No. 12-98

In the
Supreme Court of the United States

ALBERT A. DELIA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

E.M.A., a Minor, by and through her Guardian ad Litem, DANIEL H. JOHNSON, WILLIAM EARL ARMSTRONG and SANDRA ARMSTRONG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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The court of appeals' determination that North Carolina's third-party recovery statute is preempted by the Medicaid Act's anti-lien provision warrants this Court's review. That decision is in direct conflict with a prior decision by the North Carolina Supreme Court which expressly held that the North Carolina statute comported with the Medicaid Act as it was construed in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). This case presents important issues for North Carolina as well as for other States that were not addressed in *Ahlborn* and should be decided by the Court. Respondents' arguments to the contrary lack merit.

1. Respondents approach this case as if it only involved a dispute over the amount of money recoverable from a single Medicaid recipient's tort claim settlement, with the decision of the Fourth Circuit merely the law of the case. Their unpersuasive attempt to minimize the significance of the issue presented is demonstrated by their characterization of the undeniable direct conflict with the prior decision of the North Carolina Supreme Court as "of limited importance" and their assertion, based on unexplained clairvoyance, that the conflict "will likely be resolved (either through the state supreme court reconsidering its decision or through state legislative amendments) in the near future." (Br. in Opp. 8)

a. As previously detailed, acceptance of the case for review is necessary not only to resolve a direct conflict between the Fourth Circuit and the North

Carolina Supreme Court but also to address for the benefit of all States the important issue not reached in *Ahlborn* – the extent to which States are allowed to utilize special rules and procedures for allocating tort settlements under the Medicaid Act. (Pet. 10-12)

The Fourth Circuit ruled that the States have only one method of combating settlement manipulation–the use of "mini hearings" – and therefore concluded that application of North Carolina's statutory procedure to an unallocated lump-sum settlement violated the Medicaid Act's anti-lien provision. (Pet. App. 45a) The decision misconstrues guidance from the Centers for Medicare and Medicaid Services ("CMS") for the proposition that State laws are prohibited under *Ahlborn* if they "permit recovery over and above what the parties have appropriately designated as payment for medical items and services."[1] (Pet. App. 46a) The Fourth Circuit's holding has wide-ranging application to all States and, as previously explained, has been

[1] This statement takes out of context language from the *Ahlborn* decision noting that Arkansas had conclusively stipulated to the portion of the settlement proceeds that were "properly . . . *designated* as payments for medical costs." 547 U.S. at 288 (emphasis added). In proper context, the use of the word "designated" refers to the agreed stipulation and offers no support for the contention that a plaintiff and a tortfeasor have the power to "designate" which portion (if any) of a settlement can be recovered by the State as reimbursement for the payment of past medical expenses.

relied upon in a recent decision by the Supreme Court of Appeals of West Virginia. (Pet. 20-21)

b. Respondents' assertion that the Petition does not merit the time and attention of the Court because North Carolina's judicial and/or legislative branches are "likely" to resolve the conflict by accepting the analysis of the Fourth Circuit either in a subsequent court decision or in amended legislation is wholly speculative and does not withstand scrutiny.

First, Respondents' statement that the North Carolina Supreme Court "almost universally falls in line with Fourth Circuit decisions" has no relevance here. (Br. in Opp. 9) That observation merely reflects the unremarkable concept that a federal court's interpretation of statutory provision is frequently persuasive. None of the cases cited by Respondent involved anything analogous to the situation here where the North Carolina Supreme Court would be reconsidering and reversing one of its own decisions to conform to a subsequent decision of the Fourth Circuit.[2] There is no guarantee that an opportunity to

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[2] Respondents' citation to three decisions by the North Carolina Court of Appeals for the proposition that decisions by the Fourth Circuit are persuasive is particularly inappropriate. (Br. in Opp. 10) The North Carolina Court of Appeals has no "authority to overrule decisions of the Supreme Court of North Carolina" because "its responsibility [is] to follow those decisions until otherwise ordered by the Supreme Court." *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (per curiam).

revisit the matter will be presented, because a case presenting the legal issue would have to make its way through the trial and intermediate appellate levels. And even if a case did, the North Carolina Supreme Court firmly recognizes the policy of *stare decisis* and does not routinely overrule itself. All of the Justices that formed the majority for the decision in *Andrews v. Haygood*, 362 N.C. 599, 669 S.E.2d 310 (2008), *cert. denied sub nom. Brown v. North Carolina Department of Health and Human Services*, 129 S. Ct. 2792 (2009), remain on the bench, and there is no proper basis to claim that it is "likely" the legal analysis and conclusion will be diametrically different in a hypothetical future case.

Second, the suggestion that the case "may well be mooted if the North Carolina General Assembly were to enact clarifying legislation" is truly remarkable. (Br. in Opp. 11) This reason to deny review would necessarily apply in any and every case where the issue presented involves a state statute invalidated by a federal court. Any asserted likelihood of such legislative action is rank speculation.

2. Respondents argue that the decision of the Fourth Circuit is consistent with the holding in *Ahlborn*, which they characterize as simply giving

States a priority disbursement from the portion of a settlement that represents medical expenses alone.[3] (Br. in Opp. 13) They further contend that North Carolina's statutory formula "will result in the State recovering" more than it should in many individual cases, reinforcing their previous assertion that the statute allows the NC DHHS "to take one-third of all tort settlements."[4] (Br. in Opp. 13, 6)

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[3] Respondents rely on *Ahlborn's* discussion of decisions by the Departmental Appeals Board of HHS in two matters specifically limited to the question of whether § 1396k(b) (the Medicaid Act assignment statute), standing alone, "authorize[d] the State to demand reimbursement from portions of the settlement allocated or allocable to nonmedical damages." 547 U.S. at 291.

[4] Respondents mischaracterize the Petition as "impl[ying] that NC DHHS will, on occasion, 'consent to compromise' with respect to the allocation of a tort settlement." (Br. in Opp. 12 n.3) The excerpted language comes from the statement that "North Carolina's subrogation statute provides the state's consent to compromise by automatically reducing its claim to one-third of the recovery if the recovery does not equal at least three times the amount of the Medicaid lien." (Pet. 17) In proper context, the statement is wholly consistent with the previous unchallenged statement that North Carolina's statutory provisions "provide an advance agreement that the State will reduce its lien if the amount of the Medicaid lien exceeds one-third of the total recovery." (Pet. 14-15)

As previously detailed, a proper reading of *Ahlborn* establishes that states retain the authority to regulate how tort recoveries must be allocated, and that the Fourth Circuit erroneously imposed a requirement for an "adversarial hearing" to determine the "true value" of the case before allocating a portion of a settlement as compensation for past medical expenses. (Pet. 13-16) *Ahlborn's* mere suggestion of court review does not support the Fourth Circuit's imposition of a requirement for an evidentiary hearing to establish what portion of settlement proceeds are properly allocable to past medical expenses, especially in light of other language in the opinion leaving open the option for States to adopt special rules and procedures to meet concerns about settlement manipulation.

The Petition further demonstrates how the Fourth Circuit misread guidance from CMS, detailing the relevant provision of a 2006 CMS Memorandum as well as a subsequent 2009 Reply Memo which addressed the question of whether the North Carolina Supreme Court's decision in *Andrews* was in conflict with the guidance set forth in the 2006 CMS Memorandum. (Pet. 16-19) Respondents have no substantive response to the issue regarding the CMS directives; instead, they choose to attack the author of the 2009 Reply Memo, dismissing the matter because she is merely a "registered nurse" who "holds a Masters in Business Administration" but "is neither an attorney nor a judge." (Br. in Opp. 14) It is difficult to understand how the views of any agency regarding a statute it administers could meet Respondents'

standard that they be expressed by a member of the judiciary.

Respondents have not and cannot dispute that the Reply Memo was a response to an inquiry from a member of Congress from an administrator of CMS in her official capacity and clearly demonstrates the misplaced reliance by the Fourth Circuit on the 2006 CMS policy statement to support its erroneous conclusion. The 2009 Reply Memo correctly notes that consistent with the 2006 CMS Memorandum "States have leeway to develop a reasonable statutory scheme for apportioning medical expenses" and concludes that North Carolina's actions as reviewed in *Andrews* are not in "conflict with CMS' guidance." (Pet. App. 141a, 142a)

North Carolina's statutory provision comports with *Ahlborn* because, as held by the district court, it "provides a means of calculating that portion [of a settlement representing payment for medical expenses], and then forbids the State from imposing a lien on the remainder of the settlement." (Pet. App. 82a)

3. The Petition addresses why the important issue presented should be decided by the Court, including an outline of other State statutory procedures that may be called into question under the analysis of the Fourth Circuit, as well as noting a request for guidance from a State court that recently relied upon the Fourth Circuit decision. (Pet. 19-21) Respondents attempt to diminish the importance of the issue presented by

claiming that the statutes cited in the Petition similar to North Carolina merely represent "States [that] have not yet revised their statutes to conform to the *Ahlborn* decision." (Br. in Opp. 15) As to the 26 other State statutes referenced, Respondents describe them as "simply provid[ing] a generic statement . . . that acceptance of Medicaid benefits constitutes an assignment of rights with respect to third parties," and boldly assert that "[a] close examination of the listed statutes reveals that none would be preempted under the Fourth Circuit's reasoning." (Br. in Opp. 15)

As expressly set forth in the Petition, the relevance of the referenced provisions is that the listed State statutes "do not require an 'adversarial testing' of the allocation of damages of the type mandated by the decision of the Fourth Circuit." (Pet. 19-20) Respondents have not and cannot demonstrate why a decision requiring a procedure whereby a Medicaid recipient can challenge the amount of a Medicaid third-party recovery which does not exist in any of the listed States' third-party recovery statutes "has only a minimal impact upon a handful of jurisdictions at best." (Br. in Opp. 14)

All States, by virtue of participation in the Medicaid program, are required to seek reimbursement from third-party tortfeasors, and acceptance of this case for review is appropriate and necessary to address the post-*Ahlborn* uncertainty as to what "special rules and procedures for allocation of tort settlements" are permitted by the Medicaid Act.

4. Respondents attempt to dissuade the Court from accepting the case for review, asserting that the petition is "less than an ideal vehicle for determining the question presented." They contend that the Petition does not adequately present the "threshold issue" of whether the Medicaid Act's anti-lien provision allows States to impose a lien on even the portion of tort settlements received from third-parties attributable to expenses paid by Medicaid, and that the Fourth Circuit's remand of the case to district court for an evidentiary hearing on the amount of North Carolina's Medicaid lien renders review by the Court "premature and unnecessary." (Br. in Opp.13 n.4, 16, 17) Neither argument withstands scrutiny.

a. Respondents' claimed "threshold issue" was addressed in *Ahlborn*. And, to the extent it was not presented and developed below, Respondents are directly responsible for any shortcomings regarding presentation of the purported necessary preliminary question regarding the scope of the Medicaid Act's anti-lien provision.

First, Respondents' argument requires that the anti-lien provision, 42 U.S.C. § 1396p(a), be "[r]ead literally and in isolation," an argument specifically rejected by the Court in *Ahlborn*. 547 U.S. at 284. Respondents' contention that the Court "assumed without deciding" that a State could impose a lien on the portion of a third-party settlement that constitutes reimbursement for medical costs paid by Medicaid ignores the clear statements made in *Ahlborn* that

address the question. (Br. in Opp. 13 n.4, 16) The *Ahlborn* Court found that Medicaid's "third-party liability provisions *require* an assignment" of the right to recover that portion of a settlement that represents payment for medical care, 547 U.S. at 282, declaring "[t]here is no question that the State can require an assignment" of a Medicaid recipient's right to receive payments for medical care, and that the State's prerogative is "expressly provided" for in the third-party recovery provisions of the Medicaid Act. *Id*. at 284. The Court concluded that "[t]o the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision." *Id*.

In proper context, the specific third-party recovery requirements for health-care expenditures imposed by the Medicaid Act must be read as an express exception to the general anti-lien provision, as the Act provides for a proper State lien on the portion of a tort settlement constituting reimbursement for medical costs. That is how the relevant statutory provisions were read in *Ahlborn*, and Respondents have not and cannot show that any court in any jurisdiction has read them differently.

Second, any failure of the court below to address the proper scope of the Medicaid anti-lien provision as a necessary "threshold issue" is directly attributable to the litigation strategy adopted and utilized by Respondents. The only way the purported necessary preliminary question – whether the Medicaid Act's

anti-lien provision allows States to impose a lien on even the portion of tort settlements received from third-parties attributable to expenses paid by Medicaid – could have been ruled upon is if it had been properly presented in the trial court pleadings.

Here, Respondents' Complaint sought declaratory relief to the extent North Carolina's third-party recovery statutes allowed the State "to assert a lien on settlement funds paid in lieu of damages for claims other than medical expenses." (Pet. App. 9a) Indeed, as noted by the Fourth Circuit, "[t]he parties before us do not dispute the state's entitlement to *some* reimbursement from the lump-sum settlement." (Pet. App. 4a)

Plainly, the Complaint did not raise and Respondents did not litigate in any way the question of whether the State could properly assert a statutory lien on any portion of the settlement proceeds. The failure of Respondents to raise that issue below should not provide a procedural shield against North Carolina's attempt to have this Court accept for review the important issue presented by the decision of the Fourth Circuit.

b. Respondents suggest that the Court's consideration of the question presented concerning the constitutionality of N.C. Gen. Stat. § 108A-57 would be premature because the case has been remanded by the Fourth Circuit to the district court for a determination of the proper amount of Petitioner's lien. (Br. in Opp. 17) Respondents' approach ignores the

jurisprudential effect of the Fourth Circuit's declaration that North Carolina's third-party recovery statutes "fail to comply with federal Medicaid law" such that when there is an unallocated lump-sum settlement "the sum certain allocable to medical expenses must be determined by way of a fair and impartial adversarial procedure." (Pet. App. 54a, 55a)

Respondents' attempt to defer a decision on the issue presented misses the point. A determination of the precise monetary amount of North Carolina's Medicaid lien under the facts and circumstances presented does not obviate the various holdings in the case. Nothing that occurs in the district court on remand can or will change the legal issues decided by the Fourth Circuit or diminish their precedential impact.

The express, fundamental conflict between the Fourth Circuit and the North Carolina Supreme Court as to the constitutional viability of North Carolina's third-party recovery statute and the question squarely presented in this petition – whether N.C. Gen. Stat. § 108A-57 is preempted by the Medicaid Act's anti-lien provision as it was construed in *Ahlborn* – will remain until resolved by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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