No. 08-08-603

In The

Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR WRIT OF CERTIORARI

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The federal Medicaid program requires states to seek reimbursement of Medicaid payments under certain circumstances. Minnesota Statutes section 256B.15, subdivisions 1a and 2, provide, in part, for recovery from the estate of the Medicaid recipient's surviving spouse, upon that spouse's death. If the surviving spouse did not receive Medicaid benefits, recovery is limited to the value of assets that were marital property or jointly held at any point during the marriage. Such assets include any property that was transferred by the Medicaid recipient to the spouse.

In 2007, the U.S. Secretary of Health and Human Services approved amendments to Minnesota's State Medicaid Plan. The amendments expressly incorporated these spousal recovery provisions. The Minnesota Supreme Court, however, held that the provisions are preempted by 42 U.S.C. § 1396p(b)(4)(B) to the extent they reach assets that the recipient spouse transferred to the surviving spouse before death.

The question presented is:

Does 42 U.S.C. § 1396p(b)(4)(B) preempt a state law that requires recovery of Medicaid benefits from the value of assets in a surviving spouse's probate estate regardless of which spouse formally owned those assets when the recipient spouse died?

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PETITION FOR WRIT OF CERTIORARI

Leo Vos, Director of the Mille Lacs County, Minnesota, Family Services and Welfare Department, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case. The State of Minnesota supports this petition.[1]

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported as *In re Estate of Barg* at 752 N.W.2d 52 (Minn.). App. 1a. The opinion of the Minnesota Court of Appeals is reported at 722 N.W.2d 492. App. 52a. The opinion of the district court is unpublished. App. 46a.

JURISDICTION

The Minnesota Supreme Court issued its opinion May 30, 2008. App. 1a. Petitioner filed a timely

[1] Contemporaneous with this Petition, the State of Minnesota, by and through its Commissioner of Human Services, Cal R. Ludeman, filed a motion to intervene based upon 28 U.S.C. § 2403(b) providing that a state shall be allowed to intervene as a party in cases involving the validity of a state law when a state-level entity is not already a party. Commissioner Ludeman participated as *amicus curiae* in this case before the Minnesota Court of Appeals and the Minnesota Supreme Court. The State's intervention is conditioned on the Court granting certiorari.

motion for rehearing, which was denied by an order filed July 21, 2008. App. 65a. On October 7, 2008, Justice Alito granted Petitioner's motion to extend the deadline for filing this petition to November 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 1, of the United States Constitution (the "Spending Clause") authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. App. 67a. The federal Medicaid laws involved in this case are based upon Congress's Spending Clause power.

42 U.S.C. § 1396 (2000 & Supp. V 2005) provides that:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish medical assistance * * * there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by

> the Secretary, State plans for medical assistance.

App. 68a.

42 U.S.C. § 1396a(a)(18) (2000 & Supp. V 2005) provides that:

> A State plan for medical assistance must –
>
> * * *
>
> (18) comply with the provisions of section 1396p of this title with respect to * * * recoveries of medical assistance correctly paid
>
> * * *

App. 69a.

42 U.S.C. § 1396p(b)(1), (b)(2), (b)(4), and (e)(1) (2000 & Supp. V 2005) provide, in relevant part:

> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> * * *
>
> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate

* * *

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any

* * *

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual –

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State * * * any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

* * *

(e) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and

> resources of the individual and of the individual's spouse
>
> * * *

App. 70a-83a.

The state Medicaid law involved in this case is based on Minnesota's inherent powers to provide for the welfare of its residents and to regulate the descent and distribution of property. *See In re Estate of Eggert*, 72 N.W.2d 360, 361-62 (Minn. 1955). Minnesota Statutes, section 256B.15 (2006) provides that:

> * * *
>
> **Subd. 1a. Estates subject to claims.** If a person receives any medical assistance hereunder, on the person's death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, * * * the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse
>
> * * *
>
> **Subd. 2. Limitations on claims.** * * * A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital

property or jointly owned property at any time during the marriage.

* * *

App. 87a-88a.

STATEMENT

This case is about the most common strategy for sheltering assets so that they can be passed on to heirs instead of being recovered by states to decrease Medicaid costs. It involves the transfer of marital assets from the spouse who is institutionalized and applying for or receiving Medicaid (the "recipient spouse") to the healthy spouse (the "nonrecipient spouse"). Usually, as in this case, the home is the most significant asset that is transferred. Such a transfer changes the formal ownership of an asset. The recipient spouse's lack of formal ownership is then used, like in this case, as grounds for refusing to fully satisfy the Medicaid benefit recovery claim that is made after both spouses have died. The result is that a couple's heirs receive a windfall at the expense of fewer funds being reimbursed to Medicaid.

The Stipulated Facts

In 1962 and 1967, husband and wife Francis and Dolores Barg obtained homestead property in Princeton, Minnesota. App. 2a. They acquired and continued to hold the property as joint tenants with the right of survivorship. *Id.*

In December 2001, Dolores applied for and began receiving Medicaid long-term care benefits. App. 3a. The marital homestead was their only significant asset. *See id.* Its value, however, was excluded for purposes of determining Dolores' Medicaid eligibility because Francis continued living there. *Id.* Seven months later, their daughter executed a guardian's deed conveying the home solely to Francis. App. 3a. Dolores' name was also removed as an owner on the couple's bank accounts. App. 3a-4a.

When Dolores died in January 2004, she had received $108,413.53 in Medicaid benefits from the state. App. 4a. Six months later, Francis died. *Id.* He did not receive Medicaid benefits. *Id.*

Francis left a solvent estate with assets totaling $146,446.29. App. 4a. One of these assets was the couple's home valued at $120,800.00. *Id.* All other assets in Francis' estate were also either jointly held or traceable to jointly-held assets acquired by Dolores and Francis at some time during their marriage. *Id.*

Petitioner Mille Lacs County filed a claim in Francis' probate estate to recover the full value of Medicaid benefits received by Dolores. Francis' Personal Representative (the couple's son) only partially allowed the claim. App. 4a, 47a. The County petitioned in district court for full allowance. App. 4a. The parties agreed to stipulated facts. App. 46a.

The Personal Representative has contended that federal Medicaid law does not allow Minnesota to seek recovery from Francis' estate for benefits paid on

behalf of Dolores. His alternative position has been that, if a recovery claim is allowed, federal law limits the assets liable to satisfy the claim to those that Dolores owned when she died. The County contends that the scope of required recovery under Minnesota law is consistent with federal Medicaid law.

Medicaid's Cooperative Federalism In Covering Medical Care To The Needy

What is popularly known as "Medicaid" was created as part of the Social Security Act. *Social Security Amendments of 1965*, Pub. L. No. 89-97, 79 Stat. 286 (1965). Medicaid pays for needed medical care for people whose income and resources are insufficient to meet the cost of required care. *See Atkins v. Rivera*, 477 U.S. 154, 156 (1986) (citation omitted). Unlike Social Security and Medicare, which are purely federal programs, Medicaid "is a cooperative endeavor in which the federal government provides financial assistance to participating states to aid them in furnishing health care to needy persons." *Harris v. McRae*, 448 U.S. 297, 308 (1980).

In enacting Medicaid, Congress intended it to be the payment source of *last* resort. Specifically, Congress intended that the resources of a couple, including their home equity, be used for their care, their support, or to defray Medicaid costs. S. Rep. No. 97-494 at 38;, *reprinted in* 1982 U.S.C.C.A.N. 781, 814 (1982). Congress did not intend Medicaid to be used as a way to "facilitate the transfer of accumulated

wealth from nursing home patients to their non-dependent children." H. R. Rep. No. 100-105 at 73; *reprinted in* 1988 U.S.C.C.A.N. 857, 896 (1988). Underlying Congress's intent, is its desire to ensure that sufficient funds remain for future Medicaid recipients, and to lessen the burdens on state and federal taxpayers. *Cf. Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981) ("There are limited resources to spend on welfare.").

As with other Spending Clause-based laws, federal Medicaid payments are accompanied by certain broad conditions in statutes and regulations with which a state must comply in order to receive the federal matching funds. Within this Medicaid statutory and regulatory framework, participating states enact their own state-specific legislation and rules for the administration and implementation of their state programs. Congress intended Medicaid to provide states with flexibility in designing programs to meet each state's needs, and states are given considerable latitude in formulating the terms of their programs. *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002). State laws and policies are then incorporated into State Medicaid Plans, which must be approved by the U.S. Secretary of Health and Human Services before a state may receive federal payments. 42 U.S.C. § 1396.

Medicaid Estate Recovery And Its Important Purposes

"Estate recovery" is the term for the general process by which a state seeks reimbursement, after a Medicaid recipient's death, for Medicaid benefits received. *See* U.S. Dep't of Health & Human Servs., *Issues in Medicaid Estate Recoveries: A Report to the United States Congress*, 1-2 (1989) ("HHS, *Issues in Medicaid Estate Recoveries*"). Generally, recovery only applies to Medicaid recipients who were permanently institutionalized or over age 55. 42 U.S.C. § 1396p(b)(1). Recovery must be delayed until after the death of a surviving spouse and until there are no dependant or disabled children. 42 U.S.C. § 1396p(b)(2). "Spousal recovery" is used to describe recovery that is delayed because of a surviving spouse.

Medicaid estate recovery has a number of important purposes. First, it serves to recycle public funds for other needy people by recovering the value of those funds. *See In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986) (recognizing the reuse of Medicaid funds is "a very important purpose"). Estate recovery is thus an important source of nontax support for Medicaid. HHS, *Issues in Medicaid Estate Recoveries* at 12; General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs* 23 (1989) ("GAO, *Medicaid Recoveries*"). In 2004, estate recovery returned $361.7 million to public treasuries. *See* U.S. Dep't Health & Human

Servs., *Policy Brief: Medicaid Estate Recovery Collections* 1 (2005).

Second, estate recovery promotes the public interest over the private interest of heirs. Medicaid funds are returned for public use and heirs do not unfairly benefit by receiving assets that were protected from depletion by Medicaid. *Kizer v. Hanna*, 767 P.2d 679, 681-82 (Cal. 1989); *In re Estate of Davis*, 442 N.E.2d 1227, 1229 (N.Y. 1982) (noting that disappointed nondependent heirs are the real party in interest opposing estate recovery).

Third, estate recovery helps contain Medicaid's costs of providing long-term care to the elderly. The use of estate recovery encourages the use of private long-term care insurance rather than solely relying on Medicaid. HHS, *Issues In Medicaid Estate Recoveries* 3. In the same vein, estate recovery is the "logical extension" of other Medicaid laws that prevent couples from transferring their assets to others, known as "voluntary impoverishment," in order to qualify for Medicaid earlier instead of using those assets to pay for their care. GAO, *Medicaid Recoveries* 5.

Fourth, spousal recovery specifically balances the interests of the state and those of the couple. During their lifetimes, Medicaid pays for the care of the sick spouse and many of the couple's assets can still be used to support the nonrecipient spouse living in the community. Recovery is delayed until after both spouses have died and their assets are no longer needed for their care or support. In return for

Medicaid's long-term care coverage, the couple's remaining assets, if any, can be used to reimburse Medicaid before going to heirs.

Congress's 1993 Amendments Expand Medicaid Estate Recovery

A series of reports in the late 1980s identified estate recovery as an underutilized means of offsetting Medicaid costs. *See, e.g.,* GAO, *Medicaid Recoveries*; HHS, *Issues In Medicaid Estate Recoveries*. At about the same time, though, the Ninth Circuit limited the ability of already-active state estate recovery programs to use estate recovery when it narrowly interpreted then-existing federal law. *Citizens Action League v. Kizer*, 887 F.2d 1003, 1006 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990). As a result of these events, Congress substantially expanded Medicaid estate recovery through amendments in the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"). Pub. L. No. 103-66, § 13612 (amending 42 U.S.C. § 1396p(b)). Before, estate recovery had simply been permitted. OBRA 1993, however, required that states seek recovery "from the individual's estate" in the case of Medicaid recipients age 55 and over. 42 U.S.C. § 1396p(b)(1)(B).

Congress also included in the OBRA 1993 amendments the provision at issue in this case. Subsection 1396p(b)(4)(A) mandates that, for recovery purposes, the term "estate" "shall include all real and personal property and other assets included within

the individual's estate, as defined for purposes of State probate law." Subsection 1396p(b)(4)(B) then provides that the term "estate"

> may include, at the option of the State * * * any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(emphasis added.) OBRA 1993 also provided that "[t]he term 'assets,' with respect to an individual, includes all income and resources of the individual *and of the individual's spouse* * * *." 42 U.S.C. § 1396p(e)(1) (emphasis added).

Minnesota's History Of Spousal Recovery

Minnesota has had public welfare estate recovery laws since at least 1929, when it began offering old age assistance. *See In re Estate of Paulson*, 72 N.W.2d 857, 858-59 (Minn. 1955). These laws were broad and allowed recovery from assets in the estate of one spouse of the value of benefits received by the other. *See In re Estate of Eggert*, 72 N.W.2d 360, 362 (Minn. 1955). Minnesota's Medicaid estate recovery law dates from 1967 when Minnesota began participating in Medicaid. *Turner*, 391 N.W.2d at 768.

Since 1987, Minnesota Medicaid law has expressly required recovery from the probate estates of surviving spouses. Minn. Stat. § 256B.15, subd. 1a (2006). Section 256B.15 requires filing a claim for recovery from the probate estate of the last surviving spouse, regardless of whether that spouse was the Medicaid recipient. *Id.* The state's claim, however, is limited "to the value of the assets of the estate that were marital property or jointly owned property *at any time* during the marriage." Minn. Stat. § 256B.15, subd. 2 (emphasis added).[2]

District Court And Court of Appeals Holdings

Both the district court and the court of appeals held that recovery on the county's claim was allowed.

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[2] In 2003, Minnesota added a number of provisions to section 256B.15. *See* Act of June 5, 2003, ch. 14, art. 12 §§ 40-52, 90; 2003 Minn. Laws (1st Sp. Sess.) 1751, 2205-18, 2250-51 (codified at Minn. Stat. § 256B.15, subds. 1, 1c to 1k (2006)). These provisions ensure that a joint tenancy or life estate interest held by a Medicaid recipient will be subject to recovery after the recipient's death. It ensures recovery by bringing these interests into probate rather than allowing them to pass outside of probate. The provisions address situations when the other co-owners or remaindermen are not a recipient's spouse.

The spousal recovery provisions at issue here were generally unaffected by the 2003 amendments. Spousal recovery is from a spouse's probate estate and does not rely on capturing nonprobate assets. Both parties agreed that the 2003 amendments do not apply here. Appellant's Supp. Br. at 2; Respondent's Supp. Br. at 2. The court below discussed those amendments and also concluded that they do not apply. App. 40a-43a.

These holdings were based on the conclusion that Dolores' transfer of her interest in the homestead to Francis' qualified as an "other arrangement" under § 1396p(b)(4)(B). App. 49a and 62a. Both courts, however, limited the scope of recovery based on the court of appeals' earlier decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). *Gullberg* had held that state law was partially preempted by § 1396p(b)(4)(B) to the extent the law required recovery beyond the recipient's interest in an asset at the time of death. *Id.* at 714. Thus, both the district court and the court of appeals relied on federal law to deny full recovery on the claim.

The Minnesota Supreme Court granted the County's request for discretionary review of the court of appeals' decision. It also granted the Personal Representative's conditional request for review of the question of whether federal law prohibited any recovery from a nonrecipient spouse's probate estate.

The Secretary of Health and Human Services' Approval of Minnesota's Spousal Recovery Provisions As Part of Its Medicaid State Plan

On June 27, 2007, the Secretary of the U.S. Department of Health and Human Services, acting through the Centers for Medicare and Medicaid Services, approved an amendment to Minnesota's state Medicaid plan that incorporated the spousal recovery provisions at issue in this case. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

Human Servs., *Transmittal and Notice of Approval of State Plan Material*, Transmittal No. 07-005 (June, 27, 2007). App. 90a. This approval is based upon the determination that the estate recovery provisions comply with federal Medicaid statutory conditions. 42 U.S.C. §§ 1396a(b) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section"); 1396a(a)(18) (incorporating condition of compliance with terms of § 1396p).

The approved state plan amendment incorporated the substance of Minnesota's spousal recovery laws and explained how the state applied those laws. As amended, the state plan provides that Minnesota recovers from the estates of surviving nonrecipient spouses. It then explains that "[a]ny assets, proceeds of assets and income from such assets, that were jointly owned property at any time during the marriage or marital property including all property *in which either spouse had an interest at the time of marriage and property acquired by either or both during the marriage, regardless of how acquired, titled or owned are subject to recovery*." App. 93a (emphasis added).

Soon after the Secretary issued his approval of the state plan amendment, the Minnesota Commissioner of Human Services, as *amicus curiae*, submitted it to the Minnesota Supreme Court. Minn. Comm'r of Human Servs., Supp. Authority Submission, July 9, 2007.

The Minnesota Supreme Court's Opinion

On May 30, 2008, the Minnesota Supreme Court issued its opinion, affirming the court of appeals in part and reversing the court of appeals in part.

The Minnesota Supreme Court first rejected the Personal Representative's contention that federal law bars *any* recovery from a surviving spouse's probate estate, and therefore preempts Minnesota law. App. 30a. After finding that other courts "are split on the question," the court concluded that the federal statute was sufficiently ambiguous that the presumption against preemption militated in favor of upholding state laws authorizing spousal recovery. App. 29a-30a.

The court then addressed the following question: "does federal law limit the [spousal] recovery to assets in which the recipient had an interest at the time of her death, preempting the broader recovery allowed in Minn. Stat. § 256B.15, subd. 2, as to assets owned as marital property or in joint tenancy at any time during the marriage?" App. 17a. The court answered the question yes. It held that federal law preempts Minnesota from seeking recovery from spousal assets unless the recipient spouse had a formal ownership interest in the asset at the time of death. App. 37a.

The court purported to rely on the plain language of § 1396p(b)(4)(B)(2), finding that the provision limits recovery to "assets in which the individual" – *i.e.*, the recipient spouse – "had any legal title or interest in at the time of death." App. 37a. In the

court's view, assets transferred by the recipient spouse before her death were exempt from Medicaid estate recovery claims. The court made no mention of § 1396p(e)(1), establishing the meaning of "[t]he term 'assets,' with respect to an individual, [to] include[ ] all income and resources of the individual *and of the individual's spouse*, * * *." (emphasis added). Nor did the court make any reference to the Secretary's approval of Minnesota's state Medicaid plan.

The court disagreed with the decision by the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The North Dakota court had held in *Wirtz* that federal law did *not* prohibit states from recovering from marital assets that had been transferred between spouses before the recipient's death. App. 33a-34a. The Minnesota court rejected *Wirtz*'s conclusion that such lifetime transfers constituted an "other arrangement" under 42 U.S.C. § 1396p(b)(4)(B). App. 34a.

Finally, the court applied its legal holdings to the facts and concluded that Dolores did not have an interest in the homestead or bank accounts at the time of her death because those assets had already been transferred to Francis. App. 43a. Consequently, the court held that the County was precluded from requiring satisfaction of its claim from those assets.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to address the irreconcilable conflict between the Minnesota Supreme Court's decision and the Secretary's interpretation of § 1396p(b)(4)(B). Granting this Petition is also necessary to resolve the conflict with the North Dakota Supreme Court's decision in *Wirtz*. The scope of Medicaid estate recovery is an important question, affecting the administration of the Medicaid program by both the federal and state governments, federal and state budgets, and potentially millions of elderly Medicaid recipients. A grant of certiorari is warranted.

I. THE MINNESOTA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH INTERPRETATIONS BY THE SECRETARY OF HEALTH AND HUMAN SERVICES AND BY THE NORTH DAKOTA SUPREME COURT.

A. The Decision Below Conflicts With The Secretary's Approval Of Minnesota's State Medicaid Plan.

1. The Minnesota Supreme Court's holding irreconcilably conflicts with the Secretary's interpretation and state plan approval. Minnesota's approved state plan provides that recovery applies to the "full value of all assets" in the nonrecipient spouse's probate estate that were the property of *either* spouse during their marriage. App. 93a. The court, however, held that Minnesota law was preempted because

"federal law clearly limits [recovery] to assets in which *the recipient* had an interest at the time of her death." App. 37a (emphasis added). However, this conclusion is directly contrary to how the Secretary has interpreted federal law. *See* App. 93a.

In applying its holding, the court below concluded that the Bargs' marital homestead was not subject to recovery because Dolores had transferred her interest to Francis before her death. App. 43a. Applying the Secretary's interpretation, reflected in his approval of the state plan, leads to the opposite conclusion.

Minnesota's approved spousal recovery provisions prevent the sheltering of assets from recovery by simply changing the name on the asset before the recipient dies. The decision below allows and encourages such sheltering – at public expense.

2. This conflict between the decision below and the Secretary's interpretation is significant. Congress has delegated to the Secretary substantial authority and responsibility for administering Medicaid and determining state compliance with Medicaid's statutory conditions.[3] 42 U.S.C. § 1396 (making payment of federal Medicaid funds to states contingent upon the Secretary's approval of state plans). Indeed, the Court

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[3] The Secretary has delegated Medicaid oversight to the Centers for Medicare and Medicaid Services within the Department of Health and Human Services. *See Blumer*, 534 U.S. at 479 n.1. Reference will nevertheless be made to the Secretary as the administrative and interpretive authority. *See id.*

has "long noted Congress'[s] delegation of extremely broad regulatory authority to the Secretary in the Medicaid area." *Blumer*, 534 U.S. at 497 n.13.

Congress specifically vested the Secretary with authority to enforce Medicaid conditions on states. 42 U.S.C. § 1396c. If the Secretary finds that a state plan does not comply with Medicaid conditions, or that the plan is administered in a way that results in "a failure to comply substantially" with any condition, the Secretary has authority to enforce the Medicaid statute by ending or limiting federal matching payments until there is compliance. *Id.*; *see, e.g., West Virginia v. Thompson*, 475 F.3d 204, 208 n.1 (4th Cir. 2007) (*"West Virginia II"*) (recounting history of compliance efforts directed toward West Virginia regarding estate recovery).

The submission and approval of a state plan or state plan amendment, as in this case, is not a meaningless or symbolic act. The state plan is the key document defining the federal-state relationship. 42 U.S.C. § 1396a(a); *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 284 (4th Cir. 2002) (*"West Virginia I"*). It is "a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with [federal Medicaid requirements]. The [s]tate plan contains all information necessary for the Department [of Health and Human Services] to determine whether the plan can be approved." Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

Human Servs., State Medicaid Manual § 13025. Congress has directed that the Secretary "shall approve" any plan or amendment to a plan that complies with federal law. 42 U.S.C. § 1396a(b).

In light of the significant role of the state plan in the state-federal relationship, and as the primary means of ensuring compliance with Medicaid laws, the Secretary exercises rigorous oversight. State plans and amendments are evaluated by applying the same Medicaid statutes a court would apply to verify compliance with the federal conditions. 42 C.F.R. § 430.15(a)(1) ("Determinations as to whether State plans (including plan amendments and administrative practice under plans) originally meet or continue to meet the requirements for approval are based on relevant Federal statutes and regulations."). Approval of a state plan amendment is the Secretary's determination that a state has complied with the conditions imposed by federal Medicaid laws.

3. The conflict between the decision below and the Secretary's interpretation is also significant because the application of the Secretary's interpretation is not limited to Minnesota's state plan. The Secretary has applied that interpretation in approving at least four other state plans that expressly include spousal recovery provisions. Two of those state plans, North Dakota's and Oregon's, simply state that the surviving spouse's probate estate is subject to recovery claims without imposing a limit on

what assets are subject to recovery.[4] The other two state plans, Idaho's and Indiana's, state that a surviving spouse's probate estate is liable for recovery but, like Minnesota, place some limit on the recoverable assets – e.g., excluding assets attributable to a spouse's remarriage.[5] Of course, other states also have a significant interest in knowing the permissible scope of spousal recovery as they may consider available options under federal law.

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[4] North Dakota State Medicaid Plan, Transmittal No. 95-016, Attachment 4.17-A (approved Dec. 12, 1995) (stating "North Dakota defines the estate as those assets which are, under state law, that part of the decedent's probate estate or that part of the decedent's surviving spouse's probate estate which is subject to the claims of creditors."); Oregon State Medicaid Plan, Transmittal No. 02-01, Attachment 4.17-A (approved April 17, 2002) (stating that "estate is defined as all real and personal property and other assets included within the individual's, or the individual's surviving spouse's, probatable estate.").

[5] Indiana State Medicaid Plan, Transmittal No. 05-012, Attachment 4.17-A (approved Mar. 10, 2006) (stating that "[a]ssets included in the estate of the Medicaid recipient's surviving spouse are included after the death of the surviving spouse. If the surviving spouse has remarried, assets that are attributable to the surviving spouse's subsequent spouse are not included); Idaho Medicaid State Plan, Transmittal No. 01-006, Attachment 4.17-A (approved Jul. 13, 2001) (stating that "[a] claim against the estate of a surviving spouse of a predeceased recipient is limited to the value of the assets of the estate that were community property, or the deceased recipient's share of the separate property, and jointly owned property."). The Minnesota Commissioner of Human Services included copies of the relevant sections of the North Dakota, Indiana, and Idaho state Medicaid plans with his *amicus curiae* brief below. Minn. Comm'r of Human Services' Amicus Curiae Br., App'x 4-17.

B. The Minnesota Supreme Court's Decision Directly Conflicts With The North Dakota Supreme Court's *Wirtz* Decision.

The Minnesota Supreme Court's holding on the scope of spousal recovery directly conflicts with the 2000 decision of the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). *Wirtz* considered which assets in a surviving nonrecipient spouse's probate estate were subject to recovery given the definition of "estate" contained in 42 U.S.C. § 1396p(b)(4)(B). The facts in *Wirtz* were the same as the essential facts in *Barg*: one spouse received Medicaid benefits and died leaving no probate estate; the other spouse died later, having received no Medicaid benefits and leaving property in her estate that included former marital property. 607 N.W.2d at 883.

The North Dakota Supreme Court held that marital assets conveyed by the recipient spouse to the nonrecipient spouse during the marriage, but before the recipient's death, are subject to a recovery claim. *Id.* at 885. The court reached that holding after concluding that the terms "interest" and "other arrangement" in § 1396p(b)(4)(B) created ambiguity in the statute's plain language. *Id.* The court then turned to legislative history to identify Congress's intent. Based on its earlier analysis of that intent in *In re Estate of Thompson*, 586 N.W. 2d 847 (N.D. 1998), the North Dakota court concluded that Congress intended to allow states to trace the assets of

recipients and recover from those assets after the recipient's surviving spouse died. 607 N.W.2d at 885.

The Minnesota Supreme Court rejected *Wirtz's* reliance on the phrase "other arrangement" in § 1396p(b)(4)(B). The court concluded that the plain meaning of "other arrangement" is "arrangements other than those expressly listed [in the statute] that also convey assets at the time of the Medicaid recipient's death." App. 34a. Thus, a direct and clear conflict exists between two state supreme courts on the question presented.

II. THE MINNESOTA SUPREME COURT MISCONSTRUED FEDERAL LAW.

The plain language of § 1396p(b)(4)(B) fully supports the Secretary's interpretation and the *Wirtz* holding. It allows a state, "at the option of the State," to go beyond the minimum probate scope or range of recovery. Thus, Congress allowed states to expand the range of recovery to include "any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death." (emphasis added).

Congress, in turn, unambiguously declared that the term "assets," as used throughout § 1396p, "includes all income and resources of the individual *and of the individual's spouse.*" 42 U.S.C. § 1396p(e)(1) (emphasis added). Congress adopted this meaning of "assets" at the same time it adopted § 1396p(b)(4)(B)'s expanded range of recovery option, which uses the

term "assets." OBRA 1993, Pub. L. No. 103-66, § 13611(c) (describing meaning of "assets"); § 13612(c) (adding expanded option), 107 Stat. 312, 626, 628 (1993).

Giving effect to Congress's declared reach of the term "assets" fully supports Minnesota's scope of spousal recovery. When "assets" is used in a provision, Congress expressly expanded the reach of that provision to include the resources of an individual's spouse. Thus, in § 1396p(b)(4)(B) the clause "any * * * assets in which the individual had any legal title or interest" means assets "any * * * assets in which [either or both the individual and the individual's spouse] had any legal title or interest." Minnesota's law seeking recovery from the value of assets in a surviving spouse's probate estate is consistent with the "any * * * other assets" clause.[6]

When this meaning of "assets" is applied to the phrase "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death," it is apparent that the Minnesota Supreme Court's reading of the

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[6] Consistent with the phrase "at time of death" in § 1396p(b)(4)(B), Minnesota's state Medicaid plan explains that spousal recovery "does not apply to assets attributable to a subsequent spouse when the nonrecipient spouse has remarried, or to assets acquired individually with non-marital assets or interests by the nonrecipient spouse after the death of the recipient spouse." *See* App. 93a.

provision is in error. It makes no sense to speak of "assets *of an individual's spouse* in which the individual had any legal title or interest at the time of death." By including resources of both "the individual" and "of the individual's spouse" in the meaning of "assets," Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B).

Congress's intention here is confirmed by all of the other Medicaid provisions relating to the treatment of spousal assets. Those provisions all allow or require states to consider those resources to be available to pay for the care of the recipient spouse, *regardless* of formal ownership.[7] This Court, too, has recognized what these provisions embody: the "background principle" of Medicaid that spouses are expected to support each other. *Blumer*, 534 U.S. at 494; *see also Schweiker*, 453 U.S. at 47-48 (noting that in Medicaid "Congress treated spouses differently from most other relatives by explicitly authorizing state

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[7] 42 U.S.C. § 1396a(a)(17)(D) (allowing states to take into account the financial responsibility of a spouse even though states are generally prohibited from considering the responsibility of other relatives); 42 U.S.C. § 1396r-5(c)(2)(A) (requiring that "all the resources held by *either* the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse" for eligibility purposes (emphasis added)); 42 U.S.C. § 1396p(c)(1)(A) (imposing an eligibility penalty for a transfer by *either* spouse of assets at less than fair market value to a third party); and 42 U.S.C. § 1396p(d)(2)(A)(ii) (requiring, for eligibility purposes, the counting of assets in a trust if the trust assets are those of the individual *or those of the individual's spouse*).

plans to 'take into account the financial responsibility' of the spouse.").

Finally, the decision of the Minnesota Supreme Court is inconsistent with the presumption against preemption. That presumption requires "a narrow interpretation" of federal provisions that are claimed to preempt state laws. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[8]

III. WHETHER FEDERAL LAW LIMITS SPOUSAL RECOVERY IS AN IMPORTANT QUESTION BECAUSE OF ITS IMPACT ON STATE MEDICAID PROGRAMS.

A. Limiting Recovery From Spousal Assets Significantly Affects Benefit Recovery.

The Minnesota Supreme Court's decision prohibits recovery from any spousal asset that the recipient spouse transferred before death. This limitation significantly affects benefit recovery by allowing a

[8] To the extent the federal statute's language is ambiguous about the scope of spousal recovery claims, there can still be no preemption. An ambiguous condition on states in a Spending Clause-based law is unenforceable. *See Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (stating that Spending Clause statutes must give state officials "clear notice" of the conditions that attach to acceptance of federal funds). Also, the Secretary's approval of Minnesota's state plan warrants deference if the underlying federal statute is ambiguous and the Secretary's construction of the statute is a permissible one. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

couple's most significant asset, their home, to escape recovery. *See West Virginia I*, 289 F.3d at 284-85; *West Virginia II*, 475 F.3d at 207. Indeed, the GAO estimated that recovery from home equity could offset 68% of the Medicaid costs of couples who owned their homes. GAO, *Medicaid Recoveries* at 4.

The Minnesota Supreme Court's holding has the practical effect of encouraging interspousal transfers as a way to shelter assets from being used to pay for long-term care. Consequently, the court's decision validating such transfers as a way to shelter assets will create an additional burden on state and federal taxpayers.

Interspousal transfers are the most common form of Medicaid planning. Wesley E. Wright, et al., *Planning Effectively To Cope With Medicaid Estate Recovery*, 32 Est. Plan. 20, 25 (2005) (stating "Many elder law practitioners defeat estate recovery by capitalizing on exempt transfers under the Medicaid rules."). For example, Medicaid planning practitioners advise that "[t]he home should always be transferred to the community spouse [i.e., the nonrecipient spouse] to avoid Medicaid estate recovery." Thomas D. Begley Jr., *Medicaid Planning for Married Couples*, 17 Nat'l Acad. Elder Law Att'ys Q. 19, 20 (2004). A practitioner also explained the benefit – to a couple's heirs – of this strategy in that "[t]ransfer of the home * * * allows Medicaid coverage to continue for the beneficiary, while removing the home from the beneficiary's estate and thus defeating estate recovery." Wright, *supra* at 25. The same practice was also

described as "an effective means of moving assets out of the Medicaid applicant's name, without jeopardizing Medicaid eligibility, while sheltering those assets against estate recovery." *Id.*

The Minnesota Supreme Court's decision allowing the sheltering of assets has an immediate and direct impact on public resources. The Minnesota Department of Human Services estimates that annual Medicaid benefit recoveries will initially be reduced because of the decision by over $4 million. That estimated annual reduction will increase to over $10 million by 2013. Similarly, before the decision in this case was issued, Oregon estimated that subjecting interspousal transfers to recovery would increase recoveries by $20 million over twenty-four months in that state.[9] Notably, Oregon premised its ability to make such recoveries on *Wirtz* and Minnesota caselaw before the Minnesota Supreme Court's decision in this case.[10]

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[9] Oregon Secretary of State, *Notice of Proposed Rulemaking Hearing*, Jan. 24, 2008 (available at http://www.dhs.state.or.us/policy/selfsufficiency/publications/01-24-08nprm.pdf) (Last visited October 22, 2008).

[10] *Id.*

B. The Scope Of Spousal Recovery Under Medicaid Is A Question Important To All States.

The scope of spousal recovery under federal law is a matter of widespread importance to those states that use spousal recovery. At least eleven other states have spousal recovery statutes: California,[11] Idaho,[12] Indiana,[13] Iowa,[14] Kansas,[15] Missouri,[16] North Dakota,[17] Ohio,[18] Oregon,[19] South Dakota,[20] and Wyoming.[21] Any limitation on the scope of spousal recovery claims is important to these states because it constrains their present or future practices. Three other states had spousal recovery practices or statutes that were subsequently invalidated by court decisions holding that federal law prohibited recovery claims against a nonrecipient spouse's estate: Illinois,[22] Tennessee,[23]

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[11] Cal. Welf. & Inst. Code § 14009.5(a) (2008).

[12] Idaho Code Ann. § 56-218 (2008).

[13] Ind. Code § 12-15-9-1 (2008).

[14] Iowa Code § 249A.5 (2007).

[15] Kan. Stat. Ann. § 39-709(g)(2) (2008).

[16] Mo. Rev. Stat. § 473.399 (2008).

[17] N.D. Cent. Code § 50-24.1-07(5) (2008).

[18] Ohio Rev. Code § 5111.11(B)(1) and 5111.111(B) (2008).

[19] Or. Rev. Stat. § 414.105 (2008); Or. Admin. R. 461-135-0832 (2008).

[20] S.D. Codified Laws § 28-6-23 (2008).

[21] Wyo. Stat. Ann. § 42-4-206(c) (2008).

[22] *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006).

[23] *In re Estate of Smith*, 2006 WL 3114250 (Tenn. Ct. App. 2006).

and Wisconsin.[24] Estate recoveries in the twelve states which have opted for spousal recoveries (including Minnesota) account for over 42% of all Medicaid estate recoveries nationwide. *See* Am. Ass'n Ret. Pers., *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* 50 (2005).

The question presented is also important to states that do not currently choose to use spousal recovery. All states are required to seek recovery from assets in individuals' probate estates under § 1396p(b)(4)(A). States may consider expanding the scope of estate recovery efforts to include spousal recovery. 42 U.S.C. § 1396p(b)(4)(B). For example, the Minnesota Department of Human Services understands that its counterpart in Colorado is considering legislative proposals to expand estate recovery to include spousal recovery. Now, however, Colorado and other states are faced with conflicting statements about the scope of spousal recoveries. Such uncertainty may dissuade states from opting for spousal recovery.

Medicaid issues in general and Medicaid estate recovery issues in particular are important nationally. In 2007, six million people were covered by Medicaid in the "aged" category -- all of whom may eventually be subject to estate recovery. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

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[24] *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995).

Human Servs., Medicaid Data Compendium 34 (2007). New York's highest court concluded that the large number of elderly enrolled in Medicaid programs make the issue of estate recovery "one of broadsweeping application." *Davis*, 442 N.E.2d at 1228. Further illustration of the national significance of estate recovery issues is the participation as *amicus curiae* below of the National Senior Citizens Law Center, a national advocacy organization based in Washington, D.C., and California.

In addition, the Court has itself recognized the widespread importance of Medicaid questions. It has done so in granting certiorari in Medicaid cases involving long-term care recipients and federal limitations relating to liens on recipient property interests. *Blumer*, decided in 2002, considered whether states could use an "income first" rule in determining the eligibility of institutionalized individuals with spouses. 534 U.S. 473. In its 2006 *Ahlborn* decision, the Court considered whether the provisions in 42 U.S.C. § 1396p(a) limited the scope of a state's lien on personal injury settlements. *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006). This Court's intervention is once again required to ensure the uniform and proper application of the Medicaid program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF THE MINNESOTA ATTORNEY GENERAL
Bremer Tower, Suite 900
445 Minnesota Street
St. Paul, MN 55101-2127
(651) 296-8714

LORI SWANSON
Attorney General

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

Counsel for Petitioner

Dated: November 3, 2008.