No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

CASES CITED

FEDERAL REGULATIONS AND STATUTES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITIES CITED

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Rather than respond to the statutory construction arguments made in the opening briefs, respondent Blumer and supporting amici primarily repeat the Wisconsin Court of Appeals' mistaken assertion that the phrase "community spouse's income" is unambiguous. Their briefs, however, neither rebut the statutory interpretation arguments of petitioner Wisconsin Department of Health and Family Services ("WDHFS") and supporting amici, nor embrace the state court's reasoning. Instead, Blumer and amici now

argue that the true meaning of the phrase is revealed by other statutes that make no reference to the income of the community spouse. These arguments all but abandon the reasoning of the court below.

A. The "income-first" rule is a reasonable interpretation of 42 U.S.C. § 1396r-5.

1. **Blumer has essentially abandoned the "plain language" approach embraced by the court below.** As pointed out in past briefs, the phrase "community spouse's income" is hardly self-explanatory. First, the phrase, by itself, does not specify whether the "community spouse's income" includes income, otherwise payable to the institutionalized spouse, which the institutionalized spouse can transfer to the community spouse for his or her benefit.[1] Second, the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), 42 U.S.C. § 1396r-5 (1994 and Supp. 2000),[2] nowhere provides rules for determining what constitutes income of the community spouse for eligibility purposes. *See* U.S. brief at 23-25; State Medicaid Agencies' amicus brief at 20-23.

Third, while § 1396r-5(b)(1) specifically prohibits money otherwise attributable to the community spouse from being considered available to the institutionalized spouse when determining eligibility, § 1396r-5 nowhere prohibits states from attributing to the community spouse income from the institutionalized spouse, where the institutionalized spouse can afford to make that income available. *See*

[1] *See* WDHFS brief-in-chief at 22-23; United States' ("U.S.") brief at 22-23; *see also Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 801-02 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998).

[2] Pub. L. No. 100-360, § 303, 102 Stat. 683. 42 U.S.C. § 1396r-5 is reproduced in both the Appendix to the Petition and in the U.S. brief (App. 10a-24a), which contains 42 U.S.C. 1396a(a)(10) and (17) (1994 and Supp. 2000) as well (App. 1a-9a). 42 U.S.C. § 1396a(r) is reproduced in the Appendix to respondent Blumer's brief (App. 1a).

WDHFS brief-in-chief at 23. That omission supports a strong inference that consideration of such potential income transfers is not prohibited. Such an inference is particularly strong in view of the background rule -- which Congress overturned only in part -- that spouses are expected to support each other. *See* U.S. brief at 3, 12 and 15-17.

Fourth, the supposition that the phrase "community spouse's income" has a clear and unequivocal meaning is belied by the fact that Congress provided extensive rules for allocating income between spouses when determining the extent of medical assistance *after* the eligibility determination is made. *See* § 1396r-5(b)(2). Congress simply chose not to provide such extensive rules for initial eligibility determinations, leaving the development of those rules to the Secretary and the states. *See* U.S. brief at 24-26.

Blumer's tautological assertion that "'community spouse's income'" is self-explanatory (*see* Blumer's brief at 15) answers none of these arguments. Nor does the assertion answer the detailed discussions of why that phrase is ambiguous within the context of § 1396r-5, the spousal impoverishment statute itself. *See* Blumer's brief at 15-18; *cf.* WDHFS brief-in-chief at 21-23; U.S. brief at 4-5 and 21-25.

Unable to find support for their interpretation of the phrase "community spouse's income" in the text of the MCCA itself, respondent and her amici ultimately all but abandon the reasoning of the court below. Instead, Blumer and the amicus Wisconsin Elder Law Bar (WI Elder Bar) now insist--for the first time in this litigation--that the term can have only one meaning based on numerous other Medical Assistance ("Medicaid" or "MA") and Supplemental Security Income ("SSI") statutes and rules, *none of which uses or refers to* the term "community spouse's income" (*see, e.g.*, Blumer brief at 6, 8, 12 and 19-22). This tactic reveals the weakness of the decision below and of Blumer's

claim that § 1396r-5(e)(2)(C) has a singular, plain meaning. In fact, the statutes on which Blumer and amici rely are, at the least, extremely difficult to decipher for any purpose relevant to § 1396r-5. Review of this litany of statutes and rules vividly confirms the position of WDHFS and supporting amici that the term "community spouse's income" is indeed ambiguous.

2. **Blumer's novel reliance on SSI standards to define the term "community spouse's income" is misplaced.** Blumer's brief and that of the WI Elder Bar advance similar arguments to the effect that the income-first rule is prohibited because the SSI rules use name-on-the-title when determining income for eligibility purposes.[3] Blumer also asserts that "the SSI program does not permit deeming of income *away* from the applicant *to* the applicant's ineligible spouse" (*id.* at 8 (emphasis in original)). The WI Elder Bar's brief makes an argument to the same effect (*id.* at 17).

Blumer relies on § 1396r-5(a)(3) in support of her claim that the SSI rules control. That provision states that "[e]xcept as [§ 1396r-5] specifically provides, [§ 1396r-5] does not apply to . . . the determination of *what constitutes*

[3]Blumer argues that Congress did not need to define "'community spouse's income'" in § 1396r-5(e)(2)(C) because, pursuant to § 1396r-5(a)(1) and (3), "the treatment of income for eligibility purposes is determined exactly as it had been prior to MCCA" (Blumer's brief at 7-8, citing 42 U.S.C. § 1396a(r)(2) and SSI rules, 42 C.F.R. §§ 435.601 and 435.831 (2000)). *See generally* Blumer brief at 6-8, 12 and 19-22. A more detailed argument to the same effect is developed at length in the amicus brief of the WI Elder Bar at 2-22, citing an array of other Medicaid and SSI statutes and rules in support of what that brief also characterizes as the plain and unambiguous meaning of the term "community spouse's income." *See id.*, also citing *inter alia*, 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(V) and (a)(10)(C)(i)(III), 1396b(f)(4)(C), 1382a and 1382b (1994 and Supp. 2000); 20 C.F.R. § 416.1103 (2001) and 42 C.F.R. §§ 435.401, 435.811, 435.831-435.832(b) and 435.1005 (2000).

income or resources, or . . . the methodology and standards for *determining and evaluating income and resources.*" (Emphasis supplied). But the question here is not what *constitutes* income or resources; there is no doubt that the Blumers' income is "income" within the meaning of the statute.[4] The question here is to which person - the institutionalized spouse or the community spouse - the income should be attributed. Section 1396r-5(a)(3) does not address that issue.

Nor do the SSI statutes and rules or the other Medicaid statutes and rules to which Blumer and amici refer. Those provisions do not use the terms "community spouse" or "institutionalized spouse," which are unique to the spousal impoverishment provisions of § 1396r-5. Obviously, those statutes and rules do not, even by inference, purport to define the term "community spouse's income" as used in § 1396r-5(e)(2)(C). The SSI statutes and rules defining income simply do not address and certainly do not expressly *prohibit* potential income transfers from an applicant spouse to an ineligible or non-applicant spouse when the former is institutionalized: the issue simply does not arise in that

[4]In Wisconsin, the Medicaid rules for defining and evaluating income and resources for elderly institutionalized persons are found, in turn, in the SSI statutes and rules. *See* Wis. Admin. Code § HFS 103.04(1) and (4); 42 C.F.R. § 435.601; 42 U.S.C. §§ 1382a (defining earned and unearned income and exclusions from income for SSI purposes) and 1382b (resources); *see also* 20 C.F.R. §§ 416.1100-416.1151 (SSI rules relating to income) and 416.1201-416.1266 (2001) (SSI rules relating to resources and exclusions). In this case, the Blumers' income and resources were evaluated under SSI rules and methodologies at the time of her initial application and there has never been any controversy about that evaluation in this case: Respondent Irene Blumer's personal income was *within* the eligibility limits for Medicaid and her "income eligibility" *per se* has never been in dispute. The denial of her application was based on the fact that she possessed excess *resources*, even under the greatly relaxed resource requirements of § 1396r-5.

context.[5] Thus, it is disingenuous for Blumer and supporting amici to claim that the "income first" approach is "not permitted" or "is prohibited" by unnamed SSI and Medicaid statutes and rules. Moreover, the reasoning--that because the use of income-first is not specifically authorized, it is prohibited--is flawed.

Blumer's contention that the name-on-the-check rule allegedly required in the SSI context must also apply when determining eligibility under § 1396r-5 is plainly contradicted by the text of § 1396r-5 itself. Section 1396r-5(b)(2) requires states to use the name-on-the-check rule to allocate income when determining *the extent of assistance* after the eligibility determination is made. If Medicaid required states to "treat[] each spouse's income separately" because SSI allegedly does, *see* WI Elder Bar brief at 15, that provision would be superfluous: an SSI requirement that a spouse's income be treated separately would control without specific mention of a name-on-the-check rule in § 1396r-5. It is wholly inappropriate to read a statute so as to make one of its provisions surplusage.

The fact that Congress required the name-on-the-check rule *post*-eligibility when deciding the amount of assistance, but omitted any such requirement when deciding eligibility, underscores the fact that the name-on-the-check rule is not required when making eligibility determinations. There is simply no inconsistency between the SSI rules and § 1396r-5 with respect to the "name-on-the-check" rule, as respondent and supporting amici claim.

[5]*See* 42 U.S.C. § 1382a; 20 C.F.R. §§ 416.1100-416.1169 (2001).

3. **The income-first rule does not violate the comparability requirement of § 1396a(r)(2).**[6] Section 1396a(r)(2) was a "conforming amendment" to Title XIX enacted as part of the MCCA, but is not part of § 1396r-5, the spousal impoverishment statute itself.[7] Blumer and amici assert--though they do not describe why--the income-first rule violates § 1396a(r)(2). According to Blumer, applying subsection (r)(2)(B) to the income-first rule of § 1396r-5(e)(2)(C) "leads to the inescapable conclusion that the income-first rule denies eligibility to individuals who would be otherwise eligible if the SSI methodologies were followed." *See* Blumer's brief at 21; *see also* WI Elder Bar brief at 19-21.

[6]This argument need not be addressed by the Court. The claim of inconsistency with the comparability requirements of § 1396a(r)(2) was neither raised nor addressed below and is outside the question presented, which is limited to *whether the income-first requirement* of Wis. Stat. § 49.455(8)(d) (1995-96) *conflicts with § 1396r-5* (*see* Petition at i). This Court ordinarily does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992).

[7]*See* Pub. L. No. 100-360, § 303(e), 102 Stat. 683, 763 (1988). The history of § 1396a(r)(2) is described in *Mowbray v. Kozlowski*, 914 F.2d 593, 596-97 (4th Cir. 1990), and, with a somewhat partisan slant in Blumer's brief at 20-21 n.7. This statute requires that the "methodology to be employed in determining income and resource eligibility" for individuals under Medicaid categories including the categorically and medically needy "may be less restrictive, and shall be no more restrictive, than," in this case, the SSI program. The language of the statute on which Blumer and amici rely is set forth in subsection (2)(B) which provides:

> For purposes of this subsection and subsection (a)(10) of this section [§ 1396a], methodology is considered to be "no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.

This argument is clearly flawed. A state's Medicaid methodology is consistent with § 1396a(r)(2)(B) if, compared to application of SSI methodologies, additional individuals "may be eligible for Medicaid and no individuals who are otherwise eligible are by use of that methodology made ineligible for Medicaid." *See* 42 C.F.R. § 435.601(d)(3); *see* § 1396a(r)(2)(B). The income-first approach for increasing the Community Spouse Resource Allowance ("CSRA") creates eligibility for more applicants than would be eligible if the SSI resource limits were used. The SSI *resource limitation for an individual is $2,000 and is $3,000 for a couple. See* 20 C.F.R. § 416.1205(c). By contrast in Wisconsin at the time Blumer applied, the minimum or "formula" CSRA was $50,000 and the maximum was $76,740 (*see* WDHFS brief-in-chief at 7 n.6).

Given that fact, it is not possible, contrary to Blumer's claim, "that the income-first rule denies eligibility to individuals who would be otherwise eligible if the SSI methodologies were followed" (*cf.* Blumer's brief at 21). Blumer's newly-asserted claim that application of the income-first rule somehow violates 42 U.S.C. § 1396a(r)(2) should be rejected.

4. **The subsection (e)(2)(C) hearing performs an "anticipatory" function.** As we have explained, the subsection (e)(2)(C) fair hearing "provides a remedy for a couple to resolve the problem of inadequate community spousal income *before* resources which might be used to insure that protected level of income are dissipated and no longer available." *See* WDHFS brief-in-chief at 29; *see generally id.* at 28-32, arguing that neither the language of § 1396r-5(b) and (c) nor the purpose of the hearing preclude the hearing officer from considering potential income transfers from the community spouse at a hearing to raise the CSRA under subsection (e)(2)(C).

Blumer and amicus SeniorLAW strongly criticize this argument on the ground that WDHFS envisions an advisory pre-eligibility hearing divorced from an appeal of an actual adverse eligibility determination. *See* Blumer's brief at 27-28; SeniorLAW brief at 17-20. In fact, the WDHFS never suggested this at all. To the contrary, as repeatedly expressed in our opening brief, the subsection (e)(2)(C) hearing takes place following an initial denial of eligibility and a resulting request for a fair hearing.[8] Blumer's and SeniorLAW's arguments on this point tilt at an imaginary windmill.

5. **The strained assertion that "attribution" is limited to the separate treatment of income and is the opposite of deeming is contrary to the statute and its legislative history.** As we have pointed out, the Conference Report accompanying the MCCA specifically contemplates the attribution of income to the community spouse when determining his or her income at the fair hearing under subsection (e)(2)(C).[9] The state, the Conference Report declares, "must allow the community spouse to retain an adequate amount of resources to provide [for his or her] minimum monthly maintenance needs allowance ["MMMNA"] (*taking into account any other income attributable to the community spouse*)." *See* Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043 (emphasis supplied).

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[8] *See* WDHFS brief at 28, 31-32 and 34. The latter reference, for example, repeats the point that in a fair hearing under subsection (e)(2)(C) the hearing officer "simultaneously address[es] the question of *the institutionalized spouse's MA eligibility* and the claimed inadequacy of the community spouse's anticipated income level in the context of whether to raise the amount of the resource allowance for the community spouse" (emphasis supplied).

[9] *See* WDHFS brief-in-chief at 36-37; U.S. brief at 18; and brief of other State Medicaid Agencies at 17-18, citing H.R. Conf. Rep. No. 100-661 ("Conf. Rep."), at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1043.

Blumer attempts to explain away this powerful expression of congressional intent. *See* Blumer's brief at 36-38. Pointing to a single express reference to "attribution" of income in § 1396r-5(b)(2),[10] Blumer claims that in the context of that provision, the word "attribute" is used to require *separate* treatment of income for the community spouse (Blumer's brief at 36). She deduces from that observation the further assertion that the terms "deeming" and "attribution," which she agrees *were* closely related prior to passage of the MCCA, now accomplish *opposite* results under § 1396r-5 (Blumer's brief at 37). According to Blumer, under § 1396r-5, attribution "results in the separate treatment of a couple's income" while "[d]eeming has the effect of commingling it."[11]

Blumer cites no authority for such a startling about-face in the use of language by Congress. In fact, the statute uses the term "attribution" to refer to both income and resources and frequently uses the term "considered available" as a definitional synonym in place of "attribute." *See, e.g.*, subsections (b)(2) and (c)(2). Furthermore, while attribution (like deeming) necessarily involves two parties, § 1396r-5 uses "attribution" or the synonym "considered available" to refer to both joint and separate treatment of income. *Cf.* subsection (b)(2)(A)(i) and (ii) (requiring separate treatment if income in the first instance; joint treatment in the second). Thus, Blumer's argument is unconvincing on the basis of the statute alone.

More importantly, as Blumer concedes, at the time the statute and the Conference Report were written, the terms deeming and attribution were understood to be closely related concepts (*see* Blumer's brief at 37). For example, this Court

[10]Presumably Blumer refers to subsection (b)(2)(B)(i), though she does not specifically cite it. *See* brief at 36.

[11]Blumer's brief at 37; *cf.* WDHFS brief-in-chief at 7 n.7 (discussing "attribution" and "deeming").

referred to "attributing" as a synonym for "deeming" in the context of deeming the income earned by one spouse to the other in *Herweg v. Ray*, 455 U.S. 265, 270 (1982). Congress is assumed to use terms as they have been interpreted by the Court. There is simply no evidence in § 1396r-5 or the conferees' explanation of subsection (e)(2)(C) to support Blumer's strained and unnatural explanation of the legislative comment that, in considering whether to increase the CSRA under subsection (e)(2)(C), a state may "'tak[e] into account any other income attributable to the community spouse.'"

Instead, the legislative history memorialized in the report supports the "income-first" rule: it clearly indicates that Congress was concerned that *all* income actually attributable to the community spouse by operation of the various provisions of the statute, including subsection (d)(1)(B) would be taken into account at the fair hearing. *See Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 811 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999).

Blumer also complains that WDHFS and supporting amici read too much into the fact that the conferees who adopted the compromise fair hearing remedy now contained in subsection (e)(2)(C) eliminated, at the same time, a Senate provision expressly *mandating* a resource-first method of protecting additional resources for the community spouse. *See* Blumer brief at 32-36; *cf.* WDHFS brief-in-chief at 34-36. Blumer insists that the conferees retained the express mandatory resource provision of the Senate bill by covertly inserting a "resource-first" requirement into subsection (e)(2)(C). Like Blumer's strained attempt to define attribution discussed above, she offers a counter-intuitive explanation of the legislative history that is not supported by the Conference Report[12] or the statute.

[12]*See* Conf. Rep. at 265 and 267, 1988 U.S.C.C.A.N. at 1043 and 1045.

As a matter of statutory interpretation, § 1396r-5(a) and the other Medicaid and SSI statutes Blumer and amici now cite neither preclude income-first nor require the resource-first interpretation.

B. The Secretary's longstanding interpretation of § 1396r-5(e)(2)(C) permitting states to employ the income-first rule is entitled to *Skidmore*[13] deference.

1. **The Secretary's authority under § 1396a(a)(17) to determine reasonable standards for Medicaid eligibility is superseded only in limited respects with regard to § 1396r-5.** Under 42 U.S.C. § 1396a(a)(17), the states must include in their respective Medical Assistance plans "reasonable standards . . . for determining eligibility for and the extent of medical assistance." *Id.* Congress has delegated to the Department of Health and Human Services' ("HHS") Secretary exceptionally broad authority to promulgate rules defining MA eligibility requirements, including standards for determining the availability of income and resources. *See* § 1396a(17)(B) and (D); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

In prior briefs, WDHFS and the United States have relied on the authority contained in § 1396a(a)(17) to support deference to the HHS Secretary's longstanding informal views permitting states to employ the income-first rule when determining an applicant's eligibility for Medicaid in the context of a fair hearing under § 1396r-5(e)(2)(C). *See* WDHFS brief-in-chief at 37; U.S. brief at 2, 13-17 and 25-26. The Secretary's informal interpretation of subsection (e)(2)(C) has now been formalized in a proposed administrative rule published on September 7, 2001, by the Centers for Medicare and Medicaid Services ("CMS")

[13]*See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

(formerly the Health Care Financing Administration ("HCFA")). *See* 66 Fed. Reg. 46,763 (2001) (U.S. App. 25a-44a).

Blumer and amicus WI Elder Bar challenge the scope of the Secretary's authority under § 1396a(a)(17) to interpret the spousal impoverishment provisions of § 1396r-5 based on § 1396r-5(a)(1). The WI Elder Bar makes the broadest possible attack, insisting on the basis of subsection 5(a)(1) that "Congress superseded § 1396a(a)(17) . . . as *per se* inconsistent with the spousal impoverishment section." (*See* WI Elder Bar brief at 10). Blumer takes a more limited view of the effect of § 1396r-5(a)(1), arguing that the "deeming provision" of § 1396a(a)(17) was "specifically superseded" by the former provision (*see* Blumer's brief at 39). She adds that "[a]s a result, CMS simply cannot speak with the force of law on this issue . . ." (*see id.*; *see also id.* at 8 and 22).

This challenge to the Secretary's interpretative and rule-making authority under § 1396a(a)(17) is anticipated in some detail in the U.S. brief (*see id.* at 2-3, 12-17 and 25) and is addressed by the proposed CMS rule (*see* U.S. App. at 26a-37a).[14] The claim that § 1396r-5 wholly supersedes the Secretary's authority under § 1396a(a)(17) is refuted by the text of the statute. 42 U.S.C. § 1396r-5(a)(1) provides that "[i]n determining the eligibility for medical assistance of an institutionalized spouse . . . ," the provisions of § 1396r-5 "supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) . . .) which is *inconsistent* with them" (emphasis supplied). As § 1396r-5(a)(1) and the

[14]At this point, absent a final rule, it appears that the Secretary's views expressed in the Notice of Proposed Rulemaking remain entitled to deference under the *Skidmore* standard, as argued in WDHFS brief-in-chief at 37-47. However, the care and persuasiveness of the agency's explanation for its position, including the basis for its interpretation of the provisions of § 1396r-5(e)(2)(C), are surely relevant to analysis of the factors warranting *Skidmore* deference. *See* WDHFS brief-in-chief at 40-47.

Conference Report indicate, § 1396r-5 supersedes other provisions of the Medicaid statute only to the extent that those other provisions are inconsistent.[15]

Referring to § 1396r-5(a)(1), the narrative accompanying the proposed CMS rule explains the relationship of that provision to § 1396a(a)(17):

> [T]he MCCA did not repeal the Secretary's authority to prescribe standards . . . [under § 1396a(a)(17)(B)] for determining what income is "available" to a spouse, and the requirement for States to set reasonable standards for determining eligibility and amount of assistance. *That [§ 1396a(a)(17)] authority may now only be exercised in a manner that does not contravene the specific requirements of the spousal impoverishment provisions.*[16]

Given the language of § 1396r-5(a)(1) itself, the Secretary's view of the extent to which the agency's interpretative and rulemaking authority under § 1396a(a)(17) is limited by the former section appears not only reasonable, but unassailable. That is, the Secretary has not been deprived of the authority to interpret the spousal impoverishment provisions. Rather, that general authority may only be exercised in ways that are consistent with specific spousal impoverishment protections of § 1396r-5.

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[15]According to the Conference Report, provisions of § 1396r-5 "supersede other provisions of title XIX, *to the extent they are inconsistent*, for purposes of determining eligibility of an institutionalized spouse." Conf. Rep. at 259, 1988 U.S.C.C.A.N. at 1037 (emphasis supplied).

[16]U.S. App. at 28a (emphasis supplied).

For example, based on § 1396r-5(a)(1) and (b)(1), the Secretary cannot, pursuant to § 1396a(a)(17)(D) permit the income of the community spouse to be deemed available to the institutionalized spouse during any month of institutionalization, except as provided in § 1396r-5(b)(2). Therefore, Blumer's claim that the "deeming provision" of § 1396a(a)(17)(D) was superseded by § 1396r-5(a)(1) is correct, but only to the extent that the former section is inconsistent with § 1396r-5(b)(1).

Where there is no inconsistency or where § 1396r-5 is silent, nothing in § 1396r-5(a)(1) prevents the Secretary from exercising existing authority under § 1396a(a)(17) to interpret the spousal impoverishment provisions of § 1396r-5 and, under § 1396a(a)(17)(B), to set reasonable standards for eligibility consistent with specific requirements of § 1396r-5. Because nothing in § 1396r-5 bars use of the income-first rule, the Secretary may establish rules, and the states may create "reasonable standards" using that rule.

Consistent with §§ 1396r-5(d) and 1396a(a)(17)(B), therefore, the Secretary certainly may interpret the provisions permitting *post*-eligibility transfers of income by the institutionalized spouse for the purposes set forth in § 1396r-5(d)(1)(A)-(D), including income transfers to the community spouse. The Secretary may also, consistent with §§ 1396a(a)(17)(B) *and* 1396r-5(a)(1), permit states to take these potential post-eligibility income transfers into account when considering whether to increase the CSRA at an eligibility hearing under § 1396r-5(e)(2)(C).

2. **Blumer and amici offer no policy basis for their insistence that the states lack discretion to employ the income-first rule.** Both Blumer and the amicus brief of the Ohio State Bar and National Academy of Elder Law Attorneys (OH-NAELA) argue emphatically that while states have wide discretion to set the CSRA and MMMNA, the states have no discretion to choose between the income-first

and resource-first interpretations of § 1396r-5(e)(2)(C). *See* Blumer's brief at 31-32; OH-NAELA brief at 8 and 17-18.

This argument, however, does not promote respondent's case. The OH-NAELA brief demonstrates that Wisconsin has chosen to set the CSRA and MMMNA limits near the high end of the permissible range in both instances (*id.* at 2-3). This means that Wisconsin has chosen to be relatively generous in administering the spousal impoverishment provisions and that a higher percentage of Wisconsin couples will likely be eligible for benefits under § 1396r-5 than in a state which has set the CSRA at a relatively low level. At the same time, employment of the income-first approach also allows Wisconsin to stick much closer to its own standard CSRA limit than it would under a resource-first rule, thereby attempting to enforce a meaningful degree of institutional equity among those seeking eligibility under the spousal impoverishment provisions of § 1396r-5.[17]

Blumer and the OH-NAELA amicus also suggest that having the discretion to choose between the resource-first or the income-first approaches may have a significant impact on whether a state sets a high or a low CSRA limit or a high or low level for the MMMNA. Indeed, both Blumer and the OH-NAELA amicus acknowledge as much: they suggest, no doubt rhetorically, that states like Wisconsin could control their costs under a mandatory resource-first rule by setting the MMMNA or the CSRA or both at significantly lower levels. *See* Blumer's brief at 32; OH-NAELA amicus at 16.

But forcing states to lower their across-the-board MMMNA and CSRA to fund a more generous *exception* to those limits hardly serves the purposes of the statute. Moreover, Blumer and amici offer no reason why the states'

[17]It is precisely this aspect of the income-first approach that Blumer and supporting amici repeatedly attack.

broad discretion to set state policy with regard to the spousal impoverishment provisions of § 1396r-5 should not also include the discretion to choose between the income-first or the resource-first approaches. They offer no policy answer to the obvious question why a state like Wisconsin, which has chosen to set its Medicaid eligibility limits at more generous levels and to serve higher numbers of its citizens, should be forced to restrict those eligibility limits and serve fewer people as a price for being required to use resource-first.

3. **Application of the income-first approach does not reduce community spouses to poverty.** In a number of instances, Blumer's brief and that of supporting amici inaccurately or unfairly criticize the income-first approach in ways that require correction. It is undisputed that the MCCA has a laudable purpose--that of protecting community spouses from impoverishment. The statute is also designed, however, to avoid protecting an *excessive* amount of resources. Blumer and supporting amici ignore the fact that the statutory protection is limited both by the statutory limits Congress placed on the CSRA and MMMNA and by limitations states themselves place on the specific levels of resources and income each will permit a community spouse to retain.[18]

While Congress may have expanded Medicaid from a strict welfare program to a "safety net" approach, it is inaccurate to claim that the spousal impoverishment protections were intended to provide community spouses with the "financial security to live independently in the community throughout life" (*see* Blumer's brief at 13). Nor

[18]The statutory protections are also limited by the hard economic fact that the couples most in need of protection under § 1396r-5 are those with incomes and resources well *within* the maximum limits set by the individual states. For those couples, the benefits of the resource-first approach are meaningless. By definition, only couples with resources above the state's maximum CSRA will benefit from a resource-first approach.

is § 1396r-5 a savings plan where contributors automatically take out a "fair share" of what they put in. The MCCA was never envisioned as an income maintenance program for persons with income and assets well above the poverty level, but instead, as a program to protect spouses from actual impoverishment and destitution resulting from the costs of long term care for an institutionalized spouse.

Blumer also describes income-first as a device permitting states "to take income *away* from an institutionalized applicant . . . for the purpose of *denying* that applicant benefits" (brief at 22). While this turn of phrase catches the eye of the reader, use of income-first does *not* in fact take income "away" from an institutionalized spouse. Rather, it permits the state to assess whether his or her community spouse will have income up to the level of the MMMNA to meet his or her own needs once eligibility occurs. And once eligibility does occur, that income may then be used to support the community spouse instead of being required to pay for the institutionalized spouse's care. The Medicaid program, in effect, makes up the difference when evaluating the portion of the institutionalized spouse's income for which it will pay. *See* § 1396r-5(d)(2).

Blumer's brief also suggests that, because of income-first, Burnett Blumer will be left in poverty if Irene predeceases him (*id.* at 24-25). In fact, should Irene die first, Burnett will be left with the remaining income-producing assets making up the CSRA ($72,822 in this case), together with their home, vehicle and other excluded resources. That is almost certainly more than Burnett would retain had Irene sought Medicaid benefits while still living at home. In addition, Burnett will still have his own income, which was close to the level of the MMMNA in 1997 when this case arose. As Blumer's own brief points out, the level of the MMMNA in Wisconsin is set at 200% of the poverty line for a family of two (*id.* at 5 n.3). Thus, should Irene predecease

Burnett, he is likely to have income approaching 200% of the poverty line for a couple.

While Burnett may be left with less monthly income under income-first than under resource-first, he will in neither case be left impoverished. In other words, in this particular case, the spousal impoverishment protections of § 1396r-5 will, in fact, achieve their purposes.

The income-first rule is a reasonable interpretation of an ambiguous provision of a highly complex statute, § 1396r-5. The Secretary's longstanding, consistent interpretation of the statute as permitting states to employ the income-first approach is entitled to deference under the *Skidmore* standard.

CONCLUSION

The decision of the Wisconsin Court of Appeals should be reversed.

Respectfully submitted,

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