No. 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

SUPPLEMENTAL BRIEF OF PETITIONER

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PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari should be granted to resolve the direct conflict between the decision below and the North Dakota Supreme Court as well as to resolve the uncertainty for states that results from the United States' recent and abrupt change in position. The law, as construed by the court below and the United States, creates a gaping loophole in the Medicaid Act allowing and encouraging the sheltering of assets for the benefit of private heirs instead of being available to decrease public spending.

A. The Decision Below Is In Direct Conflict With North Dakota On The Same Federal Question.

As demonstrated in the Petition, the Minnesota Supreme Court's decision directly conflicts with the North Dakota Supreme Court's decision in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The United States' claim that any conflict is only about state law misreads the North Dakota court's opinion.

1. The United States' reasoning relies on a passing statement in *Wirtz* that is not the holding. U.S. Br. 13-14. The North Dakota court clearly identified its holding by stating that "[w]e *hold* [that] any assets *conveyed* by Clarence Wirtz to Verna Wirtz *before Clarence Wirtz's death* . . . are subject to the department's recovery claim." 607 N.W.2d at 886 ¶14

(emphasis added). Nothing in that court's discussion suggests, as the United States claims, that the recipient spouse had a state-law interest at the time of death. Indeed, the court explicitly states that federal law allows recovery from an asset in which the recipient "*once* held an interest." *Id.* (emphasis added). That interpretation of federal law is the exact opposite of the decision below. *Compare id. with* Pet. 37a ("To be recoverable, the asset must have been subject to an interest of the Medicaid recipient at the time of her death.").

2. The United States asserts that the North Dakota court "appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, *retained* an interest in the relevant property until his death, when the interest was conveyed to his spouse through 'other arrangement.'" U.S. Br. 14 (emphasis added). That assertion is unsupported by the *Wirtz* decision. The court specifically *rejected* the state's arguments contending that the recipient had *retained* various equitable interests that were present at his time of death. 607 N.W.2d at 883 ¶4 (stating "[w]e disagree with both parties' arguments").

Instead, the court reasoned that if the recipient had *once* had an ownership interest but had transferred that interest during his lifetime, then the transfer was an "other arrangement." It reasoned that "other arrangement" must be interpreted broadly to include lifetime transfers because Congress intended "to allow states a wide latitude in

seeking Medicaid benefit recoveries." *Id.* at 885-86 ¶13.

3. The United States suggests that, assuming there is a conflict, the North Dakota court might consider its new interpretation. U.S. Br. 15. However, it has not issued formal guidance and does not state that it intends to. *See* U.S. Br. 12. In addition, it is highly unlikely that North Dakota will disturb a nine-year old precedent. Speculation that differences will thus be "work[ed] . . . out" is unwarranted.

B. The United States' Construction Gives No Effect To The Statutory Definition Of "Assets."

In this case, and many others, the couple's single largest asset, their home, was sheltered from recovery through the recipient spouse's simple lifetime transfer of her formal interest. Such a transfer is not penalized only because it is between spouses. That loophole is well-known and often exploited. *See* Pet. 29-30. Although Congress chose not to require states to counteract that loophole, it did not prohibit states like Minnesota from choosing to doing so.

1. Explicit statutory definitions control the interpretation and application of statutory terms. *Burgess v. United States*, ___ U.S. ___, 128 S.Ct. 1572, 1577 (2008). The unusual case where a definitional statute need not be followed is where doing so produces a "manifest incongruity" that will "destroy one of the major purposes" of the particular provision

containing the defined term. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). Here, applying Congress's declared scope of the term "assets" as allowing states to reach those assets of the individual and of the individual's spouse does not result in manifest incongruity or destroy a purpose of the statute.

The statutory definition of "assets" contains three dimensions. 42 U.S.C. § 1396p(e)(1) (2006). First, "assets" identifies the nuts and bolts of the term as "all income and resources," of which only resources is relevant during post-death benefit recovery. "Resources" is further defined to include a couple's home. 42 U.S.C. § 1396p(e)(5). Second, "assets" identifies whose resources Congress intended to reach: those "of the individual and of the individual's spouse." The scope thus given to the term recognizes what this Court has also recognized: that "spouses typically possess assets and income jointly and bear financial responsibility for each other." *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002). Third, the "assets" definition declares that the term even encompasses a resource to which the individual or her spouse is entitled but does not receive because they have taken an action to make the resource technically unavailable. 42 U.S.C. § 1396p(e)(1)(A)-(C).

2. In this case, Petitioner's construction is consistent with and gives effect to all three dimensions. Francis Barg's probate estate contained the couple's resources, specifically their home. Although the home and other resources were in his name alone, they

were undisputedly marital property and even formerly jointly owned with Dolores Barg. Finally, Dolores Barg's lifetime transfer was an action that divested her interest to which she was otherwise entitled and thus was an action to make that resource technically unavailable to pay for her cost-of-care after her death. In contrast, the construction of the United States and the court below give no effect to the statutory definition and thus allow the lifetime transfer to forever exclude resources from later recovery.

The United States erroneously contends that applying the definitional statute makes the statute say "the opposite of what it says." U.S. Br. 10. Because Congress used the definitional statute to include a spouse's resources and to reach a resource the individual acted to make technically unavailable, Congress intended to allow states to pierce the veil of paper ownership arrangements. This allowance ensures, after both spouses have died, that states can choose to impose liability on an asset that would have been titled in the recipient spouse's name at her death except for a lifetime transfer designed only to shelter that asset from recovery.

C. Medicaid's Purpose Is For Assets To Be Used For A Couple's Care And Support Before Going To Heirs.

1. The United States claims that three other Medicaid provisions illustrate that the Act "imposes

significant limitations" on the principle that "spouses are expected to support each other." U.S. Br. 11. However, those provisions all illustrate Petitioner's contention that during a couple's lifetime, Medicaid requires them to use their assets for only one of two purposes: to care for the sick spouse or to support the community spouse. Those purposes are served by Petitioner's construction which is consistent with the Medicaid Act. Pet. 27 n.7. The purpose served by the United States' construction is only to subsidize inheritances at public expense.

The first provision is the exemption of a couple's home from eligibility calculations. That exemption is only effective when the community spouse *continues* to reside in the home. 42 U.S.C. § 1396p(a)(1)(B) and (2)(A) (2006). Once the individual is not reasonably expected to be able to return to the home and the spouse ceases residing in the home, a lien may be imposed to recover the benefits upon the sale or transfer of the home. *Id.* Moreover, Congress specifically made the exemption of the home inapplicable in the case of an institutionalized individual for purposes of the definition of "assets" in section 1396p. 42 U.S.C. § 1396p(e)(1) (defining "assets" as including the resources of both spouses), and § 1396p(e)(5) (defining "resources" as having the meaning in section 1382b but "without regard (in the case of an institutionalized individual) to the exclusion [of the home]" in that section).

The second provision is the ability of the community spouse to retain some resources after their

spouse is eligible for Medicaid. U.S. Br. 11. That provision is also limited to supporting the community spouse during his lifetime, not to also benefitting the couple's heirs. 42 U.S.C. § 1396r-5(f)(1) (allowing transfer of resources "only to the extent the resources are transferred to (or for the sole benefit of) the community spouse.").

The third provision states that "[d]uring the continuous period in which an institutionalized spouse is in an institution" and after the institutionalized spouse is eligible for Medicaid benefits, "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(c)(4). Again, the provision is limited to the spouse's lifetime for the specific purpose of providing support.

The eligibility provisions and their limitations fit the eligibility context when the spouses are alive, but are irrelevant in the recovery context when the spouses are dead. They were never intended to allow a couple's assets to be permanently unavailable. That is precisely what the Government reported to Congress shortly after their enactment. Its report stated that

> Federal rules permitting certain transfers of assets (e.g., transfer of the home to the spouse as authorized in MCCA) convey the clear impression that the purpose is not to place the asset permanently beyond reach of government claim but to ensure that the spouse, dependent child, and other specified persons can have use of the asset until the

> grounds for that use end (e.g., death or attainment of legal majority).

U.S. Dep't of Health & Human Servs., *Issues In Medicaid Estate Recoveries: A Report to the United States Congress* 13 (1989).

2. The United States completely ignores the asset-transfer provisions of section 1396p(c) which are the most relevant and critical to understanding Medicaid's treatment of spousal assets. Those provisions are designed to keep whatever assets a couple has from being used for anything other than care for the sick spouse and support for the community spouse. Even with the limitations noted by the United States, a community spouse is never able to freely transfer assets without a penalty being imposed on his spouse's eligibility or his own possible future eligibility. 42 U.S.C. § 1396p(c)(1)(A).

Congress created a closed system encompassing both spouses and their assets in which ownership is simply irrelevant as long as the assets stay with the spouses. The United States' construction of section 1396p(b)(4)(B) would create a glaring exception to Congress's design, and would prohibit states from recovering public expenditures from spousal assets only because the couple removed the recipient spouse's name from the asset. The Minnesota Supreme Court's holding and the United States' position are thus contrary Medicaid objectives, inconsistent with the overall Medicaid statutory scheme, and unsound

public policy. The only beneficiaries are a couple's heirs.

3. This protection of a couple's heirs is in sharp contrast to Congress's limitation of any protection of heirs to only two specific circumstances. Section 1396p(b)(2) requires delayed recovery when there is a surviving spouse, or dependent or disabled child. Section 1396p(b)(3) requires that states provide for waiver of recovery if recovery "would work an undue hardship on heirs." Thus, Congress did not intend to prohibit recovery to benefit a couple's heirs except for in those two very narrow circumstances.

D. The United States' Recent Change In Position Causes More Uncertainty.

Whereas the United States approved Minnesota's state plan provision that all spousal assets are subject to recovery regardless of ownership, it now changes its position to require that the recipient spouse owned the asset at death. *Compare* Pet. 93a *with* [U.S. Br. 12 – left over from striking the original first sentence]. U.S. Br. 12. This sudden change in position weighs in favor of granting the Petition because that change increases uncertainty for the states. Those states with existing approved state plans will be uncertain of their status. Those contemplating state plan amendments or legislation will be unsure of whether to proceed. States will wonder whether the United States will again change its position.

The United States' approval of Minnesota's state plan remains effective as there is no mechanism for it to "unapprove" a state plan based on a changed interpretation. *See* 42 C.F.R. § 430.10-.25 (2008). The already-approved state plans of North Dakota, Oregon, Indiana, and Idaho all contain similar provisions and also remain effective. Pet. 23 nn.4-5.

The United States appears to claim that its approval of Minnesota's state plan amendment was meaningless. U.S. Br. 12. It asserts that its "approval is not the equivalent of binding interpretive guidance." *Id.* The only authority it offers for that proposition is the regulation providing that a state plan amendment is deemed approved if not acted upon after ninety days. *Id.* Approval in this case, however, was an affirmative and deliberate approval, not an approval based upon inaction. Pet. 90a.

The United States' present disavowal of the importance of its own state plan approval process is the *opposite* of its position when defending its state plan disapprovals before the U.S. Court of Appeals. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *16, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. For Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008) (contending that "the administrative process through which state plan amendments are considered . . . counsels deference."); *accord S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 (5th Cir. 2004) (concluding that CMS's "review and determination definitively

indicate whether it interprets a state plan or amendment to be in conformity with the statute"; and holding that "CMS's approval of state plans affording coverage for [particular medical care or service] demonstrates that the agency construes [the Medicaid statute] as encompassing that type of medical care or service.").

The United States asserts that it has not promulgated rules or issued formal guidance interpreting the federal statute at issue. U.S. Br. 12. It thus argues that none of its prior acts constitute an interpretation. That contradicts its prior position and holdings from various U.S. Court of Appeals circuits. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *41, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008); *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005).

E. The United States' Changing Interpretation Demonstrates That The Statute Is, At Minimum, Ambiguous.

The United States asserts that because the federal statute "leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death" the presumption against preemption and ambiguous conditions doctrine do not apply. U.S. Br. 11-12. Yet, its own changing position is evidence that

the Medicaid statute *is* ambiguous. *Cf. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (stating the existence of opposing interpretations by different courts makes it difficult to contend that a particular statute is unambiguous). The United States' current position stands in stark contrast to its estate recovery regulations, 42 C.F.R. § 433.36(h), the State Medicaid Manual, § 3810, and the state plan templates it requires states to use in agreeing to the express conditions accompanying receipt of Medicaid funds.

Any conditions on federal funds must be unambiguous. *South Dakota v. Dole*, 483 U.S. 203, 207. When the federal statute does not give "clear notice" to state officials that a particular condition is attached to federal funds, that condition is unenforceable. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Because a prohibition on recovery from all spousal assets remaining after the last spouse dies is not unambiguously provided, no such condition can be imposed on states when they accept Medicaid funds.

F. This Court's Review Is Necessary And Warranted.

In addition to needing to resolve the direct conflict between the court below and North Dakota, this Court should grant review to end the uncertainty in this area. States will likely be dissuaded by the decision below combined with the United States' changed interpretation from even attempting to expand their

estate recovery programs. Use of what the United States acknowledges is an important element of Medicaid may be stymied without this Court's review.[1]

Petitioner asks that this Court resolve the conflict and uncertainty by granting the petition.

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[1] Petitioner notes that Minnesota recently passed legislation, effective July 1, relating to the decision below. The legislation provides, in relevant part, that

> [a]t the time of death of a recipient spouse and solely for purpose of recovery of medical assistance benefits received, a predeceased recipient spouse shall have a legal title or interest in the undivided whole of all of the property in which the recipient and the recipient's surviving spouse owned jointly or which was marital property at any time during their marriage regardless of the form of ownership and regardless of whether it was owned or titled in the names of one or both the recipient and the recipient's spouse.

2009 Session Laws, Ch. 79 § 42. The legislation will not, however, apply to the many cases that have been stayed or otherwise placed on hold in state courts as a result of this appeal. Those cases include recovery claims totaling millions of dollars. In addition, litigation challenging the legislation is expected and likely will rely on the decision below.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Minnesota should be granted.

Respectfully submitted,

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