No. 12-98

In the Supreme Court of the United States

ALBERT A. DELIA, SECRETARY, 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, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
ALISA B. KLEIN
JOSHUA WALDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

WILLIAM B. SCHULTZ
Acting General Counsel
MARGARET M. DOTZEL
Deputy General Counsel
JANICE L. HOFFMAN
Associate General Counsel
CAROL J. BENNETT
Deputy Associate General Counsel
LESLIE STAFFORD
Attorney
Department of Health and Human Services
Washington, D.C. 20201

QUESTION PRESENTED

Under North Carolina law, if the state Medicaid program pays for a Medicaid beneficiary's medical assistance and the beneficiary later recovers from a third party that is legally liable to pay for the same care or services, the State is entitled to recover from the beneficiary either the total amount of the medical assistance the State paid, or one-third of the gross amount the beneficiary recovered, whichever is lower. The beneficiary has no opportunity to rebut the presumption that up to one-third of the gross amount of her settlement represents payment for medical expenses for which the state Medicaid program paid.

The question presented is whether this irrebuttable state-law presumption is inconsistent with the Medicaid statute's anti-lien provision, which provides that "[n]o 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).

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INTEREST OF THE UNITED STATES

This case concerns the third-party liability provisions of the federal Medicaid Act, 42 U.S.C. 1396 *et seq.*, which represent a source of compensation for that program at both the federal and state levels. Congress has vested the Secretary of Health and Human Services with broad authority to administer the Medicaid program. 42 U.S.C. 1302. The question presented directly implicates the Secretary's interpretation and implementation of the Medicaid statute.

STATEMENT

1. a. The Medicaid Act (Act), enacted in 1965 in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*,

establishes a cooperative federal-state program to fund medical care for individuals "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. 1396-1 (Supp. III 2009); see *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 275 (2006). Medicaid is administered by the Secretary of Health and Human Services (Secretary), who exercises her authority through the Centers for Medicare & Medicaid Services (CMS). *Ibid.* The Federal Government pays a significant portion of the costs the States incur for patient care. See 42 U.S.C. 1396d(b) (Supp. IV 2010). "In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins* v. *Rivera*, 477 U.S. 154, 156-157 (1986); see generally 42 U.S.C. 1396a (2006 & Supp. IV 2010).

Medicaid limits eligibility to certain categories of individuals who have extremely limited resources available to pay for medical care. See 42 U.S.C. 1396a(a)(10) (2006 & Supp. IV 2010). Because state and federal resources are not unlimited, "Medicaid is intended to be the payer of last resort," and various provisions require that other available resources must be used before an individual is deemed eligible or before Medicaid pays for an individual's care. S. Rep. No. 146, 99th Cong., 1st Sess. 312 (1985); see, *e.g.*, 42 U.S.C. 1396*o* (2006 & Supp. IV 2010). At the same time, the Act attempts to ensure that its provisions do not have the unintended effect of exhausting already-limited resources that are necessary for an individual's maintenance. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 80 (1965) (States must ensure that cost-sharing provisions "protect the income and resources of the individual needed for his maintenance").

b. At times, an individual's need for Medicaid benefits arises from circumstances that render third parties (such as a tortfeasor or insurance company) liable for the costs of the medical care. S. Rep. No. 744, 90th Cong., 1st Sess. 184 (1967). When a state Medicaid program pays medical costs for which a third party may be liable, the Medicaid Act requires the State to "take all reasonable measures to ascertain the legal liability of third parties * * * to pay for care and services available under the plan." 42 U.S.C. 1396a(a)(25)(A). "[I]n any case where such a legal liability is found to exist," and "the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery," the State must "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. 1396a(a)(25)(B).

To facilitate its ability to obtain reimbursement when third parties are liable, the State must have "in effect laws under which * * * the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services." 42 U.S.C. 1396(a)(25)(H). The state plan must also provide that a Medicaid beneficiary must "assign the State any rights * * * to payment for medical care from any third party." 42 U.S.C. 1396k(a)(1)(A). In addition, the State must require beneficiaries to "cooperate" with the State in identifying and pursuing claims against third parties. 42 U.S.C. 1396k(a)(1)(C).

c. These third-party reimbursement provisions are qualified by the Medicaid Act's "anti-lien" provision, which states that "[n]o 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). The anti-

lien provision is intended to "protect the individual and his spouse from the loss of their property, usually the home, during their lifetime." S. Rep. No. 1856, 86th Cong., 2d Sess. 8 (1960) (discussing anti-lien provision in predecessor statute).

In *Ahlborn*, this Court held that the anti-lien provision prohibits States from seeking reimbursement from third-party payments to a beneficiary that do not represent compensation for medical expenses. 547 U.S. at 283. The State of Arkansas had paid $215,000 in medical assistance on behalf of Ahlborn, a Medicaid recipient who subsequently obtained a $550,000 tort settlement. Although the State and Ahlborn stipulated that only $35,000 of the settlement represented compensation for medical expenses, see *id.* at 274-275, the State argued that it was entitled to recover from Ahlborn's settlement the entire $215,000 the State had paid on Ahlborn's behalf. The Court rejected that argument, reasoning that the State's right to seek third-party reimbursement is an "exception" to the anti-lien provision's otherwise unqualified prohibition against seeking recovery out of a Medicaid recipient's property. *Id.* at 284. Because the third-party reimbursement provisions require the State to seek recovery only "to the extent of" a third party's liability for the medical care paid for by Medicaid, 42 U.S.C. 1396a(a)(25)(A)-(B), the Court concluded that a State may recover only those third-party payments that represent "payments for medical care." *Ahlborn*, 547 U.S. at 285.

In so holding, the Court rejected the argument that a blanket rule requiring "full reimbursement" of the amount that the State had paid was necessary to prevent settlement manipulation. *Ahlborn*, 547 U.S. at 288. Although the question of how to apportion a settlement

into payments for medical costs and payments for non-medical costs was not presented, the Court acknowledged the risk that Medicaid beneficiaries might attempt to "allocate away" the State's reimbursement interest. *Ibid.* The Court suggested that States could address such concerns by "adopt[ing] special rules and procedures for allocating tort settlements." *Id.* at 288 & n.18.

2. As a participant in the federal Medicaid program, North Carolina has established a statutory framework governing its rights to reimbursement when a third party is liable for medical expenses paid by the State. See N.C. Gen. Stat. §§ 108A-57, 108A-59 (2011). Section 108A-57(a) provides that "the State * * * shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance." Section 108A-59(a) provides that "by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits * * * to which he may be entitled."

Section 108A-57 also specifies that in all cases, the State is entitled to reimbursement of the lesser of the full amount that it paid in Medicaid benefits or one-third of the gross settlement amount. Specifically, "[a]ny attorney retained by the beneficiary of the assistance shall," out of any judgment or settlement, "distribute to the [State] Department [of Health and Human Services] the amount of assistance paid by the Department on behalf of * * * the beneficiary, * * * 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).

3. Respondent E.M.A. was severely injured at birth. As a result, she is deaf, blind, and suffers from mental

retardation and a seizure disorder. The North Carolina Medicaid program paid more than $1.9 million of respondent's medical expenses. Pet. App. 3a, 5a.

In a state-court medical malpractice action, respondents—E.M.A. and her parents—sought damages on behalf of E.M.A. for her physical and developmental injuries, lost wages, pain and suffering, and future medical expenses, and on behalf of E.M.A.'s parents for past medical expenses, future medical expenses, and their own emotional distress. Pet. App. 6a-7a. In November 2006, the state court approved a settlement of approximately $2.8 million. *Id.* at 3a, 6a-7a. Neither the parties nor the court allocated the settlement funds among the distinct claims or categories of damages. *Id.* at 8a. The court ordered the parties to place the sum necessary to satisfy the State's entitlement under Section 108A-57 into a court account until the amount of the lien could be "conclusively judicially determined." J.A. 87; Pet. App. 8a-9a. Because the amount paid by the State in Medicaid benefits was more than one-third of the gross settlement, the parties placed one-third (approximately $933,000) into the account. *Id.* at 9a.

In December 2006, North Carolina's Department of Health and Human Services (the State) moved to intervene in the medical-malpractice action in order to assert its right to reimbursement. Shortly thereafter, respondents brought this action under 42 U.S.C. 1983 in federal district court. Pet. App. 9a. The state court ultimately denied the State's motion to intervene because the court had already approved the settlement. Pet. Br. 10.

4. In their complaint in this action, respondents asserted that North Carolina's statutory lien framework is inconsistent with the Medicaid Act's anti-lien provision

"to the extent that [it] allow[s] [the State] to assert a lien on compensation for damages other than medical expenses." J.A. 23; Pet. App. 9a. Respondents sought, among other things, a determination of the proper amount of the lien and a declaration that the North Carolina statutes are preempted. Pet. App. 9a-10a.

The district court held that North Carolina's statutory lien is consistent with the anti-lien provision as interpreted in *Ahlborn*. Pet. App. 71a-85a. *Ahlborn*, the court recognized, held that "when there has been a prior determination or stipulation as to the medical expense portion of a plaintiff's settlement," the anti-lien provision prohibits the State from recovering more than that amount. *Id.* at 81a. But the court held that Section 108A-57 "essentially defines" the portion of the settlement that constitutes payment for medical expenses in the first place, thereby "avoid[ing] the conflict at issue in *Ahlborn*." *Id.* at 81a-82a. The court therefore granted summary judgment to the State. *Id.* at 85a.

5. The court of appeals reversed. Pet. App. 1a-70a. The court held that North Carolina's "one-third cap * * * does not satisfy *Ahlborn* insofar as it permits [petitioner] to assert a lien against settlement proceeds intended (or otherwise properly allocable) to compensate the Medicaid recipient for other claims, such as pain and suffering or lost wages." *Id.* at 42a.

The court of appeals explained that although *Ahlborn* left open the range of procedures by which a State might determine how to allocate a settlement in the absence of a stipulation or other agreement, Pet. App. 51a-54a, *Ahlborn* established that a State may not recover amounts that properly represent payments for nonmedical damages, *id.* at 42a. The court reasoned that the State's right to full recovery or one-third of the

settlement at best reflected a rough approximation of a "typical" apportionment, which beneficiaries had no opportunity to rebut. *Id.* at 20a, 53a. Approving that blanket rule, the court concluded, would confer "unfettered discretion to allocate settlements without regard to the actual portion attributable to medical expenses," even to the point of "allocating 75%, 90% or even 100% of a settlement to medical expenses." *Id.* at 52a-53a (quoting *Tristani* v. *Richman,* 652 F.3d 360, 378 (3d Cir. 2011)). The court found support for its conclusion in a 2006 post-*Ahlborn* memorandum issued by CMS, which explained that States may not recover "over and above what the parties have appropriately designated as payment for medical" expenses, although they may "enact laws which provide for a specific allocation amongst damage[s]." *Id.* at 46a-47a (brackets in original).

To comply with *Ahlborn*, the court of appeals held, the State must provide a "process by which settlement proceeds are explicitly allocated or otherwise determined." Pet. App. 49a. Thus, "[i]n the event of a lump-sum settlement, as in this case, the sum certain allocable to medical expenses must be determined, in the absence of a stipulation by the affected parties, by judicial determination or some similar adversarial process." *Id.* at 13a. Because respondents had not been afforded that process, the court of appeals remanded the case "for an evidentiary hearing" to permit the district court to "determine the proper amount of [the State's] Medicaid lien in this case." *Id.* at 55a.

SUMMARY OF ARGUMENT

North Carolina's irrebuttable presumption that the medical-expenses portion of a settlement is equal to the lesser of the amount the State paid or one-third of the gross settlement impedes the operation of the Medicaid

Act's anti-lien provision. It is therefore preempted to the extent it forecloses a beneficiary from demonstrating that the statutory allocation is inappropriate in her case.

I. The anti-lien provision, as interpreted by this Court in *Arkansas Department of Health & Human Services* v. *Ahlborn*, 547 U.S. 268, 284-285 (2006), prohibits States from recovering portions of a lump-sum settlement between a Medicaid beneficiary and a third party that do not represent compensation for medical expenses paid by Medicaid. As a general matter, the portion of a settlement that is appropriately allocated to medical expenses will turn on a number of case-specific factors, including the relative definiteness of, and likelihood of recovering, past medical expenses when compared with other types of damages. In *Ahlborn*, the Court did not address the methods a State might use to determine the portion of the settlement that should be allocated to medical expenses. The Court recognized, however, that States may adopt rules and procedures to guide the proper allocation. *Id*. at 288 n.18.

Although allocation rules govern a determination that is antecedent to the operation of the anti-lien provision—the proper division of a settlement into a medical-expense portion and a nonmedical portion—such rules must be consistent with the anti-lien provision. This Court recognized in *Ahlborn* that preliminary determinations concerning the extent of a beneficiary's property may sometimes circumvent the anti-lien provision by divesting a beneficiary of her property interests before that provision ever comes into play. 547 U.S. at 286 n.16. Thus, a State could "allocate away" the beneficiary's interest in the settlement, *id.* at 288, by "allocating" the full settlement to medical costs.

The North Carolina statute at issue in this case, N.C. Gen. Stat. § 108A-57, frustrates the operation of the anti-lien provision. By providing that the State is always entitled to full reimbursement or one-third of the gross settlement, Section 108A-57 will in some cases overestimate the portion of the settlement that may appropriately be regarded as payment for past medical expenses. The State may not categorically substitute its unilateral determination of the amount to which it is entitled for consideration of individual circumstances in determining the proper allocation.

II. States have a substantial interest in guarding against settlement manipulation by Medicaid recipients and in preventing allocation determinations from consuming limited resources. See *Ahlborn*, 547 U.S. at 288. States therefore have broad discretion to adopt allocation rules and procedures that protect the States' interest in reimbursement while allowing for consideration of case-specific circumstances when necessary. A State may employ various approaches to further these interests, including judicial or administrative allocation hearings. A State may establish principles to guide such hearings, including a rebuttable presumption that a certain portion of the settlement represents medical-expense payments. A State may also intervene in third-party tort actions or settlement negotiations in order to protect its interests. Many States have established procedures like these, demonstrating that it is administratively feasible to provide individualized consideration while effectively preventing manipulation.

ARGUMENT

I. THE MEDICAID ACT'S ANTI-LIEN PROVISION DOES NOT PERMIT NORTH CAROLINA TO ESTABLISH AN IRREBUTTABLE PRESUMPTION THAT UP TO ONE-THIRD OF A MEDICAID BENEFICIARY'S THIRD-PARTY SETTLEMENT REPRESENTS MEDICAL EXPENSES FOR WHICH THE STATE MEDICAID PROGRAM PAID

North Carolina's irrebuttable statutory presumption concerning the amount of a settlement to be allocated past medical expenses is preempted to the extent that it forecloses a Medicaid beneficiary from demonstrating that the statutory allocation is inappropriate in her case. Because N.C. Gen. Stat. § 108A-57 disregards the case- and circumstance-specific nature of settlements, it necessarily will allocate to the State in some cases a portion of the settlement that appropriately should be allocated to elements of damages other than past medical expenses. See *Ahlborn*, 547 U.S. at 288. Section 108A-57 impedes the operation of the anti-lien provision and stands as an obstacle to the accomplishment of that provision's purpose. See *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

A. States May Not Employ Settlement-Allocation Methods That Effectively Circumvent The Anti-Lien Provision

1. In *Ahlborn*, this Court held that a State's right to seek reimbursement under the Medicaid Act's third-party liability provisions is limited by the anti-lien provision's prohibition against attaching, or placing a lien on, a beneficiary's property. 547 U.S. at 284. The third-party reimbursement provisions, the Court explained, *id.* at 281-282, require the State to seek reimbursement "to the extent of" third parties' liability "to pay for care

and services available under the plan." 42 U.S.C. 1396a(a)(25)(A)-(B). This reimbursement "exception" to the anti-lien provision is therefore "limited to payments for medical care." 547 U.S. at 284-285. As a result, when a Medicaid beneficiary pursues damages claims against a third party and obtains a settlement, the State is entitled to only that portion of the settlement that represents "payments for medical care."[1] *Id.* at 285.

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[1] In this respect, Medicaid differs from other federal programs under which an individual who receives insurance benefits must reimburse the program or plan if she receives payment from a third party that is responsible to pay for the same injury. In those programs, the controlling statutory language provides that the amount of the reimbursement generally does not depend on how the proceeds of the third-party settlement are allocated among categories of damages. See 42 U.S.C. 1395y(b)(2)(B)(ii) (Medicare secondary-payer provisions state that beneficiary "shall reimburse" Medicare "for any payment made by the Secretary"); *Hadden* v. *United States*, 661 F.3d 298, 303-304 (6th Cir. 2011) (upholding right to full reimbursement and distinguishing Medicaid's statutory language), cert. denied, 133 S. Ct. 106 (2012); 33 U.S.C. 933(e)-(f) (Longshore and Harbor Workers' Compensation Act (LHWCA) permits reimbursement of full compensation payment unless doing so would result in net loss for employee); *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 75 (1980) (LHWCA gives employer a lien against third-party recovery "in the amount of the compensation" paid by the employer); 5 U.S.C. 8132 (Federal Employees' Compensation Act (FECA) provides that beneficiary must reimburse "the amount of compensation paid by the United States" but may retain one-fifth of the net amount); *United States* v. *Lorenzetti*, 467 U.S. 167, 173-174 (1984) (government is entitled to recover from portions of settlement that represent damages not covered by FECA); *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361 (2006) (in ERISA context, reimbursement rights are governed by plan terms, and fiduciary may enforce reimbursement provision by filing suit for "appropriate equitable relief" under 29 U.S.C. 1132(a)(3)). A suit by an ERISA plan for reimbursement is at issue in *U.S. Airways, Inc.* v. *McCutchen*, No. 11-1285 (argued Nov. 27, 2012).

The operation of the anti-lien provision in *Ahlborn* was straightforward. The State and the beneficiary had stipulated to the portion of the settlement—approximately $35,000—that represented payment for medical expenses. 547 U.S. at 280-281. With the proper apportionment thus determined, the anti-lien provision prohibited the State from seeking to recover more than the medical-payments portion of the settlement. *Id.* at 285. In light of the parties' agreement, the Court had no need to address the methods a State might permissibly use to determine a proper allocation in the first place. *Id.* at 288. The Court did state, however, that States have some discretion to craft "special rules and procedures for allocating tort settlements." *Id.* at 288 n.18.

2. Allocation rules govern a determination that is antecedent to the operation of the anti-lien provision: how to divide a settlement into a medical portion (recoverable) and a nonmedical portion (unrecoverable because it is the beneficiary's property). That assessment must be made because plaintiffs who bring tort suits generally assert claims for multiple types of damages—for instance, past and future medical care, lost wages, and pain and suffering. See, *e.g.*, *Ahlborn*, 547 U.S. at 273. A settlement compromises all of the plaintiff's claims and therefore represents compensation for multiple categories of damages. The settlement amount may reflect myriad case-specific considerations, including the parties' assessment of the likelihood the defendant will be found liable, the total amount the plaintiff claims, and the likelihood of actual recovery should the defendant be held liable. And the portion of the settlement that may appropriately be attributed to medical expenses may vary from case to case based on individual circumstances: for instance, the prospect that past medical expens-

es may be more definite in amount when compared to other items of damages; the medical expenses' value relative to other categories of damages; and the relative likelihood of recovering each type of damages. See *Price* v. *Wolford*, 608 F.3d 698, 707-708 (10th Cir. 2010).

3. Although the Medicaid Act does not require States to adopt a particular allocation method, see *Ahlborn*, 547 U.S. at 288, any method chosen must be consistent with the anti-lien provision. That is because allocation rules, by ascertaining the extent of the beneficiary's property, determine how—and whether—the anti-lien provision will limit the State's recovery against the settlement. States therefore may not use allocation rules in ways that circumvent the operation of the anti-lien provision.

In *Ahlborn*, the Court recognized that a State's methods of determining what constitutes the beneficiary's property, though technically antecedent to the anti-lien provision's prohibition on attaching that property, may have the impermissible effect of "circumvent[ing] the restrictions of the federal anti-lien statute." 547 U.S. at 286 n.16 (quoting Eighth Circuit's opinion below); see *Ahlborn* v. *Arkansas Dep't of Human Servs.*, 397 F.3d 620, 624 (8th Cir. 2005) (*Arkansas*). The Court explained that there was some question whether a State could "force a recipient to assign a chose in action to receive as much of the settlement as is necessary to pay Medicaid's costs" before "the applicant liquidates the property to a sum certain." *Ahlborn*, 547 U.S. at 286 n.16. By ensuring that the ultimate recovery—including payments for damages other than medical costs—would never become the beneficiary's property, such a requirement could have the effect of evading the anti-lien provision's limitation. *Arkansas*, 397 F.3d at 624; *Ahlborn*, 547 U.S. at 286 n.16. Although the

Court did not definitively resolve the question, it expressed doubt that such a statutory property rule for the Medicaid program would be consistent with the anti-lien provision, as that rule would equate to requiring assignment of the "right to compensation for lost wages and other nonmedical damages." 547 U.S. at 286 n.16; see *Martin* v. *City of Rochester*, 642 N.W.2d 1, 18 (Minn. 2002) (state statute requiring assignment of "all proceeds" from liable third parties could "allow[] the state to take by an assignment what is protected by the anti-lien provision," thereby "circumvent[ing]" that provision), cert. denied, 539 U.S. 957 (2003).

Like such an assignment rule, allocation rules may have the effect of circumventing the anti-lien provision. Although *Ahlborn* made clear that States have discretion to choose their methods of allocation, it also recognized that the method may have impermissible substantive effects on the parties' respective interests. 547 U.S. at 288. For instance, a beneficiary might seek to "allocate away the State's interest," *i.e.*, use settlement allocation to prevent the State from obtaining an attachable interest in any portion of the settlement. *Ibid.* The converse is also possible: a State could use an allocation rule to "allocate away" the beneficiary's interest in the settlement, for instance, by "allocating" 100% of the settlement to medical costs. See *Tristani* v. *Richman*, 652 F.3d 360, 378 (3d Cir. 2011). An allocation method that frustrates the operation of the anti-lien provision in this manner is preempted.[2] See *Davidowitz*, 312 U.S. at 67.

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[2] Amicus State of Texas asserts that legislation enacted pursuant to Congress's spending power cannot preempt state law. See State of Texas et al. Amicus Br. 18-23. That argument was not made below; it is not urged by petitioner; and it is foreclosed by this Court's prece-

B. North Carolina's Irrebuttable Presumption That Medical Costs Constitute Up To One-Third Of All Settlements Impedes The Operation Of The Anti-Lien Provision

North Carolina's across-the-board rule that the medical-costs portion of a settlement shall be deemed to be the lesser of the amount the State paid or one-third of the gross settlement amount, N.C. Gen. Stat. § 108A-57, frustrates the operation of the anti-lien provision. It is therefore preempted to the extent it forecloses the beneficiary from showing that Section 108A-57's allocation was inappropriate in her particular case.

1. Section 108A-57 establishes an irrebuttable "reimbursement lien" of the amount paid by the State or one-third of the settlement in all cases.[3] *Andrews* v.

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dent. As an initial matter, Texas's argument (Br. 20-21) that a State does not violate federal law by refusing to comply with conditions imposed by the Medicaid Act ignores *Ahlborn*, which held that the State's attempt to recover nonmedical damages "violates federal law." 547 U.S. at 286. Moreover, this Court has recognized that although Spending Clause statutes are in the nature of a contract, neither the federal statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). The federal statute is binding law and can have preemptive effect under the Supremacy Clause. See, *e.g.*, *Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) ("In a pre-emption case such as this, state law is displaced" as inconsistent with the Medicaid statute "to the extent that it actually conflicts with federal law."); *Townsend* v. *Swank*, 404 U.S. 282, 283-285 (1971); *Carleson* v. *Remillard*, 406 U.S. 598, 603-604 (1972); *Blum* v. *Bacon*, 457 U.S. 132, 145-146 (1982); *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam).

[3] Contrary to the argument advanced by the National Governors Association (Amicus Br. 14), the North Carolina Supreme Court did not construe Section 108A-57 as merely a "default," rebuttable rule. Although the *Andrews* court observed that "plaintiffs are free to negotiate a settlement with the State for a lien amount less than that

Haygood, 669 S.E.2d 310, 313 (N.C. 2008), cert. denied, 557 U.S. 904 (2009). The statute thus disregards the fact that the portion of each settlement that may appropriately be regarded as payment for past medical costs, and the portion that appropriately represents compensation for other damages and thus is the beneficiary's "property," vary in each case. See pp. 13-14, *supra*. Section 108A-57's "up to one-third" rule will inevitably overestimate the portion of the settlement that appropriately represents payment for past medical expenses in some cases, thereby "allocating away" the beneficiary's property.[4] See *Ahlborn*, 547 U.S. at 288. Indeed, Section 108A-57 has had precisely that effect in several North Carolina cases. See pp. 18-19, *infra*.

Petitioner therefore may not rely on the "allocation" label to defeat the contention that Section 108A-57 frustrates the anti-lien provision. Cf. *National Meat Ass'n* v. *Harris*, 132 S. Ct. 965, 973 (2012) (State could not avoid federal preemption concerning slaughter of live-

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required by our statutes," 669 S.E.2d at 313, the court was simply pointing out that the State can choose to waive its statutory entitlement in individual cases. The court recognized, however, that Section 108A-57 entitles the State to avoid "case-by-case determination of the medical expense portion of settlements." *Id.* at 314. Consistent with that interpretation, petitioner asserts here that the State is entitled to recover one-third of the settlement, regardless of respondents' disagreement with that allocation and regardless of the circumstances of this case. *E.g.*, Pet. Br. 24.

[4] For instance, the settlement may reflect the fact that the beneficiary-plaintiff sought only medical costs and lost wages; both damages claims involve concrete, calculable loss amounts; and the medical costs represent only one-tenth of the total amount claimed. Or the settlement might reflect the likelihood that the defendant third party would not be found liable for most or all of the medical costs paid by Medicaid—if, for instance, the defendant were found not to have proximately caused the need for aspects of the medical treatment.

stock by "framing" its statute as regulating the sale of meat slaughtered in a certain way). Section 108A-57 does not function as just one step in determining the appropriate extent of the parties' interests in individual cases. Rather, it imposes the State's unilateral judgment as to the amount to which the State is entitled. Substituting that unyielding presumption in all cases for consideration of individual circumstances ensures that the State will sometimes allocate nonmedical damages to itself—while denying beneficiaries the protection of the anti-lien provision on the basis of the prescribed allocation. Such avoidance effectively circumvents the anti-lien provision. *Martin*, 642 N.W.2d at 18 (assignment statute that "circumvents the anti-lien provision and eliminates the efficacy of that provision's protection" is preempted).

The conclusion that Section 108A-57 enables circumvention of—and thus conflicts with—the anti-lien provision is reinforced by the fact that the State previously construed the statute to authorize recovery of portions of a settlement allocated to nonmedical damages. Section 108A-57 has been in effect in materially similar form since before this Court decided *Ahlborn*. See, *e.g.*, N.C. Gen. Stat. § 108A-57 (1997). Before *Ahlborn*, the State asserted, and the North Carolina courts agreed, that Section 108A-57 entitled the State "to recover the costs of medical treatment provided * * * , even when the funds received by the [beneficiary] are not reimbursement for medical expenses." *Campbell* v. *North Carolina Dep't of Human Res.*, 569 S.E.2d 670, 672 (N.C. Ct. App. 2002) (upholding reimbursement even though "the settlement money which plaintiff received was not recompense for medical expenses"); see also *Ezell* v. *Grace Hosp., Inc.*, 631 S.E.2d 131 (N.C. 2006)

(reversing lower-court judgment against State for reasons stated by the dissenting judge below, who relied on *Campbell*); *Payne* v. *State, Dep't of Human Res.*, 486 S.E.2d 469, 471 (N.C. Ct. App. 1997) (upholding State's right to recover damages allocated to a special-needs trust).

Ahlborn, of course, established that Section 108A-57, as so construed, violated the anti-lien provision. In response, the State did not change the provision. Instead, it recharacterized the statute, contending that Section 108A-57 merely prescribes an allocation method. Thus, the State argued that "a North Carolina Medicaid recipient's medical damages are apportioned by statute: up to one-third of the settlement is for medical damages." New Br. for Intervenor-Appellee at *14, *Andrews*, *supra* (No. 57A07-2) (2008 WL 2791330). The North Carolina Supreme Court agreed with that new characterization and upheld the statute as an allocation method permitted by *Ahlborn*. See *Andrews*, 669 S.E.2d at 313-314.

This history demonstrates that despite the current characterization as an "allocation" method, see Pet. Br. 24, North Carolina's irrebuttable presumption has essentially the same effect in some cases as the Arkansas statute at issue in *Ahlborn*: it permits the State to recover portions of a settlement that "are not reimbursement for medical expenses." *Campbell*, 569 S.E.2d at 672. The pre-*Ahlborn* cases in which the State was permitted to recover payments that represented nonmedical damages would come out the same way today. Only the reasoning would be different: now those same nonmedical damages would be irrebuttably "allocated" to past medical expenses. The State may not resort to such formalism to defeat the anti-lien provision. Cf.

National Meat Ass'n, 132 S. Ct. at 973; *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1747-1748 (2011) (State may not evade preemptive effect of Federal Arbitration Act by characterizing rule that effectively prevented class arbitration as a contract-law rule of general applicability).

2. Petitioner's arguments that North Carolina's statutory framework is not preempted by the anti-lien provision are not persuasive.

a. Petitioner first contends (Br. 20-23) that Section 108A-57 sets forth a state tort-law rule for apportioning damages to which the Medicaid Act does not speak. As petitioner correctly observes, state tort law determines a personal-injury plaintiff's substantive entitlement to damages in the first instance, such as by capping the amount that can be awarded by a jury. Pet. Br. 22. State law also furnishes the procedural rules that govern tort actions, such as defenses or statutes of limitations. *Id.* at 21. Such rules of general application are unlikely to conflict with the anti-lien provision's requirement that whatever damages a plaintiff receives under those rules, the State may not recover more than the amount that appropriately represents payment for medical costs.

Section 108A-57, however, does not govern the damages a plaintiff may receive for particular claims or the procedures applicable in tort actions, either in general or in the Medicaid context in particular. It does not, for example, limit a plaintiff's substantive right to recover certain types of damages or limit the jury's or the parties' discretion to calculate damages in any way. See Pet. Br. 25 (plaintiff retains "full discretion" to compromise claims). Nor is Section 108A-57 in terms limited to recoveries resulting from state-law claims: it presuma-

bly permits the State to recover damages awarded pursuant to federal statutes, such as the Jones Act, 41 Stat. 988, and the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq*. Rather than establishing the extent of a plaintiff's rights under general state tort law, then, Section 108A-57 directly governs the State's and the beneficiary's respective rights when the beneficiary has received Medicaid payments for which a third party may be liable. Thus, Section 108A-57 must be consistent with the anti-lien provision.

The fact that North Carolina has a similar medical-lien rule of general applicability that governs when a personal-injury plaintiff is "indebted" to medical providers, N.C. Gen. Stat. §§ 44-49, 44-50 (2011), does not require a different conclusion. That statute does not apply to Medicaid beneficiaries, who are not indebted to providers for their care. See 42 C.F.R. 447.15. To be sure, in the situations in which it does apply, Section 44-50 operates much like Section 108A-57, establishing a lien on 50% of the net recovery, regardless of the nature and apportionment of the damages awarded. The existence of that rule demonstrates that Section 108A-57's irrebuttable statutory lien and its reliance on a "one-third gross" rule of thumb are not unique in North Carolina law. But that does not change the fact that in the Medicaid context, the State may not decree the portion to which it is entitled without affording the beneficiary some opportunity to challenge that assertion.

b. Petitioner also contends (Br. 24) that Section 108A-57 is consistent with the anti-lien provision, as interpreted in *Ahlborn*, because *Ahlborn* indicated that States may mitigate concerns about manipulation of settlements by requiring "the State's advance agreement to an allocation." 547 U.S. at 288. Section 108A-

57, petitioner argues, may be characterized as "an advance agreement that the State will reduce its lien" to one-third of the settlement if medical costs exceed that portion of the gross settlement. Br. 24. But without any mechanism for an individualized determination when the State and the beneficiary cannot agree about the proper allocation in a particular case, the State's "agreement" is simply a unilateral decree.

Petitioner also argues (Br. 24) that Section 108A-57 prospectively instructs parties concerning the amount of their settlements that they must allocate to past medical costs. If that characterization alone were sufficient to save Section 108A-57 from preemption, however, a State could prospectively require the parties to allocate 90% or 100% to medical costs. See *Tristani*, 652 F.3d at 378; Pet. App. 53a; see also *Ahlborn*, 547 U.S. at 288 ("A rule of absolute priority might preclude settlement in a large number of cases, and be unfair to the recipient in others."). As *Ahlborn* suggested, moreover, States may not circumvent the anti-lien provision by imposing front-end rules that effectively require the beneficiary to give up her property before she obtains it. See *id.* at 286 n.16.

3. In addition to his arguments regarding the proper characterization of Section 108A-57, petitioner asserts (Br. 33-36) that CMS has concluded that Section 108A-57 is a permissible means of allocating settlements.

a. Petitioner first relies (Br. 34-35) on a 2006 CMS Guidance Memo regarding "State Options for Recovery Against Liability Settlements In Light of U.S. Supreme Court Decision in [*Ahlborn*]." See Pet. App. 124a-138a. That reliance is misplaced.

The Guidance Memo, issued to explain *Ahlborn*'s impact and suggest permissible methods of recovery in light of the decision, emphasizes that *Ahlborn* held that

States "may only recover from the amount of a [settlement] that is allocated to healthcare (medical) items and services." Pet. App. 129a. In the passage on which petitioner relies, the Guidance Memo states that "State tort or insurance liability provisions are a matter of State law and could be utilized to mitigate the adverse [e]ffects of the decision," and that "[f]or example, a State can enact laws which provide for a specific allocation amongst damage[s], i.e., pain and suffering, lost wages, and medical claims." *Ibid.*

Petitioner contends (Br. 35) that Section 108A-57 is among the methods contemplated by the Guidance Memo because it "provid[es] for a specific allocation amongst damage[s]." But petitioner reads that language in isolation from the rest of the Guidance Memo. CMS expressly cautioned that in *Ahlborn*, this Court had rejected CMS's interpretation of the Medicaid Act to permit full recovery of assistance payments "regardless of how the parties allocated the settlement." Pet. App. 127a. CMS further explained that *Ahlborn* held that "to the extent State laws permit recovery over and above what the parties have appropriately designated as payment for medical items and services, the State was in violation of federal Medicaid laws." *Ibid.* CMS thus made clear that it read *Ahlborn* to prohibit States from unilaterally disregarding an appropriate allocation of damages—which is effectively what statutes like Section 108A-57 do.

In context, then, the paragraph on which petitioner relies is best read as making two points. First, the reference to a State's substantive use of "State tort * * * provisions" could include such things as instituting generally applicable caps on the nonmedical damages that a plaintiff may recover. Pet. App. 129a. Second, States

may enact "laws which provide for a specific allocation amongst damage[s]"—*i.e.*, procedures providing for determining the proper allocation among damages within a settlement. *Ibid.* The Guidance Memo does not say that a State may employ statutes that determine the extent of the State's recovery without any opportunity for the beneficiary to demonstrate the amount that is "appropriately designated as payment for medical items and services."[5] *Id.* at 127a.

b. Petitioner also relies (Br. 34) on a 2009 letter from the Acting Associate Regional Administrator of CMS's Division of Medicaid & Children's Health Operations (Atlanta), replying to an inquiry from Representative Howard Coble of North Carolina. See Pet. App. 139a-142a. Representative Coble referred to a letter from David Andrews, a plaintiff in the *Andrews* case, in which Mr. Andrews argued that Section 108A-57 was inconsistent with the 2006 CMS Guidance Memo. *Id.* at 139a. CMS's response, which was not copied to the State's Department of Health and Human Services, stated that CMS "agree[d]" with the North Carolina Supreme Court's conclusion in *Andrews* and that Section 108A-57 was a "reasonable statutory scheme for apportioning medical expenses" that did not "conflict with CMS' guidance." *Id.* at 141a-142a.

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[5] In addition, the Guidance Memo's statement that "a State could enact laws which give priority to the repayment of medical expenses," Pet. App. 130a, indicates that a State may provide that it has the right to recover from the portion of a judgment or settlement appropriately allocated to medical costs even if that means that the remainder of the judgment or settlement reflecting nonmedical costs is insufficient to provide full or proportional payment of those other claims. See pp. 30-31, *infra*.

The CMS Administrator, in consultation with the Secretary, has concluded that the response to Representative Coble was incorrect. The Secretary's interpretation of the relevant provisions of the Medicaid Act and the 2006 CMS Guidance Memo is reflected in this brief.

In any event, petitioner is wrong to suggest (Br. 34-36) that the 2009 letter had the force of law or that it represented a binding agency interpretation. As a general matter, CMS does not treat informal responses to such inquiries as binding regulatory actions. Indeed, the limited force of the letter is clear from its nature and the manner in which it was issued. It was not the culmination of any formal or informal administrative rulemaking or adjudicatory process to which the State or a private person was a party; rather, the correspondence was essentially a "workaday advice letter that [CMS] prepare[s] countless times per year" in response to what CMS informs this Office is a large volume of inquiries from the public and Members of Congress. See *Independent Equip. Dealers Ass'n* v. *EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (letter written in response to inquiry from regulated party was not final agency action because it "had no binding effect whatsoever—not on the agency and not on the regulated community"); cf. *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000) (opinion letters issued without formal process do not have the force of law); *United States* v. *Mead Corp.*, 533 U.S. 218, 233 (2001). And rather than reflecting an affirmative agency decision to provide guidance to those responsible for administering the Medicaid program, the letter was sent in response to an unsolicited inquiry

from a party other than the State.[6] See, *e.g.*, *Holk* v. *Snapple Beverage Corp.*, 575 F.3d 329, 342 n.6 (3d Cir. 2009); *Association of Am. R.R.s* v. *DOT*, 198 F.3d 944, 948 (D.C. Cir. 1999).

CMS does not use correspondence like the 2009 letter as a vehicle for issuing instructions to the States concerning their administration of the Medicaid program. When CMS wishes to issue formal guidance, it sends the guidance directly to the State in question, or issues State Medicaid Director Letters or Memoranda to Associate Regional Administrators for Medicaid and State Operations. See Centers for Medicare & Medicaid Services, Dep't of Health & Human Servs., *Federal Policy Guidance*, http://www.medicaid.gov/Federal-Policy-Guidance/Federal-Policy-Guidance.html (last visited Dec. 17, 2012). The 2006 Guidance Memo is an example of such formal guidance, and it contains CMS's official advice to the States concerning permissible methods of recovering medical costs after *Ahlborn*.

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[6] There is no indication that the State relied on the 2009 letter in formulating its construction of Section 108A-57 or its conclusions about what methods of recovering medical payments were permissible after *Ahlborn*. By the time the letter was sent, the State had already argued—successfully—in *Andrews* that Section 108A-57's irebuttable presumption was consistent with *Ahlborn* and the anti-lien provision. *Andrews*, 669 S.E.2d at 312-314.

II. STATES HAVE CONSIDERABLE DISCRETION TO ESTABLISH ALLOCATION PROCEDURES THAT BOTH PROTECT THE STATES' ABILITY TO RECOVER MEDICAL COSTS AND PERMIT AN INDIVIDUALIZED ALLOCATION DETERMINATION WHEN NECESSARY

Because the portion of a settlement that may appropriately be regarded as payment for medical costs may vary based on case-specific factors, state allocation methods must provide some opportunity for individualized consideration when necessary to avoid frustrating the operation of the anti-lien provision. Consistent with that constraint, States have broad discretion to adopt allocation procedures that protect the States' interest in reimbursement and ensure that allocation inquiries are efficient and equitable. The Medicaid Act requires States to "take all reasonable measures to ascertain the legal liability of third parties," 42 U.S.C. 1396a(a)(25)(A), and while allocation measures that circumvent the anti-lien provision are not "reasonable," States otherwise have considerable leeway to develop methods of allocating settlements.

As petitioner observes (Br. 31-32), States have substantial interests in guarding against settlement manipulation by Medicaid recipients and in preventing allocation determinations from consuming limited resources. See *Ahlborn*, 547 U.S. at 288. The federal government shares these interests, as it is entitled to a portion of a State's third-party recovery, see 42 U.S.C. 1396k(b), and States may seek reimbursement from CMS for a portion of their administrative expenses in litigating any allocation issues, see 42 C.F.R. 433.15(b)(7). *Ahlborn* suggested that States may "adopt[] special rules and procedures for allocating tort settlements * * * to meet concerns about settlement manipulation," 547 U.S. at

288 n.18, including by requiring the State's consent to an allocation or "submitting the matter to a court for decision," *id.* at 288. Many States have established such procedures, demonstrating that, despite petitioner's argument to the contrary (Br. 26-33), allocation procedures that provide for individualized determination when necessary can effectively prevent manipulation and promote efficiency.

A. States May Employ Hearings To Determine The Appropriate Allocation, Aided By Presumptive Allocation Rules And Other Procedural Protections

Although States have the authority to protect their reimbursement interests by intervening in third-party litigation and participating in settlement negotiations, see Part II.B, *infra*, they also have the discretion to stay out of the litigation and resolve allocation issues after the beneficiary and the third party have settled the beneficiary's claims. When States choose the latter course, they may use judicial or administrative allocation hearings to provide an opportunity when necessary to determine the appropriate allocation. See Pet. App. 47a-49a (discussing examples); *Ahlborn*, 547 U.S. at 288 n.18. They may also, of course, simply negotiate an appropriate allocation with the beneficiary.

Sixteen States and the District of Columbia explicitly provide the opportunity for a post-settlement judicial or administrative hearing to determine the appropriate apportionment of damages. Such hearings are either expressly provided for by statute or are provided in accordance with state-court decisions holding that allocation hearings are required.[7] Although petitioner con-

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[7] Cal. Welf. & Inst. Code § 14124.76(a) (West 2011); D.C. Code § 4-604(b) (2011); Haw. Rev. Stat. Ann. § 346-37(h)-(i) (LexisNexis

tends (Br. 28-29) that such hearings are unworkable inquiries that place the State "at a decided disadvantage" because of the beneficiary's superior knowledge of the underlying litigation and settlement, Br. 28, some States that have adopted allocation hearings have also instituted procedural protections that address petitioner's concerns.

For instance, five States have established *rebuttable* presumptions that all or a specified percentage of settlement proceeds is appropriately allocated to payment of medical expenses.[8] Those presumptions tend to counter the State's relative lack of familiarity with the underlying litigation and settlement by requiring the beneficiary to justify a deviation from the presumptive allo-

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Supp. 2012); 305 Ill. Comp. Stat. Ann. 5/11-22 (West 2008); Mass. Ann. Laws ch. 118E, § 22(c)-(d) (LexisNexis Supp. 2012); Miss. Code Ann. § 43-13-125(2) (West 2008); Mo. Ann. Stat. § 208.215.9 (West 2010); N.H. Rev. Stat. Ann. § 167:14-a(IV) (LexisNexis 2010); Okla. Stat. Ann. Tit. 63, § 5051.1(D)(1)(d) (West Supp. 2013); 62 Pa. Cons. Stat. Ann. § 1409.1(b) (West 2010); Tenn. Code Ann. § 71-5-117(g)-(j) (2012); Va. Code Ann. § 8.01-66.9 (Supp. 2012); *State Dep't of Health & Welfare* v. *Hudelson*, 196 P.3d 905, 910 (Idaho 2008); *Smith* v. *Alabama Medicaid Agency*, 461 So. 2d 817, 820 (Ala. Civ. App. 1984); *Martin*, 642 N.W.2d at 27 (remanding for allocation hearing) (Minn. statute); *Lugo* v. *Beth Israel Med. Ctr.*, 819 N.Y.S.2d 892 (N.Y. Sup. Ct. 2006); *In re E.B.*, 729 S.E.2d 270 (W. Va. 2012). Other States may employ administrative procedures of general application or may litigate allocation as part of the underlying tort action, even though their third-party reimbursement statutes do not explicitly so provide.

[8] See Haw. Rev. Stat. Ann. § 346-37(h) (one-third allocation); *Hudelson*, 196 P.3d at 911-912 (construing Idaho Code Ann. § 56-209b(6) (1961) to establish a presumption of full reimbursement); Mass. Ann. Laws ch. 118E, § 22(b)-(c) (full reimbursement); Okla. Stat. Ann. Tit. 63, § 5051.1(D)(1)(d) (full reimbursement); 62 Pa. Cons. Stat. Ann. § 1409(b)(11) (West 2010) (one-half of settlement after fees are deducted).

cation. To the extent that North Carolina tort law reflects, as petitioner argues, a "rule of thumb" that one-third of a settlement generally should be allocated to past medical expenses, Pet. Br. 22-23, the State would be free to establish a rebuttable presumption reflecting that principle, or to construe Section 108A-57 to so provide. A rebuttable-presumption framework affords beneficiaries an opportunity to establish that the presumptive allocation does not represent an appropriate allocation in a given case.

States may also protect against manipulation and the possibility that decisionmakers will reflexively favor beneficiaries by setting forth relevant criteria to consider when adjudicating the proper allocation. Some States have adopted a method known as proportional reduction, in which the amount of the State's recovery is reduced by the proportion of the total settlement amount to the reasonable value of the beneficiary's claims.[9] As the court of appeals recognized, however, Pet. App. 49a-50a, States are free to adopt other methods. Thus, although the State and the beneficiary in *Ahlborn* stipulated that the State's lien amount should be proportionately reduced if the State's bid for full reimbursement was rejected, 547 U.S. at 274, this Court did not suggest that a proportional-reduction approach is necessarily required, see *id.* at 288 n.18; see also Pet. App. 50a; *Smalley* v. *Nebraska Dep't of Health & Human Servs.*, 811 N.W.2d 246, 257 & n.34 (Neb. 2012) (holding that proportional reduction is not required and citing cases), pet. for cert. pending, No. 12-466 (filed Oct. 11, 2012).

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[9] See, *e.g.*, Mo. Ann. Stat. § 208.215.11; *Lima* v. *Vous*, 94 Cal. Rptr. 3d 183, 197 (Cal. Ct. App. 2009) (approving proportional reduction as one method).

As petitioner explains (Br. 31-32), proportional reduction may disadvantage the State if it ignores the fact that past medical costs are often much more concrete, definite, and recoverable than other possible elements of damages, such as pain and suffering. See *McKinney* v. *Philadelphia Hous. Auth.*, No. 07-4432, 2010 WL 3364400, at *7 (E.D. Pa. Aug. 24, 2010). Similarly, proportional reduction based on a plaintiff's claimed damages would enable the beneficiary to reduce the State's recovery by inflating the amount of intangible damages sought. States accordingly may set forth other specific factors that the decisionmaker should take into account, or provide general guidance that the allocation should be equitable to both sides.[10]

States may also prevent collusive agreements to "allocate away the State's interest," *Ahlborn*, 547 U.S. at 288, by providing that any allocation made by the beneficiary and third parties or a court is not final absent the State's consent or a hearing to determine the appropriate allocation. See Resp. Br. 31-32. Several States have adopted such provisions.[11] In this respect, the hearing process can serve as a settlement-approval mechanism that evaluates the parties' tentative allocation, while also protecting the State's interest in appropriate reimbursement.

States may also institute procedural protections within allocation hearings to ensure a level playing field.

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[10] See, *e.g.*, Cal. Welf. & Inst. Code § 14124.76(a); Mo Ann. Stat. § 208.215.11; N.H. Rev. Stat. Ann. § 167:14-a(IV); Tenn. Code Ann. § 71-5-117(g)-(h); Va. Code Ann. § 8.01-66.9; *Moss* v. *Glynn*, 383 N.E.2d 275 (Ill. Ct. App. 1978) (discussing considerations, including prevention of double recovery).

[11] See, *e.g.*, Hawaii Rev. Stat. Ann. § 346-37(h); Mass. Ann. Laws ch. 118E, § 22(d); 55 Pa. Code § 259.2(b)(5) (2012).

For instance, requiring disclosure to the State of pertinent information regarding the incident, injuries, claims, and settlement that the other parties possess (pursuant to a protective order if appropriate) can ensure that the State is able to "meaningfully participate" in the hearing. Although the State even then might not be on an equal footing with the beneficiary and the tortfeasor or its insurer, see Pet. Br. 15, requiring that the State be afforded access to material evidence and other information can at least mitigate the disadvantage.

Finally, it is important to keep in mind that whatever procedure or rebuttable presumption a State's third-party reimbursement framework establishes, hearings may only rarely be necessary. Instituting rebuttable presumptions or other rules governing allocation will tend to encourage settlement by clarifying the parties' respective rights and focusing negotiations. Thus, once the particular State's ground rules are known, it may usually be possible for the state Medicaid agency and the beneficiary to agree to an allocation and avoid the need for an allocation hearing. Indeed, many States' statutes expressly contemplate settlement of the State's lien.[12]

B. States May Also Participate In Third-Party Litigation

As *Ahlborn* recognized, States may also protect their interest in reimbursement by conducting, or participating in, third-party litigation *before* any settlement is finalized. 547 U.S. at 288. The Medicaid Act instructs States to require that a Medicaid beneficiary cooperate

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[12] See, *e.g.*, Ariz. Rev. Stat. Ann. § 36-2915(H)-(I) (West 2009); Me. Rev. Stat. Ann. Tit. 22, § 14 (West Supp. 2012); Md. Code Ann., Health-Gen. § 15-120(c)(3) (LexisNexis 2009); S.C. Code Ann. § 43-7-440 (West Supp. 2011).

with the State's attempt to secure third-party recovery, 42 U.S.C. 1396k(a)(1)(C), and States may impose a range of procedural protections to ensure cooperation.

States may protect their right to participate in third-party litigation or settlement negotiations by permitting or requiring their joinder or intervention. See Pet. App. 130a. For instance, under North Carolina law, petitioner could have intervened in respondents' suit, but he chose not to attempt to do so until after the parties had entered into a settlement. *Id.* at 7a n.1. States may also choose to participate only at the settlement stage, and to that end they may require advance notice of settlement negotiations. See *id.* at 130a. Some States also require the parties to obtain the State's advance consent to an allocation and provide for a hearing if no agreement is possible.[13]

State participation in third-party litigation has the advantage of avoiding the need to resolve *post hoc* questions about the settlement that the parties reached and preventing any manipulation by the parties. Although States may not have the resources to intervene in every third-party suit or settlement negotiation, they may provide themselves with broad discretion to participate when they so choose, while also adopting procedures for individualized post-settlement allocation determinations in the cases in which they do not participate.

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[13] See Cal. Welf. & Inst. Code § 14124.76(a); Miss. Code Ann. § 43-13-125(1), (2); Tenn. Code Ann. § 71-5-117(g)-(j).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM B. SCHULTZ
Acting General Counsel
MARGARET M. DOTZEL
Deputy General Counsel
JANICE L. HOFFMAN
Associate General Counsel
CAROL J. BENNETT
Deputy Associate General Counsel
LESLIE STAFFORD
Attorney
Department of Health and Human Services

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
ALISA B. KLEIN
JOSHUA WALDMAN
Attorneys

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