No. 19-7538

IN THE

SUPREME COURT of the UNITED STATES

PETITIONERS VICTORIA CARLSON, ET VIR,

v.

JODI HARPSTEAD, in her official capacity as Commissioner of the Minnesota Department of Human Services, et al.

Respondents.

ON PETITION FOR REHEARING TO THE
MINNESOTA SUPREME COURT

Supplemental Brief on Maine Community Health Options v. U.S. and Marlowe v. Leblanc

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This briefs a recent Court precedent[1] and a decision,[2] arguing Petitioners should be granted certiorari because (1) based on *Maine* the BCCPTA/MABC statutes set forth infra fairly interpreted mandate compensation including damages, entitling Victoria, based on government liability, to continuing MA-BC benefits as a recipient of medical assistance breast and cervical cancer treatment coverage (MA-BC), under Minn. Stat. §256B.057,subd.10(a)-(c), inter alia, while she is still in her covered cancer treatment. Further because she prevailed at the administrative hearing in MNDHS she is owed an unpaid entitlement to collect payments on appeal due the government's liability to pay; and (2) based on the Court's decision in *Marlowe*, the courts are taking corona extremely seriously, and it is inconceivable that this Court wants to allow state and local administrators of a federal breast cancer treatment coverage program to require women to continue exposing themselves to corona, seeking employment just to save money for the state, just because Minnesota refuses to appropriate enough money to meet their liabilities. The governing Minnesota state authorities have failed to provide *any* reasonable responses to these public crises, to breast cancer and Covid19, and so the judgment must fall to this Court.

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[1] See *Maine Community Health Options v. United States, 590 U. S. ____ (2020)* ("*Maine*"). Our last submission to the Court was the Petition for Rehearing April 24, 2020, based on the COVID19 environment's impact on the MA-BC program patients in Minnesota (Corona in Minnesota occurred subsequent to our filing January 27, 2020) and on the *Babb v. U.S.* (No. 18-882, U.S.) case decided April 6. *Maine* was decided April 27. Secondly, the Court order in *Marlowe v. LeBlanc*, 19A1039, (May 29, 2010) is briefed because it is a decision affecting Victoria's rights during the Covid pandemic, one of the grounds of the pending petition for rehearing.

[2] Docket order May 29 19A1039, *Marlowe v. LeBlanc*, 20-30276 (5th Cir. 2020)

We are seeking remand to the Minnesota Supreme Court in this appeal, precisely for the reasons raised in *Marlowe* and in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Both the administration of MA-BC and medical assistance federal programs more generally are "intricately bound up with state laws, regulations, and procedures" *Marlowe* deals with Covid19, the grounds for the rehearing petition. Breast cancer itself is a *greater* public crisis for the hundreds of women being aged out by the state. It's 100% deadly if not caught timely and appropriately treated. The state with its intricate administration and its stated obligations to the federal government, has a completely irrational and unreasonable response to breast cancer and to Covid19.

Because have prevailed at the evidentiary hearing of the respondent Commissioner, showing her MA-BC benefits were improperly terminated, and because Victoria is still in treatment but is receiving degraded coverage and treatment, and now risks Covid19, we ask you protect Victoria immediately, maintaining her benefits to which she is entitled while this critical case based on a public crisis pandemic is resolved according to the law and Constitution. We think this should be decided promptly. The record is plain--because of respondents' failure to protect her against the public crisis of breast cancer and now Covid19 and other medical issues to which she is more vulnerable--it should be decided now. We hope respondents have to respond to this. We ask the Court to immediately order respondents to restore her MA-BC benefits payments while this is resolved.

Marlowe

Considering the district court decision enjoining Louisiana prison officials to produce a Covid19 safety plan The 5th Circuit found (*Marlowe v. LeBlanc,* No. 20-30276 5th Cir. Apr. 27, 2020):

> "*We do not question that COVID-19 presents a risk of serious harm* to those confined in prisons, nor that Plaintiff, as a diabetic, *is particularly vulnerable to the virus's effects....*"[3] [p.5] *In re Abbott*, 954 F.3d 772, 792 (5th Cir. 2020) ("As *Jacobson* repeatedly instructs, . . . if the choice is between two reasonable responses to a public crisis, *the judgment must be left to the governing state authorities.*[4] 'It is *no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease.*' . . . Such authority properly belongs to the legislative and executive branches of the governing authority." (second alteration in original) (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30, 25 S. Ct. 358, 363 (1905)))." p. 8 "..the Supreme Court has repeatedly warned that "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94, 126 S. Ct. 2378, 2388 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92, 93 S. Ct. 1827, 1837 (1973)).") p.8 ibid.

Similarly petitioners in our rehearing petition set forth that:

> "They [women aged out of the MA-BC treatment coverage but still needing cancer treatment] are at greater risk than the younger patients favored by respondents on the basis of age.[5] Moreover those with cancer as a pre-existing condition are eight times as likely, according to CDC data provided to Victoria by her employer, to die from COVID19 if she contracts it because of her pre-existing condition. See App.i:ls CDC notice to Whelan employees).

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[3] Likewise Victoria and other women in breast cancer treatment are at risk of serious harm when aged out of Medicare and forced to work in #Covid19 to pay for the medical care the Respondents refuse cover, and Victoria as a cancer patient is particularly vulnerable to the virus' effect.

[4] Here those state authorities, the legislative and executive branches, with judicial review under the administrative procedure act Minn.Stat.14.69 have made all the choices of response to breast cancer as a public crisis but they are not reasonable or lawful.

[5] The court below holds in effect Minnesota has not appropriated money for continuing care of the aged out patients. This violates the statutes mandating compensation for medical care during breast cancer treatment for eligible recipients in MA-BC see infra. E.g. at App.a10 the court reasons refusal to pay statutory liabilities based on "the eligibility age for Medicare, and accordingly, a reduced need for MA-BC benefits". And also the "MA-BC program intended..exclusion of individuals 65 and older...for ensuring that *adequate funding remains,:*

> [Victoria has] been in treatment with degraded care since 2016 and now during coronavirus." (Pet.Rehearing 2-3)

All the *LeBlanc* courts involved Texas and Louisiana courts agree this is a horrible disease and a public crisis. But Minnesota's legislative and executive branches are to "determin[e] which one of two modes [i]s likely to be the most effective for the protection of the public against disease." By refusing to include them based on age Minnesota provides *no* modes for these patients against these public crises.

Respondents refuse to conduct an impact study of aging women out of treatment coverage. Petitioners maintain *Pediatric Specialty Care v. Arkansas DHS*, No. 03-1015, 03-2616 (8th Cir. 2004)[6] Under this comparable precedent "ADHS had done nothing to determine the effect that terminating elements of the ..program would have on these principles". And the federal district court had required this. *Jacobson* also requires an impact study in effect, but delegates it to the state legislative and executive functions in the first instance. *Jacobson* was decided in 1905. Today we have a federal-state program to treat participants for breast cancer.

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[6] "We affirm...that ADHS may not alter the..program until it conducts an impact study to ensure that the changes are consistent with the principles of economy, efficiency, quality of care, and access to care." 42 U.S.C. § 1396a(a)(30)(A) mandates changes in methods and procedures of payment must be consistent with the principles of economy, efficiency, quality of care, and equal access...ADHS had done nothing to determine the effect that terminating elements of the..program would have on these principles,the district court enjoined ADHS from terminating the program until it completed an impact study. The district court further found that for a number of years, Arkansas had been trying to curtail its early intervention day treatment services program. The court noted that the decision seemed to be based on improper motivations, and would result in a loss of medical services for needy children. Finding that such conduct shocked the conscience.."Id.p.Background.

Petitioners properly pursue that unpaid liability: In the Respondent Commissioner's DHS administrative appeal process; In judicial review in the courts of appeal (district court and MN Court of Appeals) and on petition to this Court.

The BCCPTA/MABC statutes mandating compensation undercut Mn Court of Appeals refusal to pay Victoria's medical care during cancer treatment

The statutory and Constitutional basis for the liability to pay during the limitations period and the liability to pay on appeal are clear under the *Maine* precedent. Respondents *must* pay based on the law and Constitution.

The court below p.15 "[S]ympathize[s], acknowledge[s]..increased financial burden...removal from the MABC program" but cites §256B.057subd.10(a) as curtailing the government's liability to pay for Victoria's medical care during her breast cancer treatment. This Court in *Maine* wrote "States who observe their engagements . . . are respected and trusted: while the reverse is the fate of those . . . who pursue an opposite conduct." citing Hamilton, see 2f conclud "Centuries later, this Court's case law still concurs." Minnesota, through respondents, refuses to observe their engagements and must be corrected to save or preserve thousands of lives across America.

Taken together with the U.S. Const. 14th and 10th Ams. the MA-BC, BCCPTA falls comfortably within the class of statutes that permit recovery of money damages in administrative appeals and APA reviews including this Court. This finding is bolstered by MA-BC and BCCPTA focus on compensating medical

providers for past conduct. And there is no separate remedial scheme supplanting the MNDHS and Minn.APA procedures' power to adjudicate petitioners' claims.

Appropriations

An appropriations argument, that the liability is extinguished because the government appropriates only for those in the program treatment who have not reached 65, "requires the Government to show 'something more than the mere omission to appropriate a sufficient sum.' *United States v. Vulte*, 233 U. S. 509 cited in *Maine* at 3. The court below finds "MA-BC program intended..exclusion of individuals 65 and older...for ensuring that *adequate funding remains,:*

As in *Maine* p.1 the legal mandates including BCCPTA and MABC, appropriated funds for this program but did not limit the specific amounts that the Government--Congress, the Minnesota Legislature or the Ramsey County respondents might pay for Victoria's treatment. Nor was the program required to be budget neutral. The initial state requirements relied on by the court below cannot stop or even limit the government's obligations and liability.

The court relied on the program's [initial] eligibility requirements set forth in statute, Minn.Stat.§256B.057,subd.10(a)[7] alone (in addition to language infra from the elderly program) and cites the "relevant part", "under the age of 65, not otherwise eligible for certain medical assistance, and 'not otherwise covered under creditable coverage.'"*Id.2-3* But there is no dispute Victoria did meet these and so they are no longer relevant. What now *is* relevant is the limitations period the

[7] This corresponds to 42 U.S.C. 1396a(aa) federal statute.

Legislature specifically provided in Subd.10(b) Id. that "Medical assistance provided for an eligible person under this subdivision *shall be limited* to services provided during the period that the person receives treatment for breast or cervical cancer." The "shall" is mandatory money language as in *Maine*. An eligible person is an eligible recipient with the protections of *Goldberg*, *Regents v. Roth* and cases therein with 14th Am. due process vested rights in the payment for medical care that can only be terminated through *Goldberg* due process. Ignoring the legislative intent to provide an end of coverage rule Subd.10(b) violates rules of construction and certainly does not relieve the government of its liability to continue to pay under the mandatory language of the limitations period provision.

To attempt to justify limiting or stopping the payments on the obligations and liability, the court below recounts [Ramsey] "county determined that appellant no longer met the eligibility criteria, but instead qualified for medical assistance for the aged."*Id.2* This supposedly "creditable coverage" for the cancer treatment coverage she qualified for, "required, based on appellant's income, a $433 per month "spenddown" payment. Minn.Stat.§256B.055,subd.7(2018) (setting forth eligibility requirements for medical assistance for the aged)."*Id.3* Certainly under *Maine*'s use of "clear and manifest" standard *Morton v. Mancari*, 417 U. S. 535, this Court will regard each of two statutes effective if there is no intent by Congress to replace MA-BC with MA-EP or for the county to "transfer" Victoria to the spenddown program. To rely on Subd.10(a) or 42 U.S.C. §1396a(a)(10)(G)(XIV) to terminate the

liability would require clear and manifest language, not "plain language" precluding judicial inquiry.

Respondents determined the spenddown effectively barred Victoria from any medical assistance at all. The spenddown, justified by this Court's *Schweiker v. Hogan*, 457U.S.569(1982), simply does not work as a cancer treatment program to complete MA-BC patients' care. And Congress nowhere indicates that it intends to limit the government's liability, or states' liabilities to pay for medical care of the patients in the program with the elderly program.

Clearly as *Maine* p.3 concluded,

> "the Government [is required] to show "something more than the mere omission to appropriate a sufficient sum." *United States v. Vulte*, 233 U. S. 509, 515...appropriations riders[8] here did not manifestly repeal or discharge the Government's uncapped obligation, see *Langston*, 118 U. S., at 394, and do not indicate "any other purpose than the disbursement of a sum of money for the particular fiscal years," *Vulte*, 233 U. S., at 514.

The Legislature and Congress clearly did not meet the *Maine* requirement to to reduce Victoria's medical care payments and respondents remain liable. The obligation remains in effect and so the liability to Victoria remains unpaid and must be paid and we're asking this Court to order that.

The government's liability to pay Victoria

There's no dispute that the government's spending obligation was matured into a liability, when providers diagnosed her and when she participated as a patient in the program. The U.S.Const. 10th Am. protects her right to take those

[8] Here the objectionable inference is that the uncapped appropriations contemplated a "transfer" of random women to spenddowns to pay *into* the medical funds.

very actions because they are neither delegated to the United States nor reserved to the State itself (respondents). Hence the court below violates our 10th Amendment rights, viz. to maintain this liability in place until her treatment is finished according to Subd.10(b). They cannot dissolve this bond: the liability. This includes liability to continue payment of benefits to Victoria's medical providers on appeal because Petitioners prevailed at the MNDHS against the Ramsey County respondents. "'[A]n appropriation per se merely imposes limitations upon the Government's own agents,'" but "'its insufficiency does not pay the Government's debts, nor cancel its obligations.'" *Ferris v. United States*, 27 Ct. Cl. 542 (1892) accord, GAO Redbook 2–63 ("The mere failure to appropriate sufficient funds is not enough").

Instead, respondents and the Minnesota courts insist "Medicaid is a program of limited funds that cannot provide meaningful benefits to everyone. See *Schweiker v. Hogan*, 457, U.S. 569, 598 (1982)." Pet.App.19a These kinds of rules simply won't work for cancer patients since respondents refuse to provide meaningful benefits by paying their lawful liabilities.

In addition to the clear mandatory money language of Subd.10(b): "Medical assistance provided...shall be limited" to the time Victoria needs treatment both the federal and state statutory scheme is full of adjacent provisions underscoring that nature. "The Government may incur an obligation directly through statutory language, without also providing details about how the obligation must be satisfied. [Citing] *United States v. Langston*, 118 U. S. 389." *Maine* at 2.

Equal Access for all is mandated by impact studies in 42 U.S.C. §1396(a)(10)(G). § 1396(a)(10)(A)(XVIII) i,ii requires full and equal services for all medical assistance, in scope and duration. § 1396a(a)(1),(2),(3) makes the financial obligations mandatory on all state and local units including respondents. HHS can stop payments to the state if it does not comply by § 1396c. Extensive provisions in Minn.256.045, 0451 enforce Petitioner's rights to demand these payments for the doctors and these are backed up by the requirements of the 14th Am. And so on.

The obligation,and the liability are clear, and we ask the Court to enforce this critical life-saving law by ordering payment of these liabilities.

I Stephen Carlson certify the brief meets limits, being 2,860 words including footnotes.

Stephen W Carlson

For the Supplemental reasons above taking into account the Court's additional actions in *Maine Community Health Options*, and *Marlowe v LeBlanc*, Petitioners Victoria and Stephen Carlson respectfully request the Petition for Rehearing and certiorari be granted.

Victoria L. Carlson
Victoria L. Carlson
June 5, 2020

Stephen W. Carlson
6 v 5, '20