No. 00-952

IN THE SUPREME COURT OF THE UNITED STATES

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES
Petitioner.

v.

IRENE BLUMER
Respondent

BRIEF OF RESPONDENT

Filed October 17th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Whether the plain language of 42 U.S.C. § 1396r-5(e)(2)(C) (1994 and Supp. 2000), the language of 42 U.S.C. § 1396r-5 as a whole, and the income eligibility methodologies of the Supplemental Security Income program applicable to the Medicaid program prohibit the "income-first" rule of WIS. STAT. § 49.455(8)(d)(1999-2000), which requires that potential post-eligibility income transfers from the institutionalized spouse be included in "the community spouse's income" for purposes of obtaining a substituted community spouse resource allowance under § 1396r-5(e)(2)(C).

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STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

1. In General

The federal Medicaid program was created in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). The program is jointly funded by federal and state revenues. Participating states administer the program, but must, as a condition of receipt of federal funds, operate their programs in compliance with the federal statute. 42 U.S.C. § 1396a(a). The Department of Health and Human Services (HHS) through its Centers for Medicare & Medicaid Services (CMS), formerly known as the Health Care Financing Administration (HCFA), has oversight authority over the Medicaid program at the federal level.

The broad purpose of the Medicaid program is to provide federal funding to allow states to furnish medical assistance to families with dependent children and to aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. § 1396. The State of Wisconsin has chosen to participate in the Medicaid program, which it calls the "Medical Assistance" program. WI. STAT. §§ 49.43-49.99 (1999-2000).

Medicaid was originally enacted primarily as a health insurance companion program to the Aid to Families with Dependent Children (AFDC) program and the

three then-existing state-based income maintenance programs for poor elderly, blind, and disabled Americans.[1] These programs were combined as the "Supplemental Security Income" (SSI) program in 1972. 42 U.S.C. §§ 1381-1385. It also provided health care coverage to people whose income exceeded program limits, but whose health care costs consumed their excess income. 42 U.S.C. §§ 1396a(a)(10)(C) and 1396d(a). As enacted, the Medicaid program was truly a welfare program for the very poor.

Over the years the Medicaid program has increasingly become a program for the working poor and, in some cases, the middle class. As Congress has struggled to do something about the growing number of Americans who lack adequate health insurance, it has repeatedly turned to the Medicaid program as its vehicle to extend government assistance to the uninsured and underinsured. These expanded eligibility groups include individuals with income and assets significantly above the poverty level.[2]

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[1] Old Age Assistance, 42 U.S.C. § 301 et seq. (1970 ed.); Aid to the Blind, 42 U.S.C. § 1201 et seq. (1970 ed.); and Aid to the Permanently and Totally Disabled, 42 U.S.C. § 1351 et seq. (1970 ed.).

[2] For example, the Medicaid program now covers children with severe health problems without regard to their parents' income or assets, the "Katie Beckett" program, 42 U.S.C. § 1396a(e)(3) and disabled workers with incomes up to 250% of poverty and assets up to $15,000 (the "Medical Assistance Purchase Plan," 42 U.S.C. § 1396a(a)(10)(A)(ii)(XIII), Wis. Stat. § 49.472(3) (1999-2000). Through waivers of federal law HHS allows states, using federal Medicaid funds, to fashion its own programs to cover working families (*see*, e.g., Wisconsin's "Badgercare" program, which allows families with incomes up to 200% of poverty to participate. Wis. Stat. § 49.665(4)(a)1.

2. The Medicare Catastrophic Coverage Act of 1988

The Medicare Catastrophic Coverage Act (MCCA) expanded the Medicaid program from a strict welfare program to a "safety-net" program for working families and retired working families in the area of long-term care. *See* 42 U.S.C. § 1396r-5. In 1988, Congress passed MCCA to rectify serious inadequacies in the Medicare program and severe inequities in the Medicaid program. *See* Pub. L. No. 100-360, 102 Stat. 683 (1988); H.R. Rep. No. 100-105(II) at 65, *reprinted at* 1988 U.S.C.C.A.N. at 888.

3. MCCA's Spousal Impoverishment Prevention Provisions

a. The Pre-MCCA Problem

The MCCA's Medicaid provisions addressed the inequity in the arbitrary way Medicaid treated married couples when one spouse was confined to a nursing home. Before MCCA, the Medicaid program forced many couples to liquidate and spend down virtually all of their joint assets before the nursing home spouse could become Medicaid eligible. All too frequently the spouse at home, usually the wife, was left with no savings or income-producing property. Further, after the nursing home spouse became eligible, most of his income (oftentimes all) had to be paid to the nursing home. Often the spouse at home was left to subsist on her income alone. In many cases she became utterly impoverished, unable to afford

an independent existence in the community, and compelled to seek welfare herself. In other cases, if the at-home spouse happened to have retained title to the couple's assets, the couple did not have to spend any assets on the nursing home spouse's care.

The principal statutory culprits in this arbitrary system were the "deeming provision" of 42 U.S.C. § 1396a(a)(17) and the asset transfer prohibitions of 42 U.S.C. § 1396p. The deeming provision allowed states to consider or "deem" assets held in the name of the nursing home spouse as entirely available to pay the nursing home bill. The transfer prohibition prevented the nursing home spouse from transferring any assets in his name to the at-home spouse even for the laudable purpose of keeping his spouse independent in the community and off welfare. *See* Pub. L. No. 97-248, 96 Stat. 371 (1982) creating 42 U.S.C. § 1396p(c); *see also* WIS. ADMIN. CODE § HFS 103.08 entitled "Divestments prior to August 9, 1989."

b. The MCCA Solution

The goal of the 1988 MCCA was to stop this "spousal impoverishment" by allowing the at-home spouse, called the "community spouse" in MCCA, to retain sufficient income and assets to maintain independence at home. It did so in two ways. First, it set forth new rules for the treatment of income after the nursing home spouse, called the "institutionalized spouse" in MCCA, became eligible for Medicaid. 42 U.S.C. § 1396r-5(d). It also established a new resource exclusion, the "community spouse resource allowance" (CSRA), that would be disregarded

when the institutionalized spouse applied for Medicaid. 42 U.S.C. §§ 1396r-5(c) and (f).

With respect to post-eligibility treatment of income, § 1396r-5(d) allowed a Medicaid eligible institutionalized spouse to allocate some or all of his or her monthly income to the community spouse in order to maintain the community spouse's income at a minimum level, called the "minimum monthly maintenance needs allowance" (MMMNA). States were given considerable flexibility in establishing this MMMNA. Since 1992 the MMMNA must be at least 150% of the poverty level for a family of two and states were permitted to set the maximum as high as $1,500. 42 U.S.C. § 1396r-5(d)(3). Adjusted annually for inflation as required by 42 U.S.C. § 1396r-5(g), in 2001 the minimum is $1,406.25 and the maximum is $2,175. Therefore, states currently have discretion to set their MMMNAs anywhere between $1,406.25 and $2,175.[3]

Next, MCCA provided formulas for local agency officials to use to calculate the CSRA. Under these formulas, a state retains significant flexibility to establish its CSRA amount. The formulas provide that the CSRA may be the greater of (1) the standard CSRA allowance, which is set by the state between $12,000 and $60,000; or (2) half of the couple's assets, but that half could not be greater than $60,000. 42 U.S.C. §§ 1396r-5(f)(2)(A)(i) and (ii).

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[3] In 1996 Wisconsin reduced its MMMNA to 200% of the poverty level for a family of two. WIS. STAT. § 49.455(4)(c)1.a. (1999-2000). In 1997 that translated into $1,725, in 2001 it is $1,935.

A substitute CSRA is available to those who are denied eligibility under the calculations above and request a hearing pursuant to 42 U.S.C. § 1396r-5(e)(2). The "substituted" CSRA was designed as a failsafe mechanism to guarantee adequate protection for the community spouse in those unusual situations where the standard CSRA was inadequate. At the hearing an individualized CSRA must be "substituted" for the formula CSRA if the formula CSRA fails to generate income sufficient to bring the "community spouse's income" up to the MMMNA. 42 U.S.C. § 1396r-5(f)(2)(A)(iii).

The specific issue raised by this appeal is whether potential post-eligibility transfers of income from an institutionalized spouse under § 1396r-5(d) are included in a "community spouse's income" as that term is used in 42 U.S.C. § 1396r-5(e)(2)(C).

Congress also took care to weave these spousal impoverishment provisions into the larger fabric of the Medicaid Act. It did so by operation of 42 U.S.C. § 1396r-5(a). Petitioner and the United States have given short shrift to subsection (a), yet it is absolutely critical to an understanding of § 1396r-5's place within existing Medicaid law. Subsection (a) does this in three specific ways. First, it supersedes all other provisions of Title XIX that are inconsistent with the new section and explicitly supersedes the problematic "deeming provision" of 42 U.S.C. § 1396a(a)(17). 42 U.S.C. § 1396r-5(a)(1). The reason is obvious: § 1396a(a)(17) had caused spousal impoverishment in the first place by allowing states to deem jointly held resources as entirely available to the institutionalized spouse. Second, it deliberately retained preexisting Medicaid law with respect to determining "what

constitutes income or resources" and "the methodology and standards for determining and evaluating income and resources." 42 U.S.C. § 1396r-5(a)(3). This explains why Congress did not, in the context of § 1396r-5(e)(2)(C), need to define the phrase "community spouse's income." Third, it prohibited other groups of potential Medicaid applicants the right to point to the more generous income and asset provisions contained in § 1396r-5 and demand similar treatment. 42 U.S.C. § 1396r-5(a)(2).

These provisions are critically important because they manifest the intent of Congress to enact the spousal impoverishment protections within the larger Medicaid Act – not as stand-alone provisions. By operation of § 1396r-5(a)(1) and (3), the treatment of income for eligibility purposes is determined exactly as it had been prior to MCCA.

4. MCCA Left Income Eligibility Determinations Intact.

Income determinations for nursing home Medicaid eligibility have always been governed by the rules that apply in determining eligibility for the Supplemental Security Income program. 42 U.S.C. § 1396a(r)(2)(A) mandates application of the SSI rules to these eligibility determinations. In addition, 42 U.S.C. § 1396a(r)(2)(A) provides that the methodology for determining income and resource eligibility "may be less restrictive, and shall be no more restrictive, than the methodology" used in the SSI program.

Subparagraph (B) of § 1396a(r)(2) then provides that a methodology is "no more restrictive" if "additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance" by the methodology. HHS implemented the SSI methodology mandate of § 1396a(r)(2) at 42 C.F.R. § 435.601 (2000).

The SSI program, in turn, uses the "name on the title" rule when it considers income for determining eligibility. *See* 20 C.F.R. §§ 416.1100-1182 (2000) which discuss the rules for treatment of income in detail. Most important, the SSI program does not permit deeming of income *away* from the applicant *to* the applicant's ineligible spouse. Pursuant to the name on the title rule, the amount of income that might potentially be allocated to the community spouse after the institutionalized spouse is eligible may not be deducted for eligibility purposes. *See*, e.g., 42 C.F.R. § 435.831. The spousal income allocation does not occur until after the institutionalized spouse is Medicaid eligible, when the institutionalized spouse's cost share to the nursing home is calculated. 42 U.S.C. § 1396r-5(d)(1)(b).

B. APPLICATION OF THE SPOUSAL IMPOVERISHMENT PROTECTION PROVISIONS

Given this statutory framework, states have developed two different methods of determining the substituted CSRA under the hearing provision of 42 U.S.C. § 1396r-5(e)(2)(C). Under the "resource-first" rule, the CSRA is increased to provide additional assets for the community spouse if the income paid in the name of the

community spouse is not sufficient to meet the MMMNA. Under the alternative, the "income-first" rule, eligibility is more limited because the CSRA is not increased if the community spouse's income *plus* the income that may be transferred from the institutionalized spouse post-eligibility is sufficient to meet the MMMNA.

The income-first rule has the effect of denying or postponing eligibility for an institutionalized spouse whose community spouse relies on income generated by savings, rather than Social Security, pensions, annuities or employment. If the institutionalized spouse in these circumstances has sufficient income to permit post-eligibility transfers, the income-first rule will typically require the couple to deplete the savings or other assets upon which the community spouse depends before the institutionalized spouse will be Medicaid eligible. If the institutionalized spouse dies before the community spouse, the community spouse may be left destitute because the assets needed to provide a minimal income were spent on nursing home care while the institutionalized spouse remained Medicaid ineligible. This depletion of savings is not required under the resource-first rule because the substitute CSRA preserves the assets that will allow the community spouse to receive income to fund the MMMNA without relying on income from the institutionalized spouse.

C. FACTUAL BACKGROUND

The Blumers' situation illustrates the effect of these alternative rules. When Irene Blumer entered the nursing home in November 1994 she and her husband Burnett

owned assets totaling $145,644. In February 1997, two months after Irene applied for Medicaid, the Blumers had less than $90,000 left. (Pet. App. at 2a ¶2.) In slightly over two years their life savings had been reduced by 38 percent. The nursing home bill and other living expenses were consuming their savings at the rate of over $2,000 a month.

When Irene applied for Medicaid her monthly income was $926.99 in Social Security benefits and $335.72 in pension benefits for a total of $1,262.71. Burnett's monthly income included Social Security benefits of $1,015.15 and $309.45 from an annuity for a total of $1,324.60. In addition, the Blumers' remaining assets produced $377.85 per month which raised Burnett's income up to $1,702.45.[4] (Pet. App. at 25a-26a.)

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[4] Petitioner's statement of facts incorrectly states that the $377 in interest income was generated by Burnett's "resource share" – meaning, apparently, the standard CSRA of $72,822. (Pet'r. Br. at 13.) In fact, the record establishes that the interest income was generated by the couple's total remaining assets – approximately $89,000. (R. Doc. 4 at 22.) This error has led to the petitioner's erroneous statement that "[u]nder the 'income-first' rule, however, the simple solution to Burnett's $25 shortfall was to consider $25 of Irene's monthly income available to him at the fair hearing." (Pet'r. Br. at 14.) In fact, the shortfall would have been $25 ($24.55 to be precise) even if all $87,335 ($89,335-$2,000 for Irene) of Burnett's assets had been "substituted" for the standard CSRA of $72,822. For purposes of the ultimate legal issue for this Court to decide, petitioner's mistake is not material. However, we note it because we refer to the Blumers' actual situation at several points in this brief for illustrative purposes.

Irene's Medicaid application was denied because her available assets exceeded the formula CSRA set for Burnett of $72,822 (half of the couple's assets when Irene entered the nursing home) plus the $2,000 she was allowed to keep. She appealed. At the hearing Irene argued that the resource-first rule entitled Burnett to a substituted CSRA which included all $89,000 of the couple's assets, because all of the income from all of the assets would raise his monthly income only to $1,702, an amount still below the MMMNA of $1,725. Instead, the hearing examiner applied the income-first rule and found Irene ineligible. (Pet. App. at 2a-3a ¶¶2-4.) As he put it, "[a]s the couple's total monthly income exceeds $2,400 *even without the asset income listed in Finding of Fact #7*, it appears upon allocation of the institutionalized spouse's income no assets would need be retained to generate income for the community spouse." (Pet. App. at 31a) (emphasis in original). The effect of the examiner's ruling was to compel the Blumers to continue the rapid depletion of their remaining resources until only the standard CSRA of $72,822 remained. Assuming depletion would continue at $2,000 per month the decision delayed Irene's eligibility for some six months.

Had the examiner applied the resource-first rule the outcome would have been very different. Irene would have been eligible for Medicaid immediately. Burnett would have been able to keep what remained of the couple's life savings to provide for his own needs – both while Irene lives and after she passes away. Further, after eligibility was established Irene would be able to allocate a small portion of her monthly income ($24.55) to her husband to bring his income up to the MMMNA of

$1,725. Irene would pay the vast majority of her income, over $1,200, to the nursing home to defray the expense of her care to the State of Wisconsin.

SUMMARY OF ARGUMENT

The petitioner's argument is built on the faulty premise that the statute is ambiguous. The Wisconsin Court of Appeals recognized this and correctly held that the plain meaning of the phrase "community spouse's income" in § 1396r-5(e)(2)(C) can only refer to income actually received or possessed by the community spouse. Nothing in the surrounding provisions of the Act leads to any other conclusion; by its very terms, § 1396r-5(d) applies only after eligibility is established, not before. Under resource-first, § 1396r-5(e)(2)(C) and § 1396r-5(d) complement each other rather than create ambiguity.

The petitioner also fails to understand the applicability of SSI rules to Medicaid. Congress, however, did understand this basic fact and continued their application in MCCA by enacting 42 U.S.C. §§ 1396r-5(a) and 1396a(r)(2). Subsection 1396r-5(a) supersedes inconsistent provisions of the Medicaid Act and preserves the income and asset determination methodologies under the SSI program that have always been applicable to the Medicaid program. Subsection 1396a(r)(2) confirms the preexisting Medicaid rule that SSI methodologies are the base from which Medicaid financial eligibility is determined. Because the SSI rules use name-on-the-title when determining income for eligibility purposes, the income-first rule, which does not, is prohibited.

Petitioner's confusion about the word "amount" in § 1396r-5(e)(2)(C) is hard to fathom. The word "amount" plainly refers to a substituted "resource" allowance and cannot reasonably be read to refer to income. The term is not ambiguous.

The resource-first rule serves the overall remedial purpose of the Act to *end* spousal impoverishment, while the income-first rule serves only to *postpone* it until the institutionalized spouse dies. MCCA was enacted to allow a community spouse the financial security to live independently in the community throughout life. The income-first rule requires a community spouse to spend resources that could otherwise be used to maintain ongoing independence. Once these resources are spent, they are unavailable to the community spouse to fund any income reduction created by the death of the community spouse. The resource-first rule also serves the specific remedial purpose of § 1396r-5(e)(2)(C) because it makes people eligible for benefits who would otherwise be ineligible.

Contrary to petitioner's claim, the hearing at which the "substituted" CSRA is considered determines present eligibility and is not "anticipatory." At the hearing, the appeal will be dismissed if the increased CSRA does not result in immediate eligibility. Hearing examiners have no authority to issue "advisory" CSRAs.

MCCA itself compels all couples to pay their fair share of nursing home costs. Prior to MCCA, some spouses could protect unlimited amounts of resources if their resources were titled in the name of the community spouse. Under MCCA, all couples are treated equally,

without regard to which spouse retains title to the couple's assets. The MMMNA amount also limits the CSRA to the amount of resources necessary to fund the MMMNA. The rest must be spent. Finally, resource-first allows more of the institutionalized spouse's income to be paid to the nursing home, thereby permanently defraying costs to the Medicaid program.

The cooperative federalism envisioned by Congress in MCCA allows states significant flexibility to set the MMMNA and the CSRA within broad parameters, but leaves states no discretion to create new income eligibility rules. States still retain ultimate control over the costs associated with the resource-first rule through the flexibility Congress explicitly delegated.

The drafting history of MCCA supports resource-first. Both the House and Senate versions of MCCA used resources to aid couples who were not adequately protected by the standard CSRA. The Conference Committee ultimately replaced these provisions with the resource-first hearing process under § 1396r-5(e)(2)(C), but did not deviate from the underlying principle of using resources as the funding source for the MMMNA.

Income-first proponents have misinterpreted the phrase "taking into account any other income attributable to the community spouse" in MCCA's legislative history. In MCCA, the term "attribute" requires the separate treatment of spousal income and therefore supports the resource-first rule.

Finally, no deference is owed to HHS's income-first interpretation because it is contrary to the controlling

statute and because it is not reasonable, consistent, thoughtful or persuasive.

ARGUMENT

CONGRESS EXPLICITLY AND DELIBERATELY MANDATED THE RESOURCE-FIRST RULE OF 42 U.S.C. § 1396r-5(e)(2)(C).

A. THE WISCONSIN COURT OF APPEALS CORRECTLY CONCLUDED THAT § 1396r-5(e)(2)(C) UNAMBIGUOUSLY REQUIRES THE "RESOURCE-FIRST" RULE

1. The Phrase "community spouse's income" Is Self Explanatory

This Court applies a standard analysis to determine whether a word or phrase within a statute is unambiguous. The court looks to the statutory language to determine if Congress' intent is revealed by the actual words used by the Congress. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corporation v. Cartier, et al.*, 486 U.S. 281, 291 (1988). Under this analysis there is no question that Congress mandated the resource-first rule when it enacted § 1396r-5(e)(2)(C). The statutory provision which contains the disputed language, § 1396r-5(e)(2)(C), states as follows:

> Revision of community spouse resource allowance
>
> If either such spouse establishes that the community spouse resource allowance (in relation to

> the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The Wisconsin Court of Appeals applied the standard approach articulated in *K-Mart* and found that Congress clearly mandated the resource-first rule when it enacted § 1396r-5(e)(2)(C). The court began its examination with the words of the statute itself. It first found "this language very specifically directs the increase of the CSRA to an amount sufficient to generate additional income." (Pet. App. at 11a, ¶20.) The court then examined the disputed term "community spouse's income" and engaged in a plain language analysis. In so doing, the court noted that the statute referred to the "community spouse's income." The statute did not say "the couple's income or the community spouse's income plus the institutionalized spouse's income." (Pet. App. at 11a, ¶20.) The court did not twist or contort the language of the statute – it simply read it and found that the words Congress chose conveyed their meaning clearly and unambiguously.

The court of appeals got it right. By choosing the possessive in the phrase "community spouse's income," Congress clearly expressed its intent that the income *possessed* by the community spouse was the income that would be measured. Nothing in the statutory language suggests that imputed income from the institutionalized spouse was somehow contemplated in the reference to

the "community spouse's income." As written, the phrase simply cannot be read to require that the institutionalized spouse make any income available to the community spouse as a precondition to the establishment of a substituted CSRA. The plain language of the statute is not ambiguous.

The court of appeals did not end its inquiry there. It proceeded to examine § 1396r-5(e)(2)(C) in the context of the post-eligibility income transfer provision of § 1396r-5(d); the very subsection of § 1396r-5 that petitioner, as well as several of the income-first courts, claims causes ambiguity. *See Cleary v. Waldman*, 959 F.Supp. 222, 232 (D.N.J. 1997) (Cleary I); *Cleary ex. rel. Cleary v. Waldman*, 167 F.3d 801, 809 (3d Cir.) (Cleary II), *cert. denied*, 528 U.S. 837 (1999); *Chambers v. Dept. of Human Services*, 145 F.3d 793, 802 (6th Cir. 1998), *cert. denied*, 525 U.S. 964 (1998); *Thomas v. Comm'r, Div. Of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997).

The court started by noting that the opportunity to obtain the substituted CSRA occurs only at the time an *eligibility* determination is made. It then specifically discussed § 1396r-5(d)(1), the provision which allows institutionalized spouses to allocate income after they have been determined eligible. The court emphasized the statutory language in this section which clearly states that income allocation applies *"after an institutionalized spouse is determined . . . to be eligible for medical assistance."* (Pet. App. at 11a, ¶20) (emphasis in original).

As the court of appeals recognized, the purpose of § 1396r-5(d) is to assure that the institutionalized spouse will be able to allocate income to his community spouse

rather than use it to defray Medicaid expenses *after* eligibility is established. By its very terms § 1396r-5(d) applies only after the institutionalized spouse is eligible for Medicaid. (Pet. App. at 13a, ¶22.) It would be absurd to construe it to cast ambiguity on a statutory provision that relates exclusively to establishing eligibility. Put another way, § 1396r-5(d) is clearly and unambiguously irrelevant for purposes of establishing Medicaid eligibility.[5]

In fact, subsections (e)(2)(C) and (d) coexist together quite peacefully as written. Indeed, they complement each other. Under the resource-first rule the fair hearing provision of § 1396r-5(e)(2)(C) aids couples at the eligibility determination stage of the proceedings by assuring that assets still available to produce income for the community spouse will be preserved for that purpose. The income transfer provision aids couples after eligibility is established. A transfer from the institutionalized spouse will fill some or all of the gap if the couple's substituted CSRA, as determined at the fair hearing, is still insufficient to generate income up to the MMMNA. This will happen in virtually all cases because even the substituted

[5] The decision of the Wisconsin Court of Appeals is in accord with *Kimnach v. Ohio Dept. of Human Serv.*, 645 N.E.2d 825 (Ohio App. 10 Dist. 1994), *appeal not allowed*, 644 N.E.2d 409 (Ohio St. 3d 1995); *Gruber v. Ohio Dept. of Human Serv.*, 647 N.E.2d 861 (Ohio App. 5 Dist. 1994), *appeal not allowed*, 646 N.E.2d 468 (Ohio St. 3d 1995). The court of appeals considered, but rejected the conclusions of the income-first courts that it was impossible to attach a plain meaning to any provision in the Medicaid Act. It stated: "While we may agree that these provisions are complex, we cannot agree that every provision is ambiguous simply because of the complexity of the statute as a whole." (Pet. App. at 9a, 10a, ¶¶16-18.)

CSRA is limited by the actual amount of assets the couple owns at the time the institutionalized spouse applies for Medicaid.

The Blumers' situation illustrates this point. As a result of the court of appeals decision, Burnett is eligible for a substituted CSRA that is $14,513 above the standard CSRA of $72,822 and Irene's asset limit of $2,000. Excluding this amount, Irene was immediately eligible for Medicaid. Yet this substituted CSRA is still insufficient to bring Burnett's income up to the MMMNA. There simply are not enough assets to fund the entire MMMNA.

Only at that point do the post-eligibility spousal impoverishment *income* provisions come into play. Irene can then allocate a small portion of her income ($24.55 to be exact) in order to bring Burnett's income up to the MMMNA.

2. The Income-First Rule Is Prohibited By Operation Of 42 U.S.C. § 1396r-5(a).

Petitioner, the United States and many of the income-first courts have urged that the income-first rule "is not prohibited."[6] They believe that, absent a definition of "community spouse's income," the statute is ambiguous and thereby permits income-first. That argument is misplaced because the statute's language concerning income determination is not ambiguous. As previously discussed, the one area left nearly undisturbed by the MCCA reforms was the treatment of income for eligibility

[6] *See, e.g. Chambers*, 145 F. 3d 793, 802; *Thomas*, 682 N.E.2d 874, 879.

purposes. *Supra* at 6-8. Section 1396r-5(a)(1) supersedes only those provisions of previous law in conflict with the new provisions of MCCA. It does not affect "the determination of what constitutes income . . . " or the methodologies used to evaluate income. 42 U.S.C. § 1396r-5(a)(3).

In addition, Congress confirmed its retention of the SSI rules for the treatment of income by enacting § 1396a(r)(2) concurrently with MCCA, but making it retroactively effective to October 1, 1982.[7] Congress knew

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[7] The creation of § 1396a(r)(2) in MCCA was the culmination of a longstanding dispute between Congress and HCFA regarding what it meant to apply the SSI methodologies to the Medicaid program. According to Congress, HCFA had been misinterpreting the various statutory provisions that required the application of the SSI financial standards and methodologies to the Medicaid program. HCFA had been misinterpreting the SSI requirements to be the *least* and *most* liberal that states could utilize. This misinterpretation severely restricted states' flexibility to be *more* generous (not less) than a strict application of the SSI rules allowed. In order to absolutely clarify its intent, Congress enacted § 1396a(r)(2) as a "conforming amendment" to MCCA. As the House Committee on Energy and Commerce put it "[t]o avoid any possible ambiguity, the bill provides that a methodology is considered to be 'no more restrictive' if, using the methodology, individuals qualify for Medicaid even though they would not be eligible were the SSI methodology used, and individuals who would be eligible for Medicaid under the SSI methodology would not be ineligible under the State's medically needy methodology." Thus the bill specifically provided states with the flexibility to be more generous, but not less generous, than the SSI rules allowed. Finally, the House made the new language retroactive to October 1, 1982, the date the provisions that HCFA was misinterpreting had been enacted. *See* H.R. Rep. No. 100-105(II) at 74-75, 1988 U.S.C.C.A.N. at 897-898. The House's "conforming amendment" was adopted in the final version of MCCA except that it was *expanded* to include the "optionally categorically needy" as well as the "medically needy" thereby making it applicable to all nursing home applicants, no matter what their technical Medicaid status. 42 U.S.C. § 1396a(r)(2). *See* H.R. Conf. Rep. No. 100-661 at 268, 1988 U.S.C.C.A.N. at 1046.

that for income, the name-on-the-title rule applied for Medicaid eligibility purposes. Therefore, in order to retain the SSI rules regarding the treatment of income for spousal impoverishment purposes, Congress was required to do nothing. In other words, it is precisely because Congress was silent on this issue in MCCA that the name-on-the-title rule applies for the eligibility purpose contemplated in § 1396r-5(e)(2)(C).

Further, according to 42 U.S.C. § 1396a(r)(2)(B), a state may only deviate from the SSI methodologies, including those governing the treatment of income, if doing so would *not* make "individuals who are otherwise eligible for Medical Assistance . . . ineligible for . . . such assistance." Applying § 1396a(r)(2)(B) to the income-first rule 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.

To the extent Congress was "silent" on the issue in § 1396r-5(e)(2)(C) it was because it had *already spoken* quite loudly on the issue. Contrary to the position proffered by petitioner (Pet'r. Br. at 23) and particularly the United States (U.S. Br. at 25), Congress did *not* leave a gaping hole in § 1396r-5 which it expected the states or HHS to fill.

Further, the provision in § 1396r-5(b)(1) prohibiting income deeming *from* the community spouse to the institutionalized spouse (Pet'r. Br. at 23) does not by negative inference authorize income-first's "reverse deeming." A main accomplishment of the spousal impoverishment revisions was to end, once and for all, the deeming of a community spouse's income to the institutionalized spouse in the limited context of an application for institutional Medicaid. The specific prohibition on community spouse income deeming was necessary because of the problematic "deeming provision" of § 1396a(a)(17) applicable to Medicaid generally under which the income of a nonapplicant spouse may be considered available to the applicant spouse in an eligibility determination. Because no Medicaid or SSI rule authorized "reverse deeming" it was unnecessary to specifically prohibit it.

It is unlikely that Congress considered the possibility that HHS or states would invent a theory that permitted states to take income *away* from an institutionalized applicant (thereby making that applicant, theoretically at least, *poorer*) for the purpose of *denying* that applicant benefits. With all due respect to Congress, there are only a limited number of schemes by which states would frustrate Congress' intent that Congress can be expected to foresee and specifically and redundantly foreclose.

3. Petitioner's Novel Contention That "Amount" Is Also Ambiguous Is Patently Meritless.

Petitioner now, for the first time, has decided that it is also confused by the term "amount" as it appears in § 1396r-5(e)(2)(C), claiming that "[t]he referent of

'amount' is unexpressed" and suggests that it may refer to either resources or income. (Pet'r. Br. at 23.) This argument borders on the preposterous. This is because the term "amount" is immediately preceded by the phrase "for the community spouse resource allowance under subsection (f)(2) of this section."[8]

It simply could not be clearer that "amount" refers to resources. It is being "substituted" for the standard community spouse resource allowance mandated by § 1396r-5(f)(2). If "amount" referred to "income" as petitioner asserts that it could, the result would be the "substitution" of the community spouse resource allowance with an income transfer from the institutionalized spouse. The effect of this interpretation would be the *elimination* of the community spouse resource allowance altogether, leaving no assets to the community spouse. Statutory constructions that cause absurd results are generally not favored. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938), *see* also *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-201 (1993). Congress could not possibly have intended this result. Neither the income-first courts, nor any of the *amici* appearing in support of petitioner have ever found any ambiguity in the term "amount." *See Cleary I*, 959 F.Supp. 222; *Cleary II*, 167 F.3d 801; *Chambers*, 145 F.3d 793; *Golf v. State Dept. of Social Services*, 697 N.E.2d 555 (N.Y. 1998); *Thomas*, 682 N.E.2d 874. This argument accentuates the contrived nature of the income-first rule.

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[8] In petitioner's brief this phrase is curiously absent, having been replaced by " . . . " (Pet'r. Br. at 23.)

4. The Resource-First Rule Serves The Statute's Broad Remedial Purpose To End Spousal Impoverishment While The Income-First Rule Frustrates It.

a. The Purpose Of MCCA Was To End Spousal Impoverishment, For As Long As The Community Spouse Lives – Not Merely While The Institutionalized Spouse Lives.

The overarching purpose of the Medicaid provisions of MCCA was to "end spousal impoverishment,"[9] not merely delay it. The "income-first" interpretation of the statute does nothing to serve that purpose. Instead, it causes the rapid depletion of resources that could guarantee an income stream for the *life* of the community spouse. Under income-first, the institutionalized spouse cannot actually transfer income to the community spouse before Medicaid eligibility is established because the institutionalized spouse needs that income to pay the nursing home bill. In virtually all cases the institutionalized spouse's income is insufficient to pay the nursing home bill. The resources that should be saved in order to generate a permanent income stream for the community spouse are spent covering the shortfall on the nursing home bill when the income-first rule is applied. Therefore, the imputed "transfer" of income from the institutionalized spouse that is assumed under the income-first rule is fictional because Medicaid eligibility is precluded by the income-first rule.

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[9] H.R. Rep. No. 100-105(II), 69 (1988) 1988 U.S.C.C.A.N. at 857, 892.

Further, once the couple's resources have been depleted so that the institutionalized spouse is eligible for Medicaid, spousal impoverishment is *temporarily* averted. After Medicaid eligibility is established, a portion of the institutionalized spouse's income becomes available to the community spouse. However, if the institutionalized spouse dies, the income stream from the institutionalized spouse is often reduced or, in many cases, terminated. By that point the resources which would earlier have been available to generate income for the community spouse are spent. The community spouse's income is permanently reduced.

The Blumers' case underscores the point. If Irene predeceases Burnett, the income stream from her will terminate immediately. Burnett will not be entitled to a survivor's benefit because his Social Security payment exceeds that of his spouse. (Pet. App. at 25a.) Burnett would have been entitled to a survivor's benefit from his spouse's pension only if Irene had died before the 10 year guarantee period expired – which was in 1998. (R. Doc. 4 at 83-84.) The reality is that when Irene dies her income dies too.

It was not the purpose of MCCA to end spousal impoverishment while creating "*surviving spouse* impoverishment." Indeed, the purpose of the program, as declared by HHS' own website, is to ensure that "community spouses are able to *live out their lives* with independence and dignity." *See* HHS website at http://hcfa.hhs.gov/medicaid/obs10.htm (emphasis added). The resource-first rule serves the overarching legislative policy behind these crucial protections, to "end spousal

impoverishment," including impoverishment of widows and widowers.

b. The Resource-First Rule Serves The Specific Remedial Purpose Of § 1396r-5(e)(2)(C).

As petitioner aptly noted, § 1396r-5(e)(2)(C) is a remedial provision of the statute. (Pet'r. Br. at 9.) As a general rule, remedial legislation is to be construed broadly, rather than narrowly, so as to give effect to its remedial purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The resource-first rule serves the remedial purpose of the statute admirably. It makes people eligible who would otherwise be ineligible: institutionalized spouses whose community spouses' income happens to be generated by savings rather than by Social Security, pensions, annuities or employment. Finally, by accelerating the time when eligibility occurs, resource-first allows the remedial post-eligibility income provisions to *actually* attach, rather than *fictionally* attach.

By contrast, the income-first rule helps no couple who would not also be helped by the resource-first rule and remedies nothing. At its best, income-first is neutral.[10] In most cases, as in the Blumers', income-first actually serves to deny eligibility – thereby requiring the couple to spend additional assets and income on nursing

[10] It is neutral in cases where the community spouse's income, even when combined with the imputed institutionalized spouse's income, is insufficient to raise the community spouse's income to the MMMNA. The resource-first rule would apply equivalently to this situation.

home care. In *no* case does the income – first rule accelerate eligibility or make someone eligible who would otherwise be ineligible. The United States frankly acknowledges the non-remedial nature of income-first: "In general, the income-first method makes it less likely that the CSRA will be increased . . . ." (U.S. Br. at 9.) Income-first is nothing more than a tool developed by the states and CMS to unfairly shift the costs of the Medicaid program from the government to the community spouse. It undercuts the specific remedial purpose for which § 1396r-5(e)(2)(C) was enacted.

c. The Hearing Under § 1396r-5(e)(2)(C) Is An Eligibility Hearing, Not An "Anticipatory Hearing."

Another argument now offered by petitioner is that the hearing contemplated by § 1396r-5(e)(2)(C) is "anticipatory." (Pet'r. Br. at 29.) Although the argument is lengthy its essence is found in one sentence: "Neither the language of § 1396r-5(b) and (c) nor the purpose of the subsection (e)(2)(C) hearing compel the conclusion that the hearing officer cannot consider potential income transfers from the community spouse." (Pet'r. Br. at 30.) This argument is nothing more than petitioner's "income-first rule is not prohibited" argument in a change of clothes. It has already been refuted. *Supra* at 19-22.

Moreover, petitioner's characterization of this hearing as "anticipatory" is plainly wrong. Petitioner would have this Court believe that a hearing under § 1396r-5(e)(2)(C) is some kind of crystal ball proceeding where a hearing examiner scrutinizes a couple's situation

and makes predictions about their future after Medicaid eligibility has been established. This characterization puts the proverbial cart before the horse.

In actuality, the hearing under § 1396r-5(e)(2)(C) is all about the *present*. It is about becoming Medicaid eligible – not at some future date, but right then and there. In order to get to the hearing the spouse or couple must apply, have a resource allowance determination made, and be denied because of excess assets. 42 U.S.C. § 1396r-5(e)(2)(A). The institutionalized spouse is appealing a negative eligibility determination with the intent of overturning it. Even if the applicant proves facts at the hearing that establish the need for a substituted resource allowance, if the couple's resources exceed the substituted amount, eligibility will be denied and the request for hearing simply dismissed. Nothing in § 1396r-5(e)(2)(C) or state practice contemplates that the applicant will be awarded a substituted or "advisory" CSRA upon which the applicant can rely at some future date. Rather, the applicant must reapply when eligibility seems likely. Another denial is issued. Another hearing is requested and another attempt to establish the couple's need for a substituted allowance is made. The hearing is not a continuation of the earlier hearing, but an entirely new proceeding.

In summary, the eligibility determination concerns whether the couple's present income and resources *without* Medicaid satisfy the relevant eligibility criteria – not whether the couple's situation *with* Medicaid would satisfy those eligibility criteria.

d. Under Resource-First Couples Pay Their "Fair Share" Before Seeking Medicaid

The resource-first rule was enacted both to end spousal impoverishment for those community spouses unlucky enough to retain title to few or none of the couples' assets and to end the unjust enrichment of those community spouses lucky enough to retain title to most or all of the couples' assets. The legislative history describes the balance sought between these two extreme situations when it states that a community spouse should be allowed to keep "a sufficient – but not excessive – amount of income and resources." H.R. Rep. No. 100-105(II) at 65, 1988 U.S.C.C.A.N. at 888. When the House Energy and Commerce Committee used the phrase "but not excessive," it was *not* in reference to a discussion or debate about the resource-first rule. Rather, it was in the context of the arbitrary enrichment of a pre-MCCA "lucky spouse." MCCA ended both the pauperization of unlucky spouses and the arbitrary enrichment of lucky ones by equalizing the treatment of all couples, regardless of how their assets happened to be titled. Congress wanted to make sure that couples who had paid nothing under the old rules were required to pay their "fair share" under the new law.

Even if the term "excessive" is applied post-MCCA, however, it is clear that resource-first does not protect an "excessive" amount of resources. Under the resource-first rule the sufficiency of the resources is measured by their ability to generate income up to the MMMNA. Resources exceeding that amount are considered "excessive" and are not protected. That "excess" is the "fair share" that

couples must expend before seeking assistance from Medicaid. The sufficiency is also limited by the amount of resources the couple actually has at the time of the Medicaid application.

Again, the Blumers' situation illustrates the point. When Irene went into the nursing home the Blumers' had $144,000 in savings. When Irene applied for Medicaid they had less than $90,000 left. Under resource-first they could preserve what remained of their assets, less than $90,000. The additional $55,000 was "excessive" and had to be spent before Irene could become eligible for Medicaid. It is difficult to understand how a couple who expends $55,000 of their savings, plus an untold amount of their income on nursing home care over two years can be portrayed as not having paid their "fair share."

Moreover, the Blumers' contribution does not end when their excess resources are exhausted. A greater amount of Irene's monthly income is available to pay to the nursing home under resource-first than would be available under income-first. Under resource-first Irene's post-eligibility allocation of income to Burnett is reduced to a mere $24.55 because the substituted CSRA makes up most of the shortfall between Burnett's monthly income and the MMMNA. This leaves over $1,200 of Irene's income to pay the nursing home. Under resource-first the Blumers continue to pay their "fair share" each and every month.

e. The Cooperative Federalism Of MCCA Allows States Flexibility To Set The MMMNA And The Standard CSRA, But Grants States No Discretion To Create New Rules For Determining Income.

It is important to note that neither petitioner nor the United States disputes that the resource-first rule is consistent with the statutory language. Instead, they assert that the language also allows states to adopt *either* resource-first or income-first, despite the fact that these different interpretations lead to radically different results. But there is no indication that Congress intended to give states such discretion in construing "community spouse's income" or to permit widely divergent standards regarding what constitutes income. Indeed, the statute's mandate that the SSI methodologies must be followed shows that Congress sought to impose uniform rules for making these determinations.

The notion that Congress meant to authorize income-first is further belied by the fact that when Congress wanted states to have discretion in eligibility determinations, it delegated that discretion explicitly. As previously discussed, Congress gave states enormous discretion in establishing the MMMNA and the standard CSRA amounts. *Supra* at 5. Congress did so explicitly and carefully by describing in great detail the floor and ceiling amounts within which States could set these amounts. By setting the MMMNA and the CSRA amounts, a state has the ability, without resorting to the tortured income-first interpretation, to both limit the resources a couple may retain and determine for itself the amount it considers

sufficient for a community spouse to maintain independence within its own borders.

Thus, even though the language of the statute precludes states from using the income-first rule to limit eligibility, states still retain ultimate control over the costs associated with these provisions. A state that sets its MMMNA at a low level will severely restrict the applicability of resource-first. Fewer resources are needed to generate a low MMMNA. The CSRA has a similar effect. By setting its standard CSRA lower a state forecloses community spouses who have high incomes from automatic resource protection. Further, a lower standard CSRA compels an applicant to go through the arduous hearing process before being allowed to preserve sufficient resources.[11] Once a state has determined for itself what amount is sufficient to maintain the independence of a community spouse, resource-first guarantees that the community spouse will receive this amount throughout life, not until the institutionalized spouse dies.

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[11] Wisconsin is an example of a state that has exercised this discretion on two occasions. In 1989 it raised its minimum CSRA. 1989 Wisconsin Act 81, §§ 1 and 2. In 1995 it lowered both its minimum CSRA and its MMMNA. 1995 Wisconsin Act 27, §§ 3003, 3005(d). Wisconsin could further reduce these two numbers if it so chose. For example Wisconsin could reduce its MMMNA by $528.75, thereby immediately restricting the applicability of resource-first to community spouses with incomes less than that amount. Had Wisconsin's MMMNA been even $100 lower in 1997 the Blumers' ability to even raise a resource-first claim would have been foreclosed.

B. EVEN IF THIS COURT FINDS § 1396r-5(e)(2)(C) TO BE AMBIGUOUS AND THEREFORE SUBJECT TO INTERPRETATION, THE ONLY REASONABLE INTERPRETATION IS RESOURCE-FIRST.

Even if this Court finds the term "community spouse's income" to be ambiguous it should affirm the decision below because Wisconsin's income-first rule is not a reasonable interpretation of that term in light of the statute's objectives, language concerning income determinations, and legislative history.

1. The Conference Committee Ultimately Adopted The Resource-First Rule, Albeit In A Different Form Than Contained In The Senate Or House Bills.

Petitioner and courts which have adopted the income-first interpretation have focused on one small part of the drafting history of MCCA to support income-first. They have seized upon the MCCA Conference Committee's decision not to adopt a Senate provision defining "excluded resources" as those necessary "to produce income that is available to the community spouse . . . up to the limits established by this section [the MMMNA]." See H.R. Conf. Rep. No. 100-661 at 263, 1988 U.S.C.C.A.N. at 1041. Income-first proponents claim that this deletion is indicative of Congress' intent to reject resource-first. *See, e.g. Cleary I*, 959 F.Supp. 222, 233; *Cleary II*, 167 F.3d 801, 811; *Chambers*, 145 F.3d 793, 804. This myopic view ignores what actually happened in the Conference Committee. A comprehensive examination of how the final statutory language in § 1396r-5(e)(2)(C) differed from the

Senate *and House* versions reveals that the Conference Committee did not reject the resource-first rule.

In addition to the language on excluded resources, the Senate version contained a provision for *additional* increases in the CSRA if the community spouse could prove financial duress. H.R. CONF. REP. NO. 100-661 at 264, 1988 U.S.C.C.A.N. at 1042. Further, the House version contained a "choice of law" provision which allowed couples to continue to use pre-MCCA rules if those rules resulted in the protection of a greater amount of resources. H.R. CONF. REP. NO. 100-661 at 260, 1988 U.S.C.C.A.N. at 1038. Thus, both Houses of Congress demonstrated their commitment to couples who were not protected by the standard CSRA determination by providing a way around it. A way involving only resources and *not* a fictional imputation of income from the institutionalized spouse. As the Conference Committee concluded, however, both chambers had accomplished their purposes awkwardly.

The Conference Committee ultimately adopted a compromise bill that accomplished two objectives. First, it eliminated provisions that would have allowed couples to exclude large pools of marital resources. Specifically, the Committee dropped the House's "choice of law" provision and thereby ensured that couples could not preserve *unlimited* amounts of resources. Similarly, the committee deleted the Senate's "resource exclusion" and thereby eliminated the possibility that some community

spouses would, in effect, receive two CSRAs.[12] *See* H.R. CONF. REP. NO. 100-661 at 264, referring to 262, 260, 1988 U.S.C.C.A.N. at 1042 referring to 1040, 1038.

Second, the Conference Committee mandated an expanded CSRA in the event that the standard CSRA was insufficient to generate income up to the MMMNA. The Committee accomplished this by replacing the Senate's "financial duress" resource protection with the provision requiring a hearing examiner to substitute a higher CSRA if the applicant seeks a fair hearing and can prove the need for a higher CSRA.

Ultimately, the compromise bill puts the burden of seeking and proving up the need for a substituted CSRA on the applicant, rather than incorporating it as a routine part of the eligibility determination process handled by the local agency.

Nothing in the legislative history indicates that either the House or the Senate also agreed to allow states to further limit the effect of the substitute CSRA by giving

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[12] The Senate, by treating income-producing resources as "excluded," had removed them from the pool of marital resources available to the couple at time of institutionalization. Apparently, the Senate did not take this into account in its section of the bill that created the standard CSRA because it calculated the standard CSRA based on unexcluded assets. The effect was that some community spouses with lower incomes, but substantial assets would have been able to retain the equivalent of *two* CSRAs – the first through the income-producing exclusion and the second through the application of the standard resource allowance. This unintended effect must certainly have been the main reason for eliminating the income-producing exclusion.

states the option of deeming some of the income of the institutionalized spouse to the community spouse. By focusing on one part of the Conference Committee actions while conveniently ignoring the rest, petitioner and the income-first courts have read far more into the legislative history of MCCA than is supported by the actual record of its enactment.

2. The Legislative History of MCCA Supports The "Resource-First" Rule.

Petitioner and several courts have focused upon the parenthetical phrase in the legislative history "(taking into account any other income attributable to the community spouse)", H.R. CONF. REP. NO. 100-661, p. 267, 1988 U.S.C.C.A.N. at 1045, and cited it as support for the income-first rule. *See, e.g., Cleary I*, 959 F.Supp. 222, 234 ("for the purposes of resource allocation . . . the community spouse monthly income allowance provided for in (d)(1)(B) is certainly 'income attributable to the community spouse' ").

In fact, that statement supports the resource-first rule. The only time the word "attribute" or its derivations is used in reference to income in § 1396r-5 is in the post-eligibility income provision. 42 U.S.C. § 1396r-5(b)(2). In that context the word "attribute" is used to require *separate* treatment of income. The Conference Committee was certainly aware of the way it used the word "attribute" in the statutory language it had just agreed to in the compromise bill. Presumably, the Committee used "attribute" consistently in the legislative history. Read that way,

the word "attribute" leads to the conclusion that Congress intended "community spouse's income" in § 1396r-5(e)(2)(C) to include only the community spouse's individual income from Social Security, pensions, employment, and other sources. The parenthetical phrase was not included in the final statutory language because Congress did not change the preexisting SSI methodology regarding attribution of income.[13]

The petitioner's misinterpretation of this phrase stems from its erroneous view that the terms "deeming" and "attribution" are "closely related concepts." (Pet'r. Br. at 7, n. 7.) Before MCCA the terms were closely related. *See Herweg v. Ray*, 455 U.S. 265, 270 (1982). Not so since MCCA. The income attribution rules in MCCA accomplish precisely the *opposite* result that deeming accomplishes. Under MCCA, attribution results in the separate treatment of a couple's income. Deeming has the effect of commingling it. It is highly unlikely that Congress meant "attribute" to mean "deem" in the legislative history of a law in which Congress was using the word "attribute" to mean the opposite of "deem." Petitioner

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[13] The *only* significant deviation in the statutory language from the legislative history language is the statute's omission of the parenthetical statement "taking into account any other income attributable to the community spouse." All other portions of that legislative history language are clearly included in the statutory language itself, including the earlier parenthetical reference to the relationship between the CSRA and the income generated by it. Thus, the significance of the phrase lies not in its presence in the legislative history, but in its absence from the statute.

and the income-first courts have plainly misread the legislative history surrounding MCCA. A proper reading of the legislative history compels resource-first.

3. No Deference Is Owed The Agency's Income-First Interpretation Because It Is Not Reasonable, Consistent, Thoughtful, Or Persuasive.

The CMS' income-first position is entitled to no deference because the statutory language itself precludes this interpretation. As discussed above, any effort to interpret the relevant language to permit a "reverse deeming" rule is inconsistent with the statutory language and mandate that income determinations be governed by the same rules used in the SSI program. Because the income-first interpretation is inconsistent with the statute, the agency's claim that it is a permissible interpretation is not entitled to deference. *Brown v. Gardner*, 513 U.S. 115, 122 (1994); *Doe v. Steelworkers*, 494 U.S. 26, 41-43 (1990).

Even if this Court believes that a gap exists, the income-first interpretation is entitled to no deference under either *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944) because an interpretation of a statute that frustrates the purpose of an Act is not reasonable, persuasive, or thoughtful. As amply demonstrated, MCCA was enacted to grant the community spouse financial independence both during the institutionalization of his or her spouse and after the death of that spouse. Congress required the resource-first rule because it was the best

method by which to guarantee this ongoing independence. The "deeming provision" in 42 U.S.C. § 1396a(a)(17) was specifically superseded by § 1396r-5(a)(1) of MCCA in order to accomplish this goal. As a result, CMS simply cannot speak with the force of law on this issue, and no *Chevron* deference is warranted. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001).[14]

To the extent that CMS retains any policy-making authority under the "deeming provision," it is limited to a determination of what income is "available *to* the applicant or recipient." 42 U.S.C. § 1396a(a)(17)(B),(D) (emphasis added). Because 42 U.S.C. § 1396r-5(b)(1) specifically prohibits deeming to an institutional spouse the only possible authority remaining under § 1396a(a)(17) is to establish policies on deeming to *non*-institutionalized applicants or recipients.[15]

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[14] The recent regulation proposed by CMS supporting the income-first interpretation is entitled to no *Chevron* deference because it relies upon the superseded deeming provision of 42 U.S.C. § 1396a(a)(17) for policy making authority. 66 Fed. Reg. 46763 (proposed September 7, 2001) to be codified at 42 C.F.R. § 431.260.

[15] Further, if this Court finds that the Secretary retains some authority to speak with the force of law on this issue, the income-first interpretation is nonetheless impermissible because it causes applicants who would be eligible for benefits to be ineligible in violation of 42 U.S.C. § 1396a(r)(2). Section 1396a(r)(2) was necessary in the first place because the Secretary had consistently misinterpreted the applicability of SSI methodologies to Medicaid. *Supra.* at 25 n.7. Thus, contrary to United States' assertion that the "need for the Secretary's expertise is at its apogee" in this case (U.S. Br. at 21), it would actually appear that the need for that expertise is at its nadir.

The agency statements cited by petitioner as support for income-first do not reflect the reasonable, consistent, thoughtful or persuasive analysis that is necessary to justify deference under *Skidmore*. *See Mead*, 121 S.Ct. at 2172 quoting *Skidmore*, 323 U.S. at 140. Indeed, the opinion letters issued by the HCFA Chicago regional office reflect inconsistent positions and a paucity of analysis. In its first December 1993 letter, the HCFA Chicago regional office posits § 1396r-5(e) to *require* the income-first interpretation. (Pet. App. at 83a.) In the March 1994 letter, the regional office rescinds its earlier letter, stating that the first letter was based on a misplaced reliance on provisions of the HCFA State Medicaid Manual requiring the income-first interpretation. The letter describes the relied-upon section of the manual as a "derived" policy not required by the Social Security Act. The letter ultimately concludes that until regulations are promulgated, a state Medicaid plan will not be considered out of compliance with federal standards whether the state uses an income-first or a resource-first approach. (Pet. App. at 84a-86a.) The lack of consistency in the agency's position is further demonstrated by the fact that, since 1994, when the agency adopted the position that either method is permissible, the State Medicaid Manual continues to require income-first.

Finally, CMS' position is not thoughtful or persuasive. Rather, its position is a neutral, hands-off position. A careful reading of the letters relied upon by petitioner shows that the agency did not undertake any analysis of the statute itself. The letters simply reassure states that, until regulations are promulgated, states may continue under either method without fear that federal monies

would be withheld. In this case, the CMS and its predecessor, HCFA, failed to analyze the statute or address this issue for over 12 years. An agency position to postpone consideration of an issue is neither thoughtful nor persuasive.

CONCLUSION

The Court should affirm the decision of the Wisconsin Court of Appeals in all respects.

Respectfully Submitted,

MITCHELL HAGOPIAN
Counsel of Record
WISCONSIN COALITION FOR ADVOCACY
16 N. Carroll St.
Madison, WI 53703
(608) 267-0214

EVA SHIFFRIN
SARAH ORR
ELDER LAW CENTER
COALITION OF WISCONSIN AGING GROUPS
2850 Dairy Drive, Suite 100
Madison, WI 53718-6751
(608) 224-0660

Attorneys for Respondent,
Irene Blumer

APPENDIX

Section 42 U.S.C. § 1396a(r) provides in pertinent part:

(r) Disregarding payments for certain medical expenses by institutionalized individuals

* * *

(2)(A) The methodology to be employed in determining income and resource eligibility for individuals under subsection (a)(10)(A)(i)(III), (a)(10)(A)(i)(IV), (a)(10)(A)(i)(VI), (a)(10)(A)(i)(VII), (a)(10)(A)(ii), (a)(10)(C)(i)(III), or (f) of this section or under section 1396d(p) of this title may be less restrictive, and shall be no more restrictive, than the methodology –

(i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under subchapter XVI of this chapter, or

(ii) in the case of other groups, under the State plan most closely categorically related.

(B) For purposes of this subsection and subsection (a)(10) of this section, 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.