No. 20-1263

IN THE

Supreme Court of the United States

GIANINNA GALLARDO, AN INCAPACITATED PERSON, BY AND THROUGH HER PARENTS AND CO-GUARDIANS PILAR VASSALLO AND WALTER GALLARDO,

Petitioner,

v.

SIMONE MARSTILLER, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY

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ARGUMENT

Respondent, the Florida agency that administers the state's Medicaid program, has agreed that this Court should grant the petition for a writ of certiorari and resolve the important question presented. Resp. 23. Florida recognizes the direct conflict between the Eleventh Circuit and the Florida Supreme Court, the split among the lower federal and state courts, and the exceptional importance of the question presented. Resp. 13–17. And Florida's merits defense of the Eleventh Circuit's decision below—claiming that court "reach[ed] the right result" for the wrong reasons (Resp. 20)—reinforces that certiorari should be granted.

1. In lockstep with petitioner, Florida correctly reports that an "untenable" split exists between its state high court and the federal court of appeals exercising jurisdiction over it. Resp. 13; *accord* Pet. 15–16, 21–22. Thus, Florida asks this Court to resolve the split, just as North Carolina did when its high court and the Fourth Circuit were split on a related question of Medicaid law. Resp. 13 (citing *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627 (2013)).

Florida also agrees with the petitioner that the split between its supreme court and the Eleventh Circuit reflects a deeper split among state high courts and federal courts of appeals. Resp. 14–15; *accord* Pet. 16–18. Florida calls it a 3–2 split in petitioner's favor, taking issue with petitioner's invocation of two decisions that offer further support for her side. Resp. 14 & n.4. Quibbling about the numerical score, however,

is beside the point.[1] What matters is that the parties agree a split exists among state courts of last resort and federal courts of appeals, as well as among other lower federal and state courts. Resp. 14–15; Pet. 18–19.

2. The parties also agree the case presents an important question (Resp. 15–16; Pet. 1)—though Florida overlooks some areas of importance stressed in the petition.

Florida and the petitioner agree that Florida needs a resolution from this Court because, under the Florida Supreme Court's decision in *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53 (Fla. 2018), Florida "cannot recover settlement payments designated for future medical care, but under the [Eleventh Circuit's] decision below, it must do so." Resp. 13; *accord* Pet. 21. Other states that must decide which of the conflicting decisions to follow in resolving the constantly recurring question of how much of a tort recovery is subject to a lien likewise need the definitive guidance only this Court can provide. Florida also emphasizes the importance to state Medicaid agencies of

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[1] The petition acknowledged that the Fourth Circuit's decision "did not analyze the applicable statutory provisions," but pointed out that courts in that circuit likely would find the language in the decision explicitly limiting states to recovery from settlement amounts reflecting past medical expenses "highly persuasive, if not binding." Pet. 18 (discussing *E.M.A. ex. rel. Plyler v. Cansler*, 674 F.3d 290, 312 (4th Cir. 2012)). Likewise, the petition explained that the issue was not directly presented in *Doe v. Vermont Office of Health Access*, 54 A.3d. 474 (Vt. 2012), but that the Vermont Supreme Court's reasoning that a state may not assert a lien against a "*recovery* for money not paid by Medicaid," *id*. at 529 (emphasis added), would also bar the lien asserted by Florida here. *See* Pet. 17–18.

the ability to "obtain[] full reimbursement from liable third parties" and the states' interest in "crafting their own rules for tort recovery." Resp. 15–16.

Florida's accounting of the importance of the issue, however, is incomplete because it ignores the substantial property interests of millions of Medicaid beneficiaries that are also at stake. *Cf.* Pet. 23. The Medicaid statute's anti-lien and anti-recovery provisions, 42 U.S.C. § 1396p(a)(1) & (b)(1), protect these property rights and were a cornerstone of this Court's unanimous *Ahlborn* decision. *See Ark. Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 283–86 (2006). Other than a singular passing reference (Resp. 5), Florida does not mention—much less discuss or analyze—these provisions in its response. Subject to exceptions including the one whose scope is at issue here, these provisions direct in part: "No lien may be imposed against the *property* of any individual … on account of medical assistance paid or to be paid on his behalf under the State plan." 42 U.S.C. § 1396p(a)(1) (emphasis added). And this Court in *Ahlborn* unanimously rejected the argument that a tort settlement is not "property" owned by the Medicaid beneficiary. *See* 547 U.S. at 285–86. The Court should grant certiorari here not only because of the importance of providing clarity to the States about when they may impose liens on recoveries from liable third parties, but also because of the importance of the federally protected property rights of millions of Medicaid beneficiaries.

3. Florida's merits defense of the Eleventh Circuit's decision further shows why this Court's intervention is necessary. Florida suggests that the Eleventh Circuit—though "reach[ing] the right result"—relied on faulty reasoning by "proceed[ing] from the

premise that Sections 1396a(a)(25)(H) and 1396k both bear on states' right to assignment of tort settlements." Resp. 20. In other words, this case presents not only a disagreement between the Eleventh Circuit and the Florida Supreme Court, but also one between the Eleventh Circuit and the Florida agency that prevailed below. Florida's defense of the outcome below, moreover, underscores the need for review because it cannot be squared with this Court's unanimous *Ahlborn* decision.

According to Florida, "a number of lower courts"—including *both* the Eleventh Circuit and the Florida Supreme Court—have incorrectly presumed that 42 U.S.C. § 1396a(a)(25)(H) "limits states' right to assignment" of tort settlements. Resp. 18. Contrary to the Eleventh Circuit's reasoning, Florida reasons that this payment-recovery provision "addresses only states' subrogation rights as to insurers and similar third parties." *Id.* Thus, Florida further reasons, the payment-recovery provision "does not restrict a state's authority to recover by assignment part of a recipient's tort settlement" under "a state's broad right"—per the assignment/cooperation provision (42 U.S.C. § 1396k(a)–(b))—"to require a recipient to assign it medical payments that she has received from a tortfeasor." *Id.* at 18–19. In contrast to the sharp distinction drawn by Florida between the payment-recovery and assignment/cooperation provisions, this Court in *Ahlborn* said the two provisions "echo[]" one another. 547 U.S. at 281.

Florida's argument—not adopted by the Eleventh Circuit—also contradicts *Ahlborn* in other ways. For example, Florida asserts that "when a tortfeasor pays out a settlement," the payment-recovery provision does not apply because the tortfeasor "is *not* a third

party that has a 'legal liability' to pay for 'health care items or services.'" Resp. 20 (emphasis added). But in *Ahlborn*, the Court applied the payment-recovery provision—along with the anti-lien and anti-recovery provisions (42 U.S.C. § 1396p(a)(1) & (b)(1))—to limit what a State could collect from a beneficiary's settlement with a tortfeasor. 547 U.S. at 281, 283–84. Thus, *Ahlborn* rests on the premises that a tortfeasor *is* a third party that has a "legal liability" to pay for "health care items or services" within the meaning of the payment-recovery provision, and that the anti-lien provision bars assertion of a lien against a beneficiary's tort recovery except to the extent permitted by "the exception carved out by §§ 1396a(a)(25) and 1396k(a)." *Id*. at 284–85. Florida's argument cannot be reconciled with *Ahlborn*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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