NO. 22-957

IN THE

Supreme Court of the United States

LAURIE A. DERMODY,

Petitioner,

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

LINDA MARIE MONDOR, ET AL.,

Petitioners,

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

Brief of the Massachusetts Chapter of the National Academy of Elder Law Attorneys as *Amicus Curiae* in Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys ("MassNAELA") is a non-profit organization that was incorporated in 1992 with a mission of providing information, education, networking, and assistance to Massachusetts attorneys, bar organizations, and other individuals or groups advising elderly clients, clients with special needs, and their families. MassNAELA is a voluntary association whose members consist of a dedicated group of elder law and special needs attorneys across the Commonwealth of Massachusetts.

MassNAELA and its members have an interest in advocating for consistency, predictability, and reliability in jurisprudence impacting elder law attorneys and their clients. Clients rely on the advice, expertise, and experience of estate planning attorneys when making extremely consequential decisions about their futures and those of family members and heirs. Such decisions – and the advice provided by such attorneys – incorporate an assumption that, to every extent possible, judicial decisions will remain tethered to the plain language of statutes which relate to estate planning. Estate

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties were timely notified concerning the filing of this brief.

planning attorneys also rely on appellate courts to clarify and resolve the thorny questions that can arise in construing relevant state and federal statutes, including the Medicaid statute.

MassNAELA, when feasible, deploys its resources to submit briefs as *amicus curiae* in elder law cases before the Massachusetts Supreme Judicial Court ("SJC"), as it did in the *Dermody/Mondor matter* that is the subject of the instant Petition for Certiorari. As it did before the SJC, MassNAELA writes separately to emphasize the concerns of estate planning attorneys and their clients, and also to offer the organization's expertise on the legal questions at issue in this case.

ARGUMENT

I. The Decision of the Massachusetts Supreme Judicial Court in *Dermody*, and the Split of Authority Between the Sixth and Ninth Circuits on the Same Issue, Creates Uncertainty in Long-Term Care Planning That Should Be Resolved by This Court.

A. Long-Term Care Planning is a Critical Part of Estate Planning for Families Across a Broad Economic Spectrum.

Regardless of the outcome of any particular case, estate planning attorneys and their clients depend on reliability, consistency, and predictability concerning the application of federal law by state and federal courts. MassNAELA, as *amicus curiae*, believes that this case offers this Court an

opportunity to resolve specific judicial conflicts concerning the application of federal Medicaid law, as reflected in the decision of the Massachusetts Supreme Judicial Court in *Dermody v. Executive Office of Health and Human Services,* 201 N.E. 3d 285 (2023).

By nature, any estate plan involves making immensely consequential decisions in advance about the disposition of one's assets and the ordering of one's affairs. These decisions are often made without foreknowledge of when certain events will take place; an illness or loss of life could occur a month after a plan is created, or decades in the future.

For aging couples, long-term care planning is a foundational element of estate planning in the face of such uncertainties. Such planning lies at the intersection of multiple considerations, including disposing of one's assets and addressing the potential needs of one or both spouses for long-term care. Such planning includes situations where one spouse needs long-term skilled nursing home care, but where the other spouse needs sufficient assets to meet their needs that are not covered by Medicaid, such as for assisted living. Indeed, that very fact pattern is presented by the *Dermody* case.

These issues loom large given the significant number of persons in the United States who will ultimately have long-term stays in nursing homes, typically at the end of their lives. As Petitioners point out, over one-quarter of persons in the United States who reach age 57 will spend 100 or more days in a skilled-nursing facility at some point, with the average annual cost for skilled-nursing care being roughly $100,000.

As the Massachusetts SJC's *Dermody* decision lays out, Medicaid programs – which are administrated on the state level – can provide funds for nursing home care when certain conditions are met. Specifically, Medicaid law requires applicants to "spend down" or otherwise deplete their resources to qualify for Medicaid benefits when they enter a nursing home.

At the same time, the federal Medicaid statute embodies and allows a variety of techniques that can be used by couples to protect family assets while still allowing a spouse in a nursing facility (the institutionalized spouse or "IS") to qualify for Medicaid. This type of long-term planning is based upon specific, unambiguous authorizations by Congress. Further, despite the overall complexity of the Medicaid statute, some of its core provisions relating to married couples – including the Sole Benefit Rule of 42 U.S.C. § 1396p(c)(2)(B)(i) at issue in this case – are straightforward. As discussed further below, that provision unambiguously provides that transfers to or for the sole benefit of the community spouse ("CS") are exempt from consideration under the transfer penalty regime of 42 U.S.C. § 1396p(c)(1).

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Long-term care planning, including efforts to mitigate the burden of nursing home costs, is important for families across a broad economic spectrum. Take the Hamel family of the *Dermody* case. As is expressly permitted under the Medicaid statute, the couple's long-term care plan involved

purchasing an immediate, actuarially sound annuity with fixed payments.

Joan Hamel, the IS, was alone in a nursing home, with her health deteriorating, when she applied for Medicaid. Her husband, Robert Hamel, was a "community spouse" in name only, and resided at Apple Valley Center, a humble assisted living facility ("ALF") in Ayer, MA, for which he paid $6,527.60 per month out-of-pocket, without governmental assistance.

Robert, who had been a youth boxer, a Korean War Veteran, and a 37-year employee of the Colonial Gas Company in Lowell, converted spousal assets into an actuarially sound, five-year annuity for $172,000 as means of qualifying Joan for Medicaid without depleting the family assets in short order. The payouts thereby became available to help Robert pay for his residency at the ALF.[2]

However, Robert died at Apple Valley less than 18 months later, long before the annuity finished paying out. Robert's testamentary intentions had included designating the Hamel's daughter Laurie Dermody as the remainder beneficiary of the annuity. However, their ability to effectuate these intentions was hindered by MassHealth. More specifically, as a condition of Joan receiving Medicaid

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[2]According to Genworth's 2020 Annual Care Survey, the monthly cost of an ALF in Boston, MA was $6,100.00 for that year. Thus, a married couple even with the seemingly substantial sum of $366,000 in assets would generate only five years of ALF costs via a spousal annuity.

funding, Robert was required to designate the Commonwealth of Massachusetts as a remainder beneficiary of the annuity.

MassHealth, the state agency that administrates Medicaid in Massachusetts, based this requirement upon the Medicaid statute's Beneficiary Naming Provision, 42 U.S.C § 1396p(c)(1)(F)(i), which provides that the purchase of an annuity shall be a disqualifying transfer of resources unless: "(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual…." MassHealth's contention is that this provision, notwithstanding the Sole Benefit Rule, requires the state to be the first remainder beneficiary of an annuity.

The SJC ruled in favor of MassHealth, meaning that Laurie Dermody lost any rights in the annuity that her father had intended for her to have. And in doing so, the court ripened a judicial conflict concerning the Medicaid statute that is appropriate for resolution by this Court.

B. *Dermody* Deepened the Judicial Conflict and Confusion Concerning the Relationship Between the Sole Benefit Rule and the Beneficiary Naming Provision.

As Petitioners point out, the Sixth and Ninth Circuits have reached opposite interpretations concerning the relationship, or lack thereof, between the Sole Benefit Rule and Beneficiary Naming Provision. The SJC embraced the view of the 9th Circuit in *Hutcherson v. Ariz. Health Care Cost Containment Sys. Admin.*, 667 F.3d 1066 (9th Cir. 2012) and expressly rejected the contrary view of the Sixth Circuit in *Hughes v. McCarthy*, 734 F.3d 473 (2013). *Hughes*, in marked contrast to *Hutcherson*, found that the two provisions are not related, and that a transfer that satisfies the Sole Benefit Rule need not satisfy the Beneficiary Naming Provision.

Dermody could have done much to resolve existing uncertainty about the two provisions; indeed, there was ample reason to have done so. Leading up to the case, there had been (1) a myriad of shifting views and policies on the part of MassHealth itself concerning the Beneficiary Naming Provision; (2) similar vacillations by the federal government; (3) dueling opinions by federal courts; and (4) similarly opposite holdings by Massachusetts Superior Court judges. Not surprisingly, there had also been a proliferation of litigation on this precise issue in Massachusetts; as Petitioners note, there were nearly two dozen

Superior Court lawsuits since 2017 over the Beneficiary Naming Provision.

Dermody, emerging from the pen of a respected state supreme court, could have swept some of this away. Specifically, the SJC could have, as did the Sixth Circuit in *Hughes*, found that the Sole Benefit Rule and the Beneficiary Naming Provision operate independently. Instead, the court expressly rejected the reasoning and result of *Hughes* and embraced that of *Hutcherson*.

As had *Hutcherson*, *Dermody* relied heavily on the notion that estate planning relative to Medicaid care is a technique that depletes governmental resources that have been earmarked for the poor. Among other things, the court found that "one purpose of the aptly named Deficit Reduction Act was to close loopholes in the Medicaid Act that allowed affluent couples to shelter their assets." *Dermody*, 201 N.E. 3d. at 292. The decision is thus grounded significantly in policy considerations, and seeks to glean a Congressional intent residing behind the plain words of the statute.

Indeed, while the SJC purported to strictly construe the statutes at issue, the decision does cast a pejorative light upon long-term care planning, including through the use of the term "affluent." But neither this term, nor any particular characterization of long-term planning, appears in the federal Medicaid statute. Relatedly, *amicus* agrees that reference to floor statements of members of Congress during debate over the DRA, which in some instances made similar points about long-term planning, is not necessary when applying plain statutory language.

The SJC, in construing the federal Medicaid statute, purported to apply standard rules of federal statutory construction. However, the court referenced primarily its own precedents, rather than those of this Court, as a guide to its interpretation of the Medicaid statute. *See Dermody*, 201 N.E. at 291 (citing, among other cases, *Harvard Crimson, Inc. v. President & Fellows Of Harvard College*, 840 N.E.2d 518 (Mass. 2006) and *New England Power Generators Ass'n, Inc. v. Department of Envtl. Protection*, 105 N.E.3d 1156 (Mass. 2018). This case therefore presents an opportunity for this Court to reassert the primacy of federal law relative to interpretations of the Medicaid statutes by state courts.

As another example of policy considerations informing the *Dermody* decision, the SJC cites its own *Lebow* case for the proposition that "[t]he unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits." *Dermody*, 201 N.E. 3d at 293, citing *Lebow v. Commissioner of the Div. of Med. Assistance*, 740 N.E. 2d 978, 980 (Mass. 2001). Here again, the SJC is adopting a particular view of the Medicaid statute that relies more on normative characterizations of long-term planning than upon plain statutory construction.

C. Treating the Sole Benefit Rule and the Beneficiary Naming Provision as Independent is Consistent with Other Provisions in the Medicaid Statute Relating to the Community Spouse.

Amicus further agrees that the language of the Sole Benefit Rule is, notwithstanding the overall complexity of the Medicaid statute, itself straightforward. The facial intent of the Sole Benefit Rule is to protect the interests of the community spouse, which is consistent with the entirety of the Medicaid statute.

More specifically, through the 1988 Medicaid Catastrophic Care Act ("MCCA"), 42 U.S.C. § 1396r–5, Congress demonstrated a clear intent to protect community spouses and allow them to retain unencumbered assets, without any reimbursement obligation to the state. The annuity provision reflects this same concept, allowing the CS to convert assets into income. In short, the plain text of the statute reflects an intention to allow a community spouse, once the institutionalized spouse has become eligible for Medicaid, to retain control of her assets, which by nature includes the testamentary disposition of such assets.

Importantly, Congress has enshrined various other protections for spousal assets which contain no reimbursement requirements for services being provided to the IS. *See 42 U.S.C. § 1396r-5(c)(4).* These include actuarily sound sole benefit trusts, income streams created through the use of

promissory notes, the assets comprising the community spouse resource allowance, and primary residences in the name of the community spouse. These provisions demonstrate that Congress' intent was frequently to allow community spouses to retain unencumbered assets and to have income to pay for their own care.

Congress did not seek, with respect to these provisions, to restrict the testamentary disposition of remainder assets by the community spouse. Thus, it should hardly be presumed that Congress intended something entirely different for spousal annuities. Indeed, the *Dermody* decision essentially seeks to carve out an exception concerning annuities that is not present in the statute itself.

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In short, *amicus* believes that the *Dermody* decision presents this Court with an opportunity to restore consistency and certainty relative to an important aspect of long-term care planning. There are many reasons why the uncertainty created by *Dermody* and the *Hughes-Hutcherson* split should be resolved; for example, with married couples increasingly likely to change their state of residence as they age, it is all the more important that judicial interpretations of the Medicaid statute create as much certainty and consistency as possible, so that the requirements for qualifying for Medicaid do not vary from-state-to-state.

Relatedly, the decisions of the Massachusetts Supreme Judicial Court always have the potential to influence the decisions of sister supreme courts, particularly in Eastern states. As such, *Dermody*

and the policy considerations that underlay the decision have the potential to migrate to other agencies and other courts in the region or nationally.

With these and other factors in mind, *amicus* agrees with Petitioners that this case allows for resolution of clear splits of authority on the provisions implicated by this case. Indeed, this case presents fully ripe and clearly defined federal issues which are of tremendous importance to a wide range of persons across economic spectrums in the United States engaged in estate planning and long-term planning.

CONCLUSION

Based on the foregoing reasons, *amicus curiae* the Massachusetts Chapter of the National Academy of Elder Law Attorneys respectfully believes that the Court should grant the Petition for Certiorari in this matter.

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