1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WISCONSIN DEPARTMENT OF HEALTH :

4 AND HUMAN SERVICES, :

5 Petitioner :

6 v. : No. 00-952

7 IRENE BLUMER :

8 - - - - - - - - - - - - - - - - -X

9 Washington, D.C.

10 Monday December 3, 2001

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:03 a.m.

14 APPEARANCES:

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16 Madison, Wisconsin; on behalf of the Petitioner.

17 JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the United States, as amicus curiae,

20 supporting the Petitioner.

21 MITCHELL HAGOPIAN, ESQ., Madison, Wisconsin; on behalf of

22 the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 00-952, the Wisconsin

5 Department of Health and Human Services v. Irene Blumer.

6 Ms. Flanagan.

7 ORAL ARGUMENT OF MAUREEN M. FLANAGAN

8 ON BEHALF OF THE PETITIONER

9 MS. FLANAGAN: Mr. Chief Justice, and may it

10 please the Court:

11 In 1988, Congress enacted the spousal

12 impoverishment protections of the Federal Medicaid Act, 42

13 U.S. Code section 1396r-5, to accomplish two competing

14 purposes. First, Congress sought to protect spouses

15 living at home from impoverishment when the other spouse

16 is institutionalized and requires long-term nursing home

17 care. Secondly, Congress sought to ensure that married

18 couples seeking medicaid bear a fair share of the cost of

19 such care.

20 This case concerns whether States have the

21 discretion to achieve those competing goals by taking into

22 account at the time medicaid eligibility is determined

23 available income which the nursing home spouse is

24 permitted to use after eligibility to support the at-home

25 spouse.

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1 When the nursing home spouse applies for
2 medicaid, section 1396r-5 permits the community spouse to
3 retain certain income and resources to meet his own
4 monthly maintenance needs. The statute permits an
5 increase in the standard resource allowance, however, if
6 the at-home spouse can show at a fair hearing that the
7 allowance will be inadequate to provide him with income at
8 the State-protected level once the nursing home spouse
9 qualifies for medicaid.
10 When making this determination, Wisconsin, like
11 more than 30 other States, first considers whether income
12 available to the at-home spouse from the nursing home
13 spouse will be sufficient to ensure the protected level of
14 income once medicaid eligibility occurs. This method of
15 determining whether to increase or to substitute the
16 standard resource allowance is called the income-first
17 rule.
18 QUESTION: And what do the other States do?
19 MS. FLANAGAN: The remaining States use a
20 methodology called resource first, in which they look
21 first to the additional resources above the standard
22 resource allowance. These cases only arise where the
23 couple has resources above the standard allowance.
24 In this case --
25 QUESTION: It would be very helpful to me if,

1 right at this point, you pointed the statutory -- pointed
2 out the statutory provision that authorizes the State to
3 transfer income at this stage.
4 MS. FLANAGAN: The statutory provision, I think,
5 specifically is found in 42 U.S. Code 1396a(a)(17), which
6 deals with State standards for eligibility and the
7 Secretary's authority to set standards for determining
8 availability.
9 QUESTION: Do you have a handy reference in the
10 brief somewhere to the, where we can see that?
11 MS. FLANAGAN: It's in the Attorney -- the
12 Solicitor General's appendix at -- the first thing in
13 their appendix is the codified statute, 30 -- 1396r-5, the
14 one we are discussing primarily, and -- no, I'm sorry,
15 1396a is in -- the first thing in the Solicitor General's
16 appendix.
17 QUESTION: Page 1a?
18 MS. FLANAGAN: Yes, and (a)(17) --
19 QUESTION: That's 8a.
20 QUESTION: 8a?
21 QUESTION: It looks like 7 --
22 MS. FLANAGAN: Yes, Your Honor, it is. I'm
23 sorry. It is correct.
24 QUESTION: Then where in number (17) is the
25 language that you're answering Justice Stevens with?

1 MS. FLANAGAN: Okay, a(a)(17) provides that the
2 Secretary shall include reasonable standards, and then you
3 skip the one parenthetical, for determining eligibility
4 for and the extent of medical assistance under the State
5 plan, and then under (b), provide for taking into account
6 only such income and resources as are -- as determined in
7 accordance with standards prescribed by the Secretary
8 available to the applicant or recipient, et cetera.
9 QUESTION: Well, and let me ask you a question
10 on this point, if I may. There is a section, 5(b)(1), r-
11 5(b)(1) of section 1396 that says that pre-eligibility,
12 none of the income of the community spouse shall be deemed
13 available to the institutionalized spouse, right?
14 MS. FLANAGAN: That's right. `
15 QUESTION: And you're talking now about post
16 eligibility?
17 MS. FLANAGAN: We're talking about a
18 determination made at the point of eligibility, but which
19 concerns income available post eligibility.
20 QUESTION: Well, it says pre-eligibility none of
21 the income of the community spouse shall be deemed
22 available to the institutionalized spouse.
23 MS. FLANAGAN: That's right. That's right.
24 QUESTION: And that provision wouldn't make
25 sense if income of the community spouse itself included

1 income of the institutionalized spouse.

2 MS. FLANAGAN: Well, I think, Your Honor, the --

3 QUESTION: Would it? It wouldn't make any

4 sense?

5 MS. FLANAGAN: I think you have to take into

6 account that you're talking about income being calculated

7 at different points in the temporal spectrum for different

8 purposes.

9 QUESTION: Well, you're -- you seem to be

10 arguing that the phrase, community spouse's income in

11 (c) -- in (e)(2)(c) includes income from the

12 institutionalized spouse --

13 MS. FLANAGAN: I think --

14 QUESTION: -- and yet it`can't under that

15 section I read, I think. I don't understand how you get

16 there.

17 MS. FLANAGAN: No, that particular section

18 (b)(1) refers only to prohibiting income of the community

19 spouse from being deemed available to the nursing home --

20 QUESTION: Right, but Justice O'Connor's point

21 is undoubtedly correct that income of the community spouse

22 there means income of the community spouse alone, not any

23 attributed income from the institutionalized spouse,

24 right? Isn't that right? It has to mean only the income

25 of the community spouse.

1 MS. FLANAGAN: I think you have to look at --
2 QUESTION: In that section
3 MS. FLANAGAN: -- what's available at that
4 point.
5 QUESTION: I understand. Do you have any other
6 section in the act in which the phrase, income of the
7 community spouse, means not just the income of the
8 community spouse alone, but also income that has been
9 attributed from the institutionalized spouse?
10 MS. FLANAGAN: Under the definition of community
11 spouse, income maintenance allowance, I believe -- which
12 is under subsection (d)2(B) --
13 QUESTION: (d)2 what?
14 MS. FLANAGAN: (d)2(B), refers --
15 QUESTION: Can you tell us where in the SG's
16 appendix that is?
17 QUESTION: It's on 59a of your cert petition.
18 QUESTION: 18a?
19 QUESTION: 59a.
20 MS. FLANAGAN: At any rate, that particular
21 section refers to monthly income otherwise available to
22 the community spouse, and the -- our position is that this
23 evidences a recognition of the fact, as medicaid has long
24 recognized, that spouses are required to support one
25 another, and that this is a background rule.

1 QUESTION: Ms. Flanagan, it might help if -- I
2 think one of the main features of this legislation was
3 that income from the community spouse was never to be
4 attributed to the institutionalized spouse, but vice
5 versa, there is no such prohibition.
6 MS. FLANAGAN: That's right, and that's --
7 QUESTION: None of this makes sense unless you
8 appreciate that that was an absolute prohibition. Now,
9 tell us where that is in this statute, that says, income
10 from the community spouse is not to be attributed to the
11 institutionalized spouse.
12 MS. FLANAGAN: It's in subsection (b)(1), 1396r-
13 5(b)(1), and that was referred to --
14 QUESTION: That was the section I read to you --
15
16 MS. FLANAGAN: Right.
17 QUESTION: -- in my question.
18 MS. FLANAGAN: Yes.
19 QUESTION: Could I have an answer to my
20 question? The section you just referred me to is still
21 not another section other than the one at issue here in
22 which the simple phrase, income of the community spouse,
23 is used in a sense that means the community spouse's own
24 income plus any income attributed to the community spouse
25 from the institutionalized spouse.

1 You say that that's the way it's used in the
2 provision at issue here. My question is, where else in
3 the entire statute is it used in that fashion?
4 MS. FLANAGAN: I don't believe it's used
5 anywhere else. That's why the difficulty in this case
6 arose, is to try to figure out what that means.
7 QUESTION: Well, no, I think that rather solves
8 the difficulty, frankly.
9 MS. FLANAGAN: I --
10 QUESTION: I would normally think that income of
11 the community spouse means income of the community spouse,
12 and you say it means no, the community spouse's income
13 plus attributed income. I don't know anywhere else in the
14 statute that it's used in that fashion, just in this one
15 section where you say we should interpret it that way.
16 There are other sections where it clearly means only the
17 community spouse's income.
18 MS. FLANAGAN: With respect, Your Honor, the
19 medicaid statute has long considered available income as
20 part of the income of the person to which it's referring,
21 and we --
22 QUESTION: I mean, where it does that, that's
23 all I'm asking for. If it's long done that, just give me
24 another section where income of the community spouse means
25 what you say it means here. The phrase is used a lot, I'm

1 sure.

2 MS. FLANAGAN: That particular phrase is not

3 used frequently in this statute. That's part of the

4 problem. It's only used --

5 QUESTION: And isn't it true that the situation

6 you're talking about we're deeming in the other direction,

7 where they deem the community spouse income to be

8 attributable to the institutionalized spouse, not vice

9 versa?

10 MS. FLANAGAN: Well, Your Honor, Justice

11 Stevens, the background rule which I referred to which

12 this Court clearly articulated in Gray Panthers case is

13 that spouses are expected to support one another. That's

14 a two-way street.

15 QUESTION: That was for purposes of determining

16 how much of the community spouse's income should be deemed

17 to belong to the institutionalized spouse.

18 MS. FLANAGAN: That's right. I'm just saying

19 that spousal support obligations are a two-way street, and

20 the Court clearly recognized that.

21 QUESTION: In this case, we have the unusual

22 circumstance where Congress sought to provide additional

23 protection to the community spouse to reverse the prior

24 deeming rule which permitted States to take income from

25 the community spouse and require it to be used for the

1 cost of care.

2 In this case, in the spousal impoverishment

3 provisions and this provision specifically, Congress is

4 trying to protect the community spouse by making available

5 to the at-home spouse income that is specifically

6 contemplated to be made available as soon as eligibility

7 occurs.

8 QUESTION: But it is clear, is it not, that the

9 resource-first rule gives greater protection to the

10 community spouse than the income-first rule?

11 MS. FLANAGAN: The result is that it permits

12 the -- in general it frequently permits the at-home spouse

13 to retain a greater share of the couple's joint resources

14 than would be the case under the State-defined standard

15 resource allowance, and in that sense, yes, that's

16 definitely correct.

17 QUESTION: Ms. Flanagan, am I right in thinking

18 that the, neither the act we're talking about nor the SSI

19 actually define community spouse's income?

20 MS. FLANAGAN: No, it doesn't. That's the exact

21 problem in this case. There is no definition, and our

22 position is that community spouse's income means income

23 possessed by the community spouse, income that the spouse

24 has a right to, and income that is available to the spouse

25 at the particular point when it's being considered.

1 QUESTION: Was the income-first rule in
2 Wisconsin adopted by the legislature, or by a State
3 agency?
4 MS. FLANAGAN: It was initially adopted as a
5 matter of policy by the State agency immediately after
6 passage of the statute. Then in 1993 the legislature
7 amended the statute to have an express income-first
8 requirement.
9 QUESTION: So then your State court, I take it,
10 under prevailing Wisconsin rules, could not ignore the
11 legislature's determination unless it found that the
12 Federal statute was unambiguous.
13 MS. FLANAGAN: That -- well, that is what they
14 did, yes, Your Honor. They interpreted the Federal
15 statute as being unambiguous. They concluded that the
16 State law conflicted with the plain terms of the Federal
17 statute and therefore could not be enforced.
18 QUESTION: Ms. Flanagan, as I understand it,
19 there's a provision -- and these have been referred to
20 this morning, but there's a provision that forbids
21 attribution from the community spouse to the
22 institutionalized spouse, period, no qualifications on
23 that.
24 MS. FLANAGAN: During institutionalization.
25 QUESTION: That's right, yes.

1 There's also a provision which recognizes the
2 possibility of transferring income from the
3 institutionalized spouse to the community spouse after
4 eligibility has been determined, but does not require any
5 such transfer. It simply in effect says how you do it, is
6 that basically correct?
7 MS. FLANAGAN: It doesn't explicitly require the
8 transfer. There are, however, powerful incentives in the
9 statute to basically require them to do it.
10 QUESTION: But it doesn't, that latter provision
11 doesn't make any reference to the period before
12 eligibility, and I guess my question is, why don't we
13 infer some kind of a negative inference -- when the
14 provision refers totally to the post eligibility period,
15 why don't we find some negative implication that it was
16 not expected in the pre-eligibility period?
17 MS. FLANAGAN: Well, the fact is that the
18 calculation that the hearing officers ask to be made here
19 concerns the post eligibility period. The question is, is
20 the at-home spouse going to have sufficient income in the
21 post eligibility period, or does the resource allowance
22 need to be jacked up in order to provide that additional
23 income, so in that context, the hearing officer is looking
24 at the same period of time when the standard resource
25 allowance goes into effect, the same period of time when

1 the transfer provisions go into effect --

2 QUESTION: So basically the answer is, the fair

3 hearing has got to take place before eligibility is

4 determined, and that's in effect the answer to my

5 question.

6 MS. FLANAGAN: That's right. If the calculation

7 is looking ahead, if there are no --

8 QUESTION: Ms. -- I have one further question.

9 MS. FLANAGAN: Okay.

10 QUESTION: And if you can't give me an answer

11 right away, maybe you can when you come back. It's sort

12 of the flip side of the question I asked earlier. Do --

13 can you give us at least some other portions of the

14 statute where income of the institutionalized spouse is

15 clearly used to mean the institutionalized spouse's own

16 income plus -- plus income attributed to the

17 institutionalized spouse from the community spouse?

18 MS. FLANAGAN: Well, that really doesn't arise

19 because of subsection (b)(1), which expressly precludes

20 that.

21 QUESTION: Okay.

22 QUESTION: Thank you.

23 MS. FLANAGAN: Thank you, Your Honor.

24 QUESTION: Thank you, Ms. Flanagan. We'll hear

25 from you, Mr. Lamken.

1 ORAL ARGUMENT OF JEFFREY A. LAMKEN
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER
4 QUESTION: Mr. Lamken, you've heard the
5 questions, and it is difficult, looking at the text of the
6 statute, to figure out what supports the petitioner's
7 view, although, as I understand it, that is also the view
8 of the Federal Government here. That income-first rule is
9 okay.
10 MR. LAMKEN: Yes, Your Honor. It's our --
11 QUESTION: Now, are there proposed regulations
12 of HHS that would allow either resource-first or income-
13 first rules?
14 MR. LAMKEN: Yes, Your Honor.` There's currently
15 a pending rulemaking before HHS, and the Secretary in the
16 notice of proposed rulemaking has determined that States
17 should be permitted to decide whether to use the income-
18 first methodology or the resource-first --
19 QUESTION: How far along is that process? When
20 is that going to be adopted?
21 MR. LAMKEN: The comment period closed on
22 November 6. There's been a little bit of a delay because
23 there's concern that many comments might have been
24 quarantined in the Brentwood facility. However, we are
25 hoping the Secretary can proceed and complete that process

1 with all due speed.

2 QUESTION: Can I ask what authority the

3 Secretary has to say that the statute is ambiguous, so it

4 can mean either one? We don't even let Federal agencies

5 do that under Chevron. I mean, we didn't say in Chevron

6 that a Federal agency can either say that a bubble means

7 this, or say that a bubble means the other, willy nilly.

8 We said, since it can mean one or the other, we'll go

9 along with whichever one the Federal agency says it means,

10 but here we have a Federal agency that says, we have

11 ambiguous language, so hey, do whatever you like. I mean,

12 it may be ambiguous, but surely it was intended to mean

13 one thing or the other. How can the Secretary come off

14 just telling the States, it's ambiguous, you know, do it

15 either way, we don't care?

16 MR. LAMKEN: Justice Scalia, I think the answer

17 comes in two parts. The first is, one doesn't have to

18 think that the statute means two different things at once

19 in order to accept the Secretary's view. Community

20 spouse's income can have a meaning, but there may be

21 different methodologies, all of which are reasonable, for

22 determining and calculating what is the community spouse's

23 income.

24 In addition, this Court has -- and the States

25 have liberties in order to decide to choose among those

1 reasonable methodologies, because under section 17 on page
2 8a of our, of the appendix to our brief they are to
3 establish reasonable methodologies consistent with the
4 Secretary's regulations.
5 In addition --
6 QUESTION: You could say that about every
7 ambiguity, I mean, that there are two different
8 methodologies. You could have said the same thing with
9 Chevron. Now, could the Secretary in Chevron have --
10 there are two different methodologies of deciding
11 what's -- what is it, point of emission, or -- point
12 source, yes, point source of emission.
13 MR. LAMKEN: In fact, Justice Scalia, this Court
14 has upheld precisely that type of regulation issued by the
15 Secretary. In a case called Batterton v. Francis, and
16 again in a case called Lukar v. Reed, in which you wrote
17 the opinion for the Court, when the statute did not
18 clearly preclude one methodology or another, the
19 Secretary, because the Secretary has quasi-legislative
20 authority to set standards in this area, may adopt
21 standards that permit variations from State to State.
22 In Batterton v. Francis, it was under AFDC, and
23 the question is, what was unemployment? Did it include
24 striking workers, or did it not, and the Secretary said,
25 States, you may determine that based on your own State

1 law. In Lukar v. Reed, the question was whether or not a
2 tort judgment would be considered income or resources.
3 The Secretary threw guidance to all the States that they
4 had the option of choosing it as income or resources
5 because both are reasonable.
6 This Court in Lukar v. Reed again held that
7 decision, so in this particular area, where States have
8 the principal responsibility of establishing standards,
9 the Secretary may establish the boundaries, the reasonable
10 boundaries within which those standards may be
11 established, but unless the, and so long as the standards
12 established by the State are not contradicted by the
13 statute, are not contradicted by the Secretary's
14 regulations, and are reasonable --
15 QUESTION: But Mr. Lamken, isn't this a little
16 different, because in this statute, if I understand it
17 correctly, there is express statutory authorization for
18 the resource-first method, whereas the income-first method
19 is drawn by inference from what you consider ambiguities?
20 MR. LAMKEN: No, Your Honor. I believe that
21 neither methodology is particularly compelled or expressly
22 authorized by the statute. The statute simply does not
23 speak to the issue of whether when a spouse, a community
24 spouse is going to have a shortfall in income you make
25 that up first by paying additional money to the person in

1 the nursing home so that she may support the spouse at
2 home, which is the income-first methodology, or whether
3 first you raise the resource allowance so that she may --
4 so that the person at home has additional income from
5 resources.
6 I think I should probably go back and answer
7 Justice O'Connor's and Justice Scalia's question about the
8 meaning of community spouse's income in section (b)(1),
9 because there has been a suggestion about necessarily
10 includes only the income paid directly to the community
11 spouse. It is in our view a subtle legal tradition that
12 the community spouse's income, or one spouse's income may
13 include income from another spouse that is deemed to be
14 income of the community spouse in contemplation of law,
15 and so in (b)(1) community spouse's income could include
16 income from the institutionalized spouse that the
17 institutionalized spouse can make available. That's
18 consistent with the presumption of spousal support, and
19 it's consistent with, for example, existing regulations
20 such as those in --
21 QUESTION: Would you go over that a little more
22 slowly for me?
23 MR. LAMKEN: I'm -- I apologize.
24 QUESTION: How do you read (b)(1) --
25 MR. LAMKEN: (b)(1) says --

1 QUESTION: -- to cover reverse deeming as well
2 as deeming?
3 MR. LAMKEN: Right. All it says is that income
4 of the community spouse shall be -- shall not be deemed
5 available to the institutionalized spouse.
6 QUESTION: Correct.
7 MR. LAMKEN: The inference to be drawn from that
8 is that there is no prohibition in deeming income of the
9 institutionalized spouse --
10 QUESTION: But even if there's no prohibition,
11 where is your authorization for doing this? That's what I
12 don't find in the statute.
13 MR. LAMKEN: Your Honor, it was -- it's a --
14 QUESTION: If you start from a background rule
15 with the name on the check as a background rule for the
16 whole SSI program, how can you change that rule without
17 authorization?
18 MR. LAMKEN: That's the mistake, Justice --
19 QUESTION: Pardon me?
20 MR. LAMKEN: That's the mistake, Justice
21 Stevens. You don't start with the presumption of the
22 name-on-the-check rule. You start from the presumption
23 that the income of one spouse may be deemed the income of
24 another spouse because the general rule is that spouses
25 may be expected to support --

1 QUESTION: Where in the statute does it say
2 that?
3 MR. LAMKEN: The statute doesn't but Congress
4 said it when it enacted the Medicaid Act in the first
5 instance, and that was the established rule under the
6 Secretary's policies at the time that this statute was
7 enacted. If you look at the Secretary's regulations that
8 existed when Congress enacted this, it said the income --
9 QUESTION: That was deeming, not reverse
10 deeming.
11 MR. LAMKEN: I'm sorry.
12 QUESTION: That was deeming, not reverse
13 deeming.
14 MR. LAMKEN: No, Your Honor.` In fact, deeming
15 did occur -- reverse deeming did occur, or could occur
16 under the prior policies, particularly in section 209(b)
17 States. Now, in most situations -- well, first for post
18 eligibility determinations, States did set aside a certain
19 amount of money of the institutionalized spouse's income
20 for the support of the community spouse, and they treated
21 that money as unavailable to the spouse in the nursing
22 home so that it could be available to the spouse at home.
23 That is this situation which you have called reverse
24 deeming.
25 Second, even at the eligibility stage,

1 particularly in section 209(b) States, it would be
2 permissible to deem the income of the institutionalized
3 spouse to be income of the community spouse.
4 Now, it might not often come up, but it would
5 come up when, for example, both were applicants, in which
6 case that would be permissible, so the settled background
7 principle that existed at the time Congress acted is that
8 spouses support each other mutually, and Congress
9 eliminated one of those presumptions on a going forward
10 basis in (b)(1) and said, no, the community spouse's
11 income shall not be deemed available to institutionalized
12 spouses, but left in place the background principle that
13 an institutionalized spouse, if they have the funds, can
14 support the spouse --
15 QUESTION: You can leave that background
16 principle in place, and we can all concede that it's in
17 place, without thereby coming to the belief that when you
18 say income of the community spouse, you mean, income of
19 the community spouse plus whatever is deemed attributable
20 to the community spouse.
21 I mean, I don't contest the principle, but I
22 don't -- that's just not a reasonable way to use language.
23 I agree it can be deemed, but you should say -- it would
24 have been very easy to say, income of the community spouse
25 including any attributed income.

1 MR. LAMKEN: Your Honor, it would be the
2 Secretary's -- or the regulations that existed at this
3 time, when they discussed what we count as your income, as
4 your applicant for SSI, for example, it said, we count as
5 your income your income plus income from other people, so
6 that it treated it as the individual's income, and that is
7 consistent with the background principle that each
8 spouse's income is income to the other spouse, and when
9 States may establish reasonable standards --
10 QUESTION: I'm sorry, what did it mean, income
11 from other people?
12 MR. LAMKEN: The --
13 QUESTION: Money given you by your children on a
14 regular basis, and things of that sort?`
15 MR. LAMKEN: Well, actually attributed income,
16 Justice Scalia, actual income that's passed over you don't
17 need a deeming rule, because that's actually --
18 QUESTION: Right. Right. Right, you don't mean
19 that.
20 MR. LAMKEN: But for responsible individuals
21 there were categories, such as spouses, such as parents,
22 such as -- there is another category I can't remember the
23 name of, but where somebody had the responsibility for
24 supporting you, their income was deemed to be your income
25 for determining your eligibility.

1 QUESTION: But I take it the only thing that
2 you've got express in the record anywhere to indicate that
3 really is what Congress had in mind is the statement in
4 the legislative history that is quoted in the briefs that
5 refers to other income attributed, is that right? That's
6 the only thing in black and white.
7 MR. LAMKEN: That is the only thing in black and
8 white, other than the fact that the settled background
9 principles the Secretary operated under before the
10 enactment would treat the income of one spouse as
11 available to the other. It was not merely deeming from
12 the to community spouse to the institutionalized spouse,
13 but deeming in the other direction occurred.
14 QUESTION: Thank you, Mr. Lamken.
15 Mr. Hagopian, we'll hear from you.
16 ORAL ARGUMENT OF MITCHELL HAGOPIAN
17 ON BEHALF OF THE RESPONDENT
18 QUESTION: Counsel, would you mind telling us
19 why it matters which rule is followed by a State, resource
20 first or income first, not just in an individual case, but
21 overall? Who saves what in terms of money if you do one
22 thing or the other?
23 MR. HAGOPIAN: Yes, Justice O'Connor. Under the
24 resource-first rule the applicant, the community spouse of
25 the applicant, of the institutionalized spouse, is the

1 person who gets the money, and they get the money in the
2 form of an expanded community spouse resource allowance
3 that then generates income that brings the monthly -- the
4 community spouse's actual income up to or as close to the
5 monthly need amount that's set by the State.
6 Under income first, the income is fictionally
7 imputed from the institutionalized spouse to the community
8 spouse, but it doesn't actually go to the community
9 spouse. That would not ever happen until after
10 eligibility had actually been determined.
11 So in the aggregate, the resource-first rule
12 allows community spouses who would not adequately be
13 protected by the formula community spouse resource
14 allowance, because that does not generate income up to the
15 monthly need amount and because they have no other income,
16 or not enough income to bring them up to that level, it
17 allows them to actually have resources that will generate
18 that income and protect them even after the
19 institutionalized spouse passes away.
20 QUESTION: Doesn't it also make possible the
21 payments, the actual payments start earlier? I mean, the
22 reason this was of such concern is that the
23 institutionalized spouse would not be eligible monthly for
24 checks, so that the immediate effect was she could pay
25 down more rapidly what was her excess resources before she

1 qualified. Isn't that the primary effect? It's that the
2 payments under medicaid start earlier?
3 MR. HAGOPIAN: Yes. If I understand your
4 question correctly, Justice Ginsburg, the income-first
5 rule requires that those assets be spent down. Is that
6 the answer to your question?
7 QUESTION: Yes, so that -- Justice O'Connor
8 asked you what the effect of --
9 MR. HAGOPIAN: Yes.
10 QUESTION: And I think the immediate effect of,
11 she starts to collect medicaid sooner and doesn't use the
12 spousal resources.
13 MR. HAGOPIAN: Oh, now I understand your
14 question. No, that's not true. Under`income first, the
15 institutionalized spouse does not become eligible. Only
16 under resource first does the institutionalized spouse
17 become eligible, and then that allows the payments post
18 eligibility to actually occur to the community spouse.
19 QUESTION: Maybe I am not making myself clear.
20 I thought the principle of that is to the couple, of using
21 your resource rather than the income first -- resource
22 first, is that the institutionalized spouse, it pays down
23 quicker, and is therefore eligible for medicaid money
24 sooner. That's what your position achieves, is that not
25 so?

1 MR. HAGOPIAN: Yes, that's correct.
2 QUESTION: Yes.
3 QUESTION: But doesn't that assume your case and
4 not the more typical case, the more typical case, given
5 statistical projections, is that the husband will be the
6 institutionalized person, and so in the typical case it
7 will not work to the advantage of the couple?
8 MR. HAGOPIAN: Well, I would agree with you,
9 Justice Kennedy, that the typical case is statistically
10 that is the husband that goes into the nursing home first,
11 and we don't have that case here today, but I believe I
12 disagree with you as to the effect that this has. First
13 of all the sex of the spouses doesn't necessarily matter,
14 as is indicated by this case. It's possible for a male
15 spouse to be the community spouse and have exactly what
16 happened here happen.
17 QUESTION: Mr. -- I'm sorry. Are you finished
18 with that? I didn't want to cut off your answer.
19 MR. HAGOPIAN: I don't think I answered your
20 question, Justice Kennedy.
21 But the institutionalized spouse, if it is
22 the -- are you asking me whether, if the institutionalized
23 spouse has a higher income, that what happened here won't
24 happen? Is that the question, or --
25 QUESTION: Yes. I assume in many cases the

1 husband is the first to be hospitalized, and he is the one
2 with the greater income.
3 MR. HAGOPIAN: That's correct, so in many cases
4 the income first rule will have a worse effect when the
5 husband is the one that goes in first. Because his income
6 will be higher, there will be more income that will be
7 attributed to the community spouse in this pre-eligibility
8 determination, and that will prevent her from having
9 income of her own that would raise her to the minimum
10 monthly needs allowance. If resource-first was used in
11 that case, she would be able to retain assets that would
12 generate actual income to her that would meet the monthly
13 need allowance.
14 QUESTION: Mr. Hagopian --
15 QUESTION: Well, if States cannot follow this
16 income-first rule, maybe they would just respond by
17 reducing the minimum monthly maintenance needs allowance
18 and adjust it that way.
19 MR. HAGOPIAN: Yes.
20 QUESTION: Or adjust downward the resources
21 protectable for the community spouse.
22 MR. HAGOPIAN: Yes. Yes, Justice O'Connor, that
23 could happen. That is where the flexibility in the
24 spousal impoverishment provisions exists for the States.
25 QUESTION: How many States are using income

1 first?

2 MR. HAGOPIAN: We don't exactly know.

3 According, I believe, to the petition, the State estimated

4 that it's in the neighborhood of 30 to 35 States.

5 QUESTION: Of course, I suppose a really hard-

6 nosed State could do both, right, could use the income-

7 first rule plus adjust downward the other -- I mean, the

8 two don't go with each other.

9 MR. HAGOPIAN: That's correct.

10 QUESTION: You either adjust downward or use the

11 income first.

12 I have this question. You maintain that the

13 statute is not ambiguous, if they --

14 MR. HAGOPIAN: That's correct, Your Honor.

15 QUESTION: -- do it this way. What is your

16 burden if it is ambiguous? If it is ambiguous, do you

17 lose, do you acknowledge that you lose?

18 MR. HAGOPIAN: Oh, absolutely not, Justice

19 Scalia.

20 QUESTION: Do you think the ambiguity has to be

21 resolved, or can the Secretary just leave the ambiguity

22 floating out there?

23 MR. HAGOPIAN: Well, that's essentially what

24 they've decided to do in the proposed rule --

25 QUESTION: Right.

1 MR. HAGOPIAN: -- is to leave it floating. I
2 don't think that's the proper method to do it.
3 QUESTION: By proper, you mean lawful?
4 MR. HAGOPIAN: Lawful, that's correct.
5 QUESTION: They are not permitted to do that?
6 MR. HAGOPIAN: That's right. I agree, actually,
7 with the way you framed it in your questions to the
8 petitioner, and that is that it just is illogical to
9 assume that Congress, when they enacted this particular
10 protection, which we believe is a fail-safe protection for
11 those few couples who would not adequately be protected by
12 the formula resource allowance, that to have these two
13 wildly divergent interpretations spring from the exact
14 same language seems totally unreasonable.
15 QUESTION: Well, what did it do with a case like
16 Batterton v. Francis, then?
17 MR. HAGOPIAN: Well, Your Honor, I believe that
18 in a case like Batterton v. Francis, we have a different
19 set of rules here. First of all, I believe that was an
20 AFDC case.
21 QUESTION: Well, but you know, it's still the
22 general same ball park.
23 MR. HAGOPIAN: Well, we believe that the
24 enactment in the Medicare Catastrophic Coverage Act of the
25 no-more-restrictive rule under SSI resolved that whole

1 issue for us, and that is that with 1396a(r), which is
2 found at the appendix to our brief -- it's the only page
3 in the appendix -- that the question is actually resolved
4 by the application of the SSI methodologies.
5 QUESTION: Well, you say the question is
6 resolved. Do you mean by that that the Secretary does not
7 have any discretion to decide that a State is free to
8 follow either (a) or (b)?
9 MR. HAGOPIAN: Yes, Your Honor.
10 QUESTION: And how does that follow?
11 MR. HAGOPIAN: Well, there's a couple of --
12 first of all, the authority that the Secretary has relied
13 on to issue its proposed rule and apparently from which
14 its authority to develop the rule at all is
15 1396a(a)(17)(B).
16 Now, it is our position initially that that --
17 that 1396a(a)(17) was actually superseded by operation of
18 1396r-5(a)(1).
19 QUESTION: This is very difficult to take in
20 aurally.
21 MR. HAGOPIAN: I believe that.
22 (Laughter.)
23 QUESTION: But go ahead anyway.
24 (Laughter.)
25 MR. HAGOPIAN: It's almost as difficult to say

1 it.

2 But the spousal impoverishment provisions, one

3 of the main things that they did was supersede the

4 authority that the State and the United States have relied

5 upon to issue the rule and to engage in this so-called

6 reverse deeming, so -- and at the same time that they

7 superseded that rule, they also enacted 1396a(r).

8 Now, this rule -- what this rule did, and this

9 rule was actually -- I want to back up. Another provision

10 of the spousal impoverishment enactment was 1396r-5(1)(C),

11 and this provision retained the SSI methodologies, or any

12 existing methodologies that were not specifically

13 overridden by the spousal impoverishment enactments.

14 Now, the one thing that was`left untouched by

15 these spousal impoverishment provisions was the way that

16 income was determined for eligibility purposes. Now, that

17 brings us to 1396a(r), and that provision is the provision

18 of the Medicaid Act mandates that the SSI methodologies

19 apply to income and resource determinations for all the

20 eligibility groups that were relevant in these cases, and

21 that statute does allow States and HCFA, or CMS or the

22 Secretary to issue rules that deviate from those SSI

23 methodologies, but those rules, if they're going to do a

24 rule that deviates from that methodology, the rule has to

25 have the effect of making more people eligible for

1 medicaid, not fewer people, and this rule, the income-
2 first rule, fails that test.
3 What it does is -- because under the SSI
4 program, if the SSI methodologies were strictly applied,
5 the income of the two spouses is separated and is never
6 commingled, and so because under SSI this would not
7 happen, a rule which allows it to happen in medicaid is
8 considered to be no more restrictive and not -- I'm sorry,
9 more restrictive than the SSI methodologies, and is not
10 permitted by that statute.
11 QUESTION: May I ask you a question? I know a
12 case is easier if you don't look at the legislative
13 history, and so it's probably easier for my colleague than
14 for me.
15 (Laughter.)
16 QUESTION: But would you explain to me how you
17 interpret the parenthetical phrase that's quoted on page
18 18 of the Government's brief, and the -- it says taking
19 into account any other income attributable to the
20 community spouse. I find that kind of a puzzling
21 parenthetical. How do you read that?
22 MR. HAGOPIAN: Well, I've two responses to that,
23 Justice Stevens. First, within the spousal impoverishment
24 enactment, the term, attribute, or attributable is used in
25 two different fashions. When it's used in -- to describe

1 resources, it has the effect of commingling the resources
2 and pooling them. When it's used in conjunction with the
3 term, income, it has the effect of separating the income
4 between the two spouses.
5 So it's my initial position that income
6 attributable to the other -- other income attributable to
7 the community spouse merely confirms the way it was done
8 SSI statutes, and that is consistent with the way it is
9 done, where income is talked about at all, in the spousal
10 impoverishment provisions, and I think there is actually a
11 reason for that to be in there, and that is that it would
12 be possible in some cases for a community spouse to
13 attempt to get an expanded resource allowance by coming
14 into the hearing and saying, I have income, and it's in my
15 name right now.
16 Typical would be, maybe it's from employment,
17 and at this date when I'm trying to establish eligibility,
18 or my institutionalized spouse is trying to establish
19 eligibility, I have that income, but I don't believe you
20 should count that income to me because it's going to end
21 next month when my job ends.
22 So I think that is what they were talking about,
23 trying to foreclose that type of argument at a hearing,
24 and so I believe that the real effect of that
25 parenthetical phrase is to confirm the separate treatment

1 of the income. The reason it isn't in the statute and
2 it's in the legislative history is because the SSI mandate
3 under 1396(a)(R) accomplished that purpose precisely.
4 Every other part of that legislative history essentially
5 becomes 1396r-5(e)(2)(C). That phrase is missing.
6 QUESTION: In that particular provision, to
7 retain an adequate amount of resources, all that any other
8 income attributable to the community spouse need mean is
9 income attributable to him from sources other than
10 interest on his resources. I mean, that phrase could
11 include his actual wages, couldn't it?
12 MR. HAGOPIAN: The institutionalized spouse's
13 wages, or the --
14 QUESTION: The community spouse's wages.
15 MR. HAGOPIAN: Oh, yes, absolutely. It would --
16 I think it does.
17 QUESTION: I mean --
18 MR. HAGOPIAN: Yes, I believe that it does --
19 QUESTION: -- resource allowance is the
20 resources that provide income, which means, you know,
21 stocks or whatever, and all that phrase there may mean is
22 something, any other income attributable to him from
23 something other than his stocks.
24 MR. HAGOPIAN: Right.
25 QUESTION: Such as his wages, right?

1 MR. HAGOPIAN: Exactly.

2 QUESTION: You -- your argument in the event

3 that we find ambiguity I guess boils down simply to the

4 fact that for a variety of reasons it would frustrate the

5 congressional policy behind the act itself if we held

6 against you, and yet in a way, haven't you provided an

7 answer to that, a counter to that argument in your answer

8 to the question a few moments ago?

9 You said, and I think have to say, that if the

10 States lose on the particular issue before us here, the

11 States as a practical matter can get to the same kind of

12 rough dollar and sense results simply by adjusting the

13 amount of resources, that is the baseline amount for the

14 community spouse to retain and the amount of income which

15 is thought to be necessary for the community spouse to

16 live decently, so it almost seems as though it doesn't

17 very much matter, necessarily, to the enactment of

18 whatever policy Congress had, whether the flexibility

19 comes in income versus resource first, or whether it comes

20 in setting the allowances for income and assets. What's

21 your answer to that?

22 MR. HAGOPIAN: Well, I think that the answer to

23 that is that the resource-first allowance, resource-first

24 rule was placed in a provision that is what we call the

25 fail safe provision. This was a provision that was

1 supposed to be applicable to all the States and allow
2 those few couples -- and I want to stress that this is not
3 going to affect a lot of people.
4 A few couples would not be adequately protected
5 by those formula allowances, and so -- because the policy
6 of the statute was to defeat spousal impoverishment. That
7 was certainly one of the primary purposes behind it, and
8 the vast majority of cases the formula resource allowance
9 was going to adequately serve that interest, but in --
10 QUESTION: So you're saying this is kind of an
11 exceptional case kind of mechanism, regardless of how you
12 set income and resources.
13 MR. HAGOPIAN: Absolutely.
14 QUESTION: And as an exceptional case mechanism,
15 it's only going to work if it works the way you say, on a
16 resource-first basis?
17 MR. HAGOPIAN: That's right, and to stress the
18 exceptional case component of it, you have to remember how
19 you get one of these hearings. This is not an easy
20 matter. This is not something that s accomplished by the
21 local agency for every single applicant who walks through
22 the door. You have to have - know that you re in excess -
23 have resources in excess of this formula resource
24 allowance. You have to go to your local welfare office.
25 You have to apply for benefits knowing that your

1 application is going to be denied. You get denied, and
2 then you have to request a hearing, go to the hearing,
3 prove up the need with all sorts of mathematical
4 calculations for this.
5 This is not something that people -- the faint
6 of heart are going to be doing on purpose, so it is an
7 exceptional procedure.
8 QUESTION: Have you read the notice of the
9 proposed rulemaking?
10 MR. HAGOPIAN: Yes, I have, Justice Ginsburg.
11 QUESTION: And I suppose your argument is to the
12 effect that that's just not a permissible interpretation
13 of the statute?
14 MR. HAGOPIAN: Yes, that's certainly one of our
15 arguments against it. We also believe, though, that the
16 statutory authority that the Secretary is using for
17 promulgating it, which is 1396a(a)(17)(B) has been
18 superseded in spousal impoverishment, so the rule itself
19 is probably promulgated pursuant to invalid authority.
20 QUESTION: Do we owe any deference to the agency
21 here in its interpretation?
22 MR. HAGOPIAN: Well, because our position is
23 that the position they are taking is totally unreasonable,
24 no, you don't owe any deference to the agency.
25 QUESTION: Does the income-first rule mean that

1 at the end of the day less Federal money is spent on
2 medicaid care?
3 MR. HAGOPIAN: Not necessarily. In the
4 immediate -- the effect of denying an application based on
5 income first would at that moment prevent someone from
6 being eligible for medicaid, but -- and so therefore would
7 save Federal dollars, no question about that, but you have
8 to remember that the resources that the couple is required
9 to spend in order to become eligible, there's no
10 requirement that those resources be spent on the nursing
11 home, and so it's possible that those resources could be
12 spent for some other purpose, and then the person could
13 immediately become eligible for medicaid, you know, within
14 a short time after the initial application was denied.
15 And the important thing about that point is
16 that, if that happens, if those resources are gone, and
17 the income that's generated from them is gone, then when
18 you get to the post eligibility determination, the less of
19 the institutionalized spouse's income is going to be able
20 to be used to defray the cost to the medicaid program,
21 because more of it is going to have to be used to increase
22 the allowance to the institu -- or, the community spouse,
23 so in the short run it may be -- save the Federal
24 Government. In the long run, it does not.
25 QUESTION: Would you comment on one of the

1 questions I asked Mr. Lamken, whether the background rule
2 is the name-on-the-check rule, or as he puts it, the
3 better view is the background rule is one of deeming, and
4 so that we should start from the premise that it's okay to
5 treat one spouse's income as part of the other spouse.
6 MR. HAGOPIAN: Well, I beg to differ with Mr.
7 Lamken's presentation of the background rule. I don't
8 believe that there is any precedent for the reverse
9 deeming that he's talking about in any of the background
10 rules. The deeming that was permitted was strictly from
11 the nonapplicant spouse to the applicant spouse, and it
12 was for the purpose of denying that person eligibility.
13 The one rule he talked about where there was
14 some reverse deeming was, was also -- was a post
15 eligibility rule. Under the old rules pre-MCCA, the
16 nursing home spouse could allocate a small amount of money
17 to the community spouse, usually just enough to bring that
18 community spouse above the local welfare threshold so that
19 they wouldn't have to support that person on welfare, but
20 that was a post eligibility deeming, it was not an
21 eligibility, and in the SSI program, which is what -- we
22 believe where the methodologies occur that dictate how
23 income is to be determined, there is no deeming from the
24 applicant spouse back to the nonapplicant spouse.
25 QUESTION: Well, even under this program, as I

1 understand it, in the post eligibility determination
2 income can be transferred from the institutionalized
3 spouse to the community spouse.
4 MR. HAGOPIAN: Yes.
5 QUESTION: Yes.
6 QUESTION: I might ask one question. Examples
7 help a lot for me in these cases. I couldn't understand
8 them without them, and the amicus briefs were filled with
9 them, which was helpful, but the example I'm carrying
10 around in my head is that we have, say, a woman in an
11 institution who has about $200,000 or $300,000 in assets,
12 and maybe a small pension of $8,000 or $10,000, and her
13 husband's at home, and he has a pension coming in, maybe
14 of $10,000 to $12,000, and so he's lacking about $6,000 or
15 $7,000 or $8,000 or $9,000 or $10,000 to bring himself up
16 to the $24,000 level.
17 Now, if you're right, what we'll do is, we'll
18 take the $300,000 the wife has, and we give it to the
19 husband. It generates about, I don't know, $10,000,
20 $12,000, and eventually that $300,000 goes to the
21 children, and if you're right, she doesn't have to spend
22 it down, and if you're wrong, by the way, if that money
23 goes to the husband, later on, when her pension comes in,
24 and there's about 8 or $10,000 coming in, that money goes
25 right to the institution to pay for the health care. She

1 doesn't get to keep it. So that's one way.

2 Now, the other way is that she keeps -- she

3 spends down the $300,000. She has to spend down the

4 $300,000, maybe that money goes to the institution, maybe

5 it goes to fix the roof, but then when the income comes

6 in, it goes right to the husband.

7 So I don't know, you know, I mean, it's sort of

8 what -- the Government seems to think that it's better off

9 financially by making her spend the money down, but I

10 guess that depends on whether the alternative is to pay

11 the $300,000 to the doctors or pay it to get the roof

12 fixed, so when I end up thinking that, I haven't a clue.

13 (Laughter.)

14 QUESTION: And so therefore Ì'd say, well, if I

15 were writing this statute, I guess I'd leave it up to the

16 Secretary, and if the Secretary wants to leave it up to

17 the States, that's his business, so I look at the

18 language, and the language there seems not to solve the

19 problem, and -- okay, what's the response?

20 (Laughter.)

21 MR. HAGOPIAN: That was a question?

22 QUESTION: I was putting the thing because --

23 MR. HAGOPIAN: Yes, I --

24 QUESTION: -- I want you to see that at the

25 moment I think, well, I can't figure it out, but I'm

1 working with those examples, and since I can't, I say,
2 leave it up to the Secretary, leave it up to a State,
3 leave it up to somebody else, as long as the statute
4 allows that.
5 I wanted to expose that to you, because I want
6 you to have a chance to say no, you're wrong, your example
7 is wrong, your reasoning's wrong, everything's wrong, so
8 go ahead.
9 (Laughter.)
10 MR. HAGOPIAN: I concur with everything you just
11 said, Justice Breyer.
12 (Laughter.)
13 MR. HAGOPIAN: I think your first example was
14 the wrong one, the one that oddly enough is bad for me,
15 and that's because I think you're assuming that the
16 resources that are going to be protected for the care of
17 the spouse will be transferred on death to the children.
18 That's possible, but if the community spouse outlives the
19 nursing home spouse, that resource pool, because for
20 whatever reason there isn't an independent stream of
21 income available to that community spouse, it's going to
22 be that resource fund that creates the income stream for
23 that community spouse.
24 If it's protected, and not have to be spent down
25 to medicaid eligibility, that community spouse is much

1 more likely to retain it, not spend it on things that he
2 doesn't need in order to preserve that income stream so
3 that he can take care of himself, hopefully, not in a
4 nursing home but perhaps in some sort of noninstitutional
5 setting that he would prefer over that.
6 So that's my response to your question.
7 QUESTION: You make a big point of that. What
8 happens if you lose and the institutionalized spouse dies,
9 and that is a problem. I don't know why the Government
10 doesn't, as a matter of policy, make a pretty strong case,
11 but the -- I guess the response will be, well, you know,
12 everybody knows this.
13 Everybody, no matter how well-educated or badly
14 educated, or -- they all know, when they get that pension
15 choice, that if you either take it all for yourself, or
16 you say, when I die I want my spouse to get some, and
17 so -- they've all made that conscious choice, and if they
18 make it to protect the spouse, that's up to them, and they
19 probably will. I mean, that will be the response, I
20 think, to that argument.
21 MR. HAGOPIAN: It would be. The problem, when
22 you -- my understanding -- I'm not a pension expert by any
23 means, but when you exercise an option that protects the
24 surviving spouse, you so deflate the value of the pension
25 that it's economically a poor decision to make.

1 QUESTION: I would have thought that your
2 response would be the statutory language requires the
3 result you're urging, but you don't make that argument,
4 apparently.
5 MR. HAGOPIAN: No, no, we do make that
6 argument --
7 QUESTION: Oh, you do --
8 MR. HAGOPIAN: -- Justice O'Connor.
9 QUESTION: Okay.
10 MR. HAGOPIAN: Yes. The statutory language
11 definitely does require --
12 QUESTION: I just didn't hear that in response
13 to the question.
14 (Laughter.)
15 MR. HAGOPIAN: Well, it was in the opening that
16 I didn't get a chance to make, so --
17 (Laughter.)
18 QUESTION: In your response to Justice Breyer,
19 isn't it so, or am I -- counsel, am I --
20 MR. HAGOPIAN: Pardon me.
21 QUESTION: -- wrong in thinking that under ERISA
22 there is a requirement to provide for the surviving
23 spouse, it isn't the option of the insured individual?
24 MR. HAGOPIAN: Well, I'm no expert on ERISA, but
25 I believe that there is a notice requirement and a sign-

1 off requirement in ERISA. If the community spouse does
2 sign off for her rights, then it doesn't necessarily
3 happen. It's not a mandated -- it can't be overcome by
4 activity by the surviving spouse.
5 QUESTION: But it's not the insured's election
6 in the first place. Of course, if the surviving -- if the
7 spouse wants to cooperate and says, I don't want
8 anything --
9 MR. HAGOPIAN: Right.
10 QUESTION: But it isn't the wageearner's
11 choice --
12 MR. HAGOPIAN: No.
13 QUESTION: -- to say, I don't want, usually her,
14 to be any part of it.
15 MR. HAGOPIAN: That's right, but I think those
16 decisions are made at a time when long-term care is not
17 necessarily in the immediate offing, and maybe -- usually
18 at age 65 or thereabouts, long before nursing home stays
19 may be inevitable, and so the couple is making an informed
20 choice about how best to maximize their income stream.
21 I mean, nobody is ready for nursing home stays,
22 and to plan for that, you know, based at the time that you
23 make your pension election would be counter to, I think,
24 human nature.
25 QUESTION: Mr. Hagopian, I want to come back to

1 the snippet from legislative history that is referred to
2 on page 18 of the Government's brief. I guess if you
3 believe that legislative history, then it would have to be
4 done the way the Government says it need only may be done.
5 I mean, if you believe the Government's interpretation of
6 that legislative history, it certainly doesn't say the
7 Secretary has the option. It either says what you think
8 it means, or it requires the Secretary to use the income-
9 first method, no?
10 MR. HAGOPIAN: I think I frankly agree with you,
11 Justice Scalia.
12 Thank you.
13 QUESTION: Thank you, Mr. Hagopian.
14 Ms. Flanagan, you have 3 minutes left.
15 REBUTTAL ARGUMENT OF MAUREEN M. FLANAGAN
16 ON BEHALF OF THE PETITIONER
17 MS. FLANAGAN: Thank you, Your Honor. I would
18 like to talk about the impact of what the resource-first
19 rule is. I think there have been questions on that.
20 The impact of the resource-first rule is to
21 devote limited medical assistance funds to couples who
22 have resources substantially above the Federal maximum set
23 levels and that, in turn, necessarily means, since we have
24 limited pots of income, that that deprives States of money
25 needed to serve --

1 QUESTION: Why is that? I mean, he just said on
2 that that -- and it certainly was in the briefs, that if
3 you say they have to spend down the $300,000, they're not
4 going to give it to the doctors in the institution.
5 They'll fix the roof, they'll pay off the mortgage,
6 they'll figure out one of 50 other things, so the State
7 will actually end up with less money, because they won't
8 get that $300,000 as a set-off and, moreover, they lose
9 the income coming in later as a set-off.
10 MS. FLANAGAN: Well, neither of us have any
11 statistics on that. I'm sure that people do pay off their
12 long-term financial obligations, but they also have to
13 pay for the nursing home, and that bill doesn't go away
14 every month, so if they're not eligible, they're going to
15 have to be providing for that in some way, so while the
16 statute doesn't force them to devote their resources to
17 that, there are powerful practical reasons why people are
18 going to do that.
19 Another part of the impact that I'm concerned
20 about is touched on by Mr. Hagopian, who says that States
21 can just lower their resource standards and lower their
22 income maintenance standards. Well, what that says is,
23 States, you should serve fewer people. You should serve
24 fewer elderly so that you can have the money to serve
25 people who happen to have resources in excess, and in many

1 cases substantially in excess of the standard resource
2 limits.
3 The Cleary case, which is cited in the briefs,
4 is a good example of that kind of potential situation.
5 That was a situation in which the nursing home spouse had
6 something in the neighborhood of a $1/4 million of excess
7 resources, but because of the income of the -- set-up of
8 the spouses it would have taken that -- those resources to
9 make up that income, even though that particular spouse,
10 as I recall, also would have had money.
11 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
12 Flanagan. The case is submitted.
13 (Whereupon, at 11:04 a.m., the case in the
14 above-entitled matter was submitted.)
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