10-12 JUN 23 2010

No. ____

In the Supreme Court of the United States

JO CAROL ALFORD, Individually, and as Executrix of the Estate of Arthur Randall Alford, Deceased,

Petitioner,

v.

MISSISSIPPI DIVISION OF MEDICAID,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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PETITION FOR A WRIT OF CERTIORARI

RONALD CRAIG MORTON
Counsel of Record for the Petitioner
132 Fairmont Street, Suite A
Clinton, Mississippi 39056
(601) 925-9797
rmorton@mortonlaw.com

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QUESTION PRESENTED

Whether the provisions of the Medicare Catastrophic Coverage Act of 1988 designed to ensure that community spouses of Medicaid applicants have sufficient income and resources to live independently and with dignity that require state Medicaid agencies to recognize orders of increased spousal support, give trial courts independent jurisdiction to enter such orders before benefits are applied for and in the absence of exhausted state administrative remedies?

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CITATION OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

Alford v. Miss. Div. of Medicaid, 30 So. 3d 1212 (Miss. 2010).

Order and J. of Supp., *Alford v. Alford*, No. 2008-933-B (Ch. Ct. of Madison County, Miss. Dec. 2, 2008).

BASIS FOR SUPREME COURT JURISDICTION

The Mississippi Supreme Court entered its judgment on March 25, 2010. App. 4. Petitioner Jo Carol Alford seeks review of that judgment on a writ of certiorari. The present petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the final judgment rendered by the highest court of a State in which a decision could be had where any right or privilege is claimed under the statutes of the United States.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 1396r-5(d)(5) (2010), App. 1
42 U.S.C. § 1396r-5(e) (2010), App. 1
42 U.S.C. § 1396r-5(f)(3) (2010), App. 3

STATEMENT OF THE CASE

Introduction

Arthur Randall Alford was diagnosed with multiple sclerosis in 1986. App. 28. His health began rapidly deteriorating in January of 2008. *Id.* A blood clot, severe bladder infection, staff infection, and hydrocephalus, combined with the rapid progression of his multiple sclerosis, caused Mr. Alford to lose and never regain the ability to walk. App. 28-29. He moved back and forth between hospitals and rehabilitation facilities three times, and after June 4th he was continually under institutional care. *Id.*

Mrs. Alford, his wife of twelve (12) years was a relatively young fifty-eight (58), but had not worked for twenty-five (25) years and has no specialized training in any type of employment. App. 27-28. Her remaining life expectancy at the time of filing suit was twenty-five (25) years, but without an exception to Mississippi's permitted Medicaid resource and income allowance for community spouses, she would have become destitute within only five years of Mr. Alford's admittance into a nursing home. App. 30. Since the state's default maximum asset and income limits would have resulted in her own impoverishment in only a matter of sixty months following her husband's Medicaid enrollment, Mrs. Alford sought a court ordered increase in the resource and income allowances pursuant to 42 U.S.C. § 1396r-5(d)(5). App. 26, 30. Even if the Chancellor had granted her requested increase from the maximum amount allowed by the Mississippi Division of Medicaid (Division) through the community spouse resource allowance (CSRA) to the entirety of their entire joint assets, she would

still have run out of money within only twelve (12) years of his nursing home entry. App. 30.

Mrs. Alford argued that 42 U.S.C. § 1396r-5(d)(5) expressly granted the chancery court the authority to grant this increase. App. 26. Mrs. Alford further argued that an exhaustion of administrative remedies would be futile since, under state regulation, the Division is prohibited from awarding an amount above the federal maximum. App. 5. The Division contended that it had sole authority and jurisdiction to consider an increase, and the chancery court's only action, therefore, could be a review of the Division's final decision. App. 27.

The chancery court held that 42 U.S.C. § 1396r-5(d)(5) did not grant it the necessary jurisdiction to award Mrs. Alford the requested relief. App. 25. Mrs. Alford appealed the trial court's decision but shortly thereafter Mr. Alford died. App. 6. The Supreme Court of Mississippi nonetheless continued to hear the case, substituting Mr. Alford's estate as the interested party, under an exception to the mootness doctrine. App. 7. The Mississippi Supreme Court affirmed the chancery court's holding. App. 23.

A. Federal Statutory and Regulatory Background

1. The Jurisdictional Problem Regarding an Increase of the MMMNA and CSRA in General

The Medicare Catastrophic Coverage Act of 1988 (MCCA) was enacted to "protect the elderly and

disabled population from the financial disaster caused by catastrophic health care expenditures," and § 214 of the MCCA prevents community spouses from becoming destitute in order for their spouse to qualify for public benefits. 1988 U.S.C.C.A.N. 857, 888-92 (discussing the protection of income and resources of couples for maintenance of the community spouse and declaring "The [MCCA] ... end[s] spousal impoverishment."); *see Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473, 480 (2002). Sound policy and fiscal considerations underlie Congressional intent; one of the MCCA's stated purposes is to "substantially reduce the required cost sharing under Medicare." *Id.* at 858. Additionally, the drafters of the MCCA were troubled by the great variance in resource levels among states, and therefore "establishe[d] a uniform national spousal protection policy that applies in all States." *Id.* at 891-92 (citing and including an AARP study highlighting the vast discrepancy in CSRA from state to state).

The elimination of spousal impoverishment is accomplished primarily through two independent mechanisms. First, the well spouse, called the community spouse, is permitted to retain marital assets up to the limits of the "Community Spouse Resource Allowance" (CSRA). Additionally, the community spouse is also permitted to retain income of the institutionalized spouse up to the limits of the "Minimum Monthly Maintenance Needs Allowance" (MMMNA). Each state has maximum CSRA and MMMNA limits within the parameters of federal law. However, the MCCA also permits increases of these limits under appropriate circumstances.

Unfortunately, Congress' attempt to create greater uniformity between states in the area of spousal impoverishment is being frustrated, as states are not uniformly applying the MCCA's provision granting courts jurisdiction to set the MMMNA and CSRA amounts. Instead, States are currently split on whether 42 U.S.C. § 1396-r5 gives a trial court original jurisdiction to increase these qualification limits, or whether one must first exhaust all administrative remedies before petitioning a court to determine the MMMNA or CSRA amount.

The Arkansas Supreme Court and Missouri Court of Appeals have held that administrative remedies must be exhausted first. *See Ark. Dep't of Health & Human Services v. Smith*, 262 S.W.3d 167 (Ark. 2007); *Amos v. Estate of Amos*, 267 S.W.3d 761 (Mo. Ct. App. ED 2008); *and Huynh v. King*, 2008 WL 4547628 (Mo. Ct. App. WD 2008).

Conversely, the New Jersey Superior Court, Superior Court of the District of Columbia, and Tennessee Court of Appeals have held that exhaustion of administrative remedies is not a prerequisite to petitioning a court for an increase in MMMNA or CSRA amounts. *See M.E.F. v. A.B.F.*, 393 N.J. Super. 543 (2007); *In re Estate of Tyler*, 2002 WL 1274125 (D.C. Super. 2002); *and Blumberg v. Tenn. Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). Those states hold that federal law creates two independent avenues to obtain an increase – court order or administrative appeal. The split is a result of reliance on either 42 U.S.C. § 1396r-5(d)(5), which allows the MMMNA and/or CSRA amounts to be set by court order, or the application of the exhaustion doctrine, which

requires that Medicaid's remedies be exhausted first, since 42 U.S.C. § 1396r-5(e)(2) allows a fair hearing to review the MMMNA and/or CSRA amounts if either spouse is dissatisfied with the determination. There is nothing in the language of the Act suggesting that exhaustion of administrative remedies is a pre-requisite for petitioning a court under 42 U.S.C. § 1396r-5(d)(5). To the contrary, the actual language of the statute envisions that the court's order would be in place prior to making an original application for Medicaid benefits, not following an appeal of those benefits. In addition, the administrative regulations of some states, such as Mississippi, require a court order to increase MMMNA and/or CSRA amounts above the federal maximum, despite their insistence that parties must first seek an increase from the agency, rendering the exhaustion of administrative remedies futile.

2. Court Ordered Support under 42 U.S.C. §§ 1396r-5(d)(5) and 1396r-5(f)(3)

42 U.S.C. § 1396r-5(d)(5) unambiguously provides that, "[i]f a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered." 42 U.S.C. § 1396r-5(d)(5). While administrative remedies are set forth in other subsections, 42 U.S.C. § 1396r-5(d)(5) does not state those remedies must be exhausted before its judicial remedy may be sought. 42 U.S.C. § 1396r-5(f)(3) provides that, "[i]f a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of

this title shall not apply to amounts of resources transferred pursuant to such order . . . ."

3. Notice and Fair Hearing Under 42 U.S.C. § 1396r-5(e)

After eligibility for medical assistance is determined, or if either spouse requests it, states must notify the requestor of the amount of the allowance, how the allowance was computed, and of the right to a fair hearing "respecting ownership or availability of income or resources." 42 U.S.C. § 1396r-5(e)(1). If the dissatisfied spouse establishes at the fair hearing that the MMMNA and/or CSRA amounts are inadequate, an adequate amount shall be substituted. 42 U.S.C. § 1396r-5(e)(2). Often, however, an adequate amount cannot be substituted, under the administrative rules of the State in which one resides. For example, Mississippi's Div. of Medicaid manual states that "[i]n order for a [community spouse] to receive a share larger than the federal maximum, a court order would be required granting the [community spouse] a greater share of total resources[.]" Mississippi Division of Medicaid Eligibility Manual, Volume III, Section 1, 9210, App. 35.

B. Procedural History

1. The Chancery Court of Madison County, Mississippi

Mrs. Alford filed her Petition to Increase CSRA and the MMMNA on September 26, 2008. In an Order filed on December 02, 2008, the court held "that it does not have subject matter jurisdiction

pursuant to 42 USC §1396r-5, . . . and to the extent that the Petitioner seeks relief arising exclusively from jurisdiction premised on such federal law, such . . . relief is denied, base solely on this Court's lack of subject matter jurisdiction to award such . . . relief." App. 25. At trial, the Chancellor stated: "You're asking me to, as a court of first impression, apply Tennessee and New Jersey like proceedings and assert a federal statute in a state court. I do not believe that is what the court order of what you are citing was meant to be." App. 31-32.[1]

2. Supreme Court of Mississippi

The Mississippi Supreme Court affirmed the chancery court, finding "the opinions of the Arkansas Supreme Court and the Missouri Court of Appeals provide a more compelling interpretation of the spousal impoverishment provisions." App. 21. The court first discussed Tennessee, New Jersey, and the District of Columbia's interpretation of the statute in question, which is that the statute provides two, alternative mechanisms for increasing the CSRA and/or the MMMNA. App. 15-18. The first path is to seek a court order prior to filing a Medicaid application; the second alternative path is to file a Medicaid application and seek an increase through the fair hearing process under 42 U.S.C. § 1396r-5(e). App. 16. According to those courts, federal law creates these independent alternative routes to obtain an increase. *Id.* Specifically, the court cited the District of Columbia, which, after looking at the express language of 42 U.S.C. § 1396r-5, declared

[1] The Chancellor did state, however, that she welcomed an appeal and clarification of the law. App. 32.

that "[t]here can be no doubt . . . that Congress intended that spousal support orders for income not only be taken into account [by the agency] in calculating income allowances, but also bypass the standard Medicaid rules regarding resources and income." App. 17-18. Thus, the D.C. court concluded that "court orders 'preempt the spousal resource and income allowances' under the MCCA." App. 18.

The Mississippi court ultimately found Arkansas' and Missouri's approach more persuasive. App. 21. The Arkansas and Missouri opinions conclude that 42 U.S.C. § 1396r-5(d)(5) does not confer pre-filing determination authority to trial courts, concluding instead that a reading of the statute as a whole "makes it clear that any allocation of a couple's assets can only occur after a determination of Medicaid eligibility has been made." App. 18. Those courts also reason that administrative agencies are better equipped to "determine and analyze legal issues affecting their agencies," and 42 U.S.C. § 1396r-5(d)(5) does not specifically reference CSRA or MMMNA, but rather generally refers to "an order of spousal support." App. 20.

The Mississippi court gave deference to the fact that administrative review and revision is specifically provided for in 42 U.S.C. § 1396r-5(e). App. 23. Additionally, the court stated that the doctrine of primary jurisdiction applies, even though the Division's own rules require an ultimate court order, because the agency rule cited by Mrs. Alford only applies to "countable resources" instead of specifically mentioning the MMMNA. App. 21-22. Thus, the court concluded that the doctrines of

exhaustion of administrative remedies and primary jurisdiction render 42 U.S.C. § 1396r-5(d)(5) "insufficient to confer upon the courts parallel jurisdiction to increase the MMMNA and CSRA." App. 23.

ARGUMENT

A. Certiorari is Appropriate Because a Substantial Conflict Exists Between *Alford* and Decisions of Several Other States in Interpretation and Application of the Same Federal Law

The *Alford* decision directly conflicts with decisions of courts of the District of Columbia, New Jersey, and Tennessee, all of which held that 42 U.S.C. § 1396r-(d)(5)(d) grants trial courts the original subject matter jurisdiction to increase CSRA and MMMNA amounts as an alternative to administrative remedies otherwise provided. The Supreme Court of Arkansas and the Missouri Court of Appeals, however, have ruled in a manner consistent with *Alford*. Due to this conflict over an area of federal law that significantly impacts every state, this often-litigated and critically important issue is ripe for review by this Court. This is especially true in the spousal-impoverishment area, where "[u]niformity of result is critical." *Amos*, 267 S.W.3d at 764.

1. The *Alford* Decision Conflicts with Decisions of Courts of the District of Columbia, New Jersey, and Tennessee that Directly Addressed the Federal Spousal-Impoverishment Provisions

a. *M.E.F. v. A.B.F.* (Superior Court of New Jersey)

In *M.E.F. v. A.B.F.*, much like *Alford*, a spouse's default asset allowance was inadequate under the circumstances and, rather than pursuing the administrative remedy of a fair hearing, she petitioned a court for a resource increase. *M.E.F.*, 925 A.2d at 15. There, that state's division actually conceded "the Act provides alternative routes for obtaining an increased MMMNA." *Id.* The court relied heavily upon the Act's legislative history in determining the spouse could obtain an increase through a court order. *Id.* at 17-18 (citing House Report No. 100-105(II), *reprinted in* 1988 *U.S.C.C.A.N.* 857 ("inadequate" maintenance needs levels for community spouses have, "[i]n some cases, . . . forced community spouses, in desperation, to sue their husbands for support . . . . [The Act] would end spousal impoverishment" and "assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity.")). Of particular importance in the case *sub judice*, that court pointed out that:

> [t]he Committee recognizes that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. *The bill therefore provides that, if a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance*

> *must be at least as great as the amount of the income ordered to be paid.*

Id. at 18 (quoting 1988 *U.S.C.C.A.N.* at 895-96) (emphasis added).

Furthermore, the court reasoned, the Act's use of past tense suggests the court-ordered support provision can only be obtained prior to a determination of Medicaid eligibility, which is "consistent with a Congressional concern, expressed in the context of a discussion of the . . . protection of income for the community spouse, and transfer of resources, that spouses not be worse off under proposed legislation than they were under existing law, which in some instances recognized spousal support orders." *Id.* at 19. The *M.E.F.* court also recognized that the Act "merely recognizes the effect of an order of support if it has been previously obtained." *Id.* Additionally, it makes sense that the judicial remedy provided be utilized pre-filing (especially in states such as Mississippi that ultimately require a court order for an increase, anyway), since holding otherwise would foster forum shopping and render the fair hearing process meaningless. *Id.* at 21. The court concluded that, while in some cases it may be better for a trial court to recognize the state agency's primary jurisdiction, "[w]e leave the choice whether to do so in individual cases to the sound discretion of the trial courts."

b. *In re Estate of Tyler* (Superior Court of the District of Columbia)

In *In re Estate of Tyler*, the plaintiff filed her petition to increase funds after applying for Medicaid but prior to Medicaid's determination of the spouse's

eligibility. *In re Estate of Tyler*, 2002 WL 1274125 *1, *1-*2 (D.C.Super. May 30, 2002). Under the particular facts of that case the court denied the petition, but the court did explicitly endorse the position that the statute unambiguously allows a determination of the amount of resources to be kept even when administrative remedies have not been exhausted:

> There can be no doubt from the express language of the Statute, as enacted, that Congress intended that spousal support orders for income not only be taken into account in calculating income allowances, but also bypass the standard Medicaid rules regarding resources and income. A reading of the plain language of the Medicaid Statute compels the conclusion that Congress intended that court orders transferring resources and income between spouses, if more favorable to the community spouse, preempt the spousal resource and income allowances calculated by the Program. *Id.* at *3, *6 (internal citations omitted).

c. *Blumberg v. Tenn.* (Court of Appeals of Tennessee)

In *Blumberg v. Tenn.*, the plaintiff obtained a court order increasing his MMMNA amount and thereafter his wife applied for Medicaid. *Blumberg v. Tenn.*, 2000 WL 1586454 * 1 (Tenn. Ct. App. Oct. 25, 2000). Medicaid approved his wife, but the increase in his income allocation was denied. *Id.* Drawing heavily upon the language in 42 U.S.C. § 1396r-5(d)(5), the court found that, "[i]f a community spouse seeks an increase in [MMMNA], the Act sets

out two different and independent avenues of relief that can be followed in setting the increase." *Id.* at *2. Thus, the plaintiff's election of the judicial route as provided in 42 U.S.C. § 1396r-5(d)(5) was "within the ambit of the statute." *Id.* at *3.

B. Certiorari is Appropriate Because *Alford* Conflicts with this Court's Decision in *Wisconsin Dep't of Health & Family Servs. v. Blumer*, Mississippi Div. of Medicaid's Own Rules, the Dep't of Health & Human Service's Publications, and the Court's Own Precedent

1. The *Alford* Decision Directly Conflicts With This Court's Decision in *Wisconsin Dep't of Health & Family Services v. Blumer*

In *Wisconsin Dep't of Health & Family Services v. Blumer*, this Court reaffirmed its position that "'Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance' *within boundaries set by the Medicaid statute* and the Secretary of Health and Human Services." *Wisconsin Dep't of Health & Human Services v. Blumer*, 534 U.S. 473, 479 (2002) (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981)) (emphasis added). The Court also implicitly recognized the reason the judicial remedy is provided; there is a "friction between Congress' decision to guarantee a minimum level of income for the community spouse and its failure to mandate the transfer of income necessary in many cases to realize that guarantee." *Id.* at 494.

Blumer also recognized that the MCCA was designed to advance "cooperative federalism" and that "[w]hen interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, *at least where the superintending federal agency has concluded that such latitude is consistent with the statue's aims.*" *Id.* at 495 (citing *Harris v. McRae*, 448 U.S. 297, 308 (1980) *and Batterton v. Francis*, 432 U.S. 416, 429 (1977)) (emphasis added). Unlike those "other statutes so structured," however, the latitude the Mississippi Division of Medicaid has taken is not consistent with the statute's aims – one of which is an explicit endorsement of pre-filing judicial relief under 42 U.S.C. § 1396r-5(d)(5). Accordingly, since the statute clearly provides pre-filing judicial relief, the Division should not be permitted to force applicants into administrative remedies that would, by the Division's own rules, ultimately require a court order, anyway. *Blumer* reinforced that this Court "ha[s] long noted Congress' delegation of extremely broad regulatory authority to the Secretary in the Medicaid area," and this Court should reaffirm that stance today. *Id.* at 496 (internal citations omitted).

2. The Division's Own Rules and Publications by the Department of Health and Human Services Conflict With the *Alford* Decision

The Centers for Medicaid and Medicare services ("CMS"), a division of the Department of Health and Human Services, is the federal department responsible for the oversight and

administration of the Medicaid system in this country. The CMS specifically interprets 42 U.S.C. § 1396r-5 to include a separate judicial method of determining the amount of countable assets a Community Spouse is able to retain. According to CMS, the "Protected Resource Amount" (PRA):

> is *the greatest of*: (1) the spousal Share, up to a maximum of $109,560 in 2009; (2) the state spousal resource standard, which a state can set at any amount between $21,912 and $109,560 in 2009; (3) *an amount transferred to the community spouse for her/his support as directed by a court order*; (4) or an amount designated by a state hearing officer to raise the community spouse's protected resources up to the minimum monthly maintenance needs standard.

Centers for Medicare & Medicaid Services, Spousal Impoverishment (http://www.cms.hss.gov, last accessed on Feb. 2, 2009, App. 33).

Further, the Department of Health and Human Services issued a publication in April of 2005 that also indicated the judicial remedy is an entirely separate option from the "fair hearing" administrative remedy. Specifically, according to CMS, "Medicaid rules provide three pathways for the community spouse to receive a larger MMMNA" and those methods are listed as follows: (1) it may be raised by those community spouses who show that they have "exceptional housing costs," (2) after a state Medicaid hearing finding extreme financial hardship, and (3) the community spouse "may seek a court order for additional support." Spouses of Medicaid Long-Term Care Recipients, Dep't of

Health & Human Services, Policy Brief #3, 4-5. This publication further provided the following resources:

> The community spouse may be able to retain more than the maximum protected amount by: (1) obtaining a court [order] for more; (2) requesting a hearing to petition for an amount sufficient to generate income consistent with Medicaid income protection guidelines for spouses . . . .

Id. at 6.

While these regulations are not binding on Mississippi state courts, they certainly make clear that the Federal agency that is exclusively charged with the oversight of the Medicaid program in all fifty (50) states recognizes the concurrent remedies from the pre-set default MMMNA and CSRA amounts – (a) a court remedy and (b) an administrative remedy. CMS clearly recognizes that a court order is one means to increase the CSRA and/or MMMNA amounts that a community spouse is able to retain for self-support.

In determining the states' motive in denying the court-order path for an increase, one must look no further than Mississippi's own regulations which provide that administrative relief from these preset defaults is not permitted by the agency because the Division cannot award the Community Spouse "a share larger than the federal maximum" without a court order. To then say that court-order original jurisdiction is not allowed is to deny the very federal remedy of court-order relief created by the MCCA altogether. Mississippi Division of Medicaid Eligibility Manual, Volume III, Section I, 9210, App. 35. Under the court's holding in *Alford*, therefore,

one must first file for Medicaid benefits and ask Medicaid for an increase, which Medicaid by its own regulations does not have the power to give. Upon denial of the request for increase, Medicaid would then have the applicant appeal the decision to a local "fair hearing" and then to a "state hearing" before Medicaid hearing officers who also do not have authority under the state regulations to grant an increase. It is only then, after exhaustion of pursuit of a remedy that the agency does not have the power to grant, and while retaining assets that are in excess of the permitted maximums, that the applicant could appeal to a court for an increase to the CSRA and/or MMMNA. At that stage however, the court would be reviewing the case, not de novo as a trial court, but as an administrative appeal under an "arbitrary and capricious" standard. *PERS v. Ross*, 829 So. 2d 1238 (Miss. 2002); *Miss. Bureau of Narcotics v. Stacy*, 817 So. 2d 523 (Miss. 2002). Such a standard could never be met by an aggrieved applicant, since a hearing officer who denied relief that it did not have the power to grant could only act arbitrarily if they actually granted the relief sought. The result, then, is to completely deny applicants this court-ordered remedy created by federal law. Such a result is clearly antagonistic to this Court's precedent, CMS publications, unambiguous statutory language, and legislative intent.

3. The *Alford* Decision Directly Conflicts With Numerous Supreme Court of Mississippi Decisions

The Supreme Court of Mississippi has repeatedly stated administrative remedies that "provide *plain, speedy adequate and complete relief*"

must be exhausted. *PERS v. Hawkins*, 781 So. 2d 899, 907 (Miss. 2001) (citing *Hood v. Mississippi Dep't of Wildlife Conservation*, 571 So. 2d 263, 268 (Miss. 1990). Clearly, as outlined above, the case *sub judice* is not one in which administrative remedies can provide any relief, much less speedy, adequate, and complete relief. As such, the doctrine of exhaustion of administrative remedies should not have been applied in *Alford* as a means to deny a federally created right to a pre-application review.

C. Certiorari is Appropriate Because this Case Involves an Important Question of Federal Law that Has Not Been, But Should Be, Settled By This Court

While Mr. Alford died during the appeal to the Mississippi Supreme Court, that court found the public interest exception to the doctrine of mootness applied because of the advancing age of the population and the impact Medicaid has on many Mississippians. *Alford*, 30 So.3d at 1214. It is clear Medicaid impacts a significant number of the national population, as well; the Patient Protection and Affordable Care Act, the health care reform legislation signed into law on March 23, 2010, expands Medicaid significantly to cover millions more low-income, uninsured individuals. KAISER COMMISSION ON MEDICAID & THE UNINSURED, OPTIMIZING MEDICAID ENROLLMENT: PERSPECTIVES ON STRENGTHENING MEDICAID'S REACH UNDER HEALTH CARE REFORM (April 2010). In *Super Tire Engineering Company v. McCorkle*, this Court stated:

> Certainly, the pregnant appellants in Roe v. Wade . . . had long since outlasted their

> pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. Similar and consistent results were reached in Storer v. Brown; Rosario v. Rockefeller; Dunn v. Blumstein; and Moore v. Ogilvie, cases concerning various challenges to state election laws. *The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society* . . . . [L]ike pregnancy at nine months and elections spaced at yearlong or biennial intervals, [we] should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

416 U.S. 115, 126-27 (1974) (emphasis added, internal citations omitted). *Alford* pointed out that the issues raised therein were of significant importance "[a]s our current population continues to age and our state's coffers become more strained, . . [especially since] Medicaid impacts many Mississippians." *Alford*, 30 So. 3d at 1214. Medicaid certainly impacts many citizens of every state, and states' authority under federal law to increase CRSA and/or MMMNRA amounts by court order prior to filing for Medicaid benefits is an issue that has been regularly litigated over the past several years, is of major significance to the states for both financial and planning purposes, and is one that is ripe for review by this Court.

1. This Case Presents A Question Of Significant National Importance

The often litigated issue in this case is of significant national concern, particularly at a time when the level of federal funding of the Medicaid program is decreasing, and demands on states to include more and more applicants is increasing. *See, e.g.*, Patient Protection & Affordable Care Act (expanding Medicaid to include one-hundred thirty-three (133) percent of federal poverty level); Elizabeth A. Weeks, COOPERATIVE FEDERALISM & HEALTHCARE REFORM: THE MEDICARE PART D 'CLAWBACK' EXAMPLE, 1 STLUJHLP 79, 102 (2007) (discussing the increased enrollment from Medicare Part D expansion). The *Alford* decision calls into question the legitimacy of requiring people to exhaust administrative remedies that are often futile when the MCCA clearly and unambiguously provides an alternative remedy through a pre-application court order. The Division of Medicaid's manual gives no discretion to case workers or hearing officers to make a spousal increase. Only a court can do that under Medicaid's rules. This begs the question, if Medicaid cannot give the relief anyway, what is the applicant supposed to exhaust? Mrs. Alford was not seeking to do an "end run" around the Division of Medicaid, but simply sought relief that Medicaid is not authorized to grant, and which federal law and Medicaid's own regulations place exclusively before a trial court.

Pursuit of the available administrative remedies in a case such as this would have been wasteful and caused unnecessary delay and expense. When a court hearing would be comparatively less

expensive than solving this issue in an administrative arena, then the exhaustion of administrative remedies is not required under Mississippi law. *Hawkins*, 781 So. 2d 899. Requiring an individual to first file for administrative relief that the agency itself cannot, by its own admission, grant is a complete waste of resources and will multiply the attorneys' fees and costs of all parties many times over. Because the Division of Medicaid is unable to give the relief Mrs. Alford requested, and further, because no dispute exists that a "court" is the only authority that can grant the relief requested, there is no question that ultimately a court proceeding would be necessary to give Mrs. Alford the sought relief.

Medicaid has forty-five (45) days to make an initial determination, and as long as ninety (90) days on difficult or unusual files such as those seeking this type of relief. Then, appeal before a local hearing officer may take an additional thirty (30) days or more. A state hearing frequently can take as long as an additional ninety (90) days, and then Medicaid has an unspecified time in which to render a decision or remand the case for further information gathering. Miss. Code Ann. § 43-13-116 (2010). During each month this is occurring the Medicaid applicant is required to privately pay for his or her nursing home stay, which the Division of Medicaid estimates to be, on average, $4,600 per month. Then and only then, according to the Division of Medicaid, should an applicant be allowed to seek relief from a court, which has its own inherent delays due to docket crowding.

This process makes planning for individuals in such circumstances nearly impossible and a true gamble. The applicant and spouse will be forced to endure months, or even years, of private payment while their case is on the path of a futile administrative review, before finally reaching court, the only entity in the entire process with the ability to grant the requested relief. If the court then ultimately denies the relief, the applicant would have to re-structure their remaining assets, which will have been significantly reduced during the administrative and appellate delay as a result of privately paying for services, before re-applying.

Congress intended that the support order by a court could be granted prior to application for benefits, which allows the Medicaid applicant to plan and structure his or her assets in the manner most beneficial to his or her spouse. Both the state and the federal government have strong public policies against the impoverishment of a healthy non-institutionalized spouse. By recognizing that court orders of support in 42 U.S.C. § 1396r-5 can be entered prior to application, and that this statute gives the trial courts the subject matter jurisdiction to accomplish this, this Court will serve the interest of Congressionally recognized spousal self-reliance.

2. The *Alford* Decision Misinterpreted Federal Medicaid Law Regarding the Prevention of Spousal Impoverishment, Thereby Minimizing A Key Purpose Of Federal Medicaid Law

Certiorari is also appropriate in the present case because *Alford* misinterpreted federal Medicaid

law in a way that undercuts the primary purpose of the MCCA: to assure the community spouse has income and resources sufficient to live with independence and dignity. A basic principle of statutory construction provides that related statutes must be read *in pari materia*, keeping in mind the purpose of the entire federal scheme, *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972), a principle that the *Alford* decision ignored. The *Alford* court likewise erred in holding that 42 U.S.C. § 1396r-5(d)(5) does not confer subject matter jurisdiction to state courts to determine if CSRA and/or MMMNA amounts can be increased. *See, e.g.* 28 U.S.C. §§ 1331-32, giving federal courts concurrent jurisdiction with state courts over federal question and diversity questions.

The courts in the District of Columbia, New Jersey, and Tennessee have correctly recognized that 42 U.S.C. § 1396r-5(d)(5) provides an independent, alternative way to seek an increase in the CSRA and/or MMMNA amounts. The Supreme Court of Mississippi, however, erroneously applied the doctrine of exhaustion of administrative remedies. In so holding, the court reached a result that is not only inconsistent with interpretations of the law rendered by the United States Department of Health and Human Services, this Court, and several other courts, but also is antithetical to Congress's intention to prevent the pauperization of community spouses.

CONCLUSION

For the reasons and based upon the authorities set forth above, the Petitioner

respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

RONALD CRAIG MORTON
Counsel of Record for the Petitioner
132 Fairmont Street, Suite A
Clinton, Mississippi 39056
(601) 925-9797
rmorton@mortonlaw.com

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42 U.S.C. § 1396r-5(d)(5):
Court ordered support
If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

42 U.S.C. § 1396r-5(e):
Notice and fair hearing
(1) Notice
Upon--
(A) a determination of eligibility for medical assistance of an institutionalized spouse, or
(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.
(2) Fair hearing
(A) In general