No. _____

In the
Supreme Court of the United States

OFFICE OF RECOVERY SERVICES,
Petitioner,

v.

JOHN R. LATHAM,
Respondent.

On Petition for Writ of Certiorari to the Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a State incurs medical expenses because a third-party tortfeasor injures a Medicaid recipient, federal law requires the State to seek reimbursement for those expenses. Like most modern civil litigation, most claims for reimbursement settle—and those settlements often include payments for damages other than medical expenses, such as for pain and suffering. When that happens, the State is entitled to reimbursement from only the portion of the "settlement that represents medical expenses." *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 280 (2006).

The question presented is whether a State may seek reimbursement for its medical expenses from the portion of a settlement that represents all medical expenses—past and future—or only from the portion allocable to past medical expenses.

PARTIES TO THE PROCEEDINGS

1. Petitioner Office of Recovery Services is an agency in the Utah Department of Human Services. ORS was the appellee in the Utah Supreme Court and the defendant in the state district court.

2. Respondent John R. Latham was the appellant in the Utah Supreme Court and the plaintiff in the state district court.

RELATED PROCEEDINGS

Utah Supreme Court:

Latham v. Office of Recovery Services, No. 20170556 (Aug. 22, 2019)

Third Judicial District Court, Salt Lake County, State of Utah:

Latham v. Office of Recovery Services, No. 160904935 (June 14, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Office of Recovery Services, an agency in the Utah Department of Human Services, respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court.

OPINIONS BELOW

The Utah Supreme Court's opinion is published at 448 P.3d 1241. Pet. App. 1a-22a. The opinion of the Third Judicial District Court, Salt Lake County, State of Utah, is unpublished. Pet. App. 23a-33a.

JURISDICTION

The Utah Supreme Court issued its opinion on August 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The question presented implicates three sections of the United States Code. *See* 42 U.S.C. §§ 1396a(a)(25), 1396k, 1396p(a). Those sections are reproduced in the appendix. Pet. App. 34a-42a.

STATEMENT

A. Medicaid is a joint federal-state program designed to fund medical care for certain people who could not otherwise afford it. *See* 42 U.S.C. §§ 1396 *et seq.*; *see also Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006); *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 647 (2013) (Roberts, C.J., dissenting). At the federal level, the Secretary of Health and Human Services administers Medicaid

through the Center for Medicare and Medicaid Services. *See Ahlborn*, 547 U.S. at 275. States, in turn, vest Medicaid administration in a single state agency, 42 C.F.R. § 431.10; in Utah, the Utah Department of Health runs the program. *See State Plan Under Title XIX of the Social Security Act, Medical Assistance Program* at 2, https://bit.ly/2J0ESqW.

The health care services that Medicaid makes possible are not cheap. In 2017, the latest year for which data are available, total Federal and State Medicaid costs reached $581.9 billion. CMS, *Nat'l Health Expenditures 2017 Highlights* at 2, https://go.cms.gov/1V5YDcI. The Federal Government and the States share those costs, but the split varies by State because Congress based the funding formula on each State's per-capita income. *See* 42 U.S.C. § 1396d(b). In Utah, federal funds accounted for 65 percent—or $1.73 billion—of the State's $2.66 billion in Medicaid costs for 2017. Utah Dep't of Health, *2017 Utah Medicaid & CHIP Annual Report* at 10, https://bit.ly/2kLTK3f.

B. To try to keep Medicaid solvent despite its more-than-half-a-trillion-dollars-a-year price tag, Congress requires States to control and recoup Medicaid costs in several ways. This case concerns one of them: A State's statutory obligation to seek reimbursement for medical expenses it pays after a third-party tortfeasor injures a Medicaid recipient. That obligation arises from, and is implemented in accordance with, five provisions of the United States Code.

First, a State must determine whether third parties bear legal liability "to pay for care and services

available under the" State Medicaid "plan." 42 U.S.C. § 1396a(a)(25)(A). Second, if a State identifies liable third parties, it must "seek reimbursement" from them when "the amount of reimbursement" for "medical assistance" that "the State can reasonably expect to recover exceeds the costs of such recovery." *Id.* § 1396a(a)(25)(B).

The third, fourth, and fifth provisions work in tandem to create an assignment-of-rights regime governing the funds collected under the first two provisions. Under this regime, individual recipients are "required to assign the State any rights . . . to payment for medical care from any third party" "as a condition of eligibility for medical assistance under the State plan." *Id.* § 1396k(a)(1)(A). States, in turn, must enact a law providing that they are "considered to have acquired the rights of" Medicaid recipients "to payment by any other party for . . . health care items or services." *Id.* § 1396a(a)(25)(H). And when a State recovers funds "under an assignment made" in accordance with § 1396k, it "retain[s]" the amount "necessary to reimburse it for medical assistance payments made"—that is, to satisfy the State's lien under § 1396a(a)(25)(H)—then "pa[ys]" the "remainder" to the recipient. *Id.* § 1396k(b).

As it must, Utah's plan follows those mandates. Utah's Medical Benefits Recovery Act, *see* Utah Code §§ 26-19-101 *et seq.*, provides that Medicaid recipients assign to Utah their right to any recovery from third parties, *id.* § 26-19-201(1). Utah's claim on medical expenses from liable third parties becomes "a lien against any proceeds payable to or on behalf of the

recipient by that third party." *Id.* § 26-19-401(1)(b). Utah law allows the State to institute recovery proceedings itself, *id.* § 26-19-401(3), or to permit recipients and their lawyers to sue the liable third party, *id.* § 26-19-403. If Utah permits the recipient to sue, the State enters a collection agreement with the recipient's lawyer that allows the lawyer to represent both Utah's claim and the recipients, and grants the lawyer a 33.3 percent fee of the State's recovery. *Id.* § 26-19-403(2).

Petitioner ORS administers those provisions of Utah law. *See* Pet. App. 2a n.1. Since Utah's 2010 fiscal year, ORS has collected more than $32 million in reimbursements from third-party tortfeasors. *See Soc. Servs. Appropriations Subcomm. Meeting*, 2019 Leg., Gen. Sess., Jan. 31, 2019 (Utah 2019) (report from Office of Recovery Servs., Medicaid Recovery Program, *History of Third-Party Liability (TPL) Outcomes & Expenditures* (reporting annual collections for casualty claims)) ("ORS Report"), https://bit.ly/35ImcWp.

C. Those seemingly straightforward Medicaid provisions have proven to be anything but simple in application. The confusion they have wrought when States apply them to real-world facts has already produced two splits that required this Court's interpretive guidance. *See Ahlborn*, 547 U.S. at 275-92; *Wos*, 568 U.S. at 633-44. *Ahlborn* and *Wos* establish four principles that tee up the dispute here.

First, States *must* seek reimbursement from Medicaid recipients who have received a tort settlement. That's a federal command—not a State policy choice. *See Wos*, 568 U.S. at 633 ("Congress has

directed States, in administering their Medicaid programs, to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors."); *Ahlborn*, 547 U.S. at 276 (Congress has "obligat[ed]" States "to enact assignment laws").

Second, Medicaid cabins the State's assignment: "a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses." *Wos*, 568 U.S. at 639. In other words, States may not obtain "an assignment of rights to payment for anything other than medical expenses—not lost wages, not pain and suffering, not an inheritance." *Ahlborn*, 547 U.S. at 281. That limitation flows from Medicaid's text, which requires recipients to assign "any rights . . . to payment for *medical care* from any third party." 42 U.S.C. § 1396k(a)(1)(A) (emphasis added). So limited, the mandatory Medicaid assignment allows States "to be paid first out of any damages representing payments for medical care before the recipient can recover any of her own costs for medical care," *Ahlborn*, 547 U.S. at 282, while leaving untouched the recipient's "interest in the remainder of the settlement," *Wos*, 568 U.S. at 634.

Third, to identify what portion of a settlement represents payments for medical expenses, States may not use "[a]n irrebuttable, one-size-fits-all statutory presumption." *Id.* at 639. Even so, States retain "considerable latitude to design administrative and judicial procedures to ensure a prompt and fair allocation of damages." *Id.* at 641. States can even

"adopt *ex ante* administrative criteria for allocating medical and nonmedical expenses, provided that these criteria are backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases." *Id.* at 643. Of course, "a judicial finding or approval of an allocation between medical and nonmedical damages—in the form of either a jury verdict, court decree, or stipulation binding on all parties"—also "end[s] . . . the matter." *Id.* at 638.

Fourth, a properly apportioned reimbursement of medical expenses is an exception to Medicaid's general anti-lien provision. *Ahlborn*, 547 U.S. at 284-85. That provision forbids States to impose a lien "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 thus "protects from state demand the portion of a beneficiary's tort recovery that the stipulation or judgment," or administrative or judicial process, "does not attribute to medical expenses." *Wos*, 568 U.S. at 638.

Though *Ahlborn* and *Wos* clarified much for States and Medicaid recipients, they do not address the dispositive question here: May States satisfy their federally mandated liens with settlement funds "attribut[able] to medical expenses," *id.*, even if those funds are not further designated specifically for *past* medical expenses?

D. That question arose after Respondent John Latham suffered a stroke in 2014. The first time he sought medical care for his symptoms, doctors examined him at a hospital, but did not do any

neurological tests. Instead they sent him home with pain and anti-nausea medication. Later that night, after his symptoms kept getting worse, Latham went to a different hospital. Doctors there performed a brain scan and diagnosed his stroke. All parties agree that Latham's stroke-related medical expenses totaled $104,065.32. Latham was a Medicaid recipient, and Utah paid the entire amount. *See* Pet. App. 4a.

Latham sued the first hospital for malpractice. He alleged that its negligent failure to diagnose his stroke left him permanently and seriously injured. *See id.* In accordance with Utah Code § 26-19-403, Petitioner ORS entered a collection agreement with Latham and let him take the lead in the suit. That agreement also gave Latham's lawyers their statutory 33.3 percent cut of the State's potential $104,065.32 recovery—equal to $34,688.44 in attorney's fees—thereby reducing Utah's maximum reimbursement for Latham's medical expenses to $69,376.88. *Id.* at 5a.

Latham and the hospital eventually settled his claim for $800,000. ORS participated in those negotiations and approved the settlement. To facilitate the settlement, Latham and ORS stipulated to these facts: Latham's claim against the hospital was worth more than $7.2 million. That included $104,065.32 in past medical expenses and more than $6.4 million in future medical care. In other words, the parties stipulated that more than $6.5 million of Latham's $7.2 million claim—roughly 90 percent of it—is attributable to medical expenses. *See id.*

But the parties did not stipulate to what portion of the $800,000 settlement was attributable to medical

expenses—either total medical expenses, or past ones, or future ones. *Id.* at 25a. Instead, they put the full value of Latham's stipulated past medical expenses, or $104,065.32, in a trust account until they could determine what portion of that amount was subject to Utah's federally mandated assignment.

1. Latham sued ORS in Utah state district court seeking to answer that question. He contended that, under *Ahlborn*, Utah could not recover more than $7,631.46, a figure he based on this math:

- The hospital accepted liability for 11 percent of his $7.2 million claim (the $800,000 settlement is 11 percent of $7.2 million);
- Utah's maximum claim is $69,376.88 ($104,065.32 in past medical expenses minus $34,688.44 in attorney's fees); and
- 11 percent of $69,376.88 equals $7,631.46.

The district court disagreed and entered judgment for ORS for $69,376.88, the maximum amount of Utah's claim. Because "the parties agree[d]" that 90 percent of Latham's $7.2 million claim was attributable to medical expenses, the district court thought it "reasonable to conclude that the same percentage of the settlement represents compensation for medical expenses." App. 30a. That meant 90 percent of Latham's $800,000 settlement—or $720,000—constituted payment for medical expenses. And because $720,000 is more than $69,376.88, the court awarded ORS the full amount of its assignment.

In doing so, the district court declined to further allocate the $720,000 representing medical expenses between past and future medical expenses, and to limit ORS's recovery to the former. "[N]othing in *Ahlborn* draws that distinction" even though *Ahlborn* repeatedly "refers to the state's interest in the settlement as that portion representing 'medical expenses.'" *Id.* The district court also relied on "the reasoning of" other "courts that do not restrict the state's recovery to past medical expenses" to buttress its conclusion. Id.

2. The Utah Supreme Court reversed, holding "that ORS cannot collect from Latham's settlement award beyond the portion that can be fairly apportioned to past medical expenses." Pet. App. 18a.

The court recognized that *Ahlborn* itself does not resolve this question because *Ahlborn* "did not expressly differentiate between past and future medical expenses in its holding." *Id.* at 10a. And it acknowledged that *Ahlborn*'s silence has resulted in "variance" in "lower courts throughout the nation" on this question. *Id.* & n.3.

Even so, the Utah Supreme Court thought that *Ahlborn* "in conjunction with the language from section 1396a(a)(25)(H)" limited a State's lien "to the portion of a settlement representing past medical expenses." *Id.* at 14a-15a. The court pointed to *Ahlborn*'s statement that § 1396a(a)(25)(H) "'does not sanction an assignment of rights to payment for *anything other than medical expenses*—not lost wages, not pain and suffering, not an inheritance.'" *Id.* at 14a (quoting *Ahlborn*, 547 U.S. at 281 (emphasis added by Utah

Supreme Court)). It coupled *Ahlborn* with § 1396a(a)(25)(H)'s text requiring State law to create a lien "to the extent payment has been made under the State plan for medical assistance for health care items or services furnished to an individual," and specifying that the State acquires "the rights of such individual to payment by any other party for such health care items or services." *Id.* at 13a (italics omitted).

The Utah Supreme Court acknowledged, however, that "the language in section 1396k" appears to "conflict" with its holding. *Id.* at 15a. That statute requires Medicaid recipients to "assign the State any rights . . . to payment for medical care from any third party," 42 U.S.C. § 1396k(a)(1)(A), and "makes no distinction between past and future payments for medical care," Pet. App. 15a. Compounding that conflict, § 1396k(b) instructs that when a State collects from third parties more than "is necessary to reimburse it for medical assistance payments," it must pay to the Medicaid recipient the "remainder." Yet "if a state's assignment of rights was limited to the portion of the settlement allocated for past medical expenses," no "remainder" for the recipient would ever exist, Pet. App. 16a—effectively making § 1396k(b) a nullity.

The Utah Supreme Court ultimately dismissed that apparent conflict by reasoning that § 1396k(b) "speaks about the assignment of rights generally," while § 1396a(a)(25)(H) "speaks directly to the issue presented here." Pet. App. 16a. Given the canon of construction favoring a specific provision over a general one when the two conflict, the court concluded that its reading of § 1396a(a)(25)(H) controls. *See id.* (citing

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012)).

In sum, even though "ORS seeks reimbursement for only past payments made on Latham's behalf"—that is, "ORS is not attempting to collect future medical expenses that Medicaid may or may not pay"—the Utah Supreme Court reversed the district court's holding that Utah could satisfy its lien with any portion of Latham's settlement attributable to medical expenses. Pet. App. 17a. And it remanded the case to the district court, instructing it to determine the portion of Latham's $800,000 settlement allocable to past medical expenses, and to limit Utah's reimbursement to that portion. *Id.* at 18a-22a.

REASONS FOR GRANTING THE PETITION

The Court should clarify whether States may satisfy their Medicaid liens from settlement funds for all medical expenses or from only settlement funds for past medical expenses.

A. Courts are squarely split on this question.

The opinion below deepens to 3-1 the direct, acknowledged split among State supreme courts about how a State satisfies its lien for payments of past medical expenses. May it seek reimbursement from all settlement funds received under its assigned right to "payment for medical care from any third party"? 42 U.S.C. § 1396k(a)(1)(A). Or from merely the portion of a settlement allocable to past medical expenses?

Like the Utah Supreme Court, the Florida and West Virginia Supreme Courts have held that a State may satisfy its lien from only that portion of a Medicaid recipient's settlement allocable specifically to past medical expenses. *Giraldo v. Agency for Health Care Admin.*, 248 So.3d 53, 56 (Fla. 2018) (holding "that federal law allows AHCA to lien only the past medical expenses portion of a Medicaid beneficiary's third-party tort recovery to satisfy its Medicaid lien"); *In re E.B.*, 729 S.E.2d 270, 292-93 (W. Va. 2012) ("Under *Ahlborn*," the State "may obtain reimbursement for medical expenses paid from only that portion of the settlement, compromise judgment, or award obtained by a recipient of Medicaid assistance that constitutes damages for past medical expenses."). The Florida Supreme Court read *Ahlborn* and *Wos* to "appear[] to . . . compel[]" this result; but "[e]ven if not compelled," it thought "the plain language" of § 1396a(a)(25)(H) "limit[ed] Florida's assignment rights (and lien) to settlement funds fairly allocable to past medical expenses." *Giraldo*, 248 So.3d at 56. The West Virginia Supreme Court similarly reached its holding "based on *Ahlborn*." *In re E.B.*, 729 S.E.2d at 292.

In direct disagreement, the Idaho Supreme Court has held that Idaho's Medicaid agency "is entitled to reimbursement for its past Medicaid payments" "from a Medicaid recipient's total award of damages for medical care whether for past, present, or future care." *In re Matey*, 213 P.3d 389, 394 (Idaho 2009). In so holding, the Idaho Supreme Court reasoned that *Ahlborn* "specifically stated that damages received for medical care did not constitute property subject to the anti-lien provision," and "made no distinction between

damages for past medical care and those for future medical care." *Id.*

Courts in other States also diverge on this question (though they are not courts of last resort). Federal district courts in Pennsylvania and Oklahoma, and a state trial court in New York, have adopted the same rule as Utah. *McKinney ex rel. Gage v. Phil. Housing Auth.*, No. 07-4432, 2010 WL 3364400, at *9 (E.D. Pa. Aug. 24, 2010) (Pennsylvania Department of Public Welfare "cannot draw on portions of the settlement designed to compensate for future medical expenses in order to reimburse itself for *past* medical expenditures"); *Price v. Wolford*, No. Civ-07-1076, 2008 WL 4722977, at *2 (W.D. Okla. Oct. 23, 2008) (Oklahoma Health Care Authority "is not entitled to recovery of the sum allotted for payment of" Medicaid recipient's "future medical expenses, as this sum is for future medical expenses yet to be incurred and not for past medical expenses incurred"); *Lugo ex rel. Lugo v. Beth Israel Med. Ctr.*, 819 N.Y.S.2d 892, 895 (N.Y. Sup. Ct. 2006) (holding *Ahlborn* "applies here to bar" the Department of Social Services "from recouping its lien from any settlement monies not allocated to past medical expenses").

In direct conflict, a federal district court in Colorado follows Idaho's approach, holding that the Colorado Department of Health Care Policy and Financing "may seek reimbursement for its past medical expenses from funds allocated to 'medical expenses,' regardless of whether those funds are allocated for past or future medical expenses." *I.P. ex rel. Cardenas v. Henneberry*, 795 F. Supp. 2d 1189, 1197 (D. Colo. 2011).

In short, there is a square, acknowledged 3-1 split among State courts of last resort about whether States violate federal law by recouping medical expenses from the portion of a settlement allocable to medical expenses. This constitutes a paradigmatic example of the type of "conflict[]" between "state court[s] of last resort" that warrants plenary review. S. Ct. R. 10(b). And perhaps because CMS appears not to have spoken on this issue, this split is already deeper than the one that the Court found certworthy in *Ahlborn*. *See* 547 U.S. at 272 (granting certiorari to resolve 2-1 split). That other lower courts have also squarely split 3-1 only confirms the national dissonance, and urgent need for this Court's guidance, on this issue.

B. Whether States can satisfy their Medicaid liens from the portion of a settlement for all medical expenses is a question of utmost importance.

The Court should resolve the split on this question not just because it is square and acknowledged. The issue is a critically important one for at least three reasons.

First, Medicaid costs the combined Federal and State fiscs nearly $600 *billion* annually. This price tag alone self-evidently confirms why States need clear rules to follow; what the law requires (and forbids) of public officials and employees responsible for administering more than half a trillion dollars annually should not vary based on which State they work for.

Second, as to this aspect of Medicaid specifically, Utah is already "in a tight spot." *Wos*, 568 U.S. at 649 (Roberts, C.J., dissenting). "If it fails to recover what it must, it violates federal law. If it takes a beneficiary's property beyond medical expenses, it violates federal law." *Id.* Yet given the square splits on this question, either Utah (and between two to five more States) or Idaho (and maybe Colorado) is violating one of those requirements. At least the four States with pronouncements from their highest courts operate under diametrically opposed rules governing how they "recover what" they "must." They also labor under squarely conflicting rules about which portion of a recipient's "property" they may not—indeed, must not—take to satisfy their federally mandated liens. These irreconcilable State-by-State variances in administering Medicaid are intolerable for States and Medicaid recipients.

Third, limiting a State's assignment to the portion of settlements allocable only to past medical expenses will significantly decrease the actual dollars States can recover under Medicaid's third-party liability provisions. That would undermine a key component of managing Medicaid costs. Taking just Utah as an example, ORS has recovered more than $32 million from third-party tortfeasors since the State's 2010 fiscal year. ORS Report, *supra* at 4. But if, going forward, ORS may seek reimbursement from only portions of settlements allocable to past medical expenses—and if Latham's math applies in every case—funds from third-party settlements available to reimburse Utah might decrease by as much as 90 percent. That would amount to millions of dollars every

year just in this State—and thus easily tens of millions of dollars every year (or more) nationally.

The consequences of leaving this square split unresolved are too serious to ignore. This Court's plenary review is needed—now.

C. The decision below is incorrect.

On the merits, the Utah Supreme Court's rule is wrong and should be reversed. Its holding proceeds from three flawed premises.

First, the Utah Supreme Court erred by reading §§ 1396a(a)(25)(H) and 1396k as zero-sum competing assignment provisions. The court picked § 1396a(a)(25)(H) over § 1396k because it read the former as an assignment that "speaks more specifically to the issue presented here" and the latter as "speak[ing] about the assignment of rights generally." Pet. App. 16a. So despite recognizing that its conclusion about § 1396a(a)(25)(H) "seems to conflict with the language of section 1396k," Pet. App. 15a, the court concluded that § 1396a(a)(25)(H) should "prevail[]," *id.* (internal quotation marks omitted).

But the court's analysis elides crucial distinctions between those two statutes. They do not compete on a general-versus-specific assignment battlefield; they work together to ensure States get reimbursed for a Medicaid recipient's past medical expenses. The first provision creates the State's lien: It requires States to have "in effect laws under which . . . the State is considered to have acquired the rights of" Medicaid recipients "to payment by any other party for such health care items or services" they receive under a

State plan. 42 U.S.C. § 1396a(a)(25)(H). The second provision specifies the broad rights to payment that recipients assign the State to satisfy that lien: Medicaid recipients must, "as a condition of eligibility for medical assistance under the State plan," "assign the State *any rights* . . . to payment for *medical care* from any third party." *Id.* § 1396k(a)(1)(A) (emphasis added).

The Utah Supreme Court erred by concluding that § 1396a defines the scope of a recipient's assignment. It does not. Instead, § 1396k does that work. Section 1396a then ensures that State law creates a lien on past medical expenses to be satisfied from the funds assigned them by § 1396k. And § 1396k does not give States an assignment limited merely to the right to payment for past medical expenses. No such distinction appears in the text. Instead, the statute "require[s]" a much broader assignment: The recipient assigns "*any rights* . . . to payment for *medical care* from any third party." *Id.* (emphasis added).

That first error precipitated the second—the Utah Supreme Court's failure to read § 1396k(a)'s assignment in context, together with § 1396k's other subsections. Recall that § 1396k(b) requires a State to do two things: (1) To "retain[]" "any amount collected . . . under an assignment made under the provisions of this section . . . as is necessary to reimburse it for medical assistance payments made" for a recipient; and (2) to "pa[y]" to the recipient "the remainder" left after it is reimbursed. *Id.* § 1396k(b). Oddly, despite recognizing that no remainder could exist (as § 1396k(b) contemplates) unless "the state

could draw from the entire portion of the settlement allocated to 'support' or 'payment for medical care,'" the Utah Supreme Court's only answer was a non-sequitur: its (erroneous) suggestion that § 1396a(a)(25)(H) "speaks more specifically to the issue presented here." Pet. App. 16a.

With no other answer, the Utah Supreme Court's holding makes § 1396k(b) a nullity—just as the court realized it would. *See id.* Under the Utah Supreme Court's reading, § 1396k(b) does no identifiable work. ORS's reading, in contrast, preserves § 1396k(b)'s role in Congress's design: States (1) collect funds corresponding to "*any rights* . . . to payment for medical care" for a Medicaid recipient—past or future, 42 U.S.C. § 1396k(a)(1)(A) (emphasis added); (2) "retain[]" from those funds that portion "necessary to reimburse it for medical assistance payments made" for the recipient, *id.* § 1396k(b)—that is, to satisfy their lien under §1396a(a)(25)(H); then (3) "pa[y]" "the remainder" to the recipient, *id.* § 1396k(b).

That is precisely how *Ahlborn* described § 1396k(b)—as a statute that "requires . . . the State be paid first out of any damages representing payments for medical care before the recipient can recovery any of her own costs for medical care." 547 U.S. at 282. Unless this Court grants review and reverses the judgment below, that will no longer occur in Utah, and will continue not to occur in Florida and West Virginia (and in parts of New York, Oklahoma, and Pennsylvania).

The Utah Supreme Court's third error—misreading *Ahlborn*—is derivative of its two statutory-

interpretation errors. The court could have avoided this unforced error; it correctly recognized that *Ahlborn* "did not expressly differentiate between past and future medical expenses in its holding." Pet. App. 10a. Despite that recognition, it still twice relied on statements in *Ahlborn* that it thought "help[ed] resolve this issue." *Id.* at 14a; *see also id.* at 17a (suggesting the "logic in *Ahlborn*" supports its holding).

Yet properly understood, *Ahlborn* does not support the judgment below. *Ahlborn* dealt only with whether a State "can lay claim to more than the portion of" a Medicaid recipient's "settlement that represents medical expenses." 547 U.S. at 280. The Court unanimously and correctly answered that question "no" based on the Medicaid statutes' plain text: "the statute does not sanction an assignment of rights to payment for anything other than medical expenses—not lost wages, not pain and suffering, not an inheritance." *Id.* at 281.

In other words, *Ahlborn* interpreted text in § 1396a(a)(25)(H) that both (1) requires States to place a lien on funds allocated as payment for medical expenses and (2) prohibits them from placing a lien on funds allocated to *other* types of tort damages. That section says nothing about the *source* of funds—the assignment—available to satisfy a State's required lien. As discussed, § 1396k(a)(1)(A)'s text does that work: It requires an assignment to "the State" of "*any rights* . . . to payment *for medical care*." (Emphasis added.) The text does not create an *intracategory* distinction between payment for *types* of medical care—past versus future.

Because *Ahlborn* concerned the scope of a State's lien, it does not shed light on the successive question of which funds federal law makes available to satisfy that lien. That alone explains why *Ahlborn* scrupulously discussed the Medicaid assignment as one for only "medical expenses" without breaking that assignment into the smaller, nontextual subcategories of past expenses and future expenses.[1]

D. This case is an excellent vehicle for addressing the question presented.

No vehicle problems should prevent this Court from deciding the question presented. First, the Utah Supreme Court's decision turns solely on federal law. Pet. App. 14a-15a (reading *Ahlborn* "in conjunction with the language of section 1396a(a)(25)(H)" to

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[1] *See* 547 U.S. at 280 ("medical expenses"); *id.* ("compensation for medical expenses"); *id.* at 281 ("payment for anything other than medical expenses"); *id.* at 282 ("damages representing payment for medical care"); *id.* ("portion of a settlement that represents payments for medical care"); *id.* at 284 ("proceeds designated as payments for medical care"); *id.* ("payments for medical care"); *id.* at 285 ("limited to payments for medical care"). *Wos* carefully followed *Ahlborn*'s lead on this point. *See* 568 U.S. at 633 (States must "seek reimbursement for medical expenses"); *id.* at 634 (*Ahlborn* did not explain "how to determine what portion of a settlement represents payment for medical care"); *id.* at 636 (holding North Carolina statute pre-empted because "it sets forth no process for determining what portion of a beneficiary's tort recovery is attributable to medical expenses"); *id.* at 638 (finding no pre-emption problem "[w]hen there has been a judicial finding or approval of an allocation between medical and nonmedical damages"); *id.* at 639 ("a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses").

"conclude that section [1396a(a)(25)(H)] establishes a ceiling on the portions of a settlement to which a lien may extend. And that ceiling limits the lien to the portion of a settlement representing past medical expenses."). So no jurisdictional impediment exists even though this issue arises from a State court of last resort.

Second, the question is squarely presented. The parties raised and briefed it in the state district court and before the Utah Supreme Court, meaning the Utah Supreme Court properly reached the question. The parties' positions and interests are firmly established, and every indicator suggests the parties remain committed to defending their respective positions before this Court.

Third, the parties litigated the issue on stipulated facts, just like the parties did in *Ahlborn*. The absence of disputed fact questions about the underlying value of Latham's claim, or about the value of his past or future medical expenses, makes this a clean vehicle to resolve the question.

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CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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