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No. 12-98

In the Supreme Court of the United States

ALBERT A. DELIA, ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

E.M.A. (BY AND THROUGH HER GUARDIAN AD LITEM, DANIEL H. JOHNSON), WILLIAM EARL ARMSTRONG AND SANDRA ARMSTRONG,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does the anti-lien provision of the federal Medicaid laws, 42 U.S.C. § 1396p(a), preempt North Carolina General Statutes Section 108A-57, which purports to create a lien on any tort settlement received by a Medicaid recipient from a third-party up to one-third of the settlement?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-70a) is reported at 674 F.3d 290. The opinion of the district court (Pet. App. 70a-85a) is reported at 722 F. Supp. 2d 653.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 22, 2012. On June 14, 2012, the Chief Justice extended the time to and including July 20, 2012 within which to file the petition for writ of certiorari. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Subject matter jurisdiction over the action arises under 28 U.S.C. §§ 1331, 1343(a)(3). *See Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002) (recognizing § 1331 grants subject matter jurisdiction over action seeking declaratory judgment against state agency based on a purported violation of federal law unless the claim is wholly insubstantial and frivolous).

STATUTORY PROVISIONS INVOLVED

This case involves various provisions of the Medicaid Act, 42 U.S.C. §§ 1396 *et seq*. The applicable provisions are set out in the Appendix to this brief at 1a-7a and in the Appendix to the Petition for Writ of Certiorari at 118a-23a.

STATEMENT

1. North Carolina, like all other States, voluntarily participates in the federal Medicaid program. As a result, the State of North Carolina has expressly agreed to be bound by the terms of that federal program. *See, e.g.,* 42 U.S.C. § 1396a; N.C. Gen. Stat. §§ 108A-54, -56.

The federal Medicaid program limits a State's ability to impose a lien on the property of a Medicaid beneficiary. Specifically, the federal anti-lien provision states: "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan * * * *" 42 U.S.C. § 1396p(a)(1).[1] Additionally, Medicaid's assignment provisions direct that a Medicaid recipient must assign to the state Medicaid program "any rights * * * to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A).

2. Respondent E.M.A. is a twelve year old girl who lives with her parents in Taylorsville, North Carolina. As a result of malpractice by the physician who delivered her at birth, E.M.A. is deaf, blind, and unable to sit, walk, crawl or talk and suffers from mental retardation and a seizure disorder. Pet. App. 5a. Based on her extensive pain and suffering, loss of enjoyment of life, loss of earning capacity and future medical expenses, E.M.A. incurred damages in excess of $42 million as a result of her physician's malpractice. *See* J.A. 91-112.

In February 2003, E.M.A.'s guardian ad litem brought a malpractice action against E.M.A.'s treating physician and others in North Carolina state court. Following the filing of the medical malpractice action, the North Carolina Department

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[1] The anti-lien provision sets out two exceptions – neither of which is applicable here.

of Health and Human Services ("NC DHHS") asserted a statutory lien on any settlement proceeds resulting from that action. NC DHHS based its claim of lien on N.C. Gen. Stat. § 108A-57(a) which provides:

> [T]he State * * * shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance * * * * Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but *the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered*.

N.C. Gen. Stat. § 108A-57(a) (emphasis added).

3. On September 27, 2006, a mediated settlement conference was held in E.M.A.'s state tort action. J.A. 17. NC DHHS was notified of the settlement conference but failed to attend. *See, e.g., id.* At the settlement conference, an agreement was reached to settle E.M.A.'s claims for the sum of $2.8

million, subject to court approval.[2] The settlement amount was significantly influenced by considerations of limited available medical malpractice insurance coverage and the challenges generally associated with collecting a judgment from the limited assets of an individual.

Under North Carolina law, a settlement involving a minor or a person who is incompetent is valid only if approved by the court. *See Bunch v. Foreman Blades Lumber Co.,* 93 S.E. 374, 376 (N.C. 1917); *Ballard v. Hunter,* 184 S.E.2d 423, 427 (N.C. Ct. App. 1971). On November 14, 2006, the state superior court judge entered an order approving the settlement. The court concluded that the settlement agreement "is fair and just, is in the best interest of the minor plaintiff [E.M.A.], and is in all respects reasonable and proper." J.A. 80-81. The court's order directs that one-third of the settlement payment (i.e., the sum of $933,333.33) be paid to the Clerk of Court and placed in an interest bearing account "until such time as the actual amount of the lien owed by [E.M.A.] to the North Carolina Division of Medical Assistance is conclusively judicially determined." J.A. 87; *see* Pet. App. 4a.

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[2] When the parties moved for court approval of the settlement, the state superior court judge ordered that the settlement agreement be filed under seal. J.A. 81. Nevertheless, it is possible to reconstruct the amount of the settlement based on the court's order that the sum of $933,333.33 ("the maximum potential amount of the Medicaid lien") be delivered to the clerk of court until the lien is "conclusively judicially determined." J.A. 87; *see* Pet. App. 3a-4a.

Under the superior court's order, the funds released to E.M.A. were placed in a Special Needs Trust. J.A. 85. The Medicaid Act permits the proceeds of a personal injury action to be placed into a Special Needs Trust, but places specific restrictions on such a trust. 42 U.S.C. § 1396p(d)(4)(A). Funds in such a trust may be used only for the sole benefit of the trust beneficiary, including things such as medical equipment and services not provided through Medicaid, attendant care and private rehabilitation services. *See* Soc. Sec. Admin., Program Operations Manual System, SI 01120.200(E)(1)(c), .201(F)(2), .203(B)(1)(e) (available at https://secure.ssa.gov/poms.nsf/). Additionally, the trust must provide that the State will receive all amounts remaining in the trust on the death of the Medicaid beneficiary up to an amount equal to the total medical assistance paid on behalf of the individual. 42 U.S.C. § 1396p(d)(4)(A). Trusts that meet these requirements do not render the trust beneficiary ineligible for Medicaid services. *See id.* The net effect of placing E.M.A.'s settlement funds into a Special Needs Trust is that far greater assets are available to potentially reimburse the State, though the State's right to seek reimbursement from these assets cannot be enforced until E.M.A. passes away.[3]

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[3] Under this Court's decision in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), the lien of the state Medicaid program is limited to the portion of the settlement that is attributable to medical expenses. In contrast, the state Medicaid program can recover all amounts remaining in the Special Needs Trust (up to the total amount of medical assistance paid) on the death of the beneficiary.

The order of the state superior court approving the settlement expressly provides that any portion of the $933,333.33 being held by the clerk of court that is not used to pay the State's lien must be distributed to the E.M.A. Irrevocable Special Needs Trust. J.A. 87.

4. On March 23, 2007, E.M.A. and her parents brought the present action in federal district court, seeking a declaratory judgment that the lien by NC DHHS was preempted by the federal Medicaid Act, 42 U.S.C. § 1396p(a). The complaint alleges that NC DHHS' assertion of a lien is inconsistent with the anti-lien provision of the federal Medicaid laws and this Court's decision in *Arkansas Department of Health & Human Services v. Ahlborn,* 547 U.S. 268 (2006). J.A. 18. The complaint prays that the court declare N.C. Gen. Stat. § 108A-57 unconstitutional. J.A. 25. The district court proceeded to stay discovery pending the appeal before the North Carolina Supreme Court in *Andrews v. Haygood,* 57A07-2, which raised similar challenges to the North Carolina statute. Pet. App. 74a. In response to E.M.A.'s complaint, NC DHHS similarly requested that the federal district court adjudicate the interests of the parties with respect to the sum being held by the clerk of court. J.A. 30, 39.

On December 12, 2008, the North Carolina Supreme Court rendered its decision in *Andrews v. Haygood,* 669 S.E.2d 310 (N.C. 2008), *cert. denied,* 557 U.S. 904 (2009). Relying on a presumption that state statutes are constitutional, the North Carolina Supreme Court, in a 4-3 decision, held that N.C. Gen. Stat. § 108A-57 is not preempted by federal

law. 669 S.E.2d at 313-14. The North Carolina Supreme Court distinguished this Court's decision in *Ahlborn* in that the *Ahlborn* decision involved a stipulation by the parties as to the reasonable value of the plaintiff's total claim for damages. *Id.* at 313. ("*Ahlborn* thus controls when there has been a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement.").

In *Andrews,* the North Carolina Supreme Court concluded that N.C. Gen. Stat. § 108A-57 "comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements." 669 S.E.2d at 314. The majority in *Andrews* opined that allowing NC DHHS to take one-third of all tort settlements without having to determine the actual proportion between various categories of damages would "promot[e] efficiency in Medicaid reimbursement." *Id.* Justice Hudson, joined by Justices Brady and Timmons-Goodson, dissented. She reasoned that "*Ahlborn* is binding upon this Court, and its reasoning and holding compel the conclusion that the application of N.C.G.S. § 108A-57(a) here, without any further determination of how the settlement proceeds were allocated among different types of damages alleged by plaintiff, would be contrary to federal law." *Id.* at 316 (Hudson, J., dissenting).

The federal district court below adopted the reasoning of the majority in *Andrews* and granted summary judgment in favor of NC DHHS. Citing footnote 18 of this Court's decision in *Ahlborn*, the district court reasoned that the *Ahlborn* decision leaves open the possibility that a State could

"'adopt[] special rules and procedures for allocating tort settlements.'" Pet. App. 84a (quoting *Ahlborn,* 547 U.S. at 288 n.18). According to the district court, "North Carolina has adopted such a statutory scheme, which provides a reasonable method for ascertaining the State's medical reimbursements, while still protecting the interests of Medicaid recipients * * * *" Pet. App. 84a-85a.

5. The Fourth Circuit reversed the district court, concluding that the irrebuttable presumption created by N.C. Gen. Stat. § 108A-57 is inconsistent with the *Ahlborn* decision. Pet. App. 52a (noting that *Ahlborn* cautions that if state rules and statutes provide a formula for allocating a settlement between medical expenses paid by Medicaid and other categories of damages, States "must afford a mechanism permitting beneficiaries to rebut such a presumption"). The Fourth Circuit noted that "under the circumstances in this case, North Carolina's statutory presumption must be subject to adversarial testing." Pet. App. 53a. The Fourth Circuit concluded "the one-third cap on the state's recovery imposed by the North Carolina third-party liability statutes is in fatal conflict with federal law." Pet. App. 5a.

SUMMARY OF ARGUMENT

The Medicaid Act severely restricts the ability of state Medicaid programs to seize or encumber the property of Medicaid beneficiaries. *See* 42 U.S.C. § 1396p(a)(1). When a Medicaid beneficiary brings a claim against a third-party tortfeasor, the state Medicaid program has no right to claim the portion

of any settlement or award attributable to damages such as pain and suffering, disfigurement or lost wages. *Arkansas Dep't of Health & Human Servs. v. Ahlborn,* 547 U.S. 268, 280-81 (2006). Rather, the state Medicaid program may assert a claim only with respect to that portion of the settlement or award that is fairly attributable to medical expenses paid by the state Medicaid program. *Id.* In *Ahlborn,* this Court unanimously held that the Medicaid Act unambiguously prohibits States from "lay[ing] claim to more than the portion of [a Medicaid beneficiary's tort] settlement that represents medical expenses." *Id.* at 280.

Despite the clear directive of the Medicaid Act and this Court's unanimous decision in *Ahlborn*, N.C. Gen. Stat. § 108A-57 dictates the sum that the State is allowed to recover from tort settlements, even if that sum is greater than the portion of the settlement representing medical expenses. Specifically, the North Carolina statute provides that to the extent the State has paid Medicaid benefits, the State shall be subrogated to the rights of the Medicaid beneficiary against any third party, "but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered." N.C. Gen. Stat. § 108A-57. The State's one-third minimum recovery applies when a tort victim (such as E.M.A.) is able to recover only a small portion of her overall damages as a result of the tortfeasor not being sufficiently solvent. In such situations, the State ends up taking a third of the settlement even though a fair allocation of the portion of the settlement that represents payment

for medical expenses would be much smaller than one-third of the settlement.

The arbitrary nature of the North Carolina statute is shown by the State's failure to come forward with any explanation as to how the statute constitutes a fair allocation between medical expenses and other damages. In fact, Petitioner has conceded that the purported allocation created by the statute "rests on nothing more than the state's notion of how attorneys and insurance adjusters typically value tort cases." Pet. App. 20a.

The *Ahlborn* decision demonstrates that N.C. Gen. Stat. § 108A-57 is in conflict with Medicaid's anti-lien provision and is therefore unenforceable. Petitioner, however, attempts to distinguish *Ahlborn*. His efforts are not persuasive. Petitioner implies that *Ahlborn* should be cabined as a result of that decision coming before this Court on stipulated facts. Throughout the opinion, however, this Court made clear that it is irrelevant whether the applicable facts were reached by stipulation or by a judge or jury. Additionally, Petitioner relies on a statement in footnote 18 of the *Ahlborn* decision that the decision leaves open the issue of whether States may adopt procedures to prohibit settlement manipulation. 547 U.S. at 288 n.18. Like *Ahlborn*, that issue is not properly raised under the facts of this case. Here, the settlement agreement contained no allocation of damages. Therefore, the issue of what steps a State may take to prevent settlement manipulation is not presented. More importantly, to the extent that the Court were to address this issue, such procedures should not include arbitrary and

irrebuttable presumptions that would allow States to circumvent this Court's decision in *Ahlborn*.

The reimbursement to the state Medicaid program mandated by N.C. Gen. Stat. § 108A-57 frequently results in the state Medicaid program taking "more than the portion of [the] settlement that represents medical expenses." *Ahlborn,* 547 U.S. at 280. That is the case here. The Fourth Circuit correctly held that the North Carolina statute conflicts with the Medicaid Act and is therefore preempted.

ARGUMENT

The purpose of the Medicaid Act is to provide medical assistance to needy families whose income and resources are not sufficient to meet these costs. 42 U.S.C. § 1396 *et seq*. Congress' objective was to help such families in their time of need – not to cripple them with debts and liens for seeking such assistance. *See* 42 U.S.C. § 1396p.

In contrast, N.C. Gen. Stat. § 108A-57 provides that whenever a Medicaid beneficiary obtains an award or settlement in a claim against a third-party tortfeasor, North Carolina will either be paid in full or take one-third of any tort settlement – regardless of whether one-third fairly represents the portion of the settlement that is attributable to medical expenses. The North Carolina statute is inconsistent with Medicaid's anti-lien provision, 42 U.S.C. § 1396p, and this Court's decision in *Arkansas Department of Health & Human Services*

v. Ahlborn, 547 U.S. 268, 280-81 (2006). The Fourth Circuit correctly held that N.C. Gen. Stat. § 108A-57 is unenforceable and preempted by federal law.

I. NORTH CAROLINA'S STATUTE VIOLATES MEDICAID'S ANTI-LIEN PROVISION AND IS INCONSISTENT WITH THIS COURT'S DECISION IN *AHLBORN*.

As a condition of eligibility for medical assistance, an applicant for Medicaid services must assign certain rights to the state Medicaid program. 42 U.S.C. § 1396k. That assignment provision, however, is narrow. With respect to tort claims against third parties, the statute expressly limits the assignment to the right to recover for "payment of *medical care* from any third party." 42 U.S.C. § 1396k(a)(1)(A) (emphasis added); *accord* 42 U.S.C. § 1396a(a)(25)(H) (State's right of recovery against third parties is limited to payments made by the Medicaid program for "medical assistance"). The assignment does not extend to the beneficiary's right to recover lost wages, pain and suffering, disfigurement or similar damages from a tortfeasor. *Ahlborn,* 547 U.S. at 281. Additionally, Medicaid's anti-lien provision precludes a state Medicaid program from imposing a lien on the property of a Medicaid beneficiary on account of medical assistance paid or to be paid by the state Medicaid program.[4] 42 U.S.C. § 1396p(a)(1).

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[4] Medicaid's anti-lien statute does permit a lien following the death of the Medicaid beneficiary. It also provides for two

In *Ahlborn*, this Court considered an Arkansas statute that allowed Arkansas to impose a lien on a Medicaid beneficiary's tort settlement for an amount in excess of the portion of the settlement that represented payment for medical care. Rejecting the construction of the Medicaid Act advocated by Arkansas and by the United States as *amicus*, the Court held that Arkansas could not "lay claim to more than the portion of Ahlborn's settlement that represents medical expenses." 547 U.S. at 280. In *Ahlborn,* Arkansas was seeking to impose a lien on 39% of Heidi Ahlborn's tort settlement. Here, North Carolina is seeking to impose a lien on 33.3% of E.M.A.'s tort settlement. In both cases, the percentage is in excess of the portion of the settlement that represents payment for medical care. North Carolina's statute, just like the Arkansas statute struck down in *Ahlborn*, is inconsistent with the Medicaid anti-lien provision and is therefore unenforceable.

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exceptions to the anti-lien rule: (1) when a court has entered a judgment finding that benefits have been incorrectly paid to a beneficiary or (2) when a beneficiary who owns real property is receiving inpatient services at a medical facility and certain specific requirements are met. 42 U.S.C. § 1396p(a)(1). Neither of these two exceptions to the anti-lien provision is applicable here.

In *Ahlborn,* the parties assumed that a lien that was limited to medical expenses paid by the state Medicaid program would not be barred by the anti-lien provision. This Court therefore assumed, without deciding, that such a lien was not precluded by the plain language of 42 U.S.C. § 1396p(a)(1). *See* 547 U.S. at 284. That issue, however, was not ruled on by the Fourth Circuit and is not presented here. *See* Br. in Opp. at 16; Pet. App. 19a n.4.

The holding of *Ahlborn* is clear. The right of a state Medicaid program to seek reimbursement from a Medicaid beneficiary's settlement with a tortfeasor "extend[s] only to recovery of payments for medical care." *Id.* at 282; *accord id.* (any recovery by the state Medicaid program is limited to "that portion of a settlement that represents payments for medical care"). A state Medicaid program may not lay claim to payments from a third party that compensate the Medicaid beneficiary for lost wages, pain and suffering, and similar damages. *Id.* at 281. Allowing state Medicaid programs to share in a tort recovery that is properly allocated as payment for pain and suffering and lost wages – injuries for which the State has provided no compensation – would be "'absurd and fundamentally unjust.'" *Id.* at 288 n.19 (quoting *Flanigan v. Dep't of Labor & Indus.,* 869 P.2d 14, 17 (Wash. 1994)).[5]

The North Carolina statute, N.C. Gen. Stat. § 108A-57, is just as problematic as the statute at

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[5] Petitioner incorrectly, and without citation, asserts that a Medicaid recipient "has no right to reduce her reimbursement obligation because the recovery was less than the full amount of her damages." Pet. Br. at 30. *Ahlborn* holds to the contrary: "Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47 [the amount of the medical expenses paid by ADHS proportionally reduced as a result of Ahlborn being able to recover only one-sixth of her total damages], and the federal anti-lien provision affirmatively prohibits it from doing so." 547 U.S. at 292.

issue in *Ahlborn*.[6] The facts of the present case illustrate how the irrebuttable presumption created by N.C. Gen. Stat. § 108A-57 results in the state Medicaid program taking "more than the portion of [the] settlement that represents medical expenses." 547 U.S. at 280. As a result of her injuries, E.M.A. cannot crawl, walk, hold her head up or talk. J.A. 114. She is deaf and legally blind. *Id.* She has a severe brain injury which left her mentally retarded and with severe deficits in all activities of daily living. *Id.* She is unable to use her mouth to eat and therefore must be fed through a feeding tube. *Id.* Because she cannot clear her throat, E.M.A. requires frequent suctioning so that she does not gag on her own saliva. *Id.* Moreover, she has no control of her bowel or bladder function. *Id.* at 115.

The $1.9 million that NC DHHS paid toward E.M.A.'s medical expenses pales in comparison to the long list of other damages for which E.M.A.'s

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[6] Petitioner's brief refers in passing to another North Carolina statute, N.C. Gen. Stat. § 108A-59. *See* Pet. Br. at 6, 11. Whereas N.C. Gen. Stat. § 108A-57 speaks in terms of the State's right of subrogation with respect to "rights of recovery" that the Medicaid beneficiary may have against others, N.C. Gen. Stat. § 108A-59 speaks in terms of the State's assignment to "benefits" the Medicaid beneficiary is entitled to receive from third parties. The North Carolina Attorney General has opined that this difference in language is significant and that N.C. Gen. Stat. § 108A-59 applies only when the Medicaid beneficiary has a right to "benefits," such as a right to payments under a policy of insurance. Opinion of the North Carolina Attorney General, 1982 N.C. AG LEXIS 19 (Dec. 7, 1982); *but see Andrews v. Haygood,* 669 S.E.2d 310, 313 (N.C. 2008) (indicating that § 108A-57 implements § 108A-59), *cert. denied*, 557 U.S. 904 (2009).

settlement is intended to compensate her. E.M.A. faces a lifetime of pain and suffering, loss of enjoyment of life and complete dependence on her parents and others for all aspects of her care. Her injuries rendered her unable to work, taking from her a lifetime of wages. In addition, her economic damages go far beyond medical needs – and include architectural renovations, modified transportation and similar costs. In light of all of these damages which were compromised by the settlement, it is not reasonable for Petitioner to assume that of the $2.8 million settlement, the sum of $933,333.33 was being paid for past medical expenses and the remaining sum of $1,866,666.67 was intended to suffice as payment for the entirety of E.M.A.'s non-medical damages, as well as legal fees and costs.[7] At a minimum, E.M.A. should have the opportunity to obtain a fair allocation between medical and non-medical damages as the Fourth Circuit's remand contemplates.

Despite E.M.A.'s substantial damages, only limited resources were available to compensate E.M.A. for her injuries. As a result of a long history of drug abuse and addiction, E.M.A.'s treating physician (the principal defendant in her tort claim) surrendered his medical license in May 2000 (three months after delivering E.M.A.). *See Armstrong v.*

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[7] Under N.C. Gen. Stat. § 108A-57, the State is not responsible for attorneys' fees and court costs. Moreover, the amount of the State's lien is not adjusted to account for those fees and costs. Rather, the State is guaranteed that it will recover one-third of any settlement or judgment, regardless of the cost of achieving that award.

Barnes, 614 S.E.2d 371, 374 (N.C. Ct. App.), *discr. review denied,* 621 S.E.2d 173 (N.C. 2005). Due to the risks and costs of pursuing the collection of a judgment against an individual, E.M.A. and her parents settled the malpractice claim for $2.8 million – a small fraction of E.M.A.'s overall damages.[8]

Here, Petitioner is seeking to recover a sum ($933,333.33) that is far in excess of the portion of the settlement that reflects payment for medical expenses. E.M.A. was forced to give up a substantial portion of her recovery simply because her treating physician was not sufficiently solvent to pay her claim in full. The State should not be immune from sharing in that loss proportionally. E.M.A. has already borne a substantial reduction in her recovery as a result of the lack of available insurance. Petitioner now seeks to compound that loss by requiring E.M.A. to take a portion of her settlement that would be fairly allocable to damages other than medical expenses and remit that payment to the State in order to ensure that the State gets one-third of the settlement. Such a result is "'fundamentally unjust.'" *Ahlborn,* 547 U.S. at 288 n.19 (quoting

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[8] Despite the horrific nature of E.M.A.'s injuries (which are undisputed), Petitioner asserts that all damages other than medical expenses are subject to "speculation," "manipulat[ion]," and "exaggerat[ion]." Pet. Br at 31-32. Moreover, Petitioner seeks to diminish the magnitude of E.M.A.'s injuries by asserting that she will be tempted to "inflate her claim for non-medical damages." Pet. Br. at 32. The evidentiary hearing ordered by the Fourth Circuit would simply provide E.M.A. with the opportunity to demonstrate that there is no exaggeration of her damages.

Flanigan v. Dep't of Labor & Indus., 869 P.2d 14, 17 (Wash. 1994)).

1. Petitioner's efforts to distinguish *Ahlborn* should be rejected.

Like the North Carolina Supreme Court in *Andrews v. Haygood,* 669 S.E.2d 310, 313 (N.C. 2008), *cert. denied,* 557 U.S. 904 (2009), Petitioner implies that this Court's decision in *Ahlborn* should be read narrowly, given that Ms. Ahlborn and Arkansas stipulated to the plaintiff's total damages. *See* Pet. Br. at 17 ("*Ahlborn* was limited to the narrow issue [framed by Arkansas' stipulation.]"); *id.* ("Because of the controlling stipulations, the Court had no reason to address any particular method for determining how much of a settlement, in the absence of a stipulation, represents payment for medical expenses."); *Andrews,* 669 S.E.2d at 313 (*Ahlborn* controls only "when there has been a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement"). This Court's opinion in *Ahlborn* is not so limited.

Throughout the *Ahlborn* decision, this Court recognized that the stipulation that was reached by the parties had the same effect as if a judge or jury had made factual findings with respect to an allocation. As this Court stated, "[g]iven the stipulation between ADHS and Ahlborn, there is no textual basis for treating the settlement here differently from a judge-allocated settlement or even a jury award * * * *" 547 U.S. at 282 n.12. The Court further noted that the effect of the stipulation "is the same as if a trial judge had found that

Ahlborn's damages amounted to $3,040,708.12[, but] she could only recover one-sixth of those damages." *Id.* at 281 n.10.

In *Ahlborn,* this Court unanimously held that any lien asserted by a state Medicaid program against a tort settlement is limited to the portion of the settlement that represents payment for medical expenses. The fact that the record in *Ahlborn* was based on stipulations – rather than an allocation reached by a judge or jury – is irrelevant. To the extent that Petitioner suggests that the *Ahlborn* decision is somehow limited because of the "controlling stipulations" reached in that case, Pet. Br. at 17, that suggestion is without merit.

2. Petitioner's reliance on the traditional authority of States to regulate tort claims is misplaced.

Petitioner asserts that States have historically been afforded broad authority to regulate tort claims.[9] Pet. Br. at 20-23. Petitioner is correct that state tort law generally lies within the domain of the state legislature. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984) (recognizing "the States'

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[9] In his brief, Petitioner cites, as an example, N.C. Gen. Stat. § 90-21.19, which caps non-economic damages in medical malpractice cases in North Carolina at $500,000. Pet. Br. at 22. Petitioner, however, fails to inform this Court that this statute was enacted in 2011 and has no applicability to E.M.A.'s medical malpractice claim, which was filed in 2003. *See* Act of June 13, 2011, ch. 400, § 7, 2011 N.C. Sess. Laws 1712, 1715.

traditional authority to provide tort remedies to their citizens"). That undisputed principle, however, simply does not advance the State's argument.

The issue before the Court does not concern the province of States with respect to tort law. Rather, the issue before the Court is one of property rights: Did Congress intend to preclude States from placing liens on the property of Medicaid beneficiaries? *See Ahlborn,* 547 U.S. at 286. The lien created by N.C. Gen. Stat. § 108A-57 impacts E.M.A.'s property interest (i.e., the proceeds of a chose in action that has been settled). Moreover, the lien is not limited to settlements of claims that are based on North Carolina tort law. If, for example, a Medicaid beneficiary were to bring a cause of action against a third-party tortfeasor based exclusively on a federal statutory right (such as the Federal Employers' Liability Act, 45 U.S.C. § 51), NC DHHS would assert a lien on that award or settlement to the same extent as if the action had been based on North Carolina's common law of negligence.

The present appeal does not involve substantive state tort law. Even if state tort laws were relevant here, those tort laws would still have to be consistent with federal law. *See, e.g., Riegel v. Medtronic, Inc.,* 552 U.S. 312 (2008); *Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000); *see also* 42 U.S.C. § 9658 (extending state statute of limitations for personal injury and property damage claims arising from exposure to hazardous substances).

The real issue raised by this appeal is whether Congress has precluded state Medicaid programs

from seizing settlement proceeds that are in excess of the portion of the settlement that represents payment for medical care. As *Ahlborn* instructs and as set out above, States cannot. A discussion of the traditional authority of States to create (and restrict) tort remedies adds nothing to the analysis.[10]

3. North Carolina's statute does not constitute a fair and appropriate allocation of damages between medical expenses and other damages.

Picking and choosing phrases from throughout the *Ahlborn* decision, Petitioner argues that the North Carolina statute serves as a fair allocation between medical expenses and other damages. *Compare* Pet. Br. at 23 ("North Carolina's statutes apportion, in advance of a settlement or judgment, the medical services portion of any recovery of damages."), *with Ahlborn,* 547 U.S. at 288 ("[T]he risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for

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[10] Equally perplexing is Petitioner's reliance on N.C. Gen. Stat. §§ 44-49 and 44-50. These two statutes restrict the amount of the lien that is afforded to health care providers when: (1) the provider has not been paid in full, (2) the patient has obtained a personal injury award, and (3) the award includes payment for those medical expenses. The statute in no way precludes the health care provider from pursuing the patient's indebtedness by means other than the lien – such as suing the patient for non-payment. In contrast, the federal Medicaid program precludes health care providers from bringing a claim against Medicaid beneficiaries for any unpaid medical expenses. *See* 42 C.F.R. § 447.15.

decision."); *see also* Pet. Br. at 20 (arguing that the North Carolina statute "provides a fair, certain and effective solution").[11] The North Carolina statute, however, is not an allocation formula at all. Rather, it is merely an effort, as Petitioner readily admits, to ensure that there is some incentive for plaintiffs' attorneys to bring these claims, which inure to the benefit of the state Medicaid program. Pet. Br. at 25 (North Carolina statute shields a portion of the tort settlement from the Medicaid lien "[a]s an incentive for the recipient to pursue the action"). More importantly, the statute does not approach any semblance of a fair allocation between medical expenses and other damages.

The one-third cap on North Carolina's Medicaid lien precedes the *Ahlborn* decision by a decade. *See* Act of Aug. 3, 1996, ch. 18, § 24.2, 1995 N.C. Sess. Laws (2d Extra Sess. 1996) 525, 774-75. Accordingly, N.C. Gen. Stat. § 108A-57 cannot be viewed as an effort to conform North Carolina's lien to this Court's directive in *Ahlborn*. This is further confirmed by the decisions of the North Carolina appellate courts construing this statute pre- and post-*Ahlborn*.

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[11] Petitioner's effort to describe the North Carolina statute as an "advance agreement" is misplaced. The *Ahlborn* opinion notes that the allocation issue can be resolved by an agreement between the Medicaid beneficiary and the state Medicaid program. 547 U.S. at 288. N.C. Gen. Stat. § 108A-57 is a unilateral dictate by the State as to the amount of the State's lien. The statute cannot be characterized as an "advance agreement" between the Medicaid beneficiary and the state Medicaid program.

Prior to this Court's decision in *Ahlborn*, the North Carolina appellate courts repeatedly held that the purpose of N.C. Gen. Stat. § 108A-57 is to ensure that the State receives full reimbursement (subject only to the one-third cap) from any tort settlement or award obtained by a Medicaid beneficiary. *Ezell v. Grace Hosp., Inc.,* 631 S.E.2d 131 (N.C. 2006) (reversing for the reasons set out in the dissent); *Ezell v. Grace Hosp., Inc.,* 623 S.E.2d 79, 84 (N.C. Ct. App. 2005) (Steelman, J., dissenting in part), *rev'd,* 631 S.E.2d 131 (N.C. 2006); *Campbell v. N.C. Dep't of Human Res.,* 569 S.E.2d 670, 671 (N.C. Ct. App. 2002). Accordingly, the North Carolina courts emphasized that under the statute, it is "irrelevant whether a settlement compensated a plaintiff for medical expenses." *Ezell,* 623 S.E.2d at 84 (Steelman, J., dissenting in part). Rather, the State's "broad right of subrogation" under N.C. Gen. Stat. § 108A-57 entitles it "to recover the full amount of its lien," subject only to the one-third cap. 623 S.E.2d at 84-85. Thus, prior to *Ahlborn,* the North Carolina Supreme Court recognized that N.C. Gen. Stat. § 108A-57 was never intended to serve as a reasonable allocation between medical expenses and other damages. After *Ahlborn,* however, the North Carolina Supreme Court now refers to the statute as "a reasonable framework" that comports with *Ahlborn. Andrews v. Haygood,* 669 S.E.2d 310, 314 (N.C. 2008), *cert. denied,* 557 U.S. 904 (2009).

Petitioner claims that the North Carolina statute merely defines the portion of a damage award which "represent[s] compensation for past medical expenses." Pet. Br. at 17. Before the Fourth Circuit,

Petitioner all but admitted that the one-third cap was fashioned from whole cloth and had no foundation in any empirical evidence. Pet. App. 20a ("With commendable candor, the Secretary concedes that the statutory presumption that the state's recovery of one-third of an unallocated lump-sum tort settlement is fair and appropriate rests on nothing more than the state's notion of how attorneys and insurance adjusters typically value tort cases.") (internal quotations omitted). Moreover, as the Fourth Circuit recognized, in the absence of a mechanism for Medicaid beneficiaries to challenge the State's presumption, there would be nothing to "prevent states from allocating 75%, 90% or even 100% of a settlement to medical expenses, thereby eviscerating the rule promulgated by *Ahlborn*." Pet. App. 53a. Under Petitioner's argument, the outcome of the *Ahlborn* case would have been completely different if Arkansas had simply adopted a statute that created an irrebuttable presumption that medical expenses constitute 39% of any tort award or settlement.[12] Such a statute, in Petitioner's view, would have overridden the fact that in *Ahlborn*, medical expenses were only one-sixth of the total damages that Ms. Ahlborn sustained. 547 U.S. at 274.

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[12] In *Ahlborn,* the Medicaid beneficiary obtained a settlement in the amount of $550,000. 547 U.S. at 274. Medical expenses paid by Arkansas' Medicaid program totaled $215,645. *Id.* Thus, had Arkansas adopted an irrebuttable presumption of 39% (215,645 ÷ 550,000), it would not have been required, under Petitioner's theory, to make any reduction to its asserted lien.

The arbitrary nature of Petitioner's "one-third formula" is highlighted by the fact that the statute effectively recognizes that the ratio between medical expenses and other damages varies from case-to-case. The statute is not an estimate that for every dollar of medical expenses incurred by a tort victim, the plaintiff can reasonably be expected to recover total damages that are three times the amount of those medical expenditures. Instead, the statute recognizes that the amount of medical expenses will frequently be less than one-third of the plaintiff's total damages. N.C. Gen. Stat. § 108A-57 ("the amount paid to the Department *shall not exceed one-third* of the gross amount obtained or recovered") (emphasis added). As such, the statute cannot be viewed, as Petitioner claims, as an "allocation formula." Pet. Br. at 23. Rather, it is merely a statement by the North Carolina General Assembly that even though the relationship between medical expenses and other damages varies for each case, North Carolina will insist that it will either be paid in full or take one-third of any tort settlement – regardless of whether one-third fairly represents the portion of the settlement that is attributable to medical expenses.

The unfairness of the State's purported "allocation formula" can be seen through a hypothetical. Suppose a young, professional photographer is injured in a boating accident. Debris from the accident strikes the photographer in the face and causes him to lose both eyes, but he otherwise sustains relatively little bodily injury. Unable to pursue his profession as a photographer, the victim conservatively incurs damages of

approximately $650,000 for lost wages alone (based on a work-life expectancy of 32 years, a loss of $35,000 per year in annual income and reduction to present value). Being without financial resources, the victim is forced to turn to Medicaid for assistance, and the Medicaid program pays $10,000 in medical bills. The driver of the boat dies shortly after the accident with few assets in his estate. All of the estate's assets ($30,000) are used to pay the photographer's claim. Under the North Carolina statute, the $30,000 would be divided as follows: $10,000 to the state Medicaid program and $20,000 to the victim of the accident. Under these circumstances, the tort victim would receive roughly 3% of his "hard" economic damages, while the State would receive 100% of the medical payments it made.

One further example illustrates that the North Carolina statute does not truly stand as an allocation between medical expenses and other damages. Suppose E.M.A. had gone to trial against her treating physician and obtained a jury verdict of $42 million, but was able to collect only the sum of $2.8 million through diligent collection efforts. Faced with such a fact pattern, the state Medicaid program would insist on receiving $933,333.33 from the $2.8 million that was collected from the defendant. The statute provides: "[T]o the extent of payments under this [provision,] the State * * * shall be subrogated to all rights of recovery * * * *" N.C. Gen. Stat. § 108A-57(a). The statute continues: "[T]he amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered." *Id.* Under the plain wording of the

statute, as each payment is received, the beneficiary's attorney must take one-third of that payment and transmit it to the state Medicaid program. Thus, NC DHHS would insist on payment of $933,333.33 regardless of whether (1) E.M.A. had settled for $2.8 million or (2) E.M.A. had obtained a jury verdict of $42 million but could collect only $2.8 million.

The North Carolina statute creates an irrebuttable presumption that is not grounded in reality. North Carolina's statutory scheme forces Medicaid beneficiaries to take settlement proceeds that properly are allocable to non-medical expense damages and use those funds to reimburse the State for medical expenses. Such an approach violates both the Medicaid Act and this Court's decision in *Ahlborn*.

4. Petitioner's attacks on the hearing ordered by the Fourth Circuit are unfounded.

Petitioner argues that North Carolina's statutory scheme promotes efficiency. Pet. Br. at 26. Petitioner further asserts that conducting an evidentiary hearing would be "wasteful, time consuming, and costly." Pet. Br. at 28. Petitioner fails to recognize, however, that these very arguments were presented in *Ahlborn* and rejected by this Court. *See, e.g.,* Br. for U.S. as *Amicus Curiae, Arkansas Dep't of Health & Human Servs. v. Ahlborn,* No. 04-1506, at 17 n.7 (pointing out perceived difficulties with post-settlement hearings); Br. for State of Washington *et al.* as *Amici Curiae, Arkansas Dep't of Health & Human Servs. v.*

Ahlborn, No. 04-1506, at 8-10 (noting costs to States of post-settlement allocation hearings). In *Ahlborn*, this Court expressly stated that if the Medicaid beneficiary and the state Medicaid program are unable to reach an agreement with respect to the allocation of damages, the allocation can and should be resolved "by submitting the matter to a court for decision."[13] 547 U.S. at 288.

Unquestionably, it would be far more cost efficient for the State to simply adopt an arbitrary and irrational formula for the allocation of damages, rather than being troubled with having to negotiate with Medicaid beneficiaries to reach a fair and appropriate allocation of damages. When, however, a State's approach to allocation (as here) results in the state Medicaid program seizing a portion of the settlement that is not payment for medical expenses, *Ahlborn* holds that the state statute violates Medicaid's anti-lien provision and is unenforceable.

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[13] Petitioner's brief devotes numerous pages to an explanation as to why a Medicaid beneficiary should not be able to structure a settlement in such a way as to allocate various categories of damages to the detriment of the state Medicaid program. Pet. Br. at 30-33. The Fourth Circuit's decision does not authorize Medicaid beneficiaries to do so. If the Medicaid beneficiary and the state Medicaid program are unable to reach an agreement with respect to allocation, the dispute should be resolved by a judicial hearing. At that hearing, the state Medicaid program would not be bound by a settlement agreement in which it was not a party. Only the National Governors Association *et al.* – *amici* supporting *Petitioner* – argue that state Medicaid programs are bound by the allocation that a Medicaid beneficiary and tortfeasor reach in their settlement agreement. Br. of NGA *et al.* as *Amici Curiae*, at 10-11.

Petitioner complains that there is no "realistic basis" for appropriately allocating damages in a post-settlement hearing. Pet. Br. at 28. That argument also fails. At a post-settlement hearing, the Medicaid beneficiary and the state Medicaid program present evidence as to the amount of the total damages, the amount of the medical expenses, and any case-specific factors that would cause either or both of these categories to be settled for less than full value. As noted by this Court in *Ahlborn*, similar allocation hearings have been conducted by courts in a variety of contexts. *See* 547 U.S. at 288 n.18. Moreover, numerous States have successfully implemented statutes that, consistent with *Ahlborn*, provide for allocation hearings if the Medicaid beneficiary and the state Medicaid program are unable to agree on an appropriate allocation. *See, e.g.,* Cal. Welf. & Inst. Code § 14124.76; Haw. Rev. Stat. § 346-37(h); Mo. Rev. Stat. § 208.215; 62 Pa. Stat. Ann. § 1409.1.

As this Court recognized in *Ahlborn,* when the Medicaid beneficiary and the state Medicaid program are unable to agree on an allocation, the dispute can readily be resolved by a post-settlement hearing. Petitioner has failed to come forward with any plausible argument as to why this aspect of the *Ahlborn* decision should be revised by this Court. The decision of the Fourth Circuit to remand the action to the district court for an appropriate allocation determination is consistent with *Ahlborn* and the Medicaid Act.

II. ALTHOUGH *AHLBORN* LEAVES OPEN WHETHER STATES MAY ADOPT PROCEDURES TO PROHIBIT SETTLEMENT MANIPULATION, THAT POSSIBILITY DOES NOT SAVE THE NORTH CAROLINA STATUTE.

Petitioner relies heavily on footnote 18 of this Court's decision in *Ahlborn*. Pet. Br. at 19, 23-24. There, the Court noted, "As one *amicus* observes, some States have adopted special rules and procedures for allocating tort settlements in circumstances where, for example, private insurers' rights to recovery are at issue." 547 U.S. at 288 n.18 (citing Br. for Association of Trial Lawyers of America ("ATLA") as *Amicus Curiae, Arkansas Dep't of Health & Human Servs. v. Ahlborn,* No. 04-1506, at 20-21). The Court continued: "[W]e leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation." 547 U.S. at 288 n.18. This footnote does not lend support to Petitioner's argument.

The *amicus* brief cited in this footnote explained that it is not unusual for courts to conduct post-settlement allocation hearings. ATLA Br. at 20. The *amicus* noted that courts must frequently conduct such post-settlement hearings to allocate settlements between taxable and non-taxable income categories and to resolve subrogation claims by private insurers. *Id.* at 20-21. Thus, it would appear that the Court's reference to "rules and procedures" in footnote 18 of the *Ahlborn* decision was intended to encompass procedures with respect to post-settlement hearings or similar devices that

would result in a fair allocation of settlement proceeds – not rules and procedures that would permit a State, through the use of an irrebuttable presumption, to achieve virtually the same result as the statute that was struck down in *Ahlborn*.

More importantly, Petitioner has come forward with no evidence that the risk of settlement manipulation is so pervasive as to justify special procedures "to meet concerns about settlement manipulation." *Ahlborn,* 547 U.S. at 288 n.18. Nor do the facts of this case raise even the hint of settlement manipulation. NC DHHS was promptly notified of the tort claim and the proposed settlement of that claim. *See* 4th Cir. J.A. 185-87. NC DHHS, however, did not respond to those notices and did not seek to intervene (or participate in the prosecution of this tort claim) until after the settlement had been approved by the state trial court. Petitioner's concern for the risk of settlement manipulation is largely irrelevant here, given that there was no allocation in the settlement. Moreover, even if E.M.A. and the tortfeasors had drafted the settlement agreement in such a way as to allocate away the interests of the state Medicaid program, that document would not be binding on the State.

A number of States have successfully implemented post-settlement hearings in accordance with the *Ahlborn* decision. Pet. App. 47a-48a. Petitioner fails to cite to any practical difficulties that these States have incurred in doing so. This Court need not address the issue left open in *Ahlborn* by footnote 18. 547 U.S. at 288 n.18. Moreover, even if this case were an appropriate

vehicle for addressing settlement manipulation (which it is not), the response should not be to permit States to implement an irrebuttable presumption that deprives Medicaid recipients of settlement proceeds that are intended to provide compensation for non-medical expense damages.

III. PETITIONER'S SUGGESTION THAT THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES HAS APPROVED THE NORTH CAROLINA STATUTE AND THAT SUCH DECISION SHOULD BE GIVEN DEFERENCE IS MISPLACED.

In his brief, Petitioner asserts that the United States Department of Health and Human Services has approved the North Carolina statute and that such approval should be given deference by this Court. Petitioner's argument, however, fails for two reasons. First, Petitioner has not cited to any statement or official position of the United States Department of Health and Human Services ("HHS") that would be entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Second, the informal letter that Petitioner requests be afforded deference is flatly inconsistent with the text of the Medicaid anti-lien provision. Accordingly, deference would not be appropriate.

1. Petitioner asserts that the Centers for Medicare and Medicaid Services ("CMS") "specifically declared that North Carolina's statute

comports with the anti-lien provision as it was construed in *Ahlborn*." Pet. Br. at 34. In support of this statement, Petitioner cites to a letter written by an Acting Associate Regional Administrator of the Division of Medicaid & Children's Health Operations (Mary Justis) in December 2009. Pet. App. 141a-42a. This letter appears to be in response to an inquiry by a North Carolina Congressman on behalf of a constituent – the plaintiff in *Andrews v. Haygood,* 669 S.E.2d 310 (N.C. 2008), *cert. denied,* 557 U.S. 904 (2009). Petitioner, however, fails to attach the Congressman's letter or to provide any information with respect to Ms. Justis' role or level of authority within HHS.

Ms. Justis' letter is nothing more than an effort by an HHS employee to appease the concerns of a Congressman who had been contacted by one of his constituents. The letter, on its face, does not rise to the level of a formal opinion letter by HHS. As this Court has repeatedly noted, "opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *accord United States v. Mead Corp.,* 533 U.S. 218, 231-32 (2001) (letter ruling by U.S. Customs Service not entitled to *Chevron* deference). Petitioner does not and cannot assert that Ms. Justis' letter carries the force of law. The letter is not entitled to *Chevron* deference.

Moreover, the letter carries little to no persuasive force. In the letter, Ms. Justis concludes that NC DHHS does not appear to have disregarded

directives from CMS. Her conclusion is based largely on her understanding that the United States Supreme Court "affirmed" the North Carolina Supreme Court's decision in *Andrews* by denying certiorari. Pet. App. 141a. Ms. Justis' erroneous legal conclusion as to the effect of this Court's denial of certiorari should be afforded no deference.

2. Deference to an agency's construction of a federal statute should occur only when "Congress has explicitly left a gap for the agency to fill." *Chevron,* 467 U.S. at 843-44; *see id.* at 842 (If Congressional intent is clear, "that is the end of the matter."). Here, Congressional intent is clear, and there is no gap for the agency to fill.

Medicaid's anti-lien provision unambiguously precludes state Medicaid programs from placing liens on a Medicaid beneficiary's tort settlement for an amount in excess of the portion of the settlement that represents payment for medical care. Any statement by the agency to the contrary is entitled to no deference. *See Ahlborn,* 547 U.S. at 289-92.

Prior to *Ahlborn*, HHS took the position that the Medicaid program has a right superior to that of Medicaid beneficiaries with respect to any third party tort settlement. HHS read the Medicaid Act as authorizing HHS to recoup 100 percent of the medical expenses paid on behalf of a beneficiary before the beneficiary could obtain any portion of the settlement proceeds. The Agency's position was detailed at length in two separate opinions by the HHS Appeals Board. *In re Wash. State Dep't of Social & Health Servs.*, Dec. No. 1561, 1996

HHSDAB LEXIS 717 (HHS Dep't App. Bd. Feb. 7, 1996); *In re Cal. Dep't of Health Servs.,* Dec. No. 1504, 1995 HHSDAB LEXIS 996 (HHS Dep't App. Bd. Jan. 5, 1995). The decisions of the Appeals Board read: "HCFA[14] * * * characterize[s] recoveries from third parties first as payments for medical care." *In re Wash. State Dep't of Social & Health Servs*., 1996 HHSDAB LEXIS at *13; *In re Cal. Dep't of Health Servs.,* 1995 HHSDAB LEXIS at *20. The opinions further note the Agency's position that: "Medicaid has superior status to the recipient in relation to the tortfeasor to recover costs Medicaid incurred on behalf of the recipient * * * *" *In re Wash. State Dep't of Social & Health Servs.,* 1996 HHSDAB LEXIS at *13; *In re Cal. Dep't of Health Servs.,* 1995 HHSDAB LEXIS at *20.

This Court, in *Ahlborn,* rejected the argument that the Agency's long-standing view of Medicaid's anti-lien statute was entitled to deference. The Court noted that the two opinions of the Appeals Board "rest on a questionable construction of the federal third-party liability provisions." 547 U.S. at 289. Recognizing that the adjudications by HHS "typically warrant deference," the Court concluded that the Agency's construction of Medicaid's anti-lien

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[14] The Health Care Financing Administration ("HCFA") was renamed the Centers for Medicare and Medicaid Services ("CMS") in 2001. *See* Centers for Medicare & Medicaid Services; Statement of Organization, Functions and Delegations of Authority, Reorganization Order, 66 Fed. Reg. 35,437 (July 5, 2001).

provision was entitled to no deference because of the Agency's "conscious disregard for the statutory text." *Id.* at 292.

Just as the two opinions of the HHS Appeals Board disregard Congress' expressed intent, Ms. Justis would allow North Carolina to seize the portion of a tort settlement that does not represent payment for medical expenses. In that the opinions set out in Ms. Justis' letter are contrary to the statutory text, her letter should be afforded no deference.[15]

IV. CONTRARY TO THE SUGGESTION OF PETITIONER'S *AMICI*, STATES ARE NOT FREE TO IGNORE MEDICAID'S ANTI-LIEN PROVISION.

In its *amicus* brief, the State of Texas (joined by ten other States) makes two arguments not ruled on or considered by any of the courts below. First,

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[15] In addition to Ms. Justis' letter, Petitioner also asserts that a July 3, 2006, CMS memo should be given deference. Pet. Br. at 34-45; *see* Pet. App. 124a-38a. That memo, however, cannot be read as expressing approval or support of N.C. Gen. Stat. § 108A-57. In fact, the memo does not even cite the North Carolina statute. Rather, the memo emphasizes that a "State may only recover from the amount of a third party payment to a Medicaid recipient that is allocated to healthcare (medical) items and services." Pet. App. 129a. The memo should not be read as HHS' approval of state Medicaid lien statutes that create irrebuttable presumptions with respect to the allocation between medical expenses and other damages.

Texas asserts that this Court's decision in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981), precludes the federal district court from proceeding with a hearing on the appropriate allocation between medical expenses and other damages. Second, Texas asserts that state laws cannot be preempted by Medicaid's anti-lien provision. Petitioner does not press either of these theories before this Court. *See, e.g.,* Pet. Br. at 3 n.1. Both of Texas' arguments lack merit.

1. The Fourth Circuit's decision is consistent with *Pennhurst.*

Citing *Pennhurst*, Texas asserts that any conditions placed on the States by the Medicaid Act must be set out unambiguously, and the States must accept these conditions voluntarily and knowingly. Texas Br. at 6 (citing *Pennhurst* and *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291 (2006)). Texas faults the Fourth Circuit for not citing to *Pennhurst* in its opinion, even though the *Pennhurst* decision was never cited or relied on by Petitioner in any of the briefing or arguments below. Texas Br. at 6. Contrary to Texas' argument, the Fourth Circuit's decision does not run afoul of *Pennhurst.*

As Texas recognizes, when federal spending legislation is unambiguous, the rule of *Pennhurst* is not implicated. *Id.* Here, Congress has laid down a clear and unambiguous directive that precludes States from seizing the property (such as tort settlements) of Medicaid beneficiaries. The language of Medicaid's anti-lien statute places States on notice

that they may not take such property: "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan * * * *" 42 U.S.C. § 1396p(a)(1). In *Ahlborn*, this Court reiterated that the Medicaid Act unambiguously precludes States from seizing "more than * * * that portion of a judgment or settlement that represents payment for medical expenses." 547 U.S. at 278; *see also id.* at 289-92 (refusing to afford deference to HHS' construction of the Medicaid anti-lien provision in that the statutory text is unambiguous). Texas concedes that the Medicaid statute is unambiguous. Texas Br. at 8 (Medicaid Act "unambiguously preclude[s] a state Medicaid plan from imposing a lien against an individual's 'property,' except for damages that the beneficiary has recovered for medical expenses from a third-party tortfeasor"). Accordingly, the *Pennhurst* inquiry should end here.

Texas, however, argues that even though the provisions of the Medicaid Act are clear and unambiguous, the Act does not set out with precision how States must comply with the anti-lien provision. Texas Br. at 10. The answer is clear. Any state statute, rule or regulation that results in the portion of a tort recovery attributable to damages other than medical expenses being used to pay off the State's lien is invalid and unenforceable. Thus, state Medicaid programs are precluded from seizing settlement proceeds, unless the portion of the settlement that constitutes payment for medical expenses is readily ascertainable (such as by an agreement between the beneficiary and the Medicaid

program). Where the ownership interest in the settlement proceeds is in doubt, the property interests must be resolved by the courts (or through an appropriate administrative adjudication). This is precisely what our court system has done for hundreds of years. *See Wabash Ry. Co. v. Elliott,* 261 U.S. 457 (1923) (resolving lien against settlement proceeds); *Ry. Co. v. Stewart,* 95 U.S. 279, 283 (1877) (recognizing that courts are called on to "appropriat[e] * * * the fruits of * * * settlement[s]"); *see also Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1440 (2012) (Breyer, J., dissenting) (noting that society traditionally turns to courts to protect property interests).

North Carolina's statutory scheme violates the unambiguous language of Medicaid's anti-lien provision. The Fourth Circuit's decision is consistent with *Pennhurst* and its progeny.

2. Medicaid's anti-lien provision preempts inconsistent state laws.

Texas brings forward a further argument that was not presented below and which is not raised by the Petitioner. Specifically, Texas argues that because the Medicaid Act was enacted pursuant to Congress' spending authority, the Act does not preempt state laws that are inconsistent with the provisions of the Act. In making this argument, Texas concedes that some spending legislation "impose[s] binding legal obligations on entities that accept federal funds." Texas Br. at 18. Thus, Texas appears to recognize that some spending legislation preempts conflicting state laws.

This Court has struck down a variety of state laws that conflict with the Social Security Act, including the Medicaid Act. *Ahlborn,* 547 U.S. at 292 (Arkansas' lien provisions are unenforceable as a result of 42 U.S.C. § 1396p); *Dalton v. Little Rock Family Planning Servs.,* 516 U.S. 474, 478 (1996) (enjoining enforcement of provision of Arkansas State Constitution that conflicts with the Hyde Amendment); *Bennett v. Arkansas,* 485 U.S. 395, 397-98 (1988) (Arkansas statute allowing prison system to seize inmate's Social Security benefits conflicts with 42 U.S.C. § 407(a) and therefore violates the Supremacy Clause); *Blum v. Bacon,* 457 U.S. 132, 145-46 (1982) (New York statute that conflicts with Social Security Act's provisions relating to Emergency Assistance invalid under the Supremacy Clause); *Carleson v. Remillard,* 406 U.S. 598, 600 (1972) (California regulation in conflict with Social Security Act's requirements invalid under the Supremacy Clause); *Townsend v. Swank,* 404 U.S. 282, 283 (1971) (Illinois statute that conflicts with eligibility provisions of Social Security Act is invalid under the Supremacy Clause). Given that spending legislation preempts some conflicting state laws, the question then becomes which federal statutes impose binding legal obligations and which do not. That answer must be grounded on Congressional intent.

Here, there is little question that Congress intended to impose a binding obligation on States. The language that Congress chose is mandatory, not precatory: "No lien may be imposed * * * *" 42 U.S.C. § 1396p(a)(1); *see Blessing v. Freestone,* 520 U.S. 329, 341 (1997) (to give rise to a federal right,

statutory provision "must be couched in mandatory rather than precatory terms"). Congress clearly intended this provision to have teeth. The language of this provision further demonstrates Congress' intent to benefit individuals such as E.M.A. 42 U.S.C. § 1396p(a)(1) (referring to liens against "any individual"); *see also* 42 U.S.C. § 1396p(b)(1) ("an individual").

Under Texas' view of the Medicaid Act, States could freely seize assets of Medicaid beneficiaries in blatant disregard of federal law. *See* 42 U.S.C. § 1396p. Texas' argument would allow States to take not only settlement proceeds, but also the corpus of a Special Needs Trust, as well as the homes of Medicaid beneficiaries. *See* 42 U.S.C. § 1396p(a)(1)(B), (d)(4)(A); *see also* 42 U.S.C. § 1396p(b) (precluding States from seeking recoveries from Medicaid recipients). According to Texas, the only remedy available if States were to disregard these clear directives of the Medicaid Act would be to hope that the HHS Secretary would choose to reduce Medicaid reimbursements being made to that State. The threat that States may lose some Medicaid reimbursement funds would provide little comfort to the Medicaid beneficiary who is rendered homeless by a state statute that contravenes the Medicaid Act. Moreover, Medicaid beneficiaries would be completely without any means to rectify the violation of federal law when the HHS Secretary agrees with the State's actions. That, of course, was the case in *Ahlborn* where the Secretary was supporting Arkansas' argument that Arkansas had a superior right to the proceeds of Ms. Ahlborn's settlement.

Texas' novel theory would not simply harm Medicaid beneficiaries. It would effectively gut the enforceability of other provisions of the Medicaid Act. For example, 42 U.S.C. § 1396u-6 clearly authorizes the HHS Secretary to limit the liability of contractors employed to carry out investigations under the Medicaid Integrity Program. 42 U.S.C. § 1396u-6(a), (c)(4). Those contractors are not to be held civilly or criminally liable under state or federal law as a result of performing their duties under the Program. *See* 42 C.F.R. § 455.202(a). Under Texas' theory, a state statute imposing civil or criminal liability on contractors for actions taken to investigate Medicaid fraud would not be preempted by the Medicaid Act. That result cannot be squared with Congress' obvious intent to shield from liability the individuals investigating Medicaid's efficacy. As a further example from the Medicaid Act, Congress has authorized the HHS Secretary to issue subpoenas and to require testimony in matters under investigation. 42 U.S.C. § 1396q (incorporating provisions of 42 U.S.C. § 405). A state statute directing those subpoenas to be null and void would conflict with Congress' clear intent to require compliance with the Secretary's subpoenas. Congress intended for certain provisions of the Medicaid Act, such as 42 U.S.C. §§ 1396p, 1396q and 1396u-6, to preempt state laws in conflict with the Act.

Not only does Texas advocate a position that would wreak havoc on the day-to-day administration of the Medicaid Act, Texas also (implicitly) asks this Court to overrule *Ahlborn*. As set out above,

Ahlborn held that when a Medicaid beneficiary enters into a settlement with a third-party tortfeasor, the State may not assert a lien on that settlement in an amount that "exceeds the portion of the settlement that represents medical costs." 547 U.S. at 272. Any lien by a state Medicaid program that attempts to do so "contravene[s] federal law and [is] therefore unenforceable." *Id.* Accordingly, the Court in *Ahlborn* affirmed the judgment of the Eighth Circuit that 42 U.S.C. § 1396p preempts the Arkansas statute at issue. This Court should decline Texas' invitation to overrule *Ahlborn* – an issue that is not presented by the Petition or advocated by any of the parties to this appeal.

Congress has expressly precluded state Medicaid programs from taking from Medicaid beneficiaries the portions of tort settlements that are fairly allocated as payment for pain and suffering, disfigurement, lost wages and other non-medical expense damages. As reflected by the *Ahlborn* decision, Congress' directive to States is clear and unambiguous. N.C. Gen. Stat. § 108A-57 violates this express requirement. Accordingly, that statute is preempted by federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX TABLE OF CONTENTS

APPENDIX A

42 U.S.C. § 405. Evidence, procedure, and certification for payments

* * * * *

(d) Issuance of subpenas in administrative proceedings

For the purpose of any hearing, investigation, or other proceeding authorized or directed under this subchapter, or relative to any other matter within the Commissioner's jurisdiction hereunder, the Commissioner of Social Security shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Commissioner of Social Security. Such attendance of witnesses and production of evidence at the designated place of such hearing, investigation, or other proceeding may be required from any place in the United States or in any Territory or possession thereof. Subpenas of the Commissioner of Social Security shall be served by anyone authorized by the Commissioner (1) by delivering a copy thereof to the individual named therein, or (2) by registered mail or by certified mail addressed to such individual at his last dwelling place or principal place of business. A verified return by the individual so serving the subpoena setting forth the manner of service, or, in the case of service by registered mail or by certified mail, the return post-office receipt therefor signed by the individual so served, shall be proof of service. Witnesses so subpoenaed shall be paid the same fees and mileage

as are paid witnesses in the district courts of the United States.

(e) Judicial enforcement of subpenas; contempt

In case of contumacy by, or refusal to obey a subpoena duly served upon, any person, any district court of the United States for the judicial district in which said person charged with contumacy or refusal to obey is found or resides or transacts business, upon application by the Commissioner of Social Security, shall have jurisdiction to issue an order requiring such person to appear and give testimony, or to appear and produce evidence, or both; any failure to obey such order of the court may be punished by said court as contempt thereof.

* * * * *

APPENDIX B

42 U.S.C. § 1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual—

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income
required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot

reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

* * * * *

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

* * * * *

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

* * * * *

APPENDIX C

42 U.S.C. § 1396q. Application of provisions of subchapter II relating to subpoenas

The provisions of subsections (d) and (e) of section 405 of this title shall apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter, except that, in so applying such subsections, and in applying section 405(*l*) of this title thereto, with respect to this subchapter, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

APPENDIX D

42 U.S.C. § 1396u-6. Medicaid Integrity Program

(a) In general

There is hereby established the Medicaid Integrity Program (in this section referred to as the "Program") under which the Secretary shall promote the integrity of the program under this subchapter by entering into contracts in accordance with this section with eligible entities to carry out the activities described in subsection (b).

* * * * *

(c) Eligible entity and contracting requirements

* * * * *

(4) Limitation on contractor liability

The Secretary shall by regulation provide for the limitation of a contractor's liability for actions taken to carry out a contract under the Program, and such regulation shall, to the extent the Secretary finds appropriate, employ the same or comparable standards and other substantive and procedural provisions as are contained in section 1320c-6 of this title.

* * * * *

APPENDIX E

42 C.F.R. § 455.202. Limitation on contractor liability

(a) A program contractor, a person, or an entity employed by, or having a fiduciary relationship with, or who furnishes professional services to a program contractor will not be held to have violated any criminal law and will not be held liable in any civil action, under any law of the United States or of any State (or political subdivision thereof), by reason of the performance of any duty, function, or activity required or authorized under this subpart or under a valid contract entered into under this subpart, provided due care was exercised in that performance and the contractor has a contract with CMS under this subpart.

* * * * *