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No. 18-7041

IN THE

SUPREME COURT OF THE UNITED STATES

MARK P. DONALDSON,

PETITIONER,

vs.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Mark P. Donaldson
103 Deerwood Court
Roscommon, MI 48653
Phone: (616) 401-9859

QUESTIONS PRESENTED

The State of Michigan voluntarily choose to participate in Medicaid then MDHHS must comply with requirements of Title XIX and all applicable regulations as set forth in Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985) in which MDHHS is solely responsible for the administration of CMS agreements involving Medicaid programs including hearings and said hearings are required to be operated in compliance with federal law, see Frew v. Hawkins, 540 U.S. 431, 433 (2004). Under the Supremacy Clause of the U. S. Constitution, state agencies, including MDHHS and MAHS, continuing violations and their subsequent actions that violate federal laws and associated federal regulations are invalid, see Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983).

1. Whether Mr. Donaldson's procedural due process rights afforded him under Medicaid including 45 C.F.R. 155.530 (a), (b)(1) - (3) have been violated by the state agencies.

2. Whether federal regulations 45 C.F.R. 155.530 (a), (b)(1) - (3) published over five years ago preempt state agencies rules and actions which violate 45 C.F.R. 155.530 (a), (b)(1) - (3) involving Medicaid recipients including Mr. Donaldson fundamental hearing rights.

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Mark P. Donaldson - Petitioner

Michigan Department of Health and Human Services

and McLaren Health Care Corporation - Respondents

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A

to the petition and is

[ ] reported at; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the court appears at Appendix B to the petition and is

[ ] reported at; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from state courts:

The date on which the highest state court decided my case was April 3, 2018

and a copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date of

July 27, 2018 and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment, Supremacy Clause of the United States Constitution.

2. The existence and application of federal preemption involving U.S. HHS, CMS, MDHHS, and MAHS.

3. The Fourteenth Amendment, Procedural Due Process Clause of the United States Constitution.

4. Relevant provisions involving 42 U.S.C. § 1396a and 42 U.S.C. § 1396c.

5. Relevant provisions involving 42 C.F.R. § 430, 42 C.F.R. § 431.10, 42 C.F.R. § 431.205, 42 C.F.R. § 435.903, and/or 45 C.F.R. § 155.530 (a), (b)(1) - (3).

6. Relevant provisions involving MAHS Mich Admin Code rules R 792.11005, R 792.10101 (2), and/or R 792.11001 (2).

STATEMENT OF THE CASE

A. INTRODUCTION

This appeal involves four (4) Michigan Department of Health and Human Services, (MDHHS), administrative cases which were timely appealed to the Roscommon circuit court in which all four cases were consolidated by the circuit court, even though Mr. Donaldson contested the consolidation and one case involved a federal health care determination, see Appendix G.

Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals, see Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990). MDHHS is the single state agency responsible for administering Medicaid including signing agreements with CMS in which Medicaid fair hearings are delegated by MDHHS to the Michigan Administrative Hearing System, (MAHS).

More importantly, MDHHS is solely responsible for the administration of CMS agreements involving Medicaid programs including hearings in which MDHHS including MAHS are required to be operated in compliance with federal law, see Frew v. Hawkins, 540 U.S. 431, 433 (2004) and Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996) in which MDHHS and MAHS have been and are still violating their already agreed to CMS agreements involving federal directives and regulations concerning MDHHS & MAHS Medicaid hearing administration.

Under the Supremacy Clause of the U. S. Constitution, MDHHS and MAHS continuing violations and subsequent actions that violate federal laws and associated federal regulations are invalid, see Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983). Once the State of Michigan voluntarily choose to participate in Medicaid, MDHHS must comply with requirements of Title XIX and all applicable regulations as set forth in Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), citing Harris v. McRae, 448 U.S. 297, *813 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). Also, MDHHS has now for over five (5) years repeatedly stated in their already agreed to numerous agreements including State Plans with the federal govt. including CMS that MAHS' hearing rules are in compliance with federal statutes and regulations.

B. FACTS

1. One (1) of Mr. Donaldson's four (4) appealed and consolidated MDHHS cases, MAHS Docket # 14-015779, concerns Mr. Donaldson's hearing request that involves only a Marketplace, federal health care determination, see Appendix G.

2. The Michigan Attorney General's response statements to the lower court are erroneous and/or contrary to the intent of Congress involving the federal preemption analysis and MAHS rules R 792.10101 (2) and R 792.11001 (2).

3. The Michigan Attorney General's response statements to the lower court did not contest that MDHHS and MAHS Mich Admin Code Rule R 792.11015 is contrary to and/or violates federal regulations 45 CFR 155.530 (b)(1) - (3).

4. The MDHHS, (formerly Michigan Department of Community Health, MDCH), and MAHS have known about these issues for years and has not requested any form of a waiver from U.S. H.H.S and CMS that would adjust and/or exclude compliance with applicable federal regulations involving Medicaid hearings including 45 C.F.R. 155.530 (b)(1) - (3).

5. Numerous federal rules including 45 C.F.R. 155.530 (a), (b)(1) - (3) were commented on, promulgated, and published on 8/30/2013.

6. The State of Michigan combined and promulgated the administrative hearing rules for numerous departments in which Parts 1 and 10, (see Appendix D, E, and F), are applicable to the MDHHS hearings and the new hearing rules became effective of January 15, 2015 which is over 16 months after the federal rules including 45 C.F.R. 155.530 (a), (b)(1) - (3) were published on 8/30/2013.

C. STATUTORY AND REGULATORY BACKGROUND - SUPREMACY

1. This is a constitutional, supremacy issue which can be raised at any time, can be heard and ruled upon by the Court. The Attorney General's arguments when it comes to the required preemption analysis are erroneous and they also do not contest that MDHHS and MAHS Mich Admin Code rule R 792.11015 is contrary to and/or violates federal regulations 45 CFR 155.530 (b)(1) - (3). More significantly, is the denial of hearing rights and impact on all Medicaid recipients in Michigan since MDHHS and MAHS are already well aware that MAHS Rule R 792.11015 has been violating federal regulations 45 CFR 155.530 (b)(1) - (3) now for

over five (5) years which has been in affect in 78 FR 54136 since 8/30/2013.

The Supremacy Clause of the United States Constitution gives Congress the authority to preempt state laws, see 85 Packowski v. United Food & Commercial Workers Local 951, 289 Mich. App. 132, 139, 796 N.W.2d 94 (2010); US Const. art. VI, cl. 2. "There are three types of federal preemption: express preemption, conflict preemption, and field preemption." *293 Packowski, 289 Mich. App. at 140, 796 N.W.2d 94. Pursuant to the supremacy clause of the Federal Constitution, federal preemption exists in this case since compliance with both federal and state regulations is not possible and Medicaid hearing rights is a subject matter requiring federal supremacy and uniformity, see Adama v. Doehler-Jarvis, Division of N L Industries, Inc., 115 Mich. App. 82, 86, 320 N.W.2d 298 (1982). The Supreme Court held in Florida Lime & Avocado Growers, Inc v. Paul, 373 U.S. 132, 142; 83 S.Ct. 1210, [1217]; 10 L.Ed.2d 248 (1963), held that it is irrelevant to preemption analysis whether MDHHS and MAHS rules are similar to or different from the federal regulation's objectives which also includes the Assistant Attorney General Ms. Heyse's own brief's response statements to this Court. Instead, the preemption analysis must turn on Congress' intent to pre-empt MDHHS and MAHS rules, (as Congress has intended to do so in this case involving the applicable federal regulations), when it comes to Medicaid fair hearings which must include the nature of the associated and applicable federal Medicaid regulations. Furthermore, when it comes to this Supremacy clause issue, MDHHS and MAHS are not given any form of a discretionary option(s) or choice(s) and instead MDHHS and MAHS must comply with federal regulations involving Medicaid hearings in which MDHHS and MAHS have already and repeatedly agreed to do so in their written and signed agreements with CMS that MAHS Rules which pertain to Medicaid administrative hearings do

comply with federal regulations instead of violating federal regulations. Also, even MAHS own Rules 792.10101 (2) and/or R 792.11001 (2) specifically refer to the requirements and applicable federal regulations thus they must comply with federal regulations involving Medicaid hearings. When it comes to the Supremacy Clause, U.S. Const., art. VI, cl. 2 in this case federal laws take precedence over state laws by express preemption, conflict preemption, or field preemption, see Ryan v. Brunswick Corp., 454 Mich. 20, 27–28, 557 N.W.2d 541 (1997) and preemption occurs only under certain conditions: (1) when a federal statute contains a clear preemption provision; (2) when there is outright or actual conflict between federal and state law; (3) where compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, see Duprey v. Huron & Eastern R Co, Inc., 237 Mich. App. 665, 604 N.W.2d 702.

2. When it comes to the Supremacy Clause in this case, not only is there an outright and actual conflict between federal regulations 45 CFR 155.530 (b)(2) and 45 CFR 155.530 (b)(3) and the MAHS Mich Admin Code rule R 792.11005 but moreover, MAHS Mich Admin Code rule R 792.11005 stands as a clear obstacle to the accomplishment and execution of the full objectives of federal regulations 45 CFR 155.530 (b)(2) and 45 CFR 155.530 (b)(3). More importantly, compliance with federal regulations 45 CFR 155.530 (b)(2) and 45 CFR 155.530 (b)(3) by MAHS Mich Admin Code rule R 792.11005 is physically impossible since the MAHS Mich Admin Code rule R 792.11005 removed and/or excluded the very specific and

required phrases from both federal regulations 45 CFR 155.530 (b)(2) and 45 CFR 155.530 (b)(3) which protects Mr. Donaldson and all other Medicaid hearing applicants in the dismissal process. In doing so, MAHS Rule R 792.11005 has for over five (5) years and is still now clearly preempting 45 CFR 155.530 (b) and in particular (b)(2) and/or (b)(3). In doing so MAHS Mich Admin Code Rule R 792.11005 is void under the Supremacy Clause, U.S. Const., art. VI, cl. 2 as set forth in " Duprey v. Huron & Eastern R Co, Inc., 237 Mich.App. 665, 604 N.W.2d 702. Furthermore, the MAHS ALJ Armstrong's actual dismissal Order of Aug. 21, 2015 violated of 45 CFR 155.530 (b)(2) by not providing the required information in MAHS dismissal notice: "An explanation of the dismissal's effect on the appellant's eligibility" and violated 45 CFR 155.530 (b)(3) by not providing the required information in MAHS dismissal notice: "An explanation of how the appellant may show good cause why the dismissal should be vacated in accordance with paragraph (d) of this section." thus under the Supremacy Clause of the U. S. Constitution, state actions including MAHS actions in this case which violate federal law are invalid, see See Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983).

D. STATUTORY AND REGULATORY BACKGROUND - DUE PROCESS

1. The states are responsible for the administration of Medicaid are required to operate them in compliance with federal law, see Frew v. Hawkins, 540 U.S. 431, 433 (2004) and Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996). The State of Michigan participates in Medicaid and must grant "an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.", see 42 U.S.C. § 1396a(a)(3). The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid

plan , see Conn. Dep't of Soc. Servs. v. Leavitt, 428 F.3d 138, 141 (2d Cir.2005). The State of Michigan Medicaid plans must comply with applicable federal law and regulations, see 42 U.S.C. § 1396c; 42 C.F.R. § 430.0 in which the State of Michigan must designate a single State agency. MDHHS, to administer or to supervise the administration of the state's Medicaid plan, see 42 U.S.C. § 1396a(a)(5). The MDHHS has signed numerous agreements with federal agencies that delegate the performance of certain responsibilities of all administrative hearings to the Michigan Administrative Hearing System, MAHS, pursuant to 42 C.F.R. § 431.10(e). MDHHS must have methods to keep itself currently informed of the adherence of delegated responsibilities including MAHS as already agreed to State Plan's provisions and more importantly MDHHS must take corrective actions involving MAHS to ensure their adherence to federal regulations, see 42 C.F.R. § 435.903, which MDHHS has continued to and still fails to do so now for over five (5) years. More importantly, even though MAHS makes administrative determinations and issues final decisions, the MDHHS is responsible for and must ensure that MAHS actions including MAHS' actions and rules are in compliance with federal law and regulations, see 42 C.F.R. § 431.205.

2. The Medicaid Act requires MDHHS including MAHS to adopt a hearing system and rules that satisfies due process standards established by Goldberg v. Kelly 397 US 254, 271; 90 S Ct 1011; 25 L Ed 2d 287 (1970) and additional standards established by the regulations, see Perry v. Chen, 985 F. Supp. 1197, 1203 (D.Ariz. 1996), Moffitt, 600 F. Supp. at 298-99. Federal regulations 45 C.F.R. 155.530 (a) and (b) have been violated by MDHHS and MAHS which went into affect over five (5) years ago in 78 FR 54136 on 8/30/2013 and state:

45 CFR 155.530 - Dismissals.

(a) Dismissal of appeal. The appeals entity must dismiss an appeal if the appellant -

(1) Withdraws the appeal request in writing or by telephone, if the appeals entity is capable of accepting telephonic withdrawals.
(I) Accepting telephonic withdrawals means the appeals entity -
(A) Records in full the appellant's statement and telephonic signature made under penalty of perjury;
and
(B) Provides a written confirmation to the appellant documenting the telephonic interaction.
(ii) [Reserved]
(2) Fails to appear at a scheduled hearing without good cause;
(3) Fails to submit a valid appeal request as specified in §155.520(a)(4); or
(4) Dies while the appeal is pending, except if the executor, administrator, or other duly authorized representative of the estate requests to continue the appeal.

(b) Notice of dismissal to the appellant. If an appeal is dismissed under paragraph (a) of this section, the appeals entity must provide timely written notice to the appellant, including -
(1) The reason for dismissal;
(2) An explanation of the dismissal's effect on the appellant's eligibility; and
(3) An explanation of how the appellant may show good cause why the dismissal should be vacated in accordance with paragraph (d) of this section.

The MAHS ALJ Armstrong on Aug. 21, 2015 entered an "Order of Dismissal" stating "The Appellant, having failed to appear to appear and participate. IT IS HEREBY ORDERED: The hearing in this matter is DISMISSED" pursuant to MAHS rule R 792.11005 which states:

R 792.11005 Denial or dismissal of request for hearing.
Rule 1005. (1) The hearing system shall deny or dismiss the request for a hearing under any of the following:

(a) A request is withdrawn by a claimant, counsel, or petitioner, or a claimant's authorized representative in writing prior to the signing of the final decision and order.
(b) The issue is one of state or federal law, requiring automatic grant adjustments for classes of recipients.
(c) A claimant abandons the hearing.
(d) The administrative law judge has no jurisdiction over the matter.
(e) An issue is not appealable as authorized by R 400.903.

(2) Abandonment occurs if a claimant, without good cause, fails to appear by himself or herself, or by his or her authorized representative at the scheduled hearing or obstructs the hearing process such that the administrative law judge is unable to

make a clear and accurate record of the proceedings or otherwise conduct the hearing.

The MDHHS has repeatedly for over five years now has failed to administer or to supervise the administration of the state's Medicaid plan as required under 42 U.S.C. § 1396a(a)(5) in which Medicaid recipients including Mr. Donaldson's procedural due process rights have been violated by MDHHS and MAHS by failing to adopt a hearing system including specific published rules that satisfies due process standards established by Goldberg v. Kelly 397 US 254, 271; 90 S Ct 1011; 25 L Ed 2d 287 (1970) and the Medicaid Act.

E. STATUTORY AND REGULATORY BACKGROUND - HEARING RULES

1. The importance and significance of federal rules being published cannot be overemphasized including 45 C.F.R. 155.530 (a), (b)(1) - (3) which were commented on, promulgated, and published back on August 30, 2013. Several published federal rules have a direct impact on Mr. Donaldson and all Medicaid recipients constitutional rights of due process when it comes to administrative hearings which are missing from the administrative hearing rules.

2. Almost as important and significant of the federal rules being published is the lack of 45 C.F.R. 155.530 (a), (b)(1) - (3) in the promulgated administrative hearing rules that are applicable in this case and to the MDHHS, (formerly MDCH), in which Parts 1 and 10, (see Appendix D, E, and F), in which new hearing rules became effective of 1/15/2015 which is over 16 months after the federal rules 45 C.F.R. 155.530 (a), (b)(1) - (3) were published on 8/30/2013.

3. The MDHHS had the authority to withdraw the promulgated rule MAHS R 792.11005 so that it did not become effective by transmitting a written request to either the Secretary of State or the Secretary of State and the Office of Regulatory Reform which MDHHS

refused to do and chose to keep a rule that knowingly violated 45 C.F.R. 155.530 (a), (b)(1) - (3).

4. The MDHHS had the authority to cite the federal regulation 45 C.F.R. 155.530 (a), (b)(1) - (3) and/or incorporate the language from 45 C.F.R. 155.530 (a), (b)(1) - (3) and instead chose the language of R 792.11005 which violated 45 C.F.R. 155.530 (a), (b)(1) -(3).

5. The State of Michigan promulgated and published their new administrative hearing rules which excluded numerous published federal rules including 45 C.F.R. 155.530 (a), (b)(1) - (3). The specific rule promulgation processes are under the Michigan APA and includes other state agencies. More importantly, the MDHHS is bound by several agreements with the federal government even before and after Aug. 30, 2013 that the Michigan administrative hearing rules comply with federal rules involving Medicaid so the federal government is not required to petition and/or write to MDHHS or any state agency to have the published federal rules complied with in the administrative hearing rules. Furthermore, MDHHS was required to review, work with, and communicate with other state agencies involving Part 10, (Appendix E and F), during the rules promulgation process well before the new administrative hearing rules were published and instead MDHHS failed to withdraw the erroneous rules and/or did not inform the appropriate agencies of the federal rules which MDHHS and the promulgated rules must be in complied with.

The federal rules were published in Aug. 30, 2013 and the Michigan administrative rules were published over eighteen months later in which after now 5 years there is now no prospect that the violations including but not just limited to 45 C.F.R. 155.530 (a), (b)(1) - (3) will be resolved without this Court's intervention. Also, the issues are ripe for the Court's review and this Court is now the only and the ideal vehicle for resolving the federal and state issues as set forth in the questions presented in this appeal that have been timely filed with this Court.

REASONS FOR GRANTING THE PETITION

I. State agencies actions violated Mark P. Donaldson fundamental hearing rights.

II. This Court's intervention is required to restore uniformity involving the interpretation, compliance, and application of the Code of Federal Regulations by state agencies.

III. This case presents a recurring question of exceptional importance warranting this Court's immediate resolution that involves published federal regulations are not being accepted and incorporated by state agencies involving Medicaid recipients fundamental hearing rights.

IV. There is no prospect that the continuing violations, ongoing now for over five years, by state agencies will be addressed and resolved without this Court's intervention.

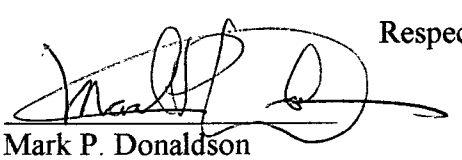
V. The questions presented are ripe for the Court's review and this Court is now the only and the ideal vehicle for resolving the federal and state issues concerning federal preemption involving fundamental published Medicaid hearing rights.

VI. The issues are ripe for the Court's review and this Court is now the only and the ideal vehicle for resolving the federal and state issue concerning published federal rules which the state agency knowingly refused to seek and have incorporated the fundamental federal hearing rules involving Medicaid and the Marketplace into the applicable administrative hearing rules.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,



Mark P. Donaldson

Date: Oct. 16, 2018