No. 22-957

IN THE
Supreme Court of the United States

LAURIE A. DERMODY,
Petitioner,
v.

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,
Respondent.

LINDA MARIE MONDOR, ET AL.,
Petitioners,
v.

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition asks this Court to resolve whether the Medicaid laws, which clearly state that asset transfers "for the sole benefit of" a community spouse are not subject to the penalty that applies to some transfers, 42 U.S.C. § 1396p(c)(2)(B)(i), nevertheless impose that penalty when the asset transfer in question is the purchase of an *annuity* for the community spouse's sole benefit. The Commonwealth does not dispute that there is a split of authority on that question, that it is an important and recurring question of federal law, or that these cases cleanly present it.

Instead, the Commonwealth argues that this Court should deny certiorari because the Sixth Circuit, whose position the decisions below squarely rejected, can theoretically "correct[] . . . itself in a future case." Br. in Opp. 13. But the same can be said in *any* case involving a split of authority. If this were a basis for denying review, this Court would be nearly out of business.

The Commonwealth also argues that certiorari should be denied because there is no split on a *second* question. The court below did not pass upon this question, however, and Petitioners have not asked this Court to address it. It is completely irrelevant.

On the merits, Section 1396p(c)'s text is unambiguous in Petitioners' favor. This Court should grant review and reverse.

I. THE LOWER COURTS ARE SPLIT ON THE QUESTION PRESENTED.

The petition discusses (Pet. 22-25) the importance of the question presented to elderly couples, estate planners, and States. It explains (Pet. 25-26) how, despite the question's frequent recurrence in practice, it is rare for it to generate appellate litigation, making these cases a prime opportunity to resolve the split of authority and offer much-needed guidance. The Commonwealth says not a word disputing any of this.

The petition argues (Pet. 27-28) that the cases below cleanly and directly tee up the question presented. Again, crickets from the Commonwealth.

Instead, the Commonwealth focuses (Br. in Opp. 12-15) on the split of authority. *See* Pet. 16-21. But even then, it does not dispute that the lower courts are split on the question presented. It acknowledges (*see* Br. in Opp. 12-13) that both the Supreme Judicial Court of Massachusetts in the decisions below and the Ninth Circuit in *Hutcherson v. Arizona Health Care Cost Containment System Administration*, 667 F.3d 1066 (2012), held that an annuity purchased for a community spouse's sole benefit is subject to Section 1396p(c)(1)'s transfer penalty. It also acknowledges (Br. in Opp. 13-15) that the Sixth Circuit held to the contrary in *Hughes v. McCarthy*, 734 F.3d 473 (2013). So how does the Commonwealth get around this clear split? By raising a number of bizarre arguments why the Sixth Circuit's decision in *Hughes* can be ignored.

1. First, the Commonwealth argues (Br. in Opp. 2, 15) that *Hughes* should be ignored because (in the

Commonwealth's view) the Sixth Circuit reached the wrong decision and it therefore "can and should correct its own error in an appropriate case." *Id.* at 2.

The same could be said in every case, however, and the Commonwealth offers no basis for thinking this will ever occur here. It points to no pending case in which the Sixth Circuit is considering overruling its holding in *Hughes*, to no past case in the decade since *Hughes* in which the Sixth Circuit (or even a single judge) has cast doubt on its holding, to no case in which a *party* has asked the court to reconsider *Hughes*, to no change in the statutory or regulatory landscape affecting *Hughes*' analysis—in short, to nothing.

2. Next, the Commonwealth suggests (Br. in Opp. 12-13) that in *Hughes*, the question presented[1] "was not the principal issue presented and was not fully briefed."

These are both strange contentions. Beginning with the first, it is true that *Hughes* first addressed another issue related to the timing of the annuity purchase. *See* 734 F.3d at 478-79. But after resolving that question in the plaintiffs' favor, *Hughes* addressed the Ohio state agency's "two alternate grounds for affirmance." *Id.* at 481. Those issues "ha[d] been sufficiently presented for [the court's] review." *Id.*

The first of those two potential arguments for ruling in the state agency's favor was that because the annuity

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[1] The "question presented" refers to the *actual*, lone question presented in the petition, *see* Pet. i, not to the imaginary second question presented that the Supreme Judicial Court did not rule upon but which the Commonwealth has nonetheless interposed, *see* Br. in Opp. i.

named remainder beneficiaries, it was not "for the sole benefit of the [institutionalized] individual's spouse," 42 U.S.C. § 1396p(c)(2)(B)(i), and thus not exempt from the transfer penalty. *Hughes*, 734 F.3d at 481. (That argument should sound familiar—it is the Commonwealth's preferred answer to the second "question presented" it is attempting to smuggle into these cases.) *Hughes* rejected that argument, concluding that the text and context of the provision better support an interpretation that "the designation of contingent beneficiaries to receive funds remaining in an annuity in the event of the spouse's early death would not necessarily violate the sole-benefit rule." *Id.* at 482; *see id.* at 481-83.

The state agency's second alternative argument was that the "purchase [of] an annuity by or on behalf of the community spouse that satisfies § 1396p(c)(2)(B)(i)'s sole-benefit rule must also satisfy the annuity rules under § 1396p(c)(1)(F)." *Hughes*, 734 F.3d at 483. That is the argument the Supreme Judicial Court accepted below, and its correctness is the question presented in these cases. Pet. i. *Hughes* wrestled with that argument for several pages before, *pace* the Supreme Judicial Court, rejecting it. 734 F.3d at 483-86. The split of authority is not any less real or clear because *Hughes* addressed other questions before addressing the question presented here.

The Commonwealth's claim that the question presented was not adequately briefed in *Hughes* is equally baffling. At the Sixth Circuit's request, the Department of Health and Human Services (HHS) submitted an amicus brief in which it argued that "[t]he transfer of a community resource to purchase an annuity by or on behalf

of the community spouse that satisfies § 1396p(c)(2)(B)(i) must also satisfy § 1396p(c)(1)(F)." Brief for the United States Department of Health & Human Services as Amicus Curiae at 16, *Hughes*, 734 F.3d 473 (No. 12-3765), 2013 WL 3366469; *see id.* at 1-2; Pet. 18. In light of HHS' brief, the parties were directed to submit supplemental briefing addressing the relationship between Section 1396p(c)(1)(F) and (c)(2)(B)(i) (in addition to other issues HHS had raised). Order at 1-2, *Hughes*, 734 F.3d 473 (No. 12-3765), ECF No. 72; *see Hughes*, 734 F.3d at 481-82, 484.

3. The Commonwealth also insists (Br. in Opp. 13-14) that the Sixth Circuit "failed to acknowledge or address the fact of Congress's December 2006 amendment clarifying the scope of the beneficiary requirement." In candor, it is unclear what exactly the Commonwealth is trying to convey. *Hughes* was decided in 2013, and the case involved an annuity purchased in 2009. *See* 734 F.3d at 477. The Sixth Circuit interpreted exactly the same words as the Ninth Circuit interpreted in *Hutcherson* (in 2012) and the Supreme Judicial Court interpreted in these cases (in 2023). The Commonwealth's suggestion (Br. in Opp. 2) that *Hughes* did not "address[] the construction of § 1396p(c)(1)(F) in light of the December 2006 amendment clarifying its scope" is thus downright bizarre.

Perhaps what the Commonwealth means is that *Hughes* should have accepted the argument it raises here (Br. in Opp. 18-19) about why the 2006 amendment clarifying the Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, 120 Stat. 4 (2006), *see* Pet. 5-6, proves the correctness of the Commonwealth's position *on the*

merits. As discussed below, this amendment is entirely irrelevant to the question presented, which is likely why neither *Hughes* nor the decisions below addressed it. But in any event, everyone knows that the Commonwealth thinks *Hughes* is wrong. The Commonwealth's argument that decisions that are (in its view) incorrect can be ignored for split purposes is, to say the least, a swing.

4. Finally, the Commonwealth is intent on establishing (Br. in Opp. 14-15, 14 n.6) that the plaintiffs in *Hughes* "*conceded* throughout that Ohio was entitled to be named as a contingent remainder beneficiary for [the] annuity," *id.* at 14. But the Sixth Circuit did not think so. *See Hughes*, 734 F.3d at 484 ("As the Hugheses correctly contend . . . , an annuity that satisfies § 1396p(c)(2)(B)(i) need not satisfy § 1396p(c)(1)(F)."). Indeed, it would be surprising if the *Hughes* plaintiffs—who *won their case*—had conceded the question presented here, which was raised by the state agency as an alternative ground for ruling in *its* favor. *See id.* at 481, 483-84. Parties who concede that the other side's position is correct usually do not find much litigation success. In any event, *Hughes* held what it held, regardless of any purported concessions.

As the Supreme Judicial Court accurately recognized, the decisions below squarely conflict with *Hughes*. Pet. App. 11a-13a, 13a n.18; *see* Pet. 18-19. In view of the undisputed practical importance of the question presented, the Court should resolve the split in these cases.

II. THE COMMONWEALTH'S SECOND QUESTION PRESENTED IS A RED HERRING.

The Commonwealth expends significant energy (Br. in Opp. 15-16, 20-22) arguing about what it claims is the second question presented in these cases. That question is whether, when an annuity names a remainder beneficiary who will collect if the community spouse dies, the purchase of that annuity is an asset transfer "for the sole benefit of" the community spouse within the meaning of 42 U.S.C. § 1396p(c)(2)(B)(i). *See* Br. in Opp. i.

The Commonwealth has lots to say on this question. It observes (Br. in Opp. 15-16) that neither the Ninth Circuit in *Hutcherson* nor the Supreme Judicial Court below addressed it and that it thus "warrant[s] additional percolation," *id.* at 15. It criticizes (*id.* at 16) the Sixth Circuit's resolution of the question in *Hughes*. And it concludes (*id.*) that "[t]his Court's intervention is not warranted" given the "little appellate authority on the issue[ ]."

All this sounds like a compelling case for the Court to deny review of the second question presented. There is just one problem: no one is *asking* the Court to review this question, and the petition *has no* second question presented. The Supreme Judicial Court did not address this question below, instead "assuming that community spouse annuities would generally qualify as sole-benefit transfers despite the existence of contingent beneficiaries." Br. in Opp. 15-16. The question is completely irrelevant for this Court's purposes, aside from being fodder for the Commonwealth's strange straw-man argument.

On remand, the Commonwealth is free to make whatever arguments it wishes concerning whether the annuities at issue in these cases satisfy Section 1396p(c)(2)(B)(i). But the question addressed below and now before this Court is whether annuities that *do* satisfy Section 1396p(c)(2)(B)(i) are subject to the transfer penalty. The existence in these cases of some other question—not passed upon below—that is not itself worthy of certiorari is no reason whatsoever for denying review on the question that *is* cert-worthy.[2]

III. THE DECISIONS BELOW ARE WRONG.

The Supreme Judicial Court held that an annuity purchase for the sole benefit of the community spouse—*i.e.*, an asset transfer satisfying the no-transfer-penalty rule in 42 U.S.C. § 1396p(c)(2)(B)(i)—is nonetheless subject to the transfer penalty if it does not comply with Section 1396p(c)(1)(F)(i)'s requirement that the State be named as primary remainder beneficiary. Pet. App. 11a-14a, 26a-27a. That holding is irreconcilable with the plain text of Section 1396p(c), and the Commonwealth's scattershot attempts to rehabilitate it (Br. in Opp. 17-20) are unconvincing.

1. The Commonwealth first observes (Br. in Opp. 17-18) that "the plain text of § 1396p(c)(1)(F) is

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[2] The Commonwealth's discussion (Br. in Opp. 20-22) of the merits of its second question can thus be safely ignored. For the record, the Commonwealth's position is incorrect, as HHS advocated and the Sixth Circuit held in *Hughes*. *See* Pet. 30 n.13; pp. 3-4, *supra*. *But see* Br. in Opp. 20-21 (attributing the contrary view to HHS). Thus, had the Supreme Judicial Court addressed this argument and ruled in the Commonwealth's favor, it would have created a *different* split of authority.

unambiguous and makes no exceptions for annuities purchased by or for community spouses." *Id.* at 17. That is immaterial—the relevant exception instead comes from Section 1396p(c)(2)(B)(i), which provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) [*i.e.*, § 1396p(c)(1)] to the extent that" assets are, as here, "transferred to the individual's spouse or to another for the sole benefit of the individual's spouse." 42 U.S.C. § 1396p(c)(2)(B)(i). The latter provision clearly overrides the former; it is irrelevant that the former provision does not *also* note that it is overridden by the latter.

2. In its effort to avoid the plain text that easily resolves these cases, the Commonwealth looks to other provisions of Section 1396p. First, it returns (Br. in Opp. 18-19) to its pet project—the relevance of the late-2006 amendment that changed the word "annuitant" in Section 1396p(c)(1)(F) to "institutionalized individual." *See* Pet. 6. It suggests (Br. in Opp. 18) that Petitioners' interpretation would "read [this amendment] out of the statute." But for all the Commonwealth's emphasis on the amendment, it is difficult to understand what relevance it has to the question presented. Both before and after the amendment, Section 1396p(c)(1)(F) does real work—it treats an annuity purchase that is *not* for the sole benefit of the community spouse "as the disposal of an asset for less than fair market value," subject to the transfer penalty unless the State is named as the primary remainder beneficiary. 42 U.S.C. § 1396p(c)(1)(F)(i).

A similar answer addresses the Commonwealth's invocation (Br. in Opp. 19) of 42 U.S.C. § 1396p(e), another

provision added by the DRA. *See* § 6012(a), 120 Stat. at 62-63. That provision requires that Medicaid applicants "disclose a description of any interest the individual or community spouse has in an annuity," and that the application "include a statement that . . . the State becomes a remainder beneficiary under such an annuity" pursuant to Section 1396p(c)(1)(F). 42 U.S.C. § 1396p(e)(1); *see id.* § 1396p(e)(2). There is nothing "nonsensical" about these requirements if annuities like the ones here "were not subject to § 1396p(c)(1)(F)." Br. in Opp. 19. Community spouses may have interests in annuities that are not for their sole benefit; it is undisputed that Section 1396p(c)(1)(F) would apply to such annuities. And it is also clear that the State has no rights in an annuity purchased more than three years before the Medicaid application, *see* 42 U.S.C. § 1396p(c)(1)(B), so the statement about the State becoming a remainder beneficiary cannot be absolute even under the Commonwealth's view.

3. The Commonwealth next argues (Br. in Opp. 21-22) that interpreting Section 1396p(c)(2)(B)(i) according to its plain text is "not required in order to effect [its] purpose." *Id.* at 21. In the Commonwealth's view (*see id.* at 4-5), the sole reason for Section 1396p(c)(2)'s addition is that because the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683, "newly required jointly counting the resources of the spouses," Congress clarified that "a transfer of assets simply from one spouse to the other should have no impact on the calculation of countable resources in determining Medicaid eligibility for the institutionalized spouse." *See* Pet. 3-5. In other words, Section 1396p(c)(2) was meant to do no

more than prevent double counting of assets that have been transferred between spouses.

The Commonwealth's version of history makes little sense in light of what Section 1396p(c)(2) actually *does*; this submission is therefore far from the "monster argument[]" the Commonwealth would need to show that "clear text . . . give[s] way to purpose." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1072 (2018). Section 1396p(c)(2) unequivocally shields not just asset transfers between spouses, *see* 42 U.S.C. § 1396p(c)(2)(A)(i), (B)(i)-(ii), but also various other transfers *outside the marriage* for the benefit of certain children or elderly, disabled individuals, *see id.* § 1396p(c)(2)(A)(ii)-(iv), (B)(iii)-(iv). There would have been no double counting of these assets without Section 1396p(c)(2), so the provision must be doing more than the Commonwealth gives it credit for.

4. The Commonwealth also claims (Br. in Opp. 22-23) that because there is a "seeming conflict[]" *id.* at 22, between Section 1396p(c)(1)(F)(i) and (c)(2)(B)(i), the former should control because it "deals specifically with the treatment of annuities," *id.*, and because it was "more recently enacted," *id.* But whatever the value of these purported interpretive principles in resolving true statutory conflicts, they play no role here. The provisions themselves instruct how to handle any potential conflict. Subparagraph (c)(1) sets forth a number of asset transfers—annuity purchases among them—that sometimes are penalized with respect to Medicaid eligibility. Subparagraph (c)(2) sets forth exceptions (*e.g.*, the sole-benefit-transfer rule). Congress has already resolved the conflict for us; if it decides it "prefers the

interpretation that applies § 1396p(c)(1)(F) notwithstanding § 1396p(c)(2)(B)(i), it need only amend the statute." *Hughes*, 734 F.3d at 486.

5. Finally, the Commonwealth falls back (Br. in Opp. 19-20) on the same policy considerations on which the Supreme Judicial Court relied. *See* Pet. App. 12a-14a. But appeals to policy must "give way when 'the words of a statute are unambiguous,' as they are here." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). And generally, "[t]his Court does not 'presume . . . that any result consistent with [one party's] account of the statute's overarching goal must be the law.'" *Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1441 (2023) (alterations in original) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)). The Commonwealth provides no compelling reason to depart from these foundational principles here.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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