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NCLA Brief Asks U.S. Supreme Court to Recognize How Deference Has Compromised Judicial Independence and Due Process in Case over Funding of Children's Hospitals

Children's Hospital Association of Texas, et al. v. Alex Azar, Secretary of Health and Human Services, et al.

Washington, DC (May 11, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, submitted an *amicus* brief to the U.S. Supreme Court today in support of the petition for a writ of certiorari filed by a group of children's hospitals from around the country. NCLA believes the D.C. Circuit Court of Appeals erred in reversing the district court's decision in this case, which had struck down a Centers for Medicare & Medicaid Services (CMS) formula for hospital payments that violates the statute.

The court of appeals instead ruled that CMS had replaced a 2008 rule with a "reasonable" 2017 rule that lowered the reimbursement of "safety net" hospitals that serve a disproportionate number of low-income patients. Administrative law generally requires agencies to explain the reasons for changing their rules, in order to obtain *Chevron* judicial deference. However, the D.C. Circuit deferred to CMS even though the agency refused to acknowledge—let alone explain—that the 2017 rule had changed the reimbursement formula. The court said that it was enough that CMS explained why its new rule was good policy.

The D.C. Circuit skipped Step One of *Chevron* and evaluated only whether the agency's interpretation was "reasonable." In doing so, the judges ducked their Article III duty as judges "to say what the law is," denied the children's hospitals the due process of law (by showing bias in favor of the agency's legal interpretation), and allowed CMS to wield unlawful administrative power. The D.C. Circuit's decision, which would make the *Chevron* judicial deference precedent even worse than it already is, shows that the Supreme Court needs to police misuse of *Chevron* more closely or—better yet—abandon the *Chevron* doctrine altogether.

Congress has already provided a detailed formula for Medicaid reimbursements. CMS's unexplained, sweeping rewrite of the carefully crafted congressional scheme takes millions of dollars of Medicaid funding away from children's hospitals. *Chevron* does not give CMS, or federal courts, the power to overturn Congress.

NCLA released the following statement:

"Courts cannot outsource their job of deciding cases to the government agencies that appear before them. This case shows why *Chevron* deference undermines judicial independence and impartiality. It is long past time for the Court to call out the ways in which this "deference" has compromised the judiciary—and return to the judicial independence and unbiased judgment that our Constitution and the APA demand."

— Adi Dynar, Litigation Counsel, NCLA

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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