville, Kentucky 40202-3352
mbreetz@stites.com
mrisley@stites.com
mkleinert@stites.com
Telephone: (502) 587-3400

Counsel for Respondent MCMC LLC

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

COUNTERSTATEMENT OF QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) provides a uniform regulatory regime over employee benefit plans and includes an integrated system of procedures for enforcement. Notwithstanding ERISA's complete preemption of certain state-law claims recognized and established by this Court in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the petitioner claims in this lawsuit that doctors and nurses who review records in the context of a benefits-review process under an ERISA plan must be licensed to practice medicine in the particular state in which the claimant resides, and that she has a state-law claim independent of ERISA when doctors and nurses involved in the benefits-review process under ERISA are not licensed in that particular state. Petitioner's counsel has asserted negligence *per se* claims against medical record reviewers on this basis several times in Kentucky federal district courts and in the Sixth Circuit, but these courts unanimously have held that state-law claims against medical record reviewers based on Kentucky's medical licensure statutes are completely preempted by ERISA. No court outside of the Sixth Circuit has ever addressed this issue, much less issued a contrary ruling.

The question presented is whether the Sixth Circuit properly applied the two-part test from *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) to the facts

COUNTERSTATEMENT OF QUESTION PRESENTED – Continued

alleged in the complaint in holding that ERISA completely preempts the medical licensing claim against MCMC, a company hired by the petitioner's insurer to provide a records review in the context of a benefits-review process under an ERISA plan.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, MCMC LLC states that its direct parent corporation is WellComp Managed Care Services, Inc. WellComp Managed Care Services, Inc. is a wholly owned subsidiary of The Frank Gates Companies, Inc., which is a wholly owned subsidiary of RMS Acquisition, Inc., which is a wholly owned subsidiary of Risk Management Solutions, Inc., which is a wholly owned subsidiary of York Risk Services Organization, Inc., which is a wholly owned subsidiary of Fox Hill Holdings, Inc., which is a wholly owned subsidiary of York Insurance Holdings, Inc., which is a wholly owned subsidiary of York Risk Services Holding Corp., which is a wholly owned subsidiary of Onex York Mid Corp., which is a wholly owned subsidiary of Onex York Holdings Corp.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The petitioner, Samantha Milby, brought a negligence *per se* claim under Kentucky's medical licensure statute against the respondent, MCMC LLC, for its role in reviewing medical records in the context of the benefits-review process under an ERISA-regulated plan. Milby complains that while the individuals conducting the review were licensed professionals, they were not licensed to practice medicine in Kentucky. The courts below – and every other court to consider this theory – properly applied *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) to the facts alleged and found her claim completely preempted by ERISA.

Despite the petitioner's unsupported statements, the appellate courts are not irrevocably split on the question presented. In fact, the Sixth Circuit is the only court of appeals to address the issue – and three panels of the Sixth Circuit independently and unanimously have concluded that ERISA completely preempts Milby's claim. Nothing suggests that another appellate court would reach a different result on the same or similar facts. But even accepting Milby's unsupported speculation that another court may reach a different result, the Court should allow the issue to percolate in the other courts of appeals. Because Milby offers no compelling reasons for this Court's review, her petition should be denied.

STATEMENT OF THE CASE

I. Milby Filed an ERISA Lawsuit Against Liberty Life Assurance Company.

Prior to filing this action against MCMC, Milby sued Liberty Life Assurance Company in state court, alleging that Liberty wrongfully denied her long-term disability (LTD) benefits. Liberty properly removed the case to federal court. *See Milby v. Liberty Life Assurance Co. of Boston*, 102 F. Supp. 3d 922, 935 (W.D. Ky. 2015) (hereinafter "*Milby I*").

In *Milby I*, Milby alleged that she began receiving LTD benefits in September 2011 under a policy issued by Liberty. *Id.* at 925. After a later eligibility review, Liberty found that Milby was no longer disabled pursuant to the terms of the policy and terminated her LTD benefits in February 2013. *Id.*

Milby sued for the wrongful termination of her LTD benefits, and included in her complaint a claim of negligence *per se* based on violations of Kentucky's medical licensing statutes, alleging that Liberty obtained medical opinions from individuals without Kentucky medical licenses. She specifically claimed that the "use of unlicensed physician opinions was in direct violation of Kentucky statutory and regulatory requirements" and "constitutes negligence *per se*." (Am. Compl. in *Milby I*, ¶ 44.) She also claimed that, "[a]s a direct result of Liberty's statutory violation and the use of the unlicensed physician opinions, [she] has been and continues to be damaged." (*Id.*, ¶ 45.)

After Milby moved to remand, the district court held that Liberty properly removed the action based on complete ERISA preemption. *See Milby I*, 102 F. Supp. 3d at 934-35. The court recognized that ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(1)(B), has "such 'extraordinary pre-emptive power' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* at 927 (quoting *Davila*, 542 U.S. at 209 and *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Thus, any state-law claim that "duplicates, supplements, or supplants" the exclusive civil enforcement mechanism in section 1132(a)(1)(B) is completely preempted and subject to removal. *Id.* (quoting *Davila*, 542 U.S. at 209).

After finding that ERISA's governmental plan exemption did not apply, the district court in *Milby I* concluded that "ERISA covers the LTD policy offered by [Milby's employer] and subjects it to civil enforcement through § 1132(a)(1)(B)." *Id.* at 934. The court held that "recent decisions of [the district court] make clear that § 1132(a)(1)(B) completely preempts all of Plaintiff's purported state law claims." *Id.* at 934-35 (citing *Hanshaw v. Life Ins. Co. of N. Am.*, 3:14-CV-216-JHM, 2014 U.S. Dist. LEXIS 151411 (W.D. Ky. Oct. 24, 2014) and *Hogan v. Jacobson*, 3:12-CV-820-DJH, 2013 U.S. Dist. LEXIS 138079 (W.D. Ky. Sept. 26, 2013)).

The court further recognized that a claim is within the scope of section 1132(a)(1)(B) if: "(1) the plaintiff complains about the denial of benefits to which he is

entitled 'only because of the terms of an ERISA-regulated employee benefit plan'; and (2) the plaintiff does not allege the violation of any 'legal duty (state or federal) independent of ERISA or the plan terms[.]'" *Id.* at 934 (quoting *Gardner v. Heartland Indus. Partners*, 715 F.3d 609, 613 (6th Cir. 2013) and *Davila*, 542 U.S. at 210). In applying this two-part test, the court first determined that Milby's claims, "while framed in state law terms, all complain of the denial of LTD benefits to which she is supposedly entitled only by reason of an ERISA-regulated plan." *Id.* at 935 (citation omitted). The court next held that Milby failed to allege a violation of any legal duty "independent of ERISA or the terms of the LTD policy," as her "claim for negligence per se based on Liberty's alleged reliance on the opinions of unlicensed physicians in denying benefits also derives from the rights and obligations established under the LTD policy." *Id.* (citations omitted). The court held that, "[t]hough Plaintiff asserts violations of Kentucky's medical licensing statutes, the purported duty only arises, in this instance, because of Liberty's role in reviewing the claim for LTD benefits under the ERISA plan." *Id.* Section 1132(a)(1)(B) therefore completely preempted Milby's state-law claims against Liberty in *Milby I*. *Id.*

II. Milby Later Filed a Separate Lawsuit Against MCMC.

Five months after the court held that ERISA completely preempted Milby's medical licensure claim,

Milby filed this separate action in state court, asserting the same negligence *per se* claim against MCMC based on the same Kentucky medical licensing law. Milby's complaint failed to mention *Milby I* and the name of her insurer, Liberty. She also omitted that the district court in *Milby I* already had determined that her state-law claims were completely preempted by ERISA. Instead, Milby alleged in substance the same medical licensure claim against MCMC that she previously had made against Liberty in *Milby I*. She specifically alleged that the unnamed insurer terminated her benefits based on an opinion rendered by MCMC, which was completed "[a]t the insurer's request, and in exchange for payment." (Compl., ¶¶ 13-15.)

MCMC's opinion concluded that Milby's condition did not prevent her from engaging in full-time employment:

> The opinions of Dr. Bowlds and Barefoot are not supported by the available medical documentation as there are no objective findings which would support the claimant's inability to stand and move for more than just a few minutes, as well as repetitively bend, squat, kneel, and crouch. The claimant would have the capacity to perform sustained full time work without restrictions as of 02/22/2013 forward.

(*Id.*, ¶ 17.) Milby alleged that, "[a]s a direct result of MCMC's medical opinions concerning [her] physical limitations and restrictions, the insurer denied [her]

claim" for ongoing LTD benefits. (*Id.*, ¶ 18.) Thus, according to Milby's complaint, MCMC simply reviewed her medical records to determine whether her condition prevented her from performing the necessary functions of her occupation. There is no allegation that MCMC examined or treated Milby, had any communications with Milby, or ever recommended a course of medical action or treatment for Milby.

Milby nonetheless alleged that, when MCMC issued its opinion, neither it nor its agent had a license to practice medicine in Kentucky. Similar to her complaint against Liberty, Milby claimed MCMC was negligent *per se* because it allegedly violated KRS 311.560 (Kentucky's medical licensure law) when it reviewed Milby's medical records as part of the benefits-review process. Without further elaboration, Milby claimed damages as a result of MCMC's alleged violation.

III. The District Court Held That Milby's Claim Against MCMC Was Completely Preempted by ERISA.

MCMC removed this case to federal court based on complete ERISA preemption. Milby moved to remand, but the district court agreed that Milby's claim against MCMC was completely preempted by ERISA.

In denying Milby's motion to remand, the district court described Milby's allegations: "MCMC rendered the medical opinion in reviewing Milby's claim for [ERISA] benefits," and that "medical opinion led to the

denial of her claim." (Pet. App. 17-18.) The court recognized that Milby "does not dispute that the medical review occurred for ERISA plan benefit determination purposes." (*Id.* at 18.) After reviewing these allegations, the district court applied the two-part *Davila* test. Relying on *Hogan v. Jacobson*, 3:12-CV-820-DJH, 2013 U.S. Dist. LEXIS 138079 (W.D. Ky. Sept. 26, 2013) (which the Sixth Circuit later affirmed), the court held that Milby's challenge to the MCMC reviewers' medical qualifications was subsumed within her claims for the wrongful denial of ERISA benefits. (*Id.* at 19.)

The district court recognized that Milby's claimed damages relating to a medical professional's records review for an ERISA plan benefit determination necessarily arise under ERISA. "Otherwise, a state enforcement mechanism supplants Congress' uniform enforcement system." (*Id.* at 18-19.) The court stated that Milby's complaint "reads as an attempt to evade federal jurisdiction" and her "persistent recital that these claims are grounded solely in state law cannot vanquish the evident federal jurisdiction." (*Id.* at 17.) The court also acknowledged Milby's pending suit against the insurer for the alleged wrongful denial of benefits. (*Id.* at 20 (citing *Milby I*).) Because Milby's suit against MCMC arose "only because of her ERISA benefit claim review," and because Milby did "not allege a violation of any legal duty beyond the scope of the ERISA plan and the review of her benefit claim," the district court denied Milby's motion to remand. (*Id.*)

After finding the state-law claim completely preempted by ERISA, the district court granted

MCMC's motion to dismiss because MCMC is not the proper defendant in an ERISA action concerning benefits. (Pet. App. 14.) The court concluded that Milby's then-pending suit against the insurer "is the appropriate avenue for Milby's sought relief." (*Id.* at 14-15.)

IV. The Sixth Circuit Affirmed the District Court's Complete ERISA Preemption Ruling.

The Sixth Circuit applied the two-prong *Davila* test to the facts alleged and unanimously affirmed. *See Milby v. MCMC LLC*, 844 F.3d 605 (6th Cir. 2016) (hereinafter "*Milby II*"). First, as to whether "the plaintiff complains about the denial of benefits to which he is entitled only because of an ERISA-regulated employee benefit plan," *Davila*, 542 U.S. at 210, the Sixth Circuit recognized that MCMC's conduct giving rise to the lawsuit was part of the process used to assess a participant's claim for benefits under an ERISA plan, thereby making the purported state-law claim "an alternative enforcement mechanism to ERISA's civil enforcement provisions." *See Milby II*, 844 F.3d at 611 (quoting *Hogan v. Jacobson*, 823 F.3d 872, 880 (6th Cir. 2016) and *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1489 (7th Cir. 1996)). The Sixth Circuit further recognized that the damages arose from the ultimate denial of disability benefits. *Id.*

The court rejected Milby's argument that the first *Davila* prong was not satisfied because MCMC was not a proper defendant in an ERISA case. As the Sixth Circuit recognized in *Hogan*, the analysis hinges not on

who was sued but on whether her claim in essence is an attempt to recover an ERISA benefit. *Id.*

The Sixth Circuit then analyzed the second prong of the *Davila* test, *i.e.*, whether the plaintiff alleges the violation of a legal duty independent of ERISA or the plan terms. *Davila*, 542 U.S. at 210. While recognizing that an independent duty may exist even when an ERISA plan is the basis for the relationship between the parties, the Sixth Circuit analyzed the Kentucky statute at issue and held that it created no duty that flowed from MCMC to Milby. *See Milby II*, 844 F.3d at 611-12. Because MCMC owed no independent duty to Milby, *Davila*'s second requirement was satisfied and the claim was completely preempted.

In applying *Davila* and reaching its decision, the Sixth Circuit relied on its recent ruling in *Hogan*, which involved the same plaintiff's counsel. In *Hogan*, the Sixth Circuit found that a negligence claim asserted under the same Kentucky medical licensing statute against two nurses involved in the claim review process was completely preempted by ERISA. The panel in *Milby II* acknowledged that the nurses in *Hogan* were employees of the insurer providing coverage for the disability plan (while MCMC was a separate entity), but concluded that the factual difference produced the same result: the claims were completely preempted by ERISA. *See Milby II*, 844 F.3d at 611-12.

REASONS FOR DENYING THE WRIT

ERISA provides a uniform regulatory regime over employee benefit plans. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Congress enacted ERISA to, among other things, "provid[e] for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b). Thus, ERISA's comprehensive legislative scheme includes an "integrated system of procedures for enforcement." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Those provisions, found at ERISA § 502(a), 29 U.S.C. § 1132(a),

> set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

This integrated enforcement mechanism is a distinctive feature of ERISA and essential to accomplish Congress's purpose of creating a comprehensive statute for the regulation of employee benefits plans. *Davila*, 542 U.S. at 208. Any claim stated as a state-law claim that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the

clear congressional intent to make the ERISA remedy exclusive and is therefore preempted. *Id.* at 209.

In *Davila*, this Court held that a state-law claim is within the scope of 29 U.S.C. § 1132(a)(1)(B) and thus completely preempted when: (1) "an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan," and (2) "no legal duty (state or federal) independent of ERISA or the plan terms is violated." *Davila*, 542 U.S. at 210. The Court recognized that distinguishing between preempted and non-preempted claims based on the particular label affixed to them would "'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA" simply by relabeling their contract claims as tort claims. *Id.* at 214. As such, Congress's intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not duplicate the elements of an ERISA claim. *Id.* at 216.

The Sixth Circuit's straightforward application of *Davila* to the specific facts and claims in this case does not warrant this Court's review.

I. Every Court to Consider Milby's Claim Has Found It Completely Preempted by ERISA.

This Court need not review the unanimous decisions interpreting *Davila* to find complete preemption

of Milby's claims, particularly where courts also have unanimously rejected the argument that medical reviewers (like MCMC) owe ERISA plan participants (like Milby) any duty under Kentucky law. Three unanimous Sixth Circuit panels and five district courts all have found complete preemption on nearly identical facts. Another five courts (two appellate panels, three district courts) have rejected that medical record reviewers owe any duty to ERISA plan beneficiaries under Kentucky's medical licensure statute. No court has found any merit in Milby's theory. This Court need not review an issue on which there is judicial unanimity.

A. Three Sixth Circuit Panels Unanimously Have Found Complete Preemption.

All three appellate panels to consider Milby's theory have unanimously rejected it. Eight judges in the Sixth Circuit have found complete preemption when clients of Milby's counsel asserted negligence *per se* claims for alleged violations of Kentucky's medical licensure statute by reviewing medical records as part of the ERISA benefits-review process. *See Hackney v. AllMed Healthcare Mgmt., Inc.*, 679 F. App'x 454, 459 (6th Cir. 2017) (Stranch, Kethledge, & McKeague, JJ.)[1]; *Milby II*, 844 F.3d at 612 (Stranch, Batchelder, & Donald, JJ.); *Hogan v. Jacobson*, 823 F.3d 872, 879 (6th Cir. 2016) (Moore, Gibbons, & Davis, JJ.). Though MCMC and others review medical records for ERISA plans

[1] One of petitioner's counsel filed a petition for a writ of certiorari in *Hackney* on July 17, 2017.

across the country, no appellate court outside the Sixth Circuit has even considered whether a negligence *per se* claim under any state's medical licensure law is completely preempted, much less reached a contrary result.

These appellate decisions carefully applied this Court's complete preemption precedent in rejecting Milby's novel theory. In *Hogan*, the Sixth Circuit properly identified the general principles of complete preemption: "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted." 823 F.3d at 879. A state-law claim is completely preempted if: "(1) the plaintiff complains about the denial of benefits to which he is entitled 'only because of the terms of an ERISA-regulated employee benefit plan'; and (2) the plaintiff does not allege the violation of any 'legal duty (state or federal) independent of ERISA or the plan terms.'" *Id.* (quoting *Gardner*, 715 F.3d at 613 and *Davila*, 542 U.S. at 207).

The court easily found the first prong satisfied, holding that the plaintiff "misreads *Davila* and *Gardner* to suggest that § 1132 preemption exists only if the plaintiff's claim is both a claim about the denial of ERISA-plan benefits based on the terms of an ERISA plan (what *Gardner* and *Davila* actually require) *and* is brought against a defendant that is a proper defendant for such an ERISA-benefits claim (which neither *Gardner* nor *Davila* suggests)." *Id.* at 880 (emphasis in

original). A plaintiff cannot "evade complete preemption merely by suing the wrong party"; "[t]o limit § 1132 preemption in this way would create the odd result that claims about the denial of ERISA-plan benefits would remain in state court if the plaintiff sued the wrong party." *Id.* The court also found the first prong to be satisfied because "the entire relationship between the parties was limited to the [nurses'] review of Hogan's medical file, which arose solely in connection with a disability-benefits determination." *Id.* The court concluded that Hogan's negligence *per se* claim *was* a claim for ERISA benefits because the negligence it alleged, "though carefully veiled, [was] the negligent processing and denial of her claim for ERISA benefits, which . . . [arose] solely from the ERISA plan." *Id.*

Moving to the second prong, the court rejected that Hogan's claim was predicated on an independent legal duty created by Kentucky's medical licensure laws. That argument "ignores that a duty cannot have arisen out of thin air; instead, some relationship between her and the [nurses] must have created it." *Id.* And the relationship in *Hogan* – as in *Milby* – arose solely "in the context of a benefits-review process under an ERISA plan." *Id.* Any "claimed damages" also "flow[ed] entirely from the denial of her request for benefits." *Id.* "Whether a duty is 'independent' of an ERISA plan, for purposes of the *Davila* rule, does not depend merely on whether the duty nominally arises from a source other than the plan's terms." *Id.* The court concluded that, as any duty owed to Hogan "arose solely because of and within the context of the benefits-review required by

the plan," the theory was "merely an artfully pleaded claim for ERISA benefits." *Id.* at 882-83.

The Sixth Circuit decided *Milby II* next, relying heavily on *Hogan* but also finding additional grounds on which to find complete preemption. In *Milby II*, the court found the first prong satisfied because "MCMC's conduct was indisputably part of the process used to assess a participant's claim for a benefit payment under the plan, making the negligence claim an alternative enforcement mechanism to ERISA's civil enforcement provisions." *Milby II*, 844 F.3d at 611. Also relevant to the first prong, the court found that "the damages in this case arise from the ultimate denial of disability benefits." *Id.* The first prong was satisfied because the "analysis hinges on whether in essence such a claim is for the recovery of an ERISA plan benefit, and not on who was sued." *Id.* (citation and quotation omitted). As for the second prong, the court held that because independent records review is not the practice of medicine, "the licensing law does not create a duty that flows from those professionals to claimants." *Id.* MCMC "is not practicing medicine and does not have an independent duty to Milby under the Kentucky medical licensing statute invoked in this case. Instead, the allegations in Milby's complaint implicitly rely on ERISA to establish the duty required for her negligence claim." *Id.* (citing *Hackney v. Lincoln Nat'l Fire Ins. Co.*, 657 F. App'x 563, 579 (6th Cir. 2016)). The court therefore concluded that "both of the prongs of the *Davila* test are met." *Id.*

Most recently, a concurrence in *Hackney v. AllMed Healthcare Management* offered yet another reason to find complete preemption here. The majority relied on *Hogan* to find the first *Davila* prong satisfied and *Milby II* for the second. *Hackney*, 679 F. App'x at 457-59 (a participant cannot evade federal jurisdiction by suing the wrong party, and Kentucky's medical licensure law creates no independent duty to support a negligence *per se* claim). Judge McKeague wrote separately because "even if Kentucky's medical licensing statute had imposed a duty on [the defendant]" – the majority held that it did not – "this duty would not have 'arise[n] independently of ERISA or the plan terms' since it is inextricably intertwined with the benefits review process." *Id.* at 459. The concurrence explained that "Hackney's claim against AllMed exists solely because Lincoln retained AllMed for the purpose of determining whether Hackney was entitled to benefits under the terms of his ERISA-regulated plan." *Id.* at 460. Judge McKeague distinguished the case from "those in which a truly independent state-law tort claim is brought between parties that happen also to have an ERISA-based relationship." *Id.* And so he concluded: "Because any duty that AllMed owed Hackney arose *solely because of and within the context of benefits review required by the plan*, ERISA's 'extraordinary preemptive power' bars the state law claim." *Id.* (citations and quotations omitted, emphasis in original).

B. Five District Courts Have Found Complete Preemption.

Every district court to consider these claims also has found complete preemption. *Milby v. MCMC LLC*, 3:15-CV-814, 2016 U.S. Dist. LEXIS 15975, at *4-5 (W.D. Ky. Feb. 10, 2016) (Simpson, J.); *Hackney v. AllMed Healthcare Mgmt., Inc.*, 3:15-CV-75-GFVT, 2015 U.S. Dist. LEXIS 166142, at *6-11 (E.D. Ky. Dec. 11, 2015) (Van Tatenhove, J.); *Milby v. Liberty Life Assurance Co. of Boston*, 102 F. Supp. 3d 922, 935 (W.D. Ky. 2015) (Simpson, J.); *Hanshaw v. Life Ins. Co. of N. Am.*, 3:14-CV-216-JHM, 2014 U.S. Dist. LEXIS 151411, at *12-15 (W.D. Ky. Oct. 24, 2014) (McKinley, J.); *Hogan v. Jacobson*, 3:12-CV-820-DJH, 2013 U.S. Dist. LEXIS 138079, at *8-12 (W.D. Ky. Sept. 26, 2013) (Hale, J.). The petition identifies no district court anywhere that has reached a different conclusion with respect to any state's medical licensure law.

C. Federal Courts Unanimously Have Rejected That Medical Records Reviewers Owe ERISA Plan Participants a Duty Under Kentucky Law.

Federal courts also unanimously have held that record reviewers like MCMC do not owe ERISA plan participants like Milby any duty to support a negligence *per se* claim under Kentucky's licensure statutes. *See Milby II*, 844 F.3d at 612 ("MCMC . . . is not practicing medicine"); *Hackney v. Lincoln Nat'l Fire Ins. Co.*, 657 F. App'x 563, 569 (6th Cir. 2016) ("Unlike the

doctors in the two [Kentucky Board of Medical Licensure] opinions Hackney cites, the nurses who reviewed Hackney's medical file made no determinations regarding the medical necessity of any treatment; they simply determined whether Hackney was capable of performing the necessary functions of his job. Such determinations do not fall within the ambit of § 311.560."); *Graves v. Standard Ins. Co.*, 3:14-CV-558-DJH, 2015 U.S. Dist. LEXIS 128267, at *7 (W.D. Ky. Sept. 24, 2015) (holding that one of petitioner's counsel had no good-faith basis for threatening a negligence *per se* action against an opposing party's out-of-state physician witness); *Anderson v. Standard Ins. Co.*, 3:14-CV-51-H, 2014 U.S. Dist. LEXIS 150013, at *7-10 (W.D. Ky. Oct. 21, 2014) (Heyburn, J.) ("[N]either an insurance company nor its agents are engaged in the practice of medicine in violation of KRS § 311.560(1) when they investigate a disability claim. . . . It would be absurd to conclude the General Assembly intended such a result when it enacted the Medical Practice Act."); *Hackney v. Lincoln Nat'l Life Ins. Co.*, 3:12-CV-170-CRS, 2014 U.S. Dist. LEXIS 73771 (W.D. Ky. May 30, 2014) (same).

Whether analyzing the claims in the context of searching for an independent duty under *Davila*'s first prong or on a motion to dismiss for failure to state a claim, no federal court has ever ruled that independent medical record reviewers (like MCMC) owe ERISA plan participants or beneficiaries (like Milby) a duty based on Kentucky's medical licensure statutes.

II. There Is No Circuit Split.

As the Sixth Circuit is the only court of appeals to address the novel theory advanced by Milby, there is no direct conflict with other circuits. Milby tries to invent a conflict by culling appellate decisions that applied the same two-part test but reached an opposite result based on significantly different facts. But none of the appellate decisions from other circuits cited in Milby's petition involved the same (or even a remotely similar) claim, nor are these decisions inconsistent with the Sixth Circuit's rulings. There is no circuit split on the application of either *Davila* prong, and the Court should deny Milby's request for review.

A. There Is No Circuit Split as to *Davila*'s First Prong.

No circuit split exists concerning the application of *Davila*'s first prong because the Sixth Circuit is the only court of appeals to address Milby's theory that an individual involved in an ERISA benefits-review process must hold an active medical license in the state where the claimant resides. No other court of appeals has addressed the issue with respect to *Davila*'s first prong, much less reached a contrary result.

Milby offers no authority for her blanket assertion that appellate courts in other jurisdictions have established a bright-line rule precluding complete ERISA preemption in claims against a third-party service provider to an ERISA insurer. Instead, she strains to manufacture a circuit split by arguing that the Sixth

Circuit's ruling below conflicts with decisions from the Ninth and Tenth Circuits. Neither case cited in the petition addressed a similar negligence *per se* claim against a medical reviewer based on a state licensing statute. Rather, the cases addressed completely unrelated tort claims that "only peripherally impact[ed] daily plan administration," *Dishman v. UNUM Life Ins. Co.*, 269 F.3d 974, 983 (9th Cir. 2001), or had only a "fortuitous connection to the plan," *David P. Coldesina, D.D.S., P.C., Empl. Profit Sharing Plan & Trust v. Estate of Simper*, 407 F.3d 1126, 1137 (10th Cir. 2005).

Dishman was rendered several years before this Court's decision in *Davila*, so the Tenth Circuit obviously did not apply the two-part *Davila* test. Milby fails to explain how a pre-*Davila* decision could create a circuit split concerning the application of *Davila*'s first prong.

In any event, *Dishman* involved a claim for tortious invasion of privacy that was only "peripherally" connected with the plan. 269 F.3d at 978-79. There, the plaintiff alleged numerous instances of "objectionable" and "offensive" conduct by a private investigator hired by the insurer, such as "elicit[ing] information about [the plaintiff's] employment status by falsely claiming to be a bank loan officer," "elicit[ing] personal information about him from neighbors and acquaintances by representing that he had volunteered to coach a basketball team," and "impersonating him" to obtain "credit card information and travel itineraries." *Id.* at 978-79, 982.

Not surprisingly, the Ninth Circuit ruled that the plaintiff's invasion of privacy claim was not completely preempted because it did "not depend on or derive from his claim for benefits in any meaningful way," as the harm he suffered was not "inextricably intertwined with the plan's decision not to pay." *See id.* at 982-83. The plaintiff's "damages for invasion of privacy remain[ed] whether or not [his insurer] ultimately pa[id] his claim." *Id.* at 983. Thus, the invasion of privacy claim was not a complaint about the denial of ERISA benefits. The same cannot be said here, as Milby's complaint specifically alleges that her claim for ERISA benefits was denied "[a]s a direct result" of MCMC's records review. (*See* Compl., ¶ 18.)

Milby also erroneously argues that the Sixth Circuit's decision conflicts with the Tenth Circuit's ruling in *Coldesina*, a case filed by an employee benefits plan against two financial services companies seeking to recover $600,000 that was stolen from the plan. 407 F.3d at 1130. The court held that negligent supervision claims against the financial companies were not completely preempted since "any connection to the plan [was] fortuitous," as "the plan's structure and administration [was] not being regulated," and "[n]either the plan nor ERISA [were] involved." *Id.* at 1137. As in *Dishman*, the plan was not complaining about the denial of ERISA benefits, as *Davila*'s first prong requires. Rather, the plan sued to recover money that had been embezzled. *Id.* at 1138 (recognizing that "the claims had nothing to do with the areas ERISA meant to regulate because the only wrongful conduct alleged was

the defendant's supervision of [the thief]"). The Ninth Circuit notably recognized (like the Sixth Circuit did below) that "the availability of a remedy under ERISA is not relevant to the preemption analysis." *Id.*

B. There Is No Circuit Split as to *Davila*'s Second Prong.

There likewise is no circuit split concerning the application of *Davila*'s second prong because the Sixth Circuit is the only court of appeals to address whether an individual reviewing medical records as part of an ERISA benefits-review process owed an independent duty to the individual claimant. No other court of appeals has addressed that issue, much less reached a contrary result.

The Sixth Circuit's analysis here, in *Hogan*, and in *Hackney* actually is consistent with each of the opinions identified in Milby's petition with regard to *Davila*'s second prong. Unlike in the Sixth Circuit cases, each opinion declining to find complete preemption addressed claims that asserted a viable state-law duty independent of ERISA or the plan that was only tangentially related to the plan.

For instance, in *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009), a hospital (not an ERISA plan participant or beneficiary) sued a benefits administrator under various state law theories arising from a phone call between the hospital and the administrator. The hospital alleged the administrator made misrepresentations when it verified the

insured's coverage and breached an "oral agreement" made during that call to cover the insured's medical expenses. *Id.* at 943. After finding the first *Davila* prong unsatisfied, the Ninth Circuit held that the state-law claims arising from the call "are in no way based on an obligation under an ERISA plan, and since they would exist whether or not an ERISA plan existed, they are based on 'other independent legal duties' within the meaning of *Davila*." *Id.* at 950 ("We conclude that the Hospital's state-law claims based on its alleged oral contract with [the administrator] were based on an independent legal duty, and that the Hospital's claims therefore do not satisfy the second prong of *Davila*."). As the Ninth Circuit recognized, "[t]he various state-law claims asserted by the Hospital all arise out of what was allegedly said during that call." *Id.* The Seventh Circuit's decision in *Fransciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594 (7th Cir. 2008), is nearly identical and involved claims by a healthcare provider against an ERISA plan administrator, not as an assignee of an ERISA beneficiary, but as an independent entity claiming damages based on an oral agreement. *See id.* at 599, 601 ("[The healthcare provider] is bringing state-law claims based on the alleged shortcomings in the communications between it and [the benefit plan]. These are no grounds for removal.").

Stevenson v. Bank of N.Y. Co., 609 F.3d 56 (2d Cir. 2009) and *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130 (10th Cir. 2014) likewise concerned alleged breaches of independent, non-ERISA plan contracts

where ERISA-regulated plans played only a tangential role. In *Stevenson*, the Second Circuit found no preemption of an employee's claims that his former employer reneged on promises to maintain benefits and pension plans on his behalf during an absence and then unlawfully terminated and defamed him. *Stevenson*, 609 F.3d at 58. The decision did not even apply the two-part *Davila* test and apparently relied on express preemption principles. *See id.* at 59-61 (citing and quoting 29 U.S.C. § 1144(a)). Nonetheless, the court recognized that "state laws that would tend to control or supersede central ERISA functions – such as state laws affecting the determination of eligibility for benefits, amount of benefits, or means of securing unpaid benefits – have typically been found to be preempted." *Id.* at 59. But it found no preemption because the state-law claims did not derive from "the particular rights and obligations established by any benefit plan, but rather from a separate promise that references various benefit plans." *Id.* at 60. And in *Salzer*, the Tenth Circuit found no complete preemption of breach of contract and other claims arising from alleged breaches of two separate agreements – not the benefits plan – concerning alleged improper billing practices. *Salzer*, 762 F.3d at 113 (no complete preemption when the plaintiff's state-law claims sought to enforce contracts other than the plan). The quotation concerning the merits of the claim referenced in Milby's petition is simply dicta and did not inform the court's ruling that, like *Stevenson* (and unlike *Milby II*, *Hogan*, and *Hackney*), the case involved an agreement that clearly was separate from an ERISA-governed plan.

Wurtz v. Rawlings Co., LLC, 761 F.3d 232 (2d Cir. 2014) also is consistent with the Sixth Circuit's reasoning. There, the Second Circuit found no complete preemption of a New York statute disallowing subrogation claims in tort settlements. *Id.* at 236. The court first found claims under the statute saved from express preemption. *Id.* at 240-41 (citing ERISA § 514(a)-(b), 29 U.S.C. § 1144(a)-(b)). Moving to complete preemption and the second *Davila* prong, the court found an independent legal duty in the New York antisubrogation statute, "which prohibits defendants from seeking subrogation or reimbursement from settling parties." *Id.* at 243. The court discussed "some tension" between its complete preemption decision and "holdings of the Third, Fourth, and Fifth Circuits in similar antisubrogation cases," *id.*, but found its opinion consistent with the Sixth Circuit authority on which *Hogan*, *Milby II*, and *Hackney* largely rested, *see id.* at 244 (citing *Gardner*, 715 F.3d at 614). Once again, this authority concerns an entirely separate and viable duty outside the ERISA benefits-review process.

Milby's reliance on *New Jersey Carpenters v. Tishman Constr. Corp.*, 760 F.3d 297 (3d Cir. 2014) to conjure up a circuit split also is misplaced. There, the Third Circuit held that complete preemption did not apply when carpenters merely assigned their claims under the New Jersey Prevailing Wage Act "to the plaintiffs, who describe themselves as employee benefit plans within the meaning of ERISA." *Id.* at 301. It is unclear from the opinion that an ERISA-governed plan played any role in the carpenters' claims, much

less an "inextricably intertwined" role akin to the role played by persons involved in the benefits review process. The court concluded that "the obligation to pay prevailing wages is an independent legal duty." *Id.* at 304.

That other federal appellate courts have applied the same test as the Sixth Circuit but reached different results under drastically different facts is no basis for this Court to consider this case. The *only* courts to consider the theory that ERISA plan medical record reviewers are negligent *per se* under a state's medical licensure law have found complete preemption. None of Milby's authority holds that a plaintiff can assert a nonexistent legal duty to satisfy the second *Davila* prong. Nor do these cases hold that claims based on a duty that arose (if at all) solely because of and within the context of a benefits-review process required by the ERISA plan avoid complete preemption. The Sixth Circuit's reasoning is consistent with *Davila*, and there is no circuit split here. The Court should decline review.

III. This Issue Does Not Otherwise Merit Review.

Nothing about this case merits review in the absence of a true circuit split. It presents a straightforward application of the *Davila* two-prong test for complete preemption. The first *Davila* prong is easily satisfied because Milby's complaint alleges that MCMC's medical review was part of the process used

to assess her claim for benefits under an ERISA-regulated employee benefit plan, thereby making her negligence claim against MCMC an alternative enforcement mechanism to ERISA's civil enforcement provisions. (*See* Compl., ¶ 18 (alleging that "*[a]s a direct result of MCMC's medical opinions concerning [her] physical limitations and restrictions*, the insurer denied [her] claim for ongoing monthly disability insurance benefits") (emphasis added)). Upon denial of the ERISA benefits, Milby could have brought – *and, in fact, did bring* – an ERISA claim against her insurer (Liberty Life Assurance Company) alleging violations of Kentucky's medical licensing statutes, and then she filed a separate action against MCMC in state court alleging the same claim under the same statute.

To satisfy *Davila*'s first prong for complete preemption under ERISA § 502(a), it must be shown that the plaintiff is complaining about the denial of benefits to which she is entitled only because of the terms of an ERISA-regulated employee benefit plan. *Davila*, 542 U.S. at 210; *Hogan*, 823 F.3d at 879. Milby misreads *Davila*'s first prong to suggest that complete preemption exists only if the claim is about the denial of ERISA-plan benefits (which *Davila* requires) and is brought against a defendant that is a proper defendant for such an ERISA-benefits claim (which *Davila* does not require). *See Hogan*, 823 F.3d at 880. As explained in *Hogan*, to limit ERISA § 502(a) preemption in this way would create the odd result that claims about the denial of ERISA-plan benefits would remain in state court if the plaintiff simply sued the wrong party. *Id.*

Milby cannot evade complete preemption merely by suing the wrong party. *Id.*

As this Court recognized in *Davila*, distinguishing between preempted and non-preempted claims "based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA. . . ." 542 U.S. at 214. It is not the label of the claim that determines whether it is preempted, but whether in essence the plaintiff is complaining about the "denial of coverage" under the terms of an ERISA plan. *See id.* at 210-11 ("It is clear . . . that respondents complain only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans."); *see also Hogan*, 823 F.3d at 880. Thus, the focus is on the nature of the claim itself and whether it is about the denial of ERISA-plan benefits, and not on the formal title of the claim against the individuals conducting the medical review. *Hackney*, 679 F. App'x at 458.

The second *Davila* prong is satisfied if "no legal duty (state or federal) independent of ERISA or the plan terms is violated," or in other words, if "there is no other independent legal duty that is implicated by a defendant's actions." *Davila*, 542 U.S. at 210. Courts must analyze the independent duty prong "in the context of" the case at issue, not in the abstract. *Id.* at 212. The plaintiffs in *Davila* alleged that the defendants "controlled, influenced, participated in and made decisions which affected the quality of the diagnosis, care, and treatment provided in a manner that violated the duty of ordinary care set forth in" the Texas Health

Care Liability Act. *Id.* They argued, like Milby has here, "that this duty of ordinary care is an independent duty." *Id.* The Court acknowledged that the "THCLA does impose a duty on managed care entities to 'exercise ordinary care when making health care treatment decisions,' and makes them liable for damages proximately caused by failures to abide by that duty." *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 88.002(a)). But the Court held that "*in the context of these cases*," where the plaintiffs "bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA," the duties imposed by the THCLA "do not arise independently of ERISA or the plan terms." *Id.* at 212-15 (emphasis added).

Notwithstanding that each claim must be considered within its context, Milby argues that her claim must be saved from complete preemption simply because she could, hypothetically, bring a negligence *per se* suit against another individual practicing medicine without a license under different circumstances. But *Davila* requires more, and the Sixth Circuit has properly recognized that. The decision below rejected Milby's argument on the second *Davila* prong because, in the context of Milby's negligence *per se* suit against MCMC under Kentucky's licensure law, the court found "no legal duty . . . independent of ERISA," as courts unanimously have rejected the existence of an independent legal duty under Kentucky's licensure law. *Milby II*, 844 F.3d at 611-12 (noting that the "inquiry is . . . a case-specific one" and holding "that the

licensing law does not create a duty that flows from those [medical records reviewing] professionals to claimants"); *see also supra* Part I.C (collecting cases finding no legal duty under Kentucky's licensure laws). Another panel and a concurrence found no independent legal duty on nearly identical facts because the claims against the reviewers arose "solely because of and within the context of benefits review required by the plan." *Hogan*, 823 F.3d at 883; *Hackney*, 679 F. App'x at 460 (McKeague, J., concurring).

Milby's suggestion that certiorari should be granted because she should not be left without a remedy also is flawed. As an initial matter, Milby *did have* a remedy for termination of her benefits, and she in fact sought that remedy against the proper party in *Milby I*. Thus, the court's dismissal of her claim in this case did not leave her without a remedy.

But even if it did, a claimed lack of remedy is insufficient to avoid complete preemption. Complete preemption is not tied to whether ERISA provides the claimant with a remedy against a particular person or entity. "ERISA preempts state law claims, even if the result is that a claimant relegated to asserting a claim only under ERISA, is left without a remedy." *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1010 (9th Cir. 1998); *see also Cannon v. Group Health Serv.*, 77 F.3d 1270, 1274 (10th Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995) ("That ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption.");

Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1333 (5th Cir. 1992) ("[T]he lack of an ERISA remedy does not affect a pre-emption analysis."); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991) ("Nor is it relevant to an analysis of the scope of federal preemption that appellants may be left without a remedy.").

At the end of the day, this case offers nothing more than what the court in *Hogan* described as a lawyer "appear[ing] to have come up with a novel legal theory. . . ." 823 F.3d at 887. So novel, in fact, that it does not appear that any other lawyer has ever attempted to assert this type of claim in the 43 years since ERISA was enacted. The courts below properly considered that novel legal theory, applied this Court's analysis in *Davila*, and concluded that ERISA completely preempts the claim.

It remains to be seen whether others will attempt to assert similar claims and, if so, whether other courts will find those claims to be preempted. That uncertainty counsels in favor of denying the petition, not granting it. This novel theory may be just a blip on the judicial screen never to be seen again. If that is not the case, and others assert this type of claim, it may well be that every additional court to consider whether such a claim is preempted will reach the same conclusion that every district court and every Sixth Circuit panel has unanimously reached. This Court should wait and see if this novel claim is asserted in other circuits and, if so, whether any disagreement develops between the

circuits. Unless and until that happens, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MATTHEW W. BREETZ
MICHAEL D. RISLEY
MICHAEL E. KLEINERT
STITES & HARBISON, PLLC
400 West Market Street
Suite 1800
Louisville, Kentucky 40202-3352
mbreetz@stites.com
mrisley@stites.com
mkleinert@stites.com
Telephone: (502) 587-3400

Counsel for Respondent
MCMC LLC