No. ____

In the
Supreme Court of the United States

CHS-GLENWELL INC., ET AL.,
Petitioners,

v.

OHIO DEPARTMENT OF MEDICAID,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Ohio's Medicaid agency, in an administrative hearing, erroneously interpreted an inapplicable federal regulation. On appeal the common pleas court rejected the erroneous interpretation. The appellate court gave deference to the agency's interpretation, rejected the lower court's interpretation and reinstated the agency's misapplication of the federal rule. The Questions presented are:

1. Is a state Medicaid agency entitled to deference in judicial review of the agency's interpretation of an unambiguous, inapplicable federal Medicare regulation?

2. Is due process denied when a federal regulation is construed and applied by a state agency extending the federal regulation's application beyond the adopting federal agency's construction and application of the rule unless the state agency has adopted as a rule its interpretation prior to application of the change to those affected?

PARTIES TO THE PROCEEDING

Petitioners are CHS-Glenwell, Inc, CHS-Ohio Valley, Inc., CHS-Miami Valley, Inc., CHS-Greater Cincinnati, Inc., and CHS-Lake Erie, Inc. (collectively "CHS"). Respondent is the Ohio Department of Medicaid (at the time of the audits at issue the state Medicaid agency was named the Ohio Department of Job and Family Services, both collectively referred to as "ODM.").

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

CORPORATE DISCLOSURE STATEMENT

Petitioners are each Ohio proprietary corporations owned by Foundations Health, LLC, a privately-held Ohio limited liability company with no parent company and no corporate ownership by any publicly traded company.

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ODM's appointed hearing examiner on October 31, 2015, issued a Report and Recommendation ("Report" App. 285) finding all issues for ODM. ODM issued an adjudication order October 3, 2016 accepting the hearing examiner's Report (App. 113). Appeal was taken by CHS to the Franklin County Common Pleas Court on October 14, 2016. The Common Pleas Court on October 30, 2018 issued a Decision and Entry ("CPC Decision" App. 96) affirming in part and reversing in part ODM's Adjudication Order. On November 26, 2018 ODM appealed to the Tenth District Court of Appeals. CHS filed a notice of cross-appeal November 27, 2018. The Tenth District Court of Appeals issued a decision February 13, 2020, sustaining ODM's assignment of error and overruling CHS's assignments of error (App. 27). CHS requested reconsideration, denied on October 22, 2020 (App. 2). Notice of Appeal to the Supreme Court of Ohio was filed December 14, 2020. By entry filed February 16, 2021 the Supreme Court of Ohio declined to accept jurisdiction (App. 1).

JURISDICTION

The Supreme Court of Ohio declined to accept jurisdiction February 16, 2021. (*02/16/2021 Case Announcements*, 2021-Ohio-375) App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

FEDERAL REGULATIONS INVOLVED

42 C.F.R. §413.100

STATEMENT OF THE CASE

Petitioners "CHS" are part of a group of commonly owned affiliated companies, engaged in the business of delivering long term health care services to occupants of CHS's nursing homes (24 total affiliated Ohio facilities for the period at issue); the costs of residents' care are reimbursed by Medicaid, Medicare and other payers. Services are delivered through a combination of employees and contracted goods and services from independent commercial enterprises.

A. Rate setting methods for inpatient Medicare and Medicaid services.

The cost of services' delivered and other operating costs are reported to Medicare and state Medicaid agencies on "cost reports," filed annually. Medicaid cost reports are used to set rates for defined future periods, after "desk audit" review by ODM. Rates are generally the rate for one day's services to a resident. Cost reports filed with ODM are audited by private contractors and the final results are used to reduce the rate paid in the period the cost report was used to set the rate if the cost report had unallowable, unreasonable, or other costs excluded.

Medicare and Medicaid have reimbursed hospitals and nursing homes under two general types of systems: (1) retrospective: where cost reports for the payment period are audited, compared to the rates paid, and payments adjusted up or down, assuring reasonable costs are reimbursed and non-allowable costs are removed. Medicare and Medicaid consider retrospective system payments during the rate payment period to be

"interim" payments. 42 C.F.R. 413.1(a); and (2) prospective: where rates are set on a prior period's reported cost, adjusted for anticipated inflation, and paid without adjustment for actual costs in the rate paid period. If the rate setting cost report included unallowable costs payments made in the rate period are adjusted down. The payer recoups the improper amount paid. In addition, prospective rates are never adjusted to exceed the rate paid (contrary to a retrospective system). Ohio had a "retrospective" reimbursement system before the period at issue (calendar 2003 cost report for rates paid in subsequent state fiscal years). (App. 106).

B. CHS audits by ODM's auditors and the administrative hearing.

CHS filed cost reports for the annual period ending December 31, 2003. The rate paid in 2003 was calculated from 2001 filed cost reports. The 2003 cost report was used to set rates for 2004, and 2005. Included in Petitioners' cost reports were payments to two independent vendors of $12,000,000.00 for services, paid by issuance of long-term promissory notes that were timely and fully paid.

All twenty-four Carington Healthcare Systems' facilities had contracts with these two vendors. Each facility had a common Master Agreement, each Master Agreement had a separate Services and Rate Addendum delineating facility specific services and charges for those services. The rates varied between facilities based on the specific services contracted. Only Petitioner CHS facilities had a disallowance proposed by ODM's contracted auditor for these contracted

payments claiming a related party was present and inadequate documentation failed to support the costs reported. Medicare made no disallowance of these contracted services.

CHS timely requested administrative hearings. The first part of the hearing process commenced October 5, 2009; the second phase commenced December 10, 2012. After initial document exchange ODM agreed there was no related party present and adequate documentation supported the costs on the seven[1] cost reports filed, removing the disallowances. Hearing proceeded on other issues and after more than a year elapsed ODM resurrected the disallowance of these contract costs on a new reason - application of a selected part of the federal Medicare retrospective system's Liquidation of Liabilities Rule (42 C.F.R. 413.100), reinstating the disallowance for the Petitioners CHS facilities' costs. This had no effect on the other 17 CHS facilities' audits or rates whose contracts costs were not disallowed by ODM's auditors.

In its novel approach to resurrect its disallowance, ODM chose to take a part of the federal rule (the part that disallows costs of a short-term liability not liquidated within a year of the filing of the cost report reporting the cost), apply it to the now re-contested costs while ignoring the part that requires reimbursement of the cost in the year in which the

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[1] There were 7 audit reports of 5 corporate entities, two of which had corporate mergers in 2003 which ODM treated as separate entities for audit purposes.

provider does liquidate the costs. The costs were fully and timely liquidated by CHS.

ODM stipulated the cost of the 2003 contracts were reasonable and otherwise allowable Medicaid costs, thus only the selective application of part of a federal rule allowed ODM to recoup the prospective rate funds expended for Medicaid patient care seven years prior. See R.C.§5165.01(B), and (MM) defining the terms "reasonable" and "allowable costs."

CHS presented in the administrative hearing expert testimony from John Hapchuk, a recently retired Senior Executive Service, Department of Health and Human Services ("HHS") accountant, instrumental in developing Medicare's Liquidation of Liabilities Rule. For 40 years he was the head of HHS's bureau charged with interpreting all federal Medicare audit rules and standards nationally to assure uniform application. He was recognized as an expert and was adamant "…the Liquidation of Liabilities Rule does not apply to the facts…" in this matter.

Following administrative hearing, before a hearing examiner who has never in her long career ruled against ODM in any provider hearings, ODM issued in its favor an adjudication order, timely appealed to the common pleas court.

C. Appeal to and decision of the Franklin County Common Pleas Court and Court of Appeals decision.

That court found the adjudication order was not in accordance with law and vacated it. (App. 96, "CPC Decision") The CPC Decision found Medicare's

retrospective rate Liquidation of Liabilities Rule cannot be applied in a prospective rate system, the notes were long term liabilities, and the Liquidation Rule had no application to long term debts. The CPC Decision relied on federal authorities (*Abington Mem. Hosp, v. Burwell*, 216 F.Supp.3d 110, 122 (D.D.C. 2016), "The 1995 Final Rule was…explicitly made inapplicable to inpatient care that was subject to the [prospective payment system] scheme." (citations omitted)) and John Hapchuk's expert report and opinion in its ruling.

The Court of Appeals ruling on a question of law (App. 27) found the common pleas court abused its discretion, approved the use of the Liquidation Rule as "applicable to Ohio Medicaid cost reports," and reinstated the adjudication order. The Court of Appeals never considered the restrictive language of Medicare's application of the Liquidation Rule to only a retrospective reimbursement system, deferring to ODM's construction of the federal rule, sidestepped the *Abington* ruling on a fact basis, deferred to the testimony of ODM's witnesses citing the "special expertise" of administrative agencies. The appellate court never addressed ODM's inability to apply all of the Liquidation Rule, or the retroactivity of this new interpretation. Reconsideration was requested and en banc hearing, both denied on October 26, 2020. The Supreme Court of Ohio declined review.

ARGUMENT

"It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other. This is of vital

concern to States." *Idaho v. Couer d'Alene Tribe of Idaho,* 521, U.DS. 261, 276 (1997). Ohio's courts have failed its citizens and accords excessive deference to administrative agencies even with no ambiguity present.

Most citizens sole encounter with a state's judicial system is not in a court any longer, but the "quasi-judicial" administrative hearing, where few, if any, rules govern evidence, hearsay abounds, and the agency controls the hearing examiner (by payment and rules of procedure). The agency is the legislature, prosecutor, and judge.

A Washington Post op-ed states[2]:

> The rise of the fourth branch has been at the expense of Congress's lawmaking authority. In fact, the vast majority of 'laws' governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats. One study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.

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[2] J. Turley, Professor, George Washington Univ, Washington Post, May 24, 2013: https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html ("Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.")

Administrative agencies judicial powers are often called "quasi-judicial," but "quasi" is a term candidly defined as "generally implying that what it qualifies is in some degree fictitious or unreal."[3] Given how this action progressed this definition is fitting.

A. 42 C.F.R. 431.100 Cannot apply to a prospective system of reimbursement.

The Liquidation of Liabilities Rule in a retrospective system is a *deferral* of payment, but when only part of the rule is applied in a prospective system it is a *denial* of payment, contrary to the rule's explicit intent and application.

ODM chose to read it differently this time, and for just Petitioners. Other audited CHS facilities reporting the same reasonable costs, paid in the same manner, to the same venders had no audit disallowance. The evidence showed other CHS facilities' ODM auditors examined the same Master contracts. Two expert CPA's testified, without rebuttal, the Liquidation of Liabilities Rule had never before been applied in this manner in Ohio.

ODM changed the reason for disallowance of the costs of contracted services by selecting only the part of the Medicare Liquidation Rule beneficial to ODM (ignoring its restrictive application to only retrospective reimbursement systems) and disallowed the cost of the contracted services, while stipulating the costs were reasonable, actual, and necessary costs. The CPC

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[3] (https://duckduckgo.com/?t=ffab&q=quasi+defined&atb=v198-1&ia=definition).

Decision saw through ODM's scheme, but the Tenth District deferred to ODM, making no effort to determine whether ambiguity was present or whether ODM was properly entitled to deference.

B. Use of only part of the Liquidation of Liabilities Rule Renders the "Rule" as applied absurd.

The Liquidation of Liabilities Rule, adopted June 27, 1995, was inserted into a longstanding set of regulations governing Medicare's retrospective reimbursement system. As such it is to be read as part of the mechanism used to meet the objectives of 42 C.F.R. Part 413 Subpart F and not to conflict with its companion rules.

The "General Rules" (42 C.F.R. 413.1) governing retrospective reimbursement, establish why Medicare limited its Liquidation of Liabilities Rule to a retrospective reimbursement system. The goal was to reimburse reasonable allowable costs while preventing the reporting of costs used to set an interim rate (exclusively in a retrospective rate system) and excluding costs accrued and reported but never paid.

All cost reports use an accrual basis (booked when the expense is incurred) as opposed to a cash basis (booked when the expense is paid). Medicare thus required short term liabilities to be liquidated within a defined time to remain allowable on the cost report used to set the interim rate. If that did not happen Medicare would disallow the expense from the interim rate and lower the rate paid.

But that did not end the ability of a provider to pay the costs and later recoup the expense. This latter provision does not, and cannot, happen in a prospective rate system, where the rate allowed is never adjusted to account for costs accrued or paid in the period the prospective rate is paid to providers. The Liquidation of Liabilities Rule expressly allows a provider to include on a later cost report an untimely paid allowable cost accrued and reported in an earlier period and receive Medicare payment for its share of the allowable cost paid late, a prospective system does not allow such subsequent reporting.

The reason this is allowed in a retrospective reimbursement system is explained in the "Cost reimbursement: General" section of the retrospective reimbursement rules (42 C.F.R. 413.5): Reimbursement is to be "fair and equitable" such that "[a]ll necessary and proper expenses…are recognized." (*Id*. at (a)); No part of the Medicare share of costs is to be "borne by other patients." (*Id*.); Current payments should be sufficient so that a provider does not have to "put up money for the purchase of goods and services well before they receive reimbursement." (*Id.* at (b)(1)); and "in addition to current payment, there should be retroactive adjustment so that increases in costs are taken fully into account as they actually occurred, not just prospectively." (*Id*. at (b)(2)).

The phrase above, "not just prospectively," is as telling as the Ohio legislative directive to ODM that the "hierarchy of rules" (R.C.5111.27(B)(1)-(8)) used must be "applicable" rules. In a Medicare prospective rate system to pay the expense in a later period to have

it put in the rate would be an extended deferral of reimbursement the language of 42 C.F.R. 413.5(b)(1) requires be prevented; hence HHS recognized what the expert testimony of Hapchuk and Cummins stated, and the Common Pleas Judge recognized, the Liquidation of Liabilities Rule cannot be applied in a prospective rate system.

Since Medicare stated expressly the subsequent payment of an untimely liquidated expenses will be reimbursed by Medicare, and under ODM's prospective rate system these costs are never paid, the appeals court's deference to use the piece of the federal rule ODM likes creates an absurd result, preventing reimbursement of reasonable costs.

C. The Tenth District did not apply the *Chevron* standard.

The deference granted does not meet the *Chevron USA v. Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984), standard and exceeds any reasonable application of this Court's deference standard. In addition, the Court of Appeals decision gave complete deference to ODM in its interpretation of federal Medicare law in spite of federal authority such deference was not due a state Medicaid agency. *Amisub (PSL), Inc. v. St. of Colorado Dept. of Social Services,* 879 F.2d 789, 795-6 (10th Cir. 1989) holds a state Medicaid agency is not entitled to deference in the interpretation of federal Medicare law.

An egregious due process denial result is achieved by the judiciary's unwillingness to conduct a proper

appellate review allowing ODM to "put its thumb on the scale."

Chevron requires a 3-part test before the application of deference (also *National Cable Telecommunications Ass'n v. Brand X Internet Services,* 125 S. Ct. 2668 (2005)): deference is given if the rule is within the agency's jurisdiction, the rule is ambiguous, and the construction is reasonable. 467 U.S. at 843-844, and n. 11, 865-866.") *Id*. at 969.

The court of appeals did no analysis of *Chevron*'s three-part test of ODM's partial application of the federal Liquidation of Liabilities Rule. The facts are: (1) ODM does not administer the Medicare Program, the U.S. Dept. of Health and Human Services does; (2) There is no ambiguity present. The federal rule at issue is contained in 42 C.F.R. Part 413, Subpart F, which explicitly applies only to retrospective reimbursement. Prospective reimbursement of skilled nursing facilities is a completely different area of federal rules, 42 C.F.R Part 431, Subpart J. The rule is not "applicable," Ohio was a prospective reimbursement system in the period at issue; and (3) ODM's construction is unreasonable and retroactively applied.

When the Liquidation of Liabilities Rule was first adopted the federal agency's opening sentences under "Background" state: "This policy pertains to all services furnished by providers other than…skilled nursing facilities choosing to be paid on a prospective payment basis;" (60 Fed. Reg. No. 123, pg. 33126), "the cost can be claimed in the cost reporting period when the liquidation of the liability occurs, that is, when an

actual expenditure takes place,…" (*Id*, at 33131); it also has no application to long term liabilities (as the CHS notes paid were found to be by the CPC Decision). (Id.)

When HHS publishes rules regarding inpatient services reimbursement it readily demonstrates it understands the distinction between retrospective and prospective systems. HHS makes the distinction clearly when it published rules by stating which reimbursement system the new rule has application. For prospective system changes see: 73 Fed. Reg. No. 193, 57888 (October 3, 2008), 67 Fed. Reg. No. 148, 49982 (August 1, 2002), 63 Fed. Reg. No. 147, 40954 (July 31, 1998); for retrospective system changes, 51 Fed. Reg. 34793 (September 30,1986).

Clearly Medicare never intended to use the Liquidation of Liabilities Rule as a club to deny payment for stipulated allowable costs. The retroactive partial application of the federal rule is contrary to the explicit intent and application of the rule when adopted and as thereafter applied by Medicare. Due process was denied.

D. ODM has no special expertise in application of Medicare retrospective reimbursement rules.

"Federal courts generally defer to a state agency's interpretation of those statutes it is charged with enforcing, but not to its interpretation of federal statutes it is not charged with enforcing. *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507 (2d Cir.2002) ; *see also Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy*, 959 F.2d 149, 152 (9th

Cir.1992)." *City of Bangor v. Citizens Communications Co.*, 532 F 3d. 70, 94 (1st Cir. 2008).

ODM has a view of its powers extending beyond any reasonable authority to supplant with regulations enacted statutes. In practice ODM holds Ohio's legislature in some disdain; for example, in recent discovery by a Medicaid provider an ODM Director's email was produced outlining recommendations of ODM staff "…to change the statutes and cost report instructions in order to align with the department's intentions." Ohio's executive branch has lost sight of the first three words of the Ohio Constitution, Art. II, §1, "The legislative power of the state shall be vested in a general assembly."

Here the Tenth District deferred to ODM's staff construction of an unambiguous federal rule without considering if such was reasonable, let alone retroactive. (App. 59).

ODM interprets statutes consistent with its desires and directions, not with any regard to legislative intent. The same email string referenced above contains an email from the Governor's Office stating "'[L]egislators wanted and the Administration agreed to work to create a rate add-on for critical access nursing homes…This is the right thing to do….However, because it would be an increase in spending on [Nursing Facilities], something the Governor has said he does not want to do, we need to discuss." It is not over- reach to see Ohio's executive branch feels it controls Ohio's legislature, and since it gets deference from a court reviewing its rules' application it will win far more times than it loses.

Small wonder then ODM has doggedly pursued Petitioner CHS to recoup monies, to the point of butchering an inapplicable federal regulation to fit it into a system where only part of the rule is applied – the part that benefits ODM.

If this Court's *Chevron* standard permits this chicanery it needs review and modification. What is not present here are the "genuinely ambiguous regulations" that the *Auer* deference permits. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Nor is there present a "reasonable agency reading" and in point every "especially important markers" for *Auer* deference is lacking; consider the manner this interpretation came about - it was an ad hoc decision in the midst of administrative hearing, not an "authoritative or official position" (*Kisor*, infra). Rather this is the essence of the "convenient litigating position…[and] a new interpretation that creates 'unfair surprise' to regulated parties" this Court voiced its disapproval in *Kisor*.

In *Kisor* this Court declined to reverse the *Chevron/Auer* judicially created doctrine of deference for the stated reason that Kisor's arguments were based on the position the doctrine was "wrong or poorly reasoned," the Circuit Court "jumped the gun in declaring the VA's regulation ambiguous" before using its interpretative tools. *Kisor* notes the reason agencies get *Auer* deference - the "agency that 'wrote the regulation' will often have direct insight into what the rule was intended to mean." (*Kisor* at 2413).

Here the head of the federal agency that wrote the rule testified and his testimony was ignored by the

Court of Appeals. If there were "genuine ambiguity" ("And when we use that term we mean it" *Kisor* at 2415) present in this action why would the Court of Appeals ignore the testimony of Hapchuk? *Kisor* notes the obligation of courts "to perform their reviewing and restraining function." After all, "Want to know what a rule means? Ask its author." (*Kisor* at 2413.)

The Court of Appeals incanted "deference" and stopped further review, permitting a convenient litigating position to take back millions of dollars by creating a court sanctioned rule bypassing the statutory rule adoption process. This new "rule" was never before applied and never since applied to any other provider.

When *Kisor* refers to the "mixed messages we have sent" about deference, Petitioners experienced what this Court meant. This is not the sort of "hard interpretative conundrum" the Court noted could still be solved; after all Hapchuk was clear and the Federal Register equally clear, the Liquidation of Liabilities Rule does not apply to a prospective rate system. ODM's reading does not fall "within the bounds of reasonable interpretation" (*Kisor* at 2417). "And let there be no mistake. That is a requirement the agency can fail." (*Id*.)

ODM failed and the Court of Appeals failed as well for there was no making of "authoritative policy in the relevant context" (*Id*.) here, the Liquidation of Liabilities Rule's application came about because the original reasons for the disallowance of the two contracts costs evaporated when the facts came out in hearing. ODM has no administrative expertise in

auditing nursing homes cost reports, ODM contracts with private companies and has for four decades and no ODM contracted auditor disallowed these specific costs, or ever before applied this rule in this way.

Last *Kisor* requires "an agency's reading of a rule must reflect 'fair and considered judgment' to receive Auer deference." (*Kisor* at 2418). "We have…only rarely given *Auer* deference to an agency construction 'conflicting with a prior' one." (*Id.* at 2419) ODM had previously (when using a retrospective reimbursement system) adopted part of the Liquidation of Liabilities Rule into its audit manual and never before announced an intention to apply the rule to a prospective system.

Central to the deference standard's rationale is the "expertise" of an administrative agencies' personnel. But is the perception correct? "Agency expertise" is part of the mantra listed to support a court confining its inquiry and/or deflecting non-government expert testimony. Casemaker™ research of Circuit Court decisions reveal the term "agency expertise" is used 1,737 times. It is a central component of the "thumb on the scale" the judiciary gives the executive branch. Agency expertise was considered a factor "cloaked in ambiguity" in *Axon Enterprises, Inc. v. Federal Trade Commission,* __F.3d__, 9th Cir., No. 20-15662, January 28, 2021. An agency determination must be reversed if "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Native Village of Point Hope v. Jewell,* 740 F.3d 489 (9th Cir. 2014). This Court held an agency's decision within its area of authority need not consider issues that derive from statute's other than the agency's

enabling act in *Pension Benefit Guaranty Corporation v. LTV Corporation*, 110 U.S. 633, 645 (1990); eliminating the concept of *in pari materia* for an administrative agency and further assuring agency dominance over citizens who must live and work under all rules and laws.

When one must follow all the laws it is easy to violate a regulatory bodies rules when the regulations can be interpreted and applied without regard to other laws. Here the CPC Decision found the long-term promissory notes given in payment were not subject to the Liquidation of Liabilities Rule and were fully and timely paid in accord with their terms, construing and applying Ohio's Uniform Commercial Code. Once the Court of Appeals gave deference it gave total deference including deference to ODM's reading of the UCC as well.

ODM contracted CPA's from the community to conduct the audits at issue, there was no in-house expertise applied. Three expert CPA's testified for CHS in the administrative hearing. Bert Cummins, CPA, for 39 years focused exclusively on Medicare/Medicaid nursing facilities financial records, auditing, and cost reporting; the firms he was part of were retained by ODM's predecessor to perform Medicaid cost report audits and assist in administrative hearings, and Cummins was the principal chief auditor for over 400 of Ohio's Medicaid cost report audits. John Fleisher, CPA, testified as an expert based on his career as a nursing facility accountant similar to Cummins and involved with a "couple thousand" Medicaid audits and audit settlements. Having "expertise" in writing and

enforcing rules gives no expertise in how businesses operate. Both business and bureaucracies have an equal interest in use and knowledge of the interpretation and application of regulations. Cummins was a General Assembly appointee to the legislative committee formed to write the statutes to establish and monitor Ohio's nursing facility reimbursement system. Why is a civil servant to receive deference over equally or more experienced professionals?

John Hapchuk gave expert testimony as a recently retired Senior Executive Service, Department of Health and Human Services ("HHS") accountant instrumental in developing Medicare's Liquidation Rule. Integrally involved in crafting the Liquidation of Liabilities Rule he was quite direct in his testimony. Not only is the result the Department desires inequitable, and contrary to the intention of the law, the Department's application of Section 42 C.F.R. 413.100 is incorrect.

Mr. Hapchuk's testimony is supported by the Federal Register. When HHS adopted the Liquidation Rule the opening sentences under "Background" state: "This policy pertains to all services furnished by providers other than…skilled nursing facilities choosing to be paid on a prospective payment basis." 60 Fed. Reg. No. 123, pg. 33126 (underline added); the cost can be claimed in the cost reporting period when the liquidation of the liability occurs, that is, when an actual expenditure takes place." (*Id*. at 33131). Yet the Court of Appeals ignored his agency expertise and the federal agency's statement of the application of the Medicare Liquidation of Liability Rule.

Justice Scalia said it well: "It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265-66 (Scalia, J., Concurring (citations omitted).

If our Founders thought deference wise the power to do so would have been excluded from judicial powers and interpretative power vested in the executive branch. Having just dealt with King George III it is unlikely the Founders would ever have considered placing such power in the executive branch. Yet here we are. What is present here is the "all to easy intrusions on the liberty of the people." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (Justice, then Judge, Gorsuch, concurring).

Ohio's legislature, at O.R.C. §5111.27(B), had since 1980 and prior (while on a retrospective reimbursement system) specified audits had to "(1) comply with **applicable** rules prescribed pursuant to titles XVIII and XIX; (2) consider generally accepted auditing standards…." ODM adopted in 1980 O.A.C. 5101:3-3-01(A) defining "Allowable costs" "…determined in accordance with the following reference material, as currently issued and updated, in the following priority: (1) Title 42 Code of Federal Regulations (C.F.R.) Chapter IV; (2) The provider reimbursement manual ("health care financing administration HCFA Publication 15-1,"); or (3) Generally accepted accounting principles." (Emphasis added) The Ohio legislature's requirement the Medicare rules must be "applicable" has been

ignored by ODM and the Court of Appeals. Medicare's retrospective rules have no application to the Medicaid prospective reimbursement system and HHS said so.

The common pleas court in reviewing the *entire* record saw through the disingenuous action of interpreting the Liquidation of Liabilities Rule into a prospective rate system which the federal agency adopting the rule refused to permit to be applied to Medicare's prospective rate system. The Court of Appeals, in obedience to its view of the deference standard, substituted its judgment, reinstated ODM's interpretation, and the Supreme Court of Ohio refused to correct the error. This action personifies the perverse "incentive to draft vague regulations and interpret those regulations through less-formal means after the fact."[4]

E. ODM violates due process in adopting a new interpretation of a Medicare rule and retroactively applying the new interpretation.

At the lower court level CHS objected to ODM's violation of due process in creating a new rule for Medicaid in the same hearing it first applied the new rule. Without rebuttal CHS provided testimony ODM was applying the Liquidation of Liabilities Rule in a manner it has never been applied prior to this case and 9 years after the expenses were incurred and reported to ODM. ODM was obligated by O.A.C. § 5101:3-1-17.1 "[b]efore the effective date of the final adoption,

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[4] Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo.J.L. & Pub. Policy 103, 106 (2018).

amendment or rescission of a rule in division 5101:3 of the Administrative Code, the [ODM] shall make a reasonable effort to notify persons affected by the rule adoption, amendment or rescission. 'Reasonable effort to notify persons' means posting the full text of a new or amended rule on the ODJFS website." ODM never posted notice it was adopting and incorporating the Liquidation of Liabilities Rule to Medicaid cost reports in a prospective rate period.

The Ohio Revised Code defines a "rule" as "any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule." R.C. §119.01(C). The Department's application of the Liquidation of Liabilities Rule was newly adopted in the underlying hearing and is intended, presumably, to have a uniform and general application; thus, to implement this new position uniformly and generally applied is solely through application of R.C. 119.03's rule adoption process and prospectively applying it. ODM cannot adopt a rule by securing deference from a complicit court.

Long before this controversy began, before the contracts at issue were written and when Ohio was on a retrospective reimbursement system, ODM placed in its audit manual a single, specific, and restricted use of the Liquidation of Liabilities rule: a provider must liquidate a compensation obligation to an owner-administrator within 75 days of close of the cost-reporting period or it would be disallowed on audit. ODM intentionally included a single provision,

referencing only owner-administrator compensation, though the Medicare Liquidation of Liabilities Rule includes an array of other areas of application (vacation pay, paid time off, sick pay, deferred compensation, self-insurance plans, and benefit plans, and short-term liabilities). *See* 42 C.F.R. 413.100(b). In doing so ODM placed Ohio Medicaid providers on notice that this single incorporated provision would be applied to audits of cost reports. Providers, then, were on notice those costs must be incurred, paid, and reported in a manner consistent with those standards to prevent disallowance or non-reimbursement.

"[D]eference is not appropriate if the interpretation is clearly erroneous." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 at 1215, citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). In *Christensen,* this Court rejected the request for deference as an effort "under the guise of interpreting a regulation, to create de facto a new regulation." *Id.* In this case, ODM is applying 42 C.F.R. § 413.100 to the 2003 Medicaid prospective cost-based system, even though the regulation specifically states the cost reimbursement "is to be made on the basis of current costs of the individual provider, rather than costs of a past period or a fixed negotiated rate." 42 C.F.R. §413.5(a). In other words, in a retrospective, not prospective, system. This is clearly erroneous and serves as the basis for this Court to refuse to grant deference to the Department's interpretation." (CHS Merit Brief pg.56-7) The Tenth District improperly deferred to ODM.

The case *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), turned on the application of *Auer*

v. Robbins, 519 U.S. 452 (1997) and holds: "Deference is undoubtedly inappropriate,…when it appears that the interpretation is nothing more than a " convenient litigating position"' *Id*. at 155 (citations omitted). ODM's actions clearly point to the "convenient litigating position", first presented in an administrative hearing it controlled and years after Petitioners negotiated the contracts, received and paid for performance, and reported the costs to ODM.

The "unfair surprise" (*Id*. at 156) and lack of "'adequacy of notice to regulated parties' as a factor relevant to the reasonableness of the agency's interpretation" (*Id*. citations omitted) is certainly present in this action. CHS had no reason to suspect ODM would, mid-hearing and having stipulated the costs at issue were reasonable, actual, necessary and otherwise allowable, come up with such a twisted reading of inapplicable law and force fit it into this administrative hearing. The court of appeals' decision to reverse the lower court is nothing more than acceding to ODM's demand for deference, denying Petitioners' due process.

F. Ohio's judiciary has violated Petitioners' due process rights in its undefined deference to administrative agencies.

Ohio's courts accord more than just deference and say so clearly. The Supreme Court of Ohio states it accords "considerable deference to an agency's interpretation of rules the agency is required to administer." *State ex rel. Celebrezzze v. Natl. Lime & Stone Co*., 68 Ohio St. 3d 377, 382 (citations omitted). To the Secretary of State "…this court typically gives

'great deference'." *State ex rel. McCann v. Delaware County Bd. of Elections*. 155 Ohio St.3d 14, ¶20. Citing *Stinson v. United States* (1993) 508 U.S. 36, 44-45, the Ohio Supreme Court provides "an agency's commentary regarding its own rules is due even greater deference than the court gives rules in Chevron." *Charvat v. Dispatch Consumer Serv., Inc*., 95 Ohio St.3d 505, ¶35. So long as a state agency does not ignore express terms of enabling legislation any interpretation the agency says is reasonable will receive deference from an Ohio court. See, *Northwestern Ohio Bldg. & Constr, Trades Council v. Conrad,* 92 Ohio St.3d 282.

In Ohio the State Employment Relations Board ("SERB") heard a dispute between a labor union and Miami University. Previously a petition for decertification of the union had been submitted to SERB which SERB dismissed. Shortly after unfair labor practice charges were filed before SERB. In the judicial appeal process the Court of Appeals found SERB's decision was "a break from" prior SERB decisions and was "fundamentally inconsistent with the statutory framework" of SERB's enabling legislation. *State. Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 352, 643 N.E. 2d 1113 (1994). Reversing the court of appeals the Supreme Court of Ohio held:

> In assessing SERB's policy, this court must afford deference to SERB's interpretation of R.C. Chapter 4117. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, paragraph two of the syllabus. The General Assembly has entrusted SERB with the responsibility of administering

> the statute,[sic] and has bestowed upon it the special function of applying the statute's provisions to the complexities of Ohio's industrial life. In so doing, it has delegated to SERB the authority to make certain policy decisions. *Id*. at 353.

This is frank acknowledgment bureaucrats in a government office are far more capable than a judge in interpreting statute to address the "complexities of Ohio's industrial life." This is the equivalent of Pilate washing his hands; a court surrendering up its duty to the people that empower all three branches, all three of whom are to serve not another branch but the people. One doubts Oliver W. Holmes could even imagine penning so damning a sentence as quoted above. Deference has become abdication.

Christopher J. Walker, Assoc. Prof. of Law. Michael E. Moritz College of Law, Ohio State University, published an essay[5] which in part reviewed every published Circuit Court opinion from 2003 through 2013 wherein *Chevron* deference was referenced. The agency "won 77.4 percent of the time when courts applied the *Chevron* framework and 93.8 percent of the time when courts found the statute ambiguous and thus assessed the agency's interpretation for reasonableness." (*Id*. pg. 554) In a survey of agency rule writers in 9 federal agencies found 90% of agencies' drafters utilize the "*Chevron* space" when drafting. (Id. 555). "The agency

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[5] Walker, *Lawmaking Within Federal Agencies and Without Judicial Review,* Journal of Land Use & Environmental Law, Vol.32 pgs. 551-565, 2017

rule drafters surveyed appreciated that if a statutory provision is ambiguous, the agency -not the courts – will be the primary interpreter of the statute…." (*Id*. pg. 556). The paper concludes this section noting agency drafters, knowing they are "insulated from searching judicial review," regulate "more aggressively" when they are inside *Chevron* space. (*Id*. pg. 557). Since courts do not review how agencies participate in confidential assistance to Congressional staffers in writing legislation, "courts do not assess whether agencies self-delegate lawmaking authority by leaving statutory mandates broad and ambiguous…." (*Id*. pg.557). This practice coupled with courts' deference leaves the People out in the cold.

When a court does not go along with the deference agencies demand the dissents speak in terms that prove deference really means "don't question the Fourth Estate," consider: "These are matters in which deference to the bureau's discretionary authority is paramount and judicial intervention is cautiously restricted to the most flagrant transgressions of administrative power." *Arth Brass & Aluminum Castings, Inc. v. Conrad*, 104 Ohio St.3d 547, ¶56. If the real standard is the "Most Flagrant" standard, it was met here where the act of "theft by interpretation of rule" was given a judicial nod of approval.

The Court of Appeals showed how smooth the route a state agency has in court: "Considerable deference should be accorded to an agency's interpretation of rules the agency is required to administrator." *Smith v. Med. Bd. of Ohio*, 10th Dist, Case No. 11AP-1005, 2012-Ohio-2472, ¶11. In effect it seems since the agencies

are empowered to write its rules of process and procedure, bring charges for non-adherence to the rules, prosecute violations before an agency "hearing officer" bound by paycheck and process to the agency, and courts defer to it all. The purpose of a right of appeal is mere lip service to the Constitutional rights of due process. An empty promise to a citizen.

G. Several states have abandoned the deference standard.

Federal courts are bound to channel decisions within the boundaries of *Chevron*. States have taken a lead role in criticism of deference and several refuse to yield judicial power to the executive branch and administrative agencies.

The recent opinion in *Gun Owners of America, Inc. v. Garland*, 6th Cir. No. 9-1928, __WL__, March 25, 2021, while a criminal case noting the inapplicability of *Chevron* deference (Opinion pg. 9), it nonetheless discusses at length, the scope, and breadth of deference. *Garland* considers *Chevron* to have been an unintentional "tectonic shift" in administrative law which "means that an agency's construction is paramount to even a *prior* judicial construction, thus an agency may effectively overrule court precedent," (Id., pg. 10, emphasis in original). Agencies should not have the power to overrule judicially established precedent. Agencies are not Congress and quasi-legislative power is not co-equal to legislative power.

Garland (pg. 14, citations omitted) notes the rule of lenity, "the practical opposite of Chevron deference," applies to a rule with both civil and criminal penalties.

When Petitioners stand to lose tens of millions it is as devastating as a criminal charge and may well be a corporate death sentence. *Garland* (pg. 16, citations omitted) notes "'How is it fair in a court of justice for judges to defer to one of the litigants?...Such deference is found nowhere in the Constitution – the document to which judges take an oath.'"

Florida settled the issue conclusively. In the November 2018 election Florida's citizens amended Article V of the Constitution of the State of Florida to add Section 21: "In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

The Wisconsin Supreme Court Opinion *Tetra Tech EC, Inc. v. Wisconsin Dept. of Revenue*, 382 Wis.2d 496 (2018) expansively examines the breadth and range of deference, its pros and cons, concluding, "Core powers, however, are not for sharing." (Id. at ¶47), stating "As to these areas of authority, ... *any* exercise of authority by another branch of government is unconstitutional." (Id. at ¶48, citations omitted). Their concern was just the concern in this appeal: "The United States Supreme Court says that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)." (Id. ¶64).

On the heels of the *Tetra Tech* ruling the Wisconsin legislature made the abandonment of deference to its executive branch agencies statutory. (Wisc. Stat. §227.10(2)(g) "No agency may seek deference in any

proceeding based on the agency's interpretation of any law.").

In 2020 the Court of Appeals of Arizona, First Division issued an opinion addressing wastewater rate setting appeals. *Sun City Home Owners Association v. Arizona Corporation Commission*, 460 P3d 283 (2020). The opinion found it had no authority to set aside the rate setting decision as it was "bound by the decisions of our supreme court" and "where [the state agency] is given exclusive power it is supreme." *Id*. at ¶13. The dissent addressed the "excessive deference" noting "judicial review is meaningless if reviewing courts merely 'rubberstamp' Commission decisions" without a court's determination of the agency's compliance with constitutional and statutory duties." *Id*. at ¶48.

In 2021, Arizona codified a "no deference" standard. (A.R.S. §12-910 "In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.").

Michigan's Supreme Court analyzed the judicial use of the deference standard in *In re Complaint of Royas Against SBC Michigan*, 482 Mich. 90 (2008). The Court referenced *Marbury v. Madison*, noting one defining aspect of judicial power is interpreting the law (*Id*. at 98). The Court acknowledged use of the term "deference" by the Michigan Supreme Court had "unmistakably added to the confusion" over the deference standard in implying "the judiciary must accede to the agency's interpretation of a statute." (*Id*.

at 107) In a statement remarkedly parallel to this appeal (where the lower court's interpretation of statute was cast aside as inferior to ODM's tortured construction of the federal regulation), the Michigan Supreme Court stated: "Given that statutory construction is the domain of the judiciary, it is hard to imagine why a different branch's interpretation would be entitled to more weight than a lower court's interpretation." (*Id*. at 108).

Here just that happened, even when the former head of the federal agency (Hapchuk) strenuously asserted in testimony ODM's use and construction of the Liquidation of Liabilities Rule was completely wrong. The standard of deference is so imprecise as to have no definition. When deference merely "rubber stamps" an agency's retrospective application of a new interpretation of a federal regulation Petitioners' due process rights are denied.

How many times a day does a court in the United States give agency deference to similarly accede to the agency and remove from its docket one case, leaving the citizen to know only there was nothing fair about the judicial proceeding; it is just a bump in the road of administrative agency dominance of the judicial branch.

The Kansas Supreme Court abandoned the deference doctrine in 2013. *Douglas v. Ad Astra Information Systems. LLC*, 296 Kan. 552 (2013) (deference "has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal." *Id*. at 559).

Utah is no less direct in rejection of the *Chevron* deference standard: "In fact our caselaw has openly repudiated that approach. *** So we have retained for the courts the de novo prerogative of interpreting the law, unencumbered by any standard of agency deference." *Hughes General Contractors, Inc. v. Utah Labor Commission,* 322 P.3d 712, ¶25 (2014); see also, *Ellis-Hall Consultants v. Public Service Commission of Utah*, 379 P.3d 1270 (2016) ("We reiterate that agency decisions premised on pure questions of law are subject to non-deferential review for correctness." *Id*. at ¶27).

Mississippi's Supreme Court noted its inconsistency in the application of deference, concluded a standard of deferential review violated the separation of powers in the state's constitution and ended deference. *King v. Mississippi Military Department*, 245 So.3d 404 (2018) ("we announce today that we abandon the old standard of review giving deference to agency interpretations of statutes. Our pronouncements describing the level of deference were vague and contradictory, such that the deference could be anywhere on a spectrum from "great" to illusory. Moreover, in deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes." *Id*. at ¶12).

Wyoming (*Delcon Partners LLC v. Wyoming Dept. of Revenue*, 450 P.3d 682 (2019)) and Arkansas (*Myers v. Yamato Kogyo Company, Ltd*., 2020 Ark. 135) both acknowledged the confusion caused by inconsistent application of deference and separation of powers and abandoned the deference standard. California reserves

the "ultimate interpretation of [a statute] is an exercise of the judicial power…conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." *Yahama Corp. of America v. State Board of Equalization*, 78 Ca. Rpts.2d 1, 7 (1998) (also, "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." *Id* at11).

REASONS FOR GRANTING THE PETITION

The conflict presented is not one between the federal circuit courts. The conflict is between this Court's *Chevron/Auer* standard and state courts which either adopt their interpretation of *Chevron* (in a muddled, ad hoc fashion as Ohio's case law demonstrates) and those states which find *Chevron* to violate the Constitution's separation of powers doctrine.

This Court, as the creator of *Chevron/Auer* deference, is the only and best place for there to be a uniform standard for the interpretation and application of federal administrative regulations by any court. *Chevron/Auer* as commonly interpreted and applied violates the separation of powers doctrine. Here a court's "*exhaustive* review of the record and relevant law, including examining the thousands of pages of exhibits and reading the hearing transcripts in its *entirety*" (App. 97, emphasis in original) was meaningless as the Court of Appeals, using state decisional progeny of *Chevron*, gave deference to

ODM's interpretation of a clearly inapplicable federal rule, and permitted the interpretation to be retroactively applied. (App. 59).

On July 2, 2021, this Court accepted the Petition filed in *American Hospital Association v. Xavier Becerra, Secretary of Health and Human Services, et al.*, Case No. 20-1114. The question presented is parallel to this Petition's questions: the limits of *Chevron* deference when an agency acts outside legislative channels and, as in this appeal, found to have been exceeded by the lower court, but reversed on appeal by appellate deference to the government agency.

Garland (at pg. 21, citations omitted) states: "Indeed, 'we judges are experts on one thing – interpreting the law.'" Except that is no longer true for the vast majority of laws, since regulations far exceed statutes is number, scope and reach. Congress allows agency staff to "assist" in writing the laws, then writes the rules perhaps to fill in what Congress was unwilling or hesitant to do. Ceding judicial power to the Fourth Estate denies due process.

CONCLUSION

It is respectfully requested this Court accept this appeal to state whether a state agency is entitled to deference in the interpretation of federal regulations it does not enforce, and if so the parameters of this judicially created standard. A court denies due process to a citizen when it permits a state agency to select piecemeal parts of a federal rule in order to extract payments made that were otherwise reasonable and

allowable costs; costs which the federal rule would not otherwise permit to be denied reimbursement. The retroactive application of a new interpretation of a mid-hearing rule is further a due process denial.

Respectfully submitted:

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