No. 22-957

# In the Supreme Court of the United States

LAURIE A. DERMODY, PETITIONER

*v.*

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
CHARLES L. MCCLOUD
*Assistant to the Solicitor General*
ALISA B. KLEIN
DANA L. KAERSVANG
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

The Medicaid Act, 42 U.S.C. 1396 *et seq.*, imposes limitations on an individual's eligibility for Medicaid assistance for nursing home care. Under 42 U.S.C. 1396p(c)(1)(A), individuals who dispose of assets for less than fair market value during a specified period before applying for Medicaid are subject to a period of ineligibility. Married couples generally may transfer assets from one spouse to the other, or to another for the sole benefit of the "community spouse"—the spouse who is not in a nursing home—without incurring a period of ineligibility. 42 U.S.C. 1396p(c)(2)(B)(i). But the purchase of an annuity for the benefit of one of the spouses is considered a disposal of assets for less than fair market value unless the annuity names the State as a remainder beneficiary for at least the amount of benefits that the State provided to the "institutionalized spouse"—the spouse in a nursing home. 42 U.S.C. 1396p(c)(1)(F). The question presented is:

Whether Section 1396p(c)(2)(B)(i), concerning a transfer of assets for the sole benefit of the community spouse, creates an exception to the requirement in 42 U.S.C. 1396p(c)(1)(F) that an annuity name the State as the remainder beneficiary for the amount of Medicaid benefits the State paid on behalf of the institutionalized spouse.

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## INTEREST OF THE UNITED STATES

This brief is submitted 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

### A. Statutory Background

1. "The federal Medicaid program provides funding to States that reimburse needy persons for the cost of medical care," including long-term care such as nursing home care. *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 479 (2002). Under the program, "[e]ach participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance.'" *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981)

(quoting 42 U.S.C. 1396a(a)(17)). State standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary [of Health and Human Services], available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B).

Congress has long grappled with questions of Medicaid eligibility when one spouse lives in a nursing home or other institution (the "institutionalized spouse") and the other remains in the community (the "community spouse"). "Because spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married applicants have resisted simple solutions." *Blumer*, 534 U.S. at 479.

Until 1989, States generally treated each spouse's income and jointly held assets as available to both spouses, but "did not treat resources held individually by the community spouse as available to the institutionalized spouse." *Blumer*, 534 U.S. at 480. As a result, "[m]any community spouses were left destitute by the drain on the couple's assets necessary to qualify the institutionalized spouse for Medicaid," while "couples with ample means could qualify for assistance when their assets were held solely in the community spouse's name." *Ibid.*

2. a. Congress first addressed this issue in the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, 102 Stat. 683. "The purpose" of the relevant amendments was "to end" the "pauperization" of the community spouse "by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available for his or her own use while the [institutionalized] spouse is in a nursing home

at Medicaid expense." H.R. Rep. No. 391, 100th Cong., 1st Sess., at 490 (1987) (1987 House Report). The amendments were designed to ensure that "Medicaid—an entitlement program for the poor—should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." *Id.* at 502.

Under the MCCA, all of a couple's assets are considered jointly for purposes of the initial eligibility determination, regardless of which spouse has an ownership interest in any particular asset. See *Blumer*, 534 U.S. at 482. The community spouse is allowed to retain a limited amount of those assets, called the Community Spouse Resource Allowance or CSRA, for his or her own support. But most of the couple's assets above that amount must be spent before the institutionalized spouse can qualify for Medicaid. *Id.* at 482-483. A Committee Report accompanying the MCCA explained that because "Medicaid is a means-tested program whose primary purpose is the financing of needed health care services to poor children, poor families, and poor elderly and disabled individuals," "it is appropriate, as a general rule, to require couples with total liquid resources" above a certain threshold "to contribute more than half of those liquid resources to the cost of the institutionalized spouse's long-term care." 1987 House Report 496.

The MCCA did not make *income* subject to the same rules. Generally, income paid to one spouse is treated as available only to that spouse. See *Blumer*, 534 U.S. at 481 (citing 42 U.S.C. 1396r-5(b)(2)(A)). An exception to that rule is that the institutionalized spouse is permitted to transfer sufficient income to the community spouse to allow the community spouse to reach a certain minimum income, which is capped by statute. 42 U.S.C.

1396r-5(d). Similar provision is made for transfers of income to certain other family members, including "minor or dependent children." 42 U.S.C. 1396r-5(d)(1)(C). Any income earned by the institutionalized spouse beyond those amounts must be contributed toward the cost of care. 42 U.S.C. 1396r-5(d)(1)(D).

b. In the same amendments made by the MCCA, Congress also guarded against the possibility that a couple might give away assets or dispose of them for less than their value in order to qualify for Medicaid. If either the institutionalized spouse or the community spouse "disposes of assets for less than fair market value" during a specified lookback period, Medicaid will not pay for nursing home costs for a period of time calculated to approximate the amount of time in the nursing home that could have been paid for with those assets. 42 U.S.C. 1396p(c)(1)(A).

The MCCA permits transfers of assets by spouses without penalty in certain circumstances. Those circumstances include where the assets were transferred between spouses for the "sole benefit" of one spouse, or the assets were transferred by an individual's spouse to a third party for the "sole benefit" of the other spouse. MCCA § 303(b), 102 Stat. 760-761 (42 U.S.C. 1396p(c)(2)(B)). The Committee Report explained that because the MCCA "would establish rules for the attribution of resources of married couples at the time of institutionalization which affect both spouses, no purpose would be served by prohibiting transfers from the institutionalized spouse to the community spouse." 1987 House Report 503.

3. Congress did not address the subject of annuities when it enacted the MCCA in 1988. An annuity is a financial arrangement in which an individual pays a lump

sum amount in exchange for the right to receive fixed payments on a set schedule (typically monthly or semi-annually) for a pre-determined period of time. The purchase of an annuity thus allows the purchaser to transform assets into income.

Annuities present a special challenge under the Medicaid scheme. Although a couple's assets used to purchase an annuity would otherwise have to be taken into account in determining the initial eligibility of the institutionalized spouse for Medicaid benefits, an annuity can provide income that is paid only to the community spouse. If the purchase of an annuity for the community spouse is considered a transfer of assets for the "sole benefit" of the community spouse under 42 U.S.C. 1396p(c)(2)(B), that treatment would enable the couple to remove unlimited assets from the Medicaid eligibility calculation without penalty.

Against this background, Congress addressed the specific subject of annuities when it enacted the Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, 120 Stat. 4. The DRA provided that for purposes of the penalty in 42 U.S.C. 1396p(c)(1)(A) for disposal of assets,

> the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value 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 annuitant under this title; or (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

§ 6012(b), 120 Stat. 63 (42 U.S.C. 1396p(c)(1)(F)).

The Centers for Medicare & Medicaid Services (CMS), which administers Medicaid on behalf of the Secretary of Health and Human Services, has provided guidance for determining whether an annuity is purchased for fair market value. Under that guidance, an annuity purchased by or on behalf of either the institutionalized or the community spouse is considered a disposal of assets for fair market value so long as the annuity is, among other things, actuarially sound and commensurate with the reasonable life expectancy of the beneficiary. See CMS, *State Medicaid Manual* § 3258.9(B) (Nov. 1994).

In addition, the DRA added 42 U.S.C. 1396(e) to the Medicaid Act. See DRA § 6012(a), 120 Stat. 62-63. Paragraph (1) of that new provision requires that an individual's application for Medicaid benefits "disclose a description of any interest the individual or community spouse has in an annuity" and "include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance." *Ibid.* (42 U.S.C. 1396p(e)(1)). Paragraph (2) of Section 1396p(e), in turn, provides that "[i]n the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual." *Id.* § 6012(a), 120 Stat. 63 (42 U.S.C. 1396p(e)(2)(A)).

4. In December 2006, Congress amended the DRA's annuity-related provisions to make what was described as a "technical correction[]" to paragraph (1)(F) of 42 U.S.C. 1396p(c). 152 Cong. Rec. E2252 (daily ed. Dec. 27, 2006). As initially enacted, that paragraph, quoted

above, required that the State be named as the remainder beneficiary to the amount of payment necessary to reimburse the State for medical bills paid on behalf of the "annuitant." DRA § 6012(b), 120 Stat. 63. Congress amended that provision to require reimbursement for medical bills paid on behalf of the "institutionalized individual," regardless of whether that person was the annuitant. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 405, 120 Stat. 2996-3000 (42 U.S.C. 1396p note). Congress made that change retroactive to the date that the DRA was enacted.

The December 2006 amendment was enacted against the backdrop of July 2006 guidance that CMS had given to State Medicaid Directors regarding the 2005 DRA amendments. That guidance informed States that CMS interpreted the new paragraph (1)(F) "as applying to annuities purchased by an applicant or by a spouse" and explained that such annuities "must name the State as the remainder beneficiary." CMS, State Medicaid Dir. Letter, Enclosure Section 6012, Changes in Medicaid Annuity Rules Under the Deficit Reduction Act of 2005, Sec. II.B (July 27, 2006) (2006 CMS Letter).

### B. Facts And Procedural History

This petition involve annuities that named the community spouse as the annuitant and were purchased to reduce the couple's assets to the point that the institutionalized spouse became Medicaid eligible.

#### *1.* Dermody

a. Robert Hamel, the father of petitioner Laurie Dermody, purchased an annuity for $172,000 from Nationwide Insurance Company. Pet. App. 29a. At the time, his wife was residing in a skilled nursing facility. *Ibid.* "[I]t is undisputed that [Hamel] purchased the

annuity as part of a strategy to spend down the couple's assets so that [his wife] would be eligible for MassHealth benefits." *Id.* at 16a. Two weeks after Hamel purchased that annuity, his wife applied for and later received long-term care benefits from MassHealth, the state program through which Massachusetts participates in Medicaid. See *id.* at 21a n.5, 29a.

Hamel designated "State of MA Medicaid Per Application" as the primary beneficiary, and the annuity application provided that the Commonwealth would be the primary recipient of residual benefits to the "Extent Benefits Paid." Pet. App. 29a. Hamel listed his daughter, petitioner Laurie Dermody, as the secondary beneficiary.

Hamel himself never received benefits from MassHealth. After Hamel's death, petitioner Dermody brought suit against Nationwide and the Executive Office of Health and Human Services (the Massachusetts agency responsible for administering MassHealth), seeking a declaration that she, not Massachusetts, was entitled to the remaining balance on the annuity. Pet. App. 21a n.5, 31a.[1]

b. The Massachusetts trial court ruled for Dermody. It concluded that, regardless of the correct interpretation of federal law, Dermody "prevails under basic contract interpretation principles." Pet. App. 44a. In its view, the annuity provided that Massachusetts be reimbursed only for benefits paid on behalf of Hamel, not his wife. The court reasoned that the "Commonwealth's

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[1] Dermody also asserted claims against Nationwide for distributing the annuity funds to Massachusetts, Pet. App. 46a, and Nationwide asserted a cross claim against Massachusetts for indemnification, *id.* at 51a.

right to recover is limited to the 'Extent Benefits Paid,' " and "nothing in the plain terms of the contract suggests the 'benefits paid' language refers to anyone other than" Hamel. *Id.* at 45a. The court declared that, to the extent that the Commonwealth should not have approved his wife's Medicaid payments, "[t]his was an oversight on the Commonwealth's part" that did not affect the court's interpretation of the contract. *Id.* at 45a n.7.

The trial court further concluded that, in any event, the "unambiguous, plain language" of Section 1396p(c) demonstrated that the annuity-specific provision in paragraph (1)(F) does not apply to annuities purchased for the sole benefit of the community spouse. Pet. App. 41a. The court reasoned that the exception in paragraph (2)(B) for asset transfers for the sole benefit of either spouse created an exception to the annuity provision in paragraph (1)(F). *Ibid.*

c. The Supreme Judicial Court of Massachusetts (SJC) reversed. Pet. App. 1a-18a.

The SJC first rejected Dermody's argument that paragraph (1)(F)'s requirement to name the State as a remainder beneficiary includes "a carve-out for those annuities purchased for the sole benefit of the community spouse." Pet. App. 12a-13a. The court observed that Dermody's interpretation would leave open "the sole-benefit loophole," "frustrating not only the purpose of" the annuity provision in paragraph (1)(F), but also "the central goals of the Medicaid program." *Id.* at 13a-14a. The court explained that "[w]hen affluent individuals engage in schemes to hide assets in order to qualify for programs to which they are otherwise not entitled, their actions improperly 'divert[] scarce Federal and State resources from low-income [qualifying

individuals].'" *Id.* at 14a (quoting *Cohen* v. *Commissioner of the Div. of Med. Assistance*, 668 N.E.2d 769 (Mass. 1996), cert. denied *sub nom. Kokoska* v. *Bullen*, 519 U.S. 1057 (1997)) (second and third set of brackets in original). The court accordingly concluded that paragraph (1)(F) and paragraph (2)(B)'s sole-benefit rule "both must apply to ensure that an annuity purchased does not become a vehicle for sheltering assets that otherwise properly would be used to pay for medical care." *Ibid.*

Turning to Dermody's state-law claims, the SJC determined that the annuity contract was best read to provide for payment to MassHealth. It explained that, although "the annuity contract is not a model of clarity," in light of the fact that "it is undisputed that [Hamel] purchased the annuity as part of a strategy to spend down the couple's assets so that [his wife] would be eligible for MassHealth benefits"—and given the requirement that "a community spouse annuity must list the State as the remainder beneficiary to the extent that benefits are paid for the institutionalized spouse"—"the institutionalized spouse[] is the presumed recipient of benefits referenced in the remainder clause." Pet. App. 16a.

The SJC also rejected Dermody's argument that the Commonwealth's claim was barred by a state Medicaid statute. Pet. App. 17a-18a. The SJC reasoned that "it makes no difference whether the plaintiff's interpretation of [state law] is correct," because any interpretation that would prevent the Commonwealth from collecting would be preempted. *Id.* at 18a.

***2.*** **Mondor**

a. *Mondor* involves two consolidated cases concerning disputes over annuity proceeds. In both cases, the

community spouse purchased the annuity shortly after the other spouse was institutionalized, but before the institutionalized spouse applied for Medicaid benefits. See Pet. App. 20a-21a, 23a-24a. The purchase diminished the couple's assets to an extent that made the institutionalized spouse eligible for Medicaid benefits. Both annuities listed Massachusetts as the primary remainder beneficiary and listed the couple's children as the contingent remainder beneficiaries. *Id.* at 21a, 24a. In both cases, the community spouse died with annuity payments remaining and without having received MassHealth benefits, but Massachusetts had by then paid more than the remaining annuity amount in benefits for the institutionalized spouse. *Id.* at 23a-25a.

b. The annuity issuer, Standard Insurance Company, filed both suits to resolve the parties' competing claims to the remaining annuity benefits. The parties "stipulated to Standard's dismissal from the case" and "jointly moved to report the cases to the Appeals Court without decision on a statement of agreed material facts." Pet. App. 25a.

c. The SJC granted direct appellate review, Pet. App. 25a, and issued a decision the same day that it issued its decision in *Dermody*, *id.* at 26a. The SJC held that the *Mondor* cases "are governed in all material respects by our decision today in *Dermody,*" *ibid.*, and remanded the cases to the trial court for entry of judgment for Massachusetts, *id.* at 27a.

**DISCUSSION**

The Supreme Judicial Court's decisions are correct and do not warrant this Court's review. The SJC's holding follows from the text, context, and history of the relevant statutory provisions. The SJC's decisions are also consistent with the purpose of those statutory provisions

to ensure that when one spouse seeks Medicaid benefits for long-term care, the couple does not deprive the Medicaid program of assets that otherwise would properly be used to pay for the cost of the institutionalized spouse's care—*e.g.*, by passing assets on to their children. The SJC's interpretation of the Medicaid scheme is also consistent with CMS guidance for State Medicaid Directors that was issued shortly after the 2005 statutory amendments were enacted and shortly before Congress again amended the pertinent provision in a way that reinforced CMS's interpretation.

Although petitioners allege a conflict between the SJC's holding and a decision of the Sixth Circuit, the issue presented here was not the principal issue in the Sixth Circuit case, and that court did not address the December 2006 amendment to paragraph (1)(F), which confirms that the decision below is correct. Any consideration by this Court of the question presented therefore would benefit from further percolation in the lower courts. And in any event, this petition would be a poor vehicle for considering the question presented. The Court should deny the petition.

**A. The Decisions Below Are Correct**

The SJC correctly determined that the requirement in paragraph (1)(F) to name the State as the remainder beneficiary applied to the annuities in this petition.

1. Section 1396p(c)(1)(A) provides that "if an institutionalized individual or the spouse of such an individual *** disposes of assets for less than fair market value" during the statutory lookback period, the individual is ineligible for benefits to pay for the cost of nursing home care for a period of time set to approximate the amount of time that the care could have been paid for with those assets. 42 U.S.C. 1396p(c)(1)(A). In

addition to that general penalty on below-market-value transfers, paragraph (1)(F) of Section 1396p(c), which was added by the DRA in 2005, imposes a specific eligibility requirement where either the institutionalized spouse or community spouse purchases an annuity, with either spouse as the annuitant. In those circumstances, the statute provides that "the purchase of an annuity *shall be treated* as the disposal of an asset for less than fair market value unless *** 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 [spouse.]" 42 U.S.C. 1396p(c)(1)(F)(i) (emphasis added).

Moreover, subsection (e) of Section 1396p, which was also added by the DRA in 2005, requires an applicant for Medicaid, as a condition of eligibility for nursing home care, to disclose any interest that the applicant or community spouse has in an annuity. 42 U.S.C. 1396p(e)(1). Subsection (e) then further provides that if the annuity is one covered by paragraph (1)(F)—*i.e.*, an annuity purchased by either the institutionalized spouse or the community spouse during the lookback period—the application must provide that the State becomes a remainder beneficiary under the annuity by virtue of the provision of medical assistance, and the State must then notify the issuer of the annuity of its rights as a remainder beneficiary. 42 U.S.C. 1396p(e)(1) and (2). Those provisions make clear that any annuity purchased by either spouse, with either spouse as the annuitant, is subject to the requirement that the State is a remainder beneficiary.

2. Petitioners contend (Pet. 30) that, notwithstanding those requirements, the Commonwealth was not entitled to recover for the amount of Medicaid benefits it

paid on behalf of the institutionalized spouses in this petition. According to petitioners, paragraph (2)(B) of Section 1396p(c), a general provision concerning transfers of assets by spouses that was enacted in the MCCA in 1988, "carves out an exception" to paragraph (1)(F)'s special annuity rule enacted in 2005. Pet. 30. Paragraph (2)(B) provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that" "the assets *** were 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). Petitioners' contention is incorrect.

Petitioners' argument would erase the core application of the later-enacted paragraph (1)(F) and subsection (e). As the SJC explained, Congress added the special annuity rule in paragraph (1)(F) in an effort to prevent "affluent individuals" from "engag[ing] in schemes to hide assets in order to qualify for programs to which they are otherwise not entitled," thereby "'divert[ing] scarce Federal and State resources from low-income [qualifying individuals].'" Pet. App. 14a (quoting *Cohen* v. *Commissioner of the Div. of Med. Assistance*, 668 N.E.2d 769, 779 (Mass. 1996), cert. denied *sub nom. Kokaska* v. *Bullen*, 519 U.S. 1057 (1997)) (second and third set of brackets in original); see *Hutcherson* v. *Arizona Health Care Cost Containment System Administration*, 667 F.3d 1066 (9th Cir. 2012). Under petitioners' interpretation, however, it is difficult to see how paragraph (1)(F) could accomplish that goal.

In addition, petitioners' interpretation would violate the longstanding canon that courts "must normally seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Ysleta Del Sur Pueblo*

v. *Texas*, 596 U.S. 685, 698-699 (2022) (quoting *Corley* v. *United States*, 556 U.S. 303, 314 (2009)). On petitioners' view, an annuity naming the community spouse as the annuitant would be exempt from the requirement in paragraph (1)(F) to name the State as the remainder beneficiary in the first position by virtue of paragraph (2)(B). At the same time, the purchase of an annuity for the community spouse that would not be paid out within the community spouse's expected lifetime would be treated as a disposal for less than fair market value, see *State Medicaid Manual* § 3258.9(B), and would therefore be subject to penalty under 42 U.S.C. 1396p(c)(1)(A), without any need for paragraph (1)(F). And an annuity under which the community spouse was not the annuitant would not be a transfer for fair market value and would likewise be subject to a penalty without any need for paragraph (1)(F).[2] Thus, the only annuity purchases that would be penalized under petitioners' reading of paragraphs (1)(F) and (2)(B) would independently be deemed disposals of assets for less than fair market value, and so subject to the transfer penalty, by operation of other provisions of the statutory scheme.

3. For similar reasons, petitioners' interpretation would make the December 2006 amendment to paragraph (1)(F) virtually meaningless. As initially enacted, paragraph (1)(F) provided that the State must be the first remainder beneficiary for at least the "amount of medical assistance paid on behalf of the *annuitant*."

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[2] For example, if the annuity named the community spouse's nondisabled, adult daughter as the annuitant, the transaction would be no different than a cash gift, unless the daughter paid the couple for the value of the annuity—which would leave the couple's asset levels unchanged.

DRA § 6012(b), 120 Stat. 63 (emphasis added). In December 2006, Congress "correct[ed]" the statute to provide that the State must be the first remainder beneficiary for the amount paid on behalf of the "institutionalized individual" rather than the "annuitant." 152 Cong. Rec. at E2252; see Tax Relief and Health Care Act of 2006 § 405(b)(1), 120 Stat. 2998. In making that change, Congress plainly contemplated that States would be entitled to recover annuity remainders even where, as here, the annuitant was the community spouse who never received any medical assistance from the State. But as just explained, petitioners' interpretation would effectively exempt community spouses from the requirement to name the State as a remainder beneficiary. The SJC correctly declined to interpret the Medicaid statute to preserve precisely the kind of "loophole," Pet. App. 13a, that the DRA and the 2006 amendment were intended to close.

The context of the 2006 amendment further supports the SJC's interpretation. Prior to the amendment, CMS had interpreted paragraph (1)(F) "as applying to annuities purchased by an applicant or by a spouse." 2006 CMS Letter. In the same guidance document, CMS further warned that "[i]f the State is not named as a remainder beneficiary in the correct position, the purchase of the annuity will be considered a transfer for less than fair market value." *Ibid.* (emphasis omitted). CMS's warning made no mention of an exception for an annuity that named the community spouse as the annuitant, which under petitioners' interpretation of paragraphs (1)(F) and (2)(B) would be exempt as a transfer for the "sole benefit" of the community spouse.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt

that interpretation when it re-enacts a statute without change," *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 239-240 (2009) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)), or when it "adopts a new law incorporating sections of a prior law," *Lorillard*, 434 U.S. at 581. Here, Congress did not merely adopt the relevant provision without change—it altered paragraph (1)(F) in a way that has effect only if Congress intended the Secretary's interpretation. That is "persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

Petitioners minimize the importance of the December 2006 amendment, contending (Reply Br. 9) that "[b]oth before and after the amendment," paragraph (1)(F) "does real work" by "treat[ing] an annuity purchase that is *not* for the sole benefit of the community spouse" as subject to the transfer penalty unless the State is named as the primary remainder beneficiary. As explained, however, see p. 14, *supra*, a core purpose of the MCCA and then the DRA was to prevent a couple from shielding assets from the Medicaid program by placing them with the community spouse. Petitioners' interpretation of paragraphs (1)(F) and (2)(B) would defeat that core purpose and leave paragraph (1)(F) with little meaningful role in the statutory scheme.

**B. The Decisions Below Do Not Warrant This Court's Review**

The SJC decisions do not warrant this Court's review.

1. Petitioners point to only one decision—the Sixth Circuit's decision in *Hughes* v. *McCarthy*, 734 F.3d 473, 483-485 (2013), cert. denied 572 U.S. 1034 (2014)—that

they claim conflicts with the decision below. While the SJC disagreed with some aspects of the Sixth Circuit's reasoning, see Pet. App. 13a n.18, that disagreement does not warrant this Court's review.

In *Hughes*, the community spouse purchased an annuity prior to the institutionalized spouse applying for Medicaid. 734 F.3d at 477. The annuity named the institutionalized spouse as the first contingent beneficiary and the State as the remainder beneficiary. *Ibid.* The "primary issue" on appeal was whether the district court had erred in finding that the transfer of assets to purchase the annuity violated 42 U.S.C. 1396r-5. *Hughes*, 734 F.3d at 478; see *id.* at 478-479. That section permits the transfer of assets from the institutionalized spouse to the community spouse up to certain limits "after the date of the initial determination of eligibility." 42 U.S.C. 1396r-5. The Sixth Circuit rejected the district court's holding, correctly concluding that Section 1396r-5's limitation on transfers by the institutionalized spouse applies only *after* the institutionalized spouse is determined to be Medicaid eligible and "does not say anything about a transfer made *before* the initial determination of eligibility." *Hughes*, 734 F.3d at 479.

The Sixth Circuit then went on to discuss alternative grounds for affirmance not reached by the trial court, including the State's argument that the annuity purchase violated paragraph (1)(F) by naming the institutionalized spouse as the first remainder beneficiary and the State as the second remainder beneficiary. See *Hughes*, 734 F.3d at 481, 484-485. The court disagreed with the State, concluding that "an annuity that satisfies § 1396p(c)(2)(B)(i) need not satisfy § 1396p(c)(1)(F)." *Id.* at 484.

For several reasons, the Sixth Circuit's decision does not create a conflict warranting this Court's review. First, the Sixth Circuit's reversal of the district court rested primarily on its interpretation of Section 1396r-5, a provision that is not at issue here. Second, *Hughes* involved unusual facts. As the government explained in its amicus brief, paragraph (1)(F) permits the community spouse to be named as the beneficiary in the first position but not the institutionalized spouse. See Dep't of Health and Human Servs. Amicus Br. at 18-20, *Hughes*, *supra*, (No. 12-3765). The annuity in *Hughes* therefore did "not comply with the letter of [paragraph (1)(F)]." *Id.* at 20. But that issue had little practical significance because money paid to the institutionalized spouse would reduce the payments made by the State and so "the state w[ould] likely benefit regardless." *Ibid.*; see 42 C.F.R. 435.725 (requiring state Medicaid programs to reduce payments to institutions based an institutionalized individual's extra income). Finally, and perhaps as a consequence of the two preceding features of the case, the relationship between paragraph (1)(F) and paragraph (2)(B) was not fully considered. In particular, the Sixth Circuit did not acknowledge the 2006 amendment to the DRA and did not address the force of that amendment with respect to the interpretation of paragraph (1)(F) and paragraph (2)(B) and any relationship between the two. Under these circumstances, the Sixth Circuit could reconsider its decision in a future case and align itself with the reasoning of the SJC. And for this reason and more generally, the question presented also would benefit from percolation in

the lower courts based on a full presentation of the issue.[3]

2. In any event, even if the question presented otherwise warranted the Court's attention, this petition would present a poor vehicle for review. The *Mondor* annuities in fact *do* name Massachusetts as the primary remainder beneficiary, and thus facially *permit* the State to recover benefits paid on behalf of the institutionalized spouses irrespective of paragraph (2)(B). See Pet. App. 21a, 24a, 26a. And while petitioners assert that state law would prevent that outcome, the SJC did not determine whether that interpretation of state law was correct. *Id.* at 18a.

With respect to *Dermody*, the Commonwealth has asserted that the annuity was not for the "sole benefit" of the community spouse because it named Hamel's daughter as the second remainder beneficiary (after Massachusetts), and thus did not satisfy Section 1396p(c)(2)(B)(i) even under petitioners' interpretation. See, *e.g.*, Br. in Opp. 20-21. Although the Massachusetts courts did not pass upon that question, Dermody has acknowledged (Reply Br. 8) that the Commonwealth may advance the argument on remand. Resolution of that issue would not only provide an independent basis for rejecting Dermody's claim, but addressing the

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[3] Petitioners also cite (Pet. 19-21) the Ninth Circuit's decision in *Hutcherson*, *supra*. As petitioners acknowledge (Pet. 21), however, *Hutcherson* "did not expressly address" the question presented here. Indeed, the Ninth Circuit did not even cite the "sole benefit" exception in paragraph (c)(2)(B). Instead, the dispute in *Hutcherson* centered on how the remainder of an annuity should be divided between the first remainder beneficiary (the State) and the second (the daughter of the deceased annuitant). See 667 F.3d at 1070-72. The Ninth Circuit's decision therefore does not conflict with the Sixth Circuit's decision in *Hughes*.

meaning and scope of paragraph (2)(B) could also shed important light on any interaction between that paragraph and paragraph (1)(F) in a case like this.

Accordingly, it is unclear whether a decision by this Court would affect the ultimate outcome of either *Mondor* or *Dermody*, and review by this Court would not have the benefit of an interpretation by the SJC of one of the principal statutory provisions involved.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
BRIAN M. BOYNTON
*Principal Deputy Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
CHARLES L. MCCLOUD
*Assistant to the Solicitor General*
ALISA B. KLEIN
DANA L. KAERSVANG
*Attorneys*

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