No. 08-603

In the Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Medicaid program, 42 U.S.C. 1396 *et seq.*, generally forbids participating States from recovering correctly paid benefits. The statute requires, however, that a State seek to recover the cost of nursing home services paid on behalf of an individual over the age of 55 from the individual's probate estate, after both the individual and her surviving spouse have died. The statute also permits (but does not require) a State to recover from "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." 42 U.S.C. 1396p(b)(4)(B).

The question presented is whether, under Section 1396p(b)(4)(B), a State that seeks to recover correctly paid benefits from the estate of the recipient's surviving spouse is limited to recovering the value of assets in which the recipient had a legal interest at the time of her death.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Medicaid program, established in 1965 in Title XIX of the Social Security Act (Medicaid Act), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program under which the federal government provides funding to States to provide medical assistance to eligible needy persons. *Harris* v. *McRae*, 448 U.S. 297, 301 (1980).

To participate in the Medicaid program, a State must develop a plan specifying, among other things, the categories of individuals who will receive medical assistance

under the plan and the specific kinds of medical care and services that will be covered. 42 U.S.C. 1396a. State Medicaid plans are reviewed by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration) in the Department of Health and Human Services (HHS). 42 U.S.C. 1396; see 66 Fed. Reg. 35,437 (2001). If CMS approves a State's plan, the State is thereafter eligible for federal reimbursement for a specified percentage of the amounts "expended * * * as medical assistance under the State plan." 42 U.S.C. 1396b(a)(1), 1396d(b).

b. The Medicaid Act requires participating States to provide Medicaid benefits to the "categorically needy," that is, those persons eligible for financial assistance under specified federal programs. *Atkins* v. *Rivera*, 477 U.S. 154, 157 (1986); see 42 U.S.C. 1396a(a)(10)(A)(i)(IV), (VI) and (VII).

The Act also permits States to extend benefits to the "medically needy," that is, "persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 37 (1981); see 42 U.S.C. 1396a(a)(10)(C). To qualify as medically needy, a person may have income no higher than a defined threshold and may own assets of no more than a defined value. If the assets of a Medicaid applicant exceed the qualifying threshold, she must "spend down" her assets until they are at or below the qualifying threshold. See 42 U.S.C. 1396a(a)(17).

When a married person is institutionalized in a nursing home or other facility, the Medicaid Act considers the assets of both the institutionalized spouse and the non-institutionalized, or "community," spouse in determining the applicant's eligibility for benefits. 42 U.S.C.

1396r-5(c). To prevent the community spouse from being impoverished as a result of a required spend-down of assets, the statute exempts certain assets, such as the couple's home and an automobile, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain a certain level of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). See *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 480 (2002) (anti-impoverishment provisions are intended to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance"). Furthermore, although the Medicaid Act generally forbids a Medicaid applicant or her spouse from transferring assets at below market value in order to become eligible for benefits, 42 U.S.C. 1396p(c)(1)(A), the statute expressly permits the applicant to transfer assets, including an interest in the homestead, to the community spouse, 42 U.S.C. 1396p(c)(2). Once the institutionalized spouse is determined to be eligible for benefits, the statute provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4).

c. As a general rule, the Medicaid Act forbids States from seeking recovery of Medicaid benefits that were correctly paid. 42 U.S.C. 1396p(b)(1); see also 42 U.S.C. 1396a(a)(18). The statute provides an exception, however, for recovery from the estates of certain institutionalized and older beneficiaries.

Before 1993, the Medicaid Act's recovery provision permitted, but did not require, States to recover benefits paid on behalf of certain individuals, from the individuals' estates. 42 U.S.C. 1396p(b)(1)(B) (1988). In 1993,

Congress amended Section 1396p to require States to recover correctly paid benefits in certain circumstances. Omnibus Reconciliation Act of 1993 (OBRA 1993), Pub. L. No. 103-66, § 13612, 107 Stat. 627. As amended, the Act's estate-recovery provision requires States to seek recovery in the case of an individual who was permanently institutionalized, 42 U.S.C. 1396p(b)(1)(A), and in the case of a person who received, at age 55 or thereafter, nursing facility services, home and community-based services, or related hospital and prescription drug services, 42 U.S.C. 1396p(b)(1)(B). In addition, a State has the option to seek recovery of the cost of other items or services paid on behalf of individuals over the age of 55. *Ibid.* The recovery "may be made only after the death of the individual's surviving spouse, if any," and only at a time when the individual has no surviving children under the age of 21 or children who are blind or disabled. 42 U.S.C. 1396p(b)(2) and (2)(A). Such recovery may be waived in cases where it "would work an undue hardship." 42 U.S.C. 1396p(b)(3).

The statute provides for recovery of the cost of benefits paid on behalf of an individual over the age of 55 from "the individual's estate." 42 U.S.C. 1396p(b)(1)(B). The term "estate," for those purposes, "shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." 42 U.S.C. 1396p(b)(4)(A). The statute further provides that an individual's "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 ten-

> ancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. 1396p(b)(4)(B).

2. Since 1987, Minnesota law has provided for recovery of Medicaid benefits from the estate of a recipient's surviving spouse, as well as from the estate of a recipient. Act of June 12, 1987, ch. 403, art. 2, § 82 (Minn. Stat. Ann. § 256B.15 (2007)). Minnesota's estate-recovery law provides that "[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." Minn. Stat. Ann. § 256B.15, subd. 2 (2007).

3. In 2004, petitioner filed a claim against the estate of Francis Barg, in which he sought recovery of Medicaid benefits paid on behalf of Mr. Barg's predeceased spouse, Dolores Barg. Pet. App. 4a.[1]

a. During their marriage, the Bargs purchased real property in Princeton, Minnesota, to which they took title as joint tenants. In 2001, Ms. Barg entered a nursing home, and shortly thereafter applied for, and received, long-term Medicaid benefits. Pet. App. 2a-3a. Ms. Barg subsequently transferred her joint tenancy interest in the homestead property to Mr. Barg. At the time of the transfer, the assessed value of the property was $120,800. Ms. Barg also terminated her ownership interest in certificates of deposit the couple had held jointly. *Id.* at 3a-4a.

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[1] On March 2, 2009, this Court granted the State of Minnesota's conditional motion to intervene as a party aligned with petitioner Vos. All references in this brief to "petitioner" refer to petitioner Vos.

Ms. Barg died in 2004, having received a total of $108,413.53 in medical-assistance benefits through the state Medicaid program. Mr. Barg died five months later. Pet. App. 4a.

b. In his claim against Mr. Barg's estate, petitioner sought to recover the full amount of Medicaid benefits paid on behalf of Ms. Barg. Pet. App. 4a. Respondent, who is the representative of Mr. Barg's estate, allowed $63,880 as a claim against the estate, but disallowed $44,533.53. *Ibid.*[2]

Petitioner filed a claim-allowance petition in state court. The district court upheld the partial disallowance. Pet. App. 46a-51a. The court relied on the Minnesota Court of Appeals' decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (2002), which held that Minnesota's estate-recovery law is preempted insofar as it permits recovery up "to the value of the assets of the estate that were marital property" at any point in the marriage, because 42 U.S.C. 1396p(b)(2)(B) permits recovery only "to the extent of" the Medicaid recipient's interest at the time of death. *Gullberg*, 652 N.W.2d at 714. The court concluded that, at time of her death, Ms. Barg's interest in the assets of Mr. Barg's estate that were marital property, including a life-estate interest in the homestead and a personal property allowance, totaled $63,880. Pet. App. 50a-51a.

c. The Minnesota Court of Appeals reversed and remanded for recalculation of petitioner's allowable claim. Pet. App. 52a-64a. Like the district court, the

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[2] Respondent's partial allowance of $63,880 apparently rested on the premise that Ms. Barg (1) had a one-half interest in the homestead, valued at $58,880, at the time of her death, despite the inter vivos transfer, and (2) was entitled to a personal property allowance in the amount of $5000. See Pet. App. 49a.

court of appeals concluded that, under federal law, the claim was necessarily limited to the value of Ms. Barg's interest in specified assets at the time of her death. *Id.* at 58a (citing *Gullberg*, 652 N.W.2d at 714). The court of appeals concluded, however, that Ms. Barg's interest in the homestead at the time of her death was a joint tenancy interest, valued as a one-half interest in the property's value of $120,800, or $60,400. *Id.* at 62a.

d. The Minnesota Supreme Court affirmed in part and reversed in part, concluding that petitioner was not entitled to full recovery from Mr. Barg's estate. Pet. App. 1a-45a.

As an initial matter, the court rejected respondent's contention that federal law completely preempts Minnesota's estate-recovery law insofar as it permits recovery from the estate of the Medicaid recipient's surviving spouse. Pet. App. 19a-30a. The court concluded that allowing recovery from a surviving spouse's estate is consistent with both the Act's preclusion of recovery from the Medicaid recipient's estate until after the death of a surviving spouse, 42 U.S.C. 1396p(b)(2)(A), as well as the purposes of the Medicaid Act's recovery provisions. Pet. App. 29a.

The court concluded, however, that federal law limits the scope of recovery against a surviving spouse's estate to the value of assets in which the recipient spouse had an interest "at the time of death," 42 U.S.C. 1396p(b)(4)(B), and thereby preempts Minnesota's estate-recovery law insofar as it permits the State to reach any other assets "that were marital property or jointly owned property *at any time during the marriage*." Pet. App. 31a (quoting Minn. Stat. Ann. § 256B.15, subd. 2 (2007)); see *id.* at 30a-37a.

The court further concluded that Ms. Barg did not have any interest in the homestead or bank accounts at the time of her death, because she had transferred her interest in those assets to Mr. Barg before she died. The court therefore held that petitioner had no legal entitlement to satisfaction of the State's claim from those assets. Pet. App. 37a-43a. But because respondent had partially allowed petitioner's claim, and never challenged the district court's award of that partial allowance of $63,880, the Minnesota Supreme Court held that petitioner could recover that amount. *Id.* at 43a-45a.

DISCUSSION

The Minnesota Supreme Court's decision is correct and does not warrant further review. The federal Medicaid Act permits recovery of correctly paid benefits from the estate of the recipient's surviving spouse, but limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death.

Although the result in this case differs from the result in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000), the difference may not reflect a disagreement about the meaning of federal Medicaid law, but only divergent conclusions about when, under state law, an individual retains a legal interest in assets conveyed to a spouse. The petition for a writ of certiorari should be denied.

A. The Decision Of The Minnesota Supreme Court Is Correct

1. The Minnesota Supreme Court correctly concluded that the Medicaid Act forbids petitioner from seeking to recover correctly paid benefits from assets in which the Medicaid recipient had no legal interest at the time of her death.

Under the Medicaid Act, a State generally may not seek to recover correctly paid Medicaid benefits. 42 U.S.C. 1396p(b)(1). The Act provides, however, that a State (1) *must* seek recovery of nursing home and related benefits paid on behalf of an individual over the age of 55 from "the individual's estate" as defined by state probate law; and (2) *may*, at its option, define "the individual's estate" more broadly to include any "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." 42 U.S.C. 1396p(b)(1)(B), (b)(4)(A) and (B). Thus, the Medicaid Act, which permits recovery only after the death of the recipient's surviving spouse, 42 U.S.C. 1396p(b)(2), authorizes a State to file a reimbursement claim against the surviving spouse's estate, up to the value of any assets in which the Medicaid recipient had a legal interest at the time of her death.

The Minnesota estate-recovery law exceeds the scope of that authorization. It permits the State to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*," Minn. Stat. Ann. § 256B.15, subd. 2 (2007) (emphasis added), without regard to whether the recipient retained an interest in the assets at the time of her death. Because a State may not recover correctly paid Medicaid benefits except to the extent authorized by federal law, see 42 U.S.C. 1396p(b)(1), Minnesota's statute conflicts with federal law and is therefore preempted. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-282 (1987).

2. Petitioner argues (Pet. 25-28) that the text of the Medicaid Act imposes no limit on permissible recovery from the estate of the Medicaid recipient's surviving spouse, because the Act defines the term "assets" to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. 1396p(h)(1). According to petitioner, "[b]y 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)." Pet. 27.

Petitioner is incorrect. Although the general statutory definition of "assets" does encompass resources of both "the individual" (*i.e.*, the Medicaid recipient) and "the individual's spouse," the particular provision of the Medicaid Act at issue here refers specifically to any "assets in which *the individual* had any legal title or interest at the time of death." 42 U.S.C. 1396p(b)(4)(B) (emphasis added). Petitioner's argument finds it necessary to rewrite that clause to read "'any * * * assets in which [*either or both the individual and the individual's spouse*] had any legal title or interest.'" Pet. 26 (brackets and asteriks in original) (emphasis added). But this editing does nothing less than make the statute say the opposite of what it says. The plain language of the operative provision of the Act refutes petitioner's reading.[3]

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[3] In describing the operation of the amended estate-recovery provision, the legislative history of the 1993 amendments also focused on the assets of the individual who had received Medicaid benefits, rather than the resources of both the individual and his or her spouse. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 835 (1993) ("At the option of the State, the estate against [which] * * * recovery is sought may include any real or personal property or other assets in which *the*

3. Petitioner's reading of the Medicaid Act also finds little support in the Act's other provisions concerning the treatment of spousal assets. See Pet. 27-28. As petitioner notes, the Medicaid Act generally considers the community spouse's assets for purposes of determining whether an institutionalized individual is eligible to receive benefits. But the Act also exempts certain property, such as the couple's home, from consideration, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain certain amounts of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). Moreover, once the institutionalized spouse is determined to be eligible for benefits, the Medicaid Act provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4). The Medicaid Act, in short, imposes significant limitations on petitioner's asserted principle that "spouses are expected to support each other." Pet. 27. To read Section 1396p(b)(4)(B) in accordance with its plain terms thus is consistent with the broader statutory scheme.

4. Because Section 1396p(b) 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 does not come into play, Pet. 28 (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996))—even assuming, arguendo, that this presumption has force in the context of a comprehensive federal-state cooperative program like Medicaid in which the State's program is sub-

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beneficiary had any legal title or interest at the time of death, including the home.") (emphasis added).

ject to federal approval. And for similar reasons, petitioner's suggestion that the decision below improperly enforces against the State "[a]n ambiguous condition" on the acceptance of federal funds under Spending Clause legislation lacks any merit. Pet. 28 n.8 (citing *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006)).

Petitioner also errs (Pet. 20-23, 28 n.8) in asserting that the Minnesota Supreme Court's interpretation of Section 1396p(b)(4)(B) is inconsistent with the interpretation of the responsible federal agency. HHS has neither promulgated regulations nor issued guidance interpreting Section 1396p(b)(4)(B) to authorize the kind of estate recovery that petitioner urges in this case. To be sure, CMS in 2007 approved Minnesota's state plan amendment incorporating its statutory spousal recovery provisions. See Pet. App. 89a-93a. But CMS's approval is not the equivalent of binding interpretive guidance. Cf. 42 C.F.R. 430.16(a)(1) (a state plan or plan amendment is deemed approved if CMS does not act within 90 days after submission). Moreover, CMS's approval followed binding judicial decisions in Minnesota's own courts interpreting the Medicaid Act to limit recovery to assets in which the Medicaid recipient had an interest at time of death. See, *e.g.*, *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002). As set forth above in this brief, see p. 9, *supra*, HHS also interprets the Medicaid Act to limit recovery in that manner.

B. The Decision Below Does Not Warrant Further Review

1. Petitioner contends (Pet. 24-25) that review is warranted to resolve a conflict between the decision below and the North Dakota Supreme Court's decision in

Wirtz, *supra*.[4] In *Wirtz*, much as in this case, a Medicaid recipient had transferred assets to his spouse before his death, and the State sought to recover the cost of the Medicaid benefits from the spouse's estate after her death. The court held that the State was permitted under 42 U.S.C. 1396p(b)(4)(B) to recover the value of any assets "in which the deceased recipient once held an interest," including assets conveyed to his spouse before his death. *Wirtz*, 607 N.W.2d at 886.

But the different results in this case and in *Wirtz* may not reflect a disagreement about the meaning of federal Medicaid law. Notably, the North Dakota Supreme Court, like the Minnesota Supreme Court, stated that the State "[could] assert a claim against real or personal

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[4] As the Minnesota Supreme Court noted (Pet. App. 21a-22a), two other state courts have concluded that Section 1396p(b) authorizes recovery only from the estate of a Medicaid recipient, and not from the estate of his or her spouse. See *Hines* v. *Department of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995). But those decisions and the decision below are not in conflict. Both *Hines* and *Budney* are consistent with the principle that a State may recover from the estate of a Medicaid recipient's surviving spouse if it exercises its option under Section 1396p(b)(4)(B) to define the individual's estate more broadly than it is defined under state probate law. See *Hines*, 850 N.E.2d at 153-154 (explaining that the state legislature could have defined the recipient's estate in such a way as to provide for recovery of certain assets from the estate of his surviving spouse, but had chosen not to do so); *Budney*, 541 N.W.2d at 246 & n.2 (holding that a state statute authorizing full recovery from a surviving spouse's estate exceeded the State's authority under 42 U.S.C. 1396p(b), without considering whether it would have been permissible for the State to recover from the surviving spouse's estate the value of assets in which the recipient had an interest at the time of death). Respondent here, in any event, does not challenge the Minnesota Supreme Court's conclusion that a State is permitted to recover from the estate of a surviving spouse in some circumstances. See Br. in Opp. 6, 8-9, 19.

property, and other assets in which [the recipient] had any legal title or other interest *at his death*." *Wirtz*, 607 N.W.2d at 885 (emphasis added); see also *ibid.* ("Our inquiry * * * is * * * whether [the recipient] had 'real and personal property and other assets in which [he] had any legal title or interest *at the time of death.*") (emphasis added). Although its reasoning is not entirely clear, the court in *Wirtz* 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." 607 N.W.2d at 885 (quoting 42 U.S.C. 1396p(b)(4)(B)). The court did not elaborate on the nature of that interest, although it referred to the State's argument that the recipient had retained a "marital or equitable interest" in the assets at the time of his death, *id.* at 883, and noted that other courts had interpreted Section 1396p(b)(4)(B) to reach state-law community-property and homestead interests, *id.* at 885.

The different results reached by the North Dakota Supreme Court and the court below on similar facts thus may reflect not conflicting interpretations of federal Medicaid law, but only different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse. Compare *Wirtz*, 607 N.W.2d at 885-886, with Pet. App. 38a-40a (concluding that, after Ms. Barg transferred her interest in the homestead and bank accounts, she no longer had a legal interest that could have been conveyed to Mr. Barg upon her death), and *id.* at 40a (noting that Minnesota law "makes no reference to * * * re-defining the probate estate to include all marital property, even property transferred prior to death").

Even if the decisions in *Wirtz* and this case do reflect a disagreement as to proper interpretation of the Medicaid Act, this Court's review would not be warranted. The Minnesota Supreme Court's interpretation of federal law is correct, and to date, only the North Dakota Supreme Court has allowed Medicaid recovery following an inter vivos transfer of assets between spouses. Assuming arguendo that the North Dakota Supreme Court misunderstood federal Medicaid law, rather than simply applied a peculiar feature of its own property law, the North Dakota court has not had an opportunity to consider HHS's interpretation, and the conflict may work itself out as the issue is further addressed in the lower courts.

2. Although petitioner (Pet. 31-33) is correct that estate-recovery efforts are important to the Medicaid program, questions concerning the scope of the Act's estate-recovery provisions have not arisen frequently, and relatively few States have opted to seek estate recovery to the maximum extent permitted by federal law. See Office of Assistant Secretary for Policy & Evaluation, HHS, *Policy Br. No. 6, Medicaid Estate Recovery Collections* tbl. 4 (Sept. 2005) (only nine States make maximum use of federal policy options); see also Pet. 31.

Moreover, although the federal Medicaid Act limits estate recovery to those assets in which the Medicaid recipient had a legal interest at the time of her death, the nature and extent of such interests remain largely the domain of state law. Notably, Minnesota's Governor has proposed redefining marital property interests to permit recovery of medical assistance from the estate of the later-surviving spouse in this context. See *Governor's Recommendation, Minnesota State Budget, 2010-11 Biennial Budget, Human Services Dep't* 132 (Jan. 27,

2009). That proposal has not become law, nor has it been reviewed by the Secretary of HHS. The proposal, however, suggests that Minnesota may be able to work toward greater asset recovery consistent with the clear terms of federal Medicaid law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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