

No. 20-11179

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DATA MARKETING PARTNERSHIP, L.P.;
L.P. MANAGEMENT SERVICES L.L.C.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; MARTIN WALSH,
SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES OF
AMERICA,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Northern District of Texas, Fort
Worth, No. 4:19-cv-800

**MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* ADAM
ROCHESTER, JOHN FIEDLER, AND BENJAMIN CLEAR IN FAVOR OF
APPELLEES**

Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T:(504)262-0040
F:(504)262-0041
Jason.Elam@cs-law.com
Counsel for Amici Curiae
June 22, 2021

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
PMB #402
Atlanta, Georgia 30319
(404) 815-3100
fennlaw@outlook.com
Counsel for Amici Curiae

Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure, Adam Rochester, John Fiedler, and Benjamin Clear (collectively, “Plan Participants”) respectfully move for leave to file the attached *Amici Curiae* brief in support of Appellees and in favor of affirming the district court, below. Counsel for Appellants have consented to this motion.

This Honorable Court should allow the Plan Participants to participate as *Amici Curiae* in this appeal. Motions for leave to file amicus briefs must state “the movant’s interest” and “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3). The Plan Participants and their families have more to lose or to gain in this appeal than any other interested party. Additionally, the Plan Participants provide a practical view of how the decision in this case affects human beings (as opposed to governmental and corporate entities). For those reasons, Plan Participants respectfully request that this Honorable Court grant leave for the Plan Participants to file the attached amicus brief.

THE PLAN PARTICIPANTS HAVE A VERY STRONG INTEREST IN THIS CASE.

The Plan Participants are a common law employee and limited partners of Appellee Data Marketing Partnership, LP (“DMP”). This case centers on the health plan which provides Plan Participants their access to affordable healthcare. How this Honorable Court resolves this case is of paramount interest to the Plan Participants.

If the district court's decision that the health plan at issue is upheld, then Plan Participants get to keep their affordable healthcare. If the district court's decision is overturned, then Plan Participants would lose their affordable healthcare. There could be no more direct and profound interest in the outcome of the case than that held by the Plan Participants.

**THE PLAN PARTICIPANTS' BRIEF PROVIDES A UNIQUE
PERSPECTIVE.**

Unlike any of the named parties to this appeal – and the various *Amici Curiae* that have weighed in on the issues of this case – Plan Participants (and their families) are human-beings whose interests are affected directly by the outcome of this case. They understand how the plan at issue works and the impact of a potential adverse decision by Appellants and this Honorable Court. For Plan Participants, this is not a sterile legal or public policy debate. These are real-world issues that they are uniquely suited to address.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the proposed amici hereby certify that no party or party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money to fund the brief's preparation or submission; and no person other than the Plan Participants and their counsel contributed money intended to fund the brief's preparation or submission. The Plan Participants' brief has been filed within seven days of the filing of Appellees' brief, and thus is timely. Fed. R. App. P. 29(a)(6). The Plan Participants'

brief complies with Federal Rule of Appellate Procedure 29(a)(5), as it is no more than half the maximum length of Appellees' brief.

CONCLUSION

This case is about fellow citizens and their access to affordable healthcare. Many voices are weighing in on the issues before this Honorable Court. Plan Participants have a voice too, and that voice should be heard. For that reason, this Honorable Court should grant Plan Participants' Motion for Leave to file the proposed amicus brief.

Respectfully submitted,

/s/ Jason K. Elam

Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T: (504) 262-0040
F: (504) 262-0041
Jason.Elam@cs-law.com

and

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
PMB #402
Atlanta, Georgia 30319
(404) 815-3100
fennlaw@outlook.com

Counsel for Amici Curiae

June 22, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing was electronically filed with the Clerk of Court of the United States Court of Appeals for the 5th Circuit by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record, on this 22nd day of June 2021.

/s/ Jason K. Elam

JASON K. ELAM

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 563 words, as determined by the word-count function of Microsoft word 2013, excluding the parts of the Memorandum in Support exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Jason K. Elam
JASON K. ELAM

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Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T: (504) 262-0040
F: (504) 262-0041
Jason.Elam@cs-law.com
Counsel for Amici Curiae

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
PMB #402
Atlanta, Georgia 30319
(404) 815-3100
fennlaw@outlook.com
Counsel for Amici Curiae

June 22, 2021

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

Data Marketing Partnership, L.P.
L.P. Management Services, L.L.C.

Counsel for Plaintiffs-Appellees

Warren W. Harris
Yvonne Y. Ho
BRACEWELL LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

Defendants-Appellants

U.S. Department of Labor
Martin Walsh, Secretary, U.S. Department of Labor
United States of America

Counsel for Defendants-Appellants

Brian M. Boynton
Prerak Shah
Mark B. Stern
Michael Shih
Elena S. Goldstein
G. William Scott
Jeff Hahn
Katrina Liu
U.S. Department of Justice
950 Pennsylvania Avenue NW

Washington, DC 20530
Telephone: (202) 353-6880

Amici Curiae

Adam Rochester
John Fiedler
Benjamin Clear

Attorneys for Amicus Curiae

Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T: (504) 262-0040
F: (504) 262-0041
Jason.Elam@cs-law.com

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
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Atlanta, Georgia 30319
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Respectfully submitted,

/s/ Jason K. Elam
Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T: (504) 262-0040
F: (504) 262-0041
Jason.Elam@cs-law.com

and

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
PMB #402
Atlanta, Georgia 30319
(404) 815-3100
fennlaw@outlook.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS2
STATEMENT OF INTEREST1
ARGUMENT2
HOW THE BUSINESS WORKS3
LIMITED PARTNERS AND THE SINGLE-EMPLOYER HEALTH PLAN5
CONCLUSION9

TABLE OF AUTHORITIES

Fed. R. App. P. 29 15

Additional Authority:

Emilie Jackson, Adam Looney, and Shanthi Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,” U.S. Department of the Treasury, Office of Tax Analysis Working Paper 114 January 2017, <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>8

Steven F. Hipple and Laurel A. Hammond, “Self-employment In The United States,” U.S. Bureau of Labor Statistics Spotlight on Statistics, March 2016, <https://www.bls.gov/spotlight/2016/self-employment-in-the-united-states/pdf/self-employment-in-the-united-states.pdf>..... 8

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STATEMENT OF INTEREST

Adam Rochester, John Fiedler, and Benjamin Clear (collectively, “Plan Participants”) and their families have more to lose or to gain in this appeal than any other interested party. Additionally, the Plan Participants provide a practical view of how the decision in this case affects human beings (as opposed to governmental and corporate entities).

The Plan Participants are a common law employee and limited partners of Appellee Data Marketing Partnership, LP (“DMP”). This case centers on the health plan which provides Plan Participants their access to affordable healthcare. How this Honorable Court resolves this case is of paramount interest to the Plan Participants. If the district court’s decision that the health plan at issue is upheld, then Plan Participants get to keep their affordable healthcare. If the district court’s decision is overturned, then Plan Participants would lose their affordable healthcare. There could be no more direct and profound interest in the outcome of the case than that held by the Plan Participants.

Unlike any of the named parties to this appeal – and the various *Amici Curiae* that have weighed in on the issues of this case – Plan Participants (and their families) are human beings whose interests are affected directly by the outcome of this case. They understand how the plan at issue works and the impact of a potential adverse decision by Appellants and this Honorable Court. For Plan Participants, this is not a

sterile legal or public policy debate. These are real-world issues that they are uniquely suited to address.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the proposed amici hereby certify that no party or party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money to fund the brief's preparation or submission; and no person other than the Plan Participants and their counsel contributed money intended to fund the brief's preparation or submission.

ARGUMENT

At the time of the proceedings in the District Court, there were approximately 50,000 individuals who were limited partners in the limited partnerships managed by LP Management Services, LLC, ("LPMS"), including those partners in Data Marketing Partnership, LP ("DMP") as well as several other limited partnerships. The DMP limited partners are active owners controlling the product of their online activity by contributing it to the partnership. As working owners, they are also plan participants in the single-employer group health plan offered by DMP. DMP also employs a common law employee to assist in the business who is also a participant in the single-employer group health plan offered by DMP. In many ways, these plan participants would be the most adversely affected if the Department of Labor ("DOL"), et al, were to prevail, as such an adverse decision would likely lead to the demise of DMP's business model and cause those plan participants to lose their

opportunities to obtain affordable healthcare through the DMP Plan. Additionally, every working owner limited partner of the other partnerships managed by LPMS would face the same outcome – the elimination of the various single-employer healthcare plans associated with those limited partnerships and possible shuttering of the business.

HOW THE BUSINESS WORKS

DMP is a technology company. It is a Texas limited partnership that has as its business purpose the production, capture, segregation, aggregation, anonymization, organization, and sale (including through allowing targeted, paid online marketing to the partners) of electronic data generated by its partners. While a relatively new and novel business model, DMP requires a large number of partners contributing data to the partnership. This need for a large number of limited partners is not surprising. The marketing research and analysis business has long-required meaningfully large sample sizes of data to support insightful analysis. Stated differently, a sample size of one tells you nothing, and a small sample size tells you very little. This collection and aggregation of data relating to internet usage for market research by others (and through intelligent marketing to the partners) is the revenue-generating focus of DMP and through that activity, DMP seeks to capitalize on the increasingly lucrative market for data. A critical concept supporting this business model is that DMP limited partners are taking control of the revenue-

generating possibilities of the collection and aggregation of their internet usage data for use in market research and targeted marketing, and transmitting that data to the partnership.

LPMS manages the day-to-day operations of DMP, which is controlled and operated by LPMS and the limited partners. DMP also retains at least one common law employee. The common law employee(s) and the limited partners are eligible to participate in (and are the only people eligible to participate in) DMP's single-employer group health plan. Limited partners obtain an ownership interest in DMP through a joinder agreement; however, limited partners are only able to participate in the DMP health plan if they agree to perform services for DMP in the form of collecting and aggregating five hundred (500) hours of internet usage data (and related marketing activities) on behalf of DMP. This is achieved by installing the Legend Browser, a proprietary software for computers and mobile applications, on the computers and mobile devices that the limited partners choose. DMP limited partners activate the proprietary software, the software collects the data that is transmitted to DMP's "databank", and that aggregated data is then anonymized and organized for marketing to third-party purchasers, and used to provide them targeted, paid advertising.

LIMITED PARTNERS AND THE SINGLE-EMPLOYER HEALTH PLAN

The gig economy is on the rise, including an increase in businesses involving working ownership, which the DOL acknowledges. See Emilie Jackson, Adam Looney, and Shanthi Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,” U.S. Department of the Treasury, Office of Tax Analysis Working Paper 114 January 2017, <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>; Steven F. Hipple and Laurel A. Hammond, “Self-employment In The United States,” U.S. Bureau of Labor Statistics Spotlight on Statistics, March 2016, <https://www.bls.gov/spotlight/2016/self-employment-in-the-united-states/pdf/self-employment-in-the-united-states.pdf>; and Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky, and James R. Spletzer, “Measuring the Gig Economy: Current Knowledge and Open Issues,” March 2, 2017, <https://aysps.gsu.edu/files/2016/09/measuring-the-gig-economy-current-knowledge-and-open-issues.pdf>.¹ The rise in the gig economy has fundamentally changed the workplace and has made health plans even more important. In order to succeed, DMP (and the other LPMS-managed limited partnerships) must recruit a very large number of limited partners, who in turn must perform the work required to collect

¹As cited by the DOL, <https://www.govinfo.gov/content/pkg/FR-2018-06-21/pdf/2018-12992.pdf> (last visited on June 16, 2021).

and aggregate the internet data usage and paid marketing activity participation. As noted previously, this number must be sufficiently large to make valuable the results of the data collection and aggregation, as well as attract paid marketing opportunities. Just as with the vast majority of employers in the United States, a key recruitment tool for employees is the presence of a group health plan. In DMP's case, the health plan is a key factor in attracting enough limited partners necessary to collect the vast amount of data and participation in related marketing activities, to enhance DMP's growth. This is part of the bargain that DMP (and the other LPMS-managed limited partnerships) strikes with potential limited partners – namely, if you perform the work, then you will have the opportunity to be compensated, have access to the group health plan, and the other trappings of being associated with the limited partnership.

It would be difficult to overstate the importance of the health plans on offer to the common law employees and limited partners of these limited partnerships. The plans provide healthcare at affordable rates. The plans at issue have substantial financial backing as evidenced throughout the case, including substantial reinsurance (which is actually regulated by the states). They have robust management and governance processes associated with them, which are managed by independent fiduciaries. The claims management process is managed by independent third-party administrators (“TPAs”), as is the custom in the single-

employer healthcare market. The protections afforded plan participants are vast and have never been challenged by DOL during this litigation. Notwithstanding that record, DOL is asking the Court to make a harsh decision: either keep plan participants in a robust ERISA-governed healthcare plan or terminate the plan, leaving the limited partners with no choice other than the individual Affordable Care Act (“ACA”), or “Obamacare” market for health insurance. Since limited partners are by definition people who have determined that the individual ACA market does not offer what they need, this would effectively throw the vast majority of the plan participants into the ranks of the uninsured.

The current state of the individual market for health insurance is a direct result of the passage of the ACA.” The ACA had many supporters and many detractors, but no one can credibly debate a particular aspect of Obamacare: tens of millions of hardworking, middle-class Americans cannot afford healthcare through the individual insurance market. Those who are poor often qualify for federal subsidies to pay for their healthcare. The wealthy can afford to pay for themselves. Those who are left behind are often the self-employed individuals in the middle-class. The group health insurance that DMP’s employees and limited partners have is a meaningful benefit to those individuals. Of that there is no doubt; however “being meaningful” and “being inappropriate” are two entirely different things. DOL and many of its *Amici Curiae* contend “being meaningful” (or even “being novel”) is somehow a

disqualification for the legality of the DMP plan, the fact remains that DMP's limited partners rely on the plan's coverage to protect them and their families. Taking away that coverage would be disastrous to countless hard-working people and their families. Additionally, it would take away a significant tool to attract, retain, and manage its talent base.

At the end of the day, DMP limited partners have the opportunity to be paid to share their data and data-related activities, instead of having that data taken from them by big companies that make money off of selling that data. In other words, as working partners of DMP, the limited partners own the product of their online activity and participation in marketing opportunities – rather than being the product, they own the product.² In addition to taking control of the value of their online activity, working partners of DMP gain access to a healthcare benefits plan for those might not otherwise be able to afford health insurance. Despite allegations made by other litigants in this case, the plan covers pre-existing conditions and does not filter out people based on their health. Overall, participants are extremely satisfied with the health plans sponsored by LPMS-managed partnerships. The EASE Alliance, a non-profit group formed to promote broader access to ERISA plans, surveys

²The value of becoming an active partner is succinctly described in a short video describing the Legend Browser (the proprietary software used by LPMS managed limited partnerships like DMP) and how being a “Legend Partner” helps individual limited partners take control of the value of their online activity. This video is available at: www.legendplatform.net.

participants and features their responses on its website.³ DMP is an equal opportunity employer and does not base hiring decisions or health plan decisions based on someone's medical history. Additionally, DOL's positions in this litigation have prevented DMP from growing at its fullest potential and a victory in this appeal would bring the business opportunities represented by DMP to even more hard-working Americans.

CONCLUSION

The DMP single-employer health plan is a powerful tool for attracting, retaining, and maintaining people actively contributing to DMP's business. As important as that is, DMP's plan is truly a life-saving plan to plan participants, both the common law employee and working owner limited partners. These dual criticalities rise and fall with each other. Without the tens of thousands of limited partners, DMP has no business. Without the appropriate tools at its disposal, DMP may not be able to attract those limited partners in the first place. If the DMP plan were to go away, those plan participants would be left adrift in the stormy seas of the individual healthcare market.

The DMP Plan provides cost effective health coverage to the Plan Participants whose voice should be heard in this matter. The district court ruled correctly and should be upheld.

³ <https://easealliance.org/>.

Respectfully submitted,

/s/ Jason K. Elam

Jason K. Elam
Cosmich Simmons & Brown, PLLC
650 Poydras Street, Suite 2215
New Orleans, LA 70130
T: (504) 262-0040
F: (504) 262-0041
Jason.Elam@cs-law.com

and

S. Fenn Little, Jr.
S. Fenn Little, Jr., P.C.
3522 Ashford Dunwoody Rd
PMB #402
Atlanta, Georgia 30319
(404) 815-3100
fennlaw@outlook.com

Counsel for Amici Curiae

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2. This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Jason K. Elam

JASON K. ELAM