

No. A05-2346

STATE OF MINNESOTA
IN SUPREME COURT

In re the Estate of:

Francis E. Barg, a/k/a Francis Edward Barg

**MINNESOTA COMMISSIONER OF HUMAN SERVICES'
AMICUS CURIAE BRIEF, APPENDIX AND ADDENDUM**

LORI SWANSON
Attorney General, State of Minnesota

THOMAS J. MEINZ
Attorney at Law
Atty. Reg. No. 7181X

ROBIN CHRISTOPHER VUE-BENSON
Assistant Attorney General
Atty. Reg. No. 033408X
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714

106 Rum River Drive South, Suite 2
Princeton, MN 55371-1816
(763) 389-1243

ATTORNEY FOR RESPONDENT

ATTORNEYS FOR AMICUS CURIAE
COMMISSIONER OF HUMAN
SERVICES

JULIAN J. ZWEBER
Atty. Reg. No. 120294
1360 Energy Park Drive, Suite 310
St. Paul, MN 55108-5252
(651) 646-4354

JANICE S. KOLB
Mille Lacs County Attorney

ATTORNEY FOR AMICUS CURIAE
ELDER LAW SECTION AND
NATIONAL SENIOR CITIZENS LAW
CENTER

DAWN R. NYHUS
Assistant Mille Lacs County Attorney
Atty. Reg. No. 0329733
Courthouse Square
535 2nd Street Southeast
Milaca, MN 56353
(320) 983-8305

ATTORNEYS FOR APPELLANT

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	III
LEGAL ISSUES.....	1
INTEREST OF THE COMMISSIONER.....	2
ARGUMENT	7
I. MINNESOTA’S LAW REQUIRING RECOVERY FROM THE ESTATE OF A NON-RECIPIENT SPOUSE IS CONSISTENT WITH FEDERAL LAW.....	7
A. Rigorous Presumptions Favoring The Co-Existence Of State And Federal Laws Must Be Overcome Before A State Law Is Preempted By A Federal Law.....	7
B. Decisions Finding Preemption, Relied Upon By The Estate And Its Amici, Are Based On Flawed Reasoning.....	8
II. FEDERAL MEDICAID LAW DOES NOT PREEMPT THE SCOPE OF MINNESOTA’S SPOUSAL RECOVERY PROVISIONS.....	14
A. Preemption By The Phrase “To The Extent Of Such Interest” Is Not Supported By The Circumstances Leading To Its Inclusion In The Federal Statute.....	15
B. Congress Intended To Leave States Wide Latitude In Developing And Defining Their Medicaid Estate Recovery Programs.....	18
1. Congress adopted the Senate’s proposed estate recovery amendments that were grounded in federalism’s allowance of individual state autonomy within least restrictive federal boundaries, eschewing a uniform national program.....	18
2. The OBRA 1993 amendments did not displace the traditional police powers of states in the area of recovery of public welfare benefits.....	24
C. No Conflict Exists Between Minnesota’s Spousal Recovery Provisions And Federal Law.....	25
1. Compliance with both federal and state law is possible.....	26
2. Minnesota law furthers federal objectives.....	27
III. RECOVERY FROM THE ENTIRETY OF MARITAL PROPERTY AND JOINTLY OWNED PROPERTY IS CONSISTENT WITH HOW MEDICAID TREATS THE RESOURCES OF SPOUSES.....	28

IV.	FEDERAL APPROVAL OF STATE MEDICAID PLANS DEMONSTRATES THAT MINNESOTA'S ESTATE RECOVERY LAW DOES NOT CONFLICT WITH FEDERAL LAW OR OBJECTIVES.....	33
A.	Deference Must be Given To Federal Interpretations And Applications Of Medicaid Statutes.	33
1.	Congress delegated the administration and interpretation of Medicaid laws to the Secretary of Health & Human Services.....	33
2.	The Secretary's interpretations of Medicaid laws must be given deference.	35
B.	CMS Approval Of State Plans With Express Spousal Recovery Provisions Requires A Holding Of No Preemption.	37
C.	The Secretary has specifically approved Minnesota's State Plan And Is Fully Aware Of Minnesota's Estate Recovery Law At Issue, And Has Taken No Compliance Action Against Minnesota.	39
	CONCLUSION	41

APPENDIX

ADDENDUM

TABLE OF AUTHORITIES

	Page
MINNESOTA CASES	
<i>Dimke v. Finke</i> , 295 N.W. 75 (Minn. 1940).....	21
<i>In re Estate of Barg</i> , 722 N.W.2d 492 (Minn.Ct.App. 2006).....	5, 14, 15
<i>In re Estate of Eggert</i> , 72 N.W.2d 360 (Minn.1955)	24
<i>In re Estate of Gullberg</i> , 652 N.W.2d 709 (Minn.Ct.App. 2002)	14, 15
<i>In re Estate of Jobe</i> , 590 N.W.2d 162 (Minn.Ct.App) rev. denied (Minn. 1999). 21, 25, 31	
<i>In re Estate of O’Keefe</i> , 354 N.W.2d 531 (Minn.Ct.App. 1985)	25
<i>In re Estate of Turner</i> , 391 N.W.2d 767 (Minn. 1986)	3, 12
<i>Northern Pac. Ry. Co. v. City of Duluth</i> , 67 N.W.2d 635 (Minn. 1955).....	10, 12
<i>State ex rel. Olsen v. Bd of Control of State Institutions</i> , 88 N.W. 533 (Minn. 1902).....	10
<i>State v. First Nat’l Bank of St. Paul</i> , 313 N.W.2d 390 (Minn. 1981)	7
FEDERAL CASES	
<i>Alaska Dep’t of Health & Social Servs.</i> , 424 F.3d 931 (9th Cir. 2005)	36
<i>Atkins v. U.S.</i> , 477 U.S. 154 (1986).....	2
<i>California Fed. Sav. & Loan Ass’n v. Guerra</i> , 479 U.S. 272, 284 (1987).....	15, 17
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> ,	
467 U.S. 837 (1984)	36, 37
<i>Citizens Action League v. Kizer</i> , 887 F.2d 1003 (9th Cir. 1989)	14, 16, 22
<i>Cnty Health Ctr. v. Wilson-Coker</i> , 311 F.3d 132 (2d Cir. 2002)	38, 40
<i>Downhour v. Somani</i> , 85 F.3d 261 (6th Cir. 1996).....	24
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963).....	7

<i>Indiana Ass'n of Homes for the Aging, Inc. v. Indiana Office</i> <i>of Medicaid Policy & Planning</i> , 60 F.3d 262 (7th Cir. 1995).....	38
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996).....	8, 24
<i>New York Dep't of Social Servs. v. Dublino</i> , 413 U.S. 405 (1973).....	25
<i>New York v. United States</i> , 505 U.S. 144, 167-68 (1992).....	23
<i>Perry v. Dowling</i> , 95 F.3d 231, 236 (2d Cir. 1996)	35
<i>Pharm. Research & Mfrs. of Am. v. Thompson</i> , 362 F.3d 817 (D.C. Cir. 2004)	35
<i>Pharm. Research & Mfrs. of Am. v. Walsh</i> , 538 U.S. 644	7
<i>Philbrook v. Glodgett</i> , 421 U.S. 707 (1975)	8
<i>Rice v. Norman Williams Co.</i> , 458 U.S. 654 (1982)	7
<i>Rice v. Sante Fe Elev. Corp.</i> , 331 U.S. 218 (1947).....	25
<i>Schweiker v. Gray Panthers</i> , 453 U.S. 34, 43 (1981)	28, 35
<i>Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp.</i> , 320 U.S. 344 (1943).....	11, 12
<i>Shalala v. Guernsey Mem'l Hosp.</i> , 514 U.S. 87 (1995).....	36
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994)	38
<i>West Virginia v. Thompson</i> ,	
475 F.3d 204 (4th Cir. 2007).....	33, 35, 38
<i>West Virginia v. U.S. Dep't of Health & Human Servs.</i> ,	
289 F.3d 281 (4th Cir. 2002).....	22, 33
<i>West Virginia v. U.S. Dep't of Health & Human Servs.</i> ,	
132 F. Supp.2d 437 (S.D.W.Va. 2001)	3
<i>Wisconsin Dep't of Health & Family Servs. v. Blumer</i> ,	
534 U.S. 473 (2002)	1, 28, 33, 37

OTHER STATE CASES

Bonta v. Burke, 120 Cal. Rptr.2d 72 (Cal. Ct. App. 2002)..... 3

Hines v. Dep't of Pub. Aid, 850 N.E.2d 148 (Ill. 2006) 8, 9

In re Barkema Trust, 690 N.W.2d 50 (Iowa 2004). 2

In re Estate of Budney, 541 N.W.2d 245 (Wis.Ct.App. 1995)..... 8, 9

In re Estate of Davis, 442 N.E.2d 1227 (N.Y. 1982) 5

In re Estate of Smith, No. M2005-01410-COA-R3-CV,
2006 WL 3114250 (Tenn.Ct.App. Nov. 1, 2006) 8, 9

In re Estate of Thompson, 586 N.W.2d 847 (N.D. 1998) 6

Kizer v. Hanna, 767 P.2d 679 (Cal. 1989) 3, 4, 5

Olszewski v. Scripps Health, 69 P.3d 927 (Cal. 2003)..... 7

MINNESOTA STATUTES & RULES

Minn. R. 9505.0135, subp. 4 2

Minn. Stat. §256B.04 2

Minn. Stat. §256B.15, subd. 1 3

Minn. Stat. §256B.15, subd. 1a 2, 3

Minn. Stat. §256B.15, subd. 2 3, 39

Minn. Stat. §645.17 6

Minn.Stat. §256B.15 2

FEDERAL STATUTES & RULES

26 U.S.C. §2045 29

26 U.S.C. §2051 29

42 C.F.R. §430.14 34

42 C.F.R. §430.15	33, 34, 38
42 C.F.R. §430.32	35
42 C.F.R. §430.35	35
42 U.S.C. §1396	11, 23, 33
42 U.S.C. §1396a(a)	28, 33, 34
42 U.S.C. §1396a(b).....	34
42 U.S.C. §1396c	34
42 U.S.C. §1396p(b).....	passim
42 U.S.C. §1396p(c).....	30
42 U.S.C. §1396p(e).....	30
42 U.S.C. §1396r-5.....	28, 29
Centers for Medicare & Medicaid Services, State Medicaid Manual §13025.....	34

LEGISLATIVE MATERIALS

H.R. 2264, 103rd Cong. §5102 (1993).....	20
H.R.2138, 103rd Cong. §5112 (1993).....	19, 20, 22
H.R.2264, 103rd Cong. §13612 (1993).....	20
H.R.Rep. No.100-105 (1988), <i>as reprinted in 1988 U.S.C.C.A.N.</i> 857	28
H.R.Rep. No.103-111 (1993); <i>as reprinted in 1993 U.S.C.C.A.N.</i> 378.	20
H.R.Rep. No.103-213 (1993), <i>as reprinted in 1993 U.S.C.C.A.N.</i> 1088 (Conf.Rep.)... 20, 22	

Medicare and Medicaid Budget Reconciliation: Hearing Before the

Subcomm. on Health and the Environ. of the House Comm.

<i>on Energy and Commerce, 103rd Cong. (1993)</i>	22
---	----

P.L. 103-66 §13612 (1993)	14
---------------------------------	----

S.1134, 103rd Cong. §7421 (1993).....	20
S.Rep. No. 86-1856 (1960), <i>as reprinted in 1960 U.S.C.C.A.N.</i> 3608.....	12, 23
S.Rep. No.89-404 (1965), <i>as reprinted in 1965 U.S.C.C.A.N.</i> 1943.....	24
OTHER AUTHORITIES	
2B Norman J. Singer, <i>Sutherland Statutory Construction</i> §56.01 (5th ed. 1992).....	6
Burton D. Dunlop, <i>et al.</i> , <i>Medicaid Estate Planning And Implementation of OBRA '93 Provisions In Florida: A Policy Context</i> , 19 Nova L.Rev. 533 (1995).....	21
David C. Baldus, <i>Welfare As A Loan</i> , 25 Stan. L.Rev. 123 (1973)	24
General Accounting Office, <i>Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs</i> (1989).....	passim
Idaho Medicaid State Plan, Transmittal No. 01-006, §4.17-A.....	38
Indiana Medicaid State Plan, Transmittal No. 05-012, §4.17-A.....	38
John A. Miller & Jeffrey A. Maine, <i>Fundamentals of Estate Tax Planning</i> , 32 Idaho L.Rev. 197 (1996).....	29
M. Ann Miller, <i>Your Money For Your Life: A Survey and Analysis of Medicaid Estate Recovery Programs</i> , 11 T.M. Cooley L.Rev. 585 (1994).....	21
Michael H. Armacost, Forward, in <i>Medicaid and Devolution: A View From the States</i> (Frank J. Thompson & John J. DiIulio, Jr., eds., 1998).....	23
Minnesota Medicaid State Plan, Transmittal No. 06-10, §4.17-A	39
North Dakota Medicaid State Plan, Transmittal No. 95-016, §4.17-A	38
Office of Inspector General, U.S. Dept. of Health and Human Services, <i>Medicaid Estate Recoveries: National Program Inspection</i> (1988)	5, 16, 18, 21

U.S. Dep't of Health & Human Servs., Issues In Medicaid Estate Recoveries:

A Report to the United States Congress (1989) 16

U.S. Dep't of Health & Human Servs., *Policy Brief: Spouses of*

Medicaid Long-Term Care Recipients (2005) 29

LEGAL ISSUES

- I. Did Congress intend the phrase “from the individual’s estate” to preclude states from recovering Medicaid benefits from a surviving spouse’s estate?

Sec. & Exch. Comm’n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943)
Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002)
Northern Pac. Ry. Co. v. City of Duluth, 67 N.W.2d 635 (Minn. 1955)

42 U.S.C. §1396p(b)(1)
Minn.Stat. §256B.15, subd. 1a

- II. Did Congress intend its 1993 amendments to the federal Medicaid estate recovery statute to preclude states from recovering Medicaid costs from the entirety of marital property or jointly owned property in a surviving spouse’s estate?

California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272 (1987)
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)

42 U.S.C. §1396p(b)-(c)
Minn.Stat. §256B.15, subd. 2

- III. Medicaid treats all of a married couple’s assets as available for eligibility purposes regardless of formal ownership and penalizes transfers outside of the couple. Do these same principles apply in interpreting whether a state estate recovery law is consistent with Medicaid principles?

Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)

42 U.S.C. §§1396a(a)(17), 1396p(c), 1396r-5

- IV. Should deference be given to a determination by the Federal agency delegated with enforcing Medicaid requirements that Minnesota’s and other states’ plans regarding spousal recovery do not violate federal Medicaid requirements?

Chevron, U.S.A., Inc. v. Natural Resources Def. Coun., Inc., 467 U.S. 837 (1984)
Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)
West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007)
Pharm. Research & Mfrs. of Am. v. Thompson, 362 F.3d 817 (D.C. Cir. 2004)

42 U.S.C. §§1396, 1396a(a)(18), 1396c, 1396p(b)
42 CFR 430.15

INTEREST OF THE COMMISSIONER

The Commissioner of Human Services oversees the Minnesota Department of Human Services (“DHS”), which administers and supervises Minnesota’s Medicaid program (also known as “Medical Assistance”).¹ Minn.Stat. §256B.04, subd. 1 (2006). Medicaid is a cooperative social welfare program combining federal and state funds to pay for medical care for society’s neediest people when their income and resources are insufficient to meet their health care needs. *See Atkins v. U.S.*, 477 U.S. 154, 156 (1986). Medicaid is a payor of last resort, meaning that all other resources should be expended first before Medicaid funds are made available. *In re Barkema Trust*, 690 N.W.2d 50, 55 (Iowa 2004). In the case of beneficiaries age 55 and older, federal and state law require state Medicaid agencies to recoup Medicaid costs through “estate recovery”—post-death claims against estates. 42 U.S.C. §1396p(b) (2000); Minn.Stat. §256B.15 (2006).²

This case is about Minnesota’s ability to fully recover the Medicaid benefits received by a spouse (“recipient spouse”) when recovery is accomplished by filing a claim in the estate of a surviving spouse who did not receive Medicaid benefits (“non-recipient spouse” or “community spouse”). Minnesota requires such a “spousal

¹ The Commissioner and his counsel certify that this brief was authored entirely by counsel for the amicus and that no person or entity other than the amicus made a monetary contribution to the preparation or submission of the brief.

² In Minnesota, either the state or the appropriate county has authority to file an estate claim. Minn.Stat. §256B.15, subd. 1a(c). The state has delegated to counties the primary responsibility for filing claims. *See* Minn.R. 9505.0135, subp. 4 (2005).

recovery” claim,³ limiting it only by “the value of the assets of the [non-recipient spouse’s] estate that were marital property or jointly owned property at any time during the marriage.” Minn.Stat. §256B.15, subd. 2. This requirement reflects Minnesota’s policy that “individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program.” Minn.Stat. §256B.15, subd. 1(a).

The Commissioner’s interest in an effective and robust Medicaid estate recovery program is both significant and public in nature. This Court has recognized that estate recovery is not only legitimate, but “serves a very important purpose. It is a system whereby money paid to qualified individuals for health care purposes may be recovered and reused to help other similarly situated persons.” *In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986). The California Supreme Court has similarly concluded that Medicaid estate recovery “provide[s] an equitable and reasonable method of easing the state’s financial burden.” *Kizer v. Hanna*, 767 P.2d 679, 681 (Cal. 1989). The very important purpose of recovering funds to be used to help other needy individuals is best achieved by allowing the maximum possible recovery. *Bonta v. Burke*, 120 Cal. Rptr.2d 72, 76 (Cal.Ct.App. 2002); *see also West Virginia v. U.S. Dep’t of Health & Human Servs.* (“*West Virginia I*”), 132 F. Supp.2d 437, 440 (S.D.W.Va. 2001) (noting that requiring estate recovery reflects Congress’s “salutary purpose of maximizing the amount of money available” for Medicaid).

³ Minn.Stat. §256B.15, subd. 1a.

Estate recovery claims such as the one in this case are significant for Medicaid. The federal General Accounting Office estimates that estate recoveries from recipient homeowners or their surviving spouses could defray 68% of Medicaid costs for those recipients. General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs*, at 4 (1989) (“GAO, *Medicaid Recoveries*”). In this case, the property in the estate available for recovery is enough to recover all of the Medicaid costs for Dolores Barg’s care.

The Commissioner’s public interest in robust estate recovery is also grounded in the equitable role of ensuring recovery to prevent the enrichment—at public expense—of private heirs. This Court observed in *Turner* that “[t]he actual interested parties [in opposing estate recovery] are the disappointed nondependent devisees, legatees, and heirs of the estate”—not the Medicaid recipient or her spouse. 391 N.W.2d at 770. Likewise, the California Supreme Court in *Hanna* explained that Medicaid estate recovery “prevents the heirs of Medi[caid] recipients from unfairly benefiting from the program.” 767 P.2d at 681. That court explained that, “but for Medi[caid], a recipient would probably have to sell his home in order to obtain the funds with which to pay for medical care. As a result of not having to sell his home, the estate of a deceased Medi[caid] recipient is greater than it might otherwise be. The [Medicaid estate recovery provisions] thus seek from the estate only that which would not have existed but for the Medi[caid] program.” *Id.* (emphasis in original). The existence of Medicaid, the *Hanna* court concluded, means

“the heirs are not required to bear the full burden of the recipient’s medical care during the recipient’s lifetime.” *Id.* at 681-82.

The Court of Appeals’ invalidation of the full scope of Minnesota’s estate recovery law substantially reduces recovery. *In re Estate of Barg*, 722 N.W.2d 492, 497 (Minn.Ct.App. 2006) (limiting recovery on a \$108,000 claim to \$60,400 from estate with \$146,000 in assets). This reduction harms the public interest in Medicaid estate recovery. Recoveries from the estates of non-recipient spouses are often the most significant recoveries in terms of paying claims in full. They account for a significant part of overall estate recoveries. For example, in Ramsey County recovery from the estates of non-recipient spouses averaged 21.7 per cent of estate recoveries in fiscal years 2005 and 2006.⁴

Moreover, the reduction in recovery caused by *Barg* does not benefit non-recipient spouses. Neither spouse is affected by recovery during his or her lifetime. *See In re Estate of Davis*, 442 N.E.2d 1227, 1229 (N.Y. 1982). Rather, any reduction in recovery only benefits the private interests of heirs who, because of Medicaid, were “not required to bear the full burden of the recipient’s medical care during the recipient’s lifetime.” *Hanna*, 767 P.2d at 682; *see also* Office of Inspector General, U.S. Dept. of Health and Human Services, *Medicaid Estate Recoveries: National Program Inspection 50* (1988)

⁴ Minnesota estate recoveries totaled \$17 million, \$16 million, and \$17.69 million in fiscal years 2004, 2005, and 2006, respectively.

(HHS, *National Program Inspection*) (assets retained in the absence of estate recovery pass to heirs at the expense of taxpayers).

The Court of Appeals' interpretation of federal law to preempt Minnesota's Medicaid estate recovery law thus violates a fundamental convention of statutory construction: that legislatures are presumed to favor the public interest over a private interest. Minn.Stat. §645.17(5) (2006). Indeed, “where a public interest is affected, an interpretation is preferred which favors the public. A narrow construction should not be permitted to undermine the public policy sought to be served.” *In re Estate of Thompson*, 586 N.W.2d 847, 849 (N.D. 1998) (quoting 2B Norman J. Singer, *Sutherland Statutory Construction* §56.01 (5th ed. 1992)).

ARGUMENT

I. MINNESOTA'S LAW REQUIRING RECOVERY FROM THE ESTATE OF A NON-RECIPIENT SPOUSE IS CONSISTENT WITH FEDERAL LAW.

A. Rigorous Presumptions Favoring The Co-Existence Of State And Federal Laws Must Be Overcome Before A State Law Is Preempted By A Federal Law.

Those challenging a state law must overcome a number of presumptions against preemption. They carry a heavy burden of proving that Congress clearly intended to preempt the law in question. See *Olszewski v. Scripps Health*, 69 P.3d 927, 939 (Cal. 2003); *State v. First Nat'l Bank of St. Paul*, 313 N.W.2d 390, 392 (Minn. 1981). Courts presume that the state statute is valid. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-62 (2003). Moreover, “[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute.” *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Any conflict with federal law must be clear and substantial before preemption can invalidate the state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).

Specifically, in interpreting a federal law authorized by the Spending Clause, like the Medicaid program, “Congress must unambiguously state that it is imposing an obligation and clearly define the scope of that obligation. In light of this need for congressional clarity and the presumption against preemption, *any ambiguity in the Medicaid statutes and regulations must be construed against preemption.*” *Olszewski*, 69 P.3d at 940 (emphasis added).

Finally, “[t]he purpose of Congress is the ultimate touchstone in every preemption case. As a result, any understanding of the scope of a preempt[ing] statute must rest primarily on a fair understanding of *congressional purpose*.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quotation marks and citations omitted, emphasis in original). Congress’s intended purpose is construed primarily from a statute’s language and its broader statutory framework. *Id.* at 486. Yet, in interpreting the statute, a court “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. [The court’s] objective . . . is to ascertain the congressional intent and give effect to the legislative will.” *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

B. Decisions Finding Preemption, Relied Upon By The Estate And Its Amici, Are Based On Flawed Reasoning.

The Estate has cited *Hines v. Dep’t of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006), *In re Estate of Budney*, 541 N.W.2d 245 (Wis.Ct.App. 1995), and *In re Estate of Smith*, No. M2005-01410-COA-R3-CV, 2006 WL 3114250 (Tenn.Ct.App. Nov. 1, 2006) (collectively “*Hines, et al.*”). Resp. to Pet. for Rev. at 5. The Estate asserts that those decisions establish that “[u]nder 42 U.S.C. §1396p(b)(1) recovery may be sought from an individual recipient’s estate only. . . . no recovery is allowed against the estate of the surviving spouse.” *Id.* The Estate’s apparent argument is that federal law does not authorize recovery in this case because the claim is being made against the estate of Francis, the surviving spouse, rather than the estate of Dolores, the predeceased Medicaid recipient spouse.

The Estate's reliance on *Hines, et al.*, however, is misplaced. Those decisions employ the identical reasoning that, because section 1396p(b) begins with a general prohibition against recovery, and lists several exceptions, any recovery scenario not strictly within one of the exceptions is prohibited.

Section 1396p(b)(1) provides, in part, that state Medicaid plans shall provide that "No . . . recovery . . . may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals." The three exceptions then describe categories of Medicaid recipients, including the broad category, relevant here, of people who were 55 years old or older when they received Medicaid. 42 U.S.C. §1396p(b)(1)(B). For this category of recipients, each state "shall seek . . . recovery from the individual's estate." *Id.* The other two categories include the same requirement to seek recovery "from the individual's estate." 42 U.S.C. §1396p(b)(1)(A) & (C).

Hines, et al. reason that, because the three excepted categories of recipients all refer to recovery "from the individual's estate," there can be no recovery claim against the estate of a non-recipient spouse. *Hines*, 850 N.E.2d at 153; *Budney*, 541 N.W.2d at 246; *Smith*, 2006 WL 3114250 at *2; accord Estate's Resp. to Pet. for Rev. at 5. This reasoning is that of the maxim "*expressio unius est exclusio alterius*"—"The expression of one implies the exclusion of another." See *Hines*, 850 N.E.2d at 153 ("the enumeration of exceptions in a statute is construed as an exclusion of all other exceptions."). Such

reasoning, however, is flawed when applied to federal Medicaid estate recovery provisions and spousal recovery.

First, as a general principle, this Court has specifically warned against uncritically relying on the *expressio unius* reasoning. In *Northern Pac. Ry. Co. v. City of Duluth*, 67 N.W.2d 635 (Minn. 1955), the Court explained that “[t]his maxim is not of universal application, and great caution is needed in its application.” *Id.* at 638. It further noted that “the maxim is only a rule of construction and not of substantive law and serves only as an aid in discovering legislative intent *when not otherwise manifest.*” *Id.* (emphasis added). The Court has also cautioned that canons of construction, including the *expressio unius* maxim, “are the servants, not the masters, of a court.” *State ex rel. Olsen v. Bd of Control of State Institutions*, 88 N.W. 533, 540-41 (Minn. 1902). Using the *expressio unius* reasoning in preemption analysis is particularly unwarranted given the heightened emphasis in this analysis on requiring a clear, affirmative expression of intent to preempt a state’s exercise of its police powers. *Expressio unius* reasoning is also of little utility in determining whether the state law is truly an obstacle to a federal purpose based on an entire statutory scheme.

Second, the exceptions listed in section 1396p(b)(1) are the circumstances in which states can seek recovery of benefits paid on behalf of the individuals described in those categories. Each of the three categories repeats the phrase “from the individual’s estate.” Because section 1396p(b)(1) does not expressly state that recovery must be delayed until after the recipient dies, the use of the phrase “from the individual’s estate”

indicates only the *timing* of recovery as occurring post-death. This reading is supported by how Congress phrased the one express limitation on recovery, in the next subsection, as delayed until “after the death of the individual’s *surviving* spouse.” 42 U.S.C. §1396p(b)(2). Thus, the most cogent reading of the phrase “from the individual’s estate” is that it reflects *when* recovery can occur. The phrase cannot be read as unambiguously imposing a further limitation on recovery.

Third, by failing to examine the federal Medicaid estate recovery provision in context, *Hines, et al.* prematurely reached their conclusions. Preemption analysis is about understanding Congressional purpose and the interaction of federal and state laws. Therefore, analysis should not fixate on a single word or phrase. *Hines, et al.* ignored the context and purpose of Medicaid estate recovery, basing their entire analysis on a maxim that is *subordinate* to the doctrine “that courts will construe the details of an act *in conformity with its dominating general purpose*, will read text *in the light of context* and will interpret the text so far as the meaning of the words fairly permits so as *to carry out in particular cases the generally expressed legislative policy*.” *Sec. & Exch. Comm’n v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (emphasis added).

Hines, et al. are incorrect because they ignore the context and dominant purpose of Medicaid in general and estate recovery in particular—erroneously subordinating context and purpose to rigid application of the maxim. The purpose of Medicaid statutes is to help states provide medical assistance to pay for necessary medical services for those without adequate resources of their own. 42 U.S.C. §1396. Estate recovery serves that

purpose by returning funds to use for future Medicaid beneficiaries. *Turner*, 391 N.W.2d at 770. The only general express federal limitation on estate recovery is in its timing. 42 U.S.C. §1396p(b)(2). The purpose of this limitation is only to protect assets for the *lifetime use* of the recipient and her spouse, not to protect inheritances. S.Rep. No. 86-1856 (1960), *as reprinted in* 1960 U.S. Code Cong. Admin. News (“U.S.C.C.A.N.”) 3608, 3616 (stating “[the estate recovery] provision was inserted in order to protect the individual and his spouse from the loss of their property, usually the home, during their lifetime.”).

Hines, et al. are based on formalistic reasoning that ignores the context and purpose of the statute being construed. The U.S. Supreme Court has cautioned against rigid adherence to this maxim at the expense of complete analysis. *Sec. & Exch. Comm’n*, 320 U.S. at 350-51. This Court, too, has rejected application of the *expressio unius* reasoning when the result of the reasoning did not reflect the legislature’s intent. *Northern Pac.*, 67 N.W.2d at 638 (“It does not seem that the legislature could have intended such a result.”).

Fourth, *Hines, et al.*’s reasoning overlooks the key prerequisite for the *expressio unius* reasoning to apply to subsection 1396p(b)(1). The subsection lacks a “series of terms from which an omission bespeaks a negative implication.” *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). The *Echazabal* court explained that “[t]he canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference

that the term left out must have been meant to be excluded.” *Id.* Here, however, “from the individual’s estate” is a solitary term, albeit repeated, and not part of a related list. There is no series “of two or more terms . . . that should be understood to go hand in hand” that gives rise to an inference that by using the phrase “from the individual’s estate,” Congress intended to exclude any recovery from a surviving spouse’s estate. *Cf. Echazabal*, 536 U.S. at 81-82 (noting that plaintiff’s “failure to identify any such established series . . . from which Congress appears to have made a deliberate choice” to omit an element and thereby limit a provision’s scope). The issue here is not whether one of the section 1396p(b)(1) exceptions apply—it is beyond dispute that the age 55 exception applies moving this case beyond the “no recovery” preface to the subsection. Rather, the issue is how to act on the exception—namely whether Congress clearly intended to place any limits on recovery when recovery is made from a surviving spouse’s estate.

II. FEDERAL MEDICAID LAW DOES NOT PREEMPT THE SCOPE OF MINNESOTA'S SPOUSAL RECOVERY PROVISIONS.

Congress did not intend to restrict states by confining estate recovery to the actual recipient's literal probate estate. Nor did Congress intend to limit the scope of a claim against a surviving spouse's estate. As part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"), Congress amended section 1396p(b) to include an expanded estate option. P.L. 103-66 §13612 (1993); *codified at* 42 U.S.C. §1396p(b)(4)(B). The expanded estate option allows states to include in their recoveries "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. §1396p(4)(B). Congress intended the expanded estate option to overrule *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989), which limited estate recoveries to property in common law probate estates.

There is no evidence, however, that Congress intended its amendment, which addressed the *Kizer* decision, to impose a *new* limit on the scope of recovery from marital or jointly-owned property in a surviving spouse's estate. The Court of Appeals, in *In re Estate of Gullberg*, relied on the parenthetical phrase "to the extent of such interest" as the sole basis for finding partial preemption of Minnesota law. 652 N.W.2d 709, 714 (Minn.Ct.App. 2002); *Barg*, 722 N.W.2d at 497 (following *Gullberg*). The Court of Appeals concluded that, in order to determine the scope of recovery, courts must identify

the nature of the recipient spouse's interest at the time of death in property now in the surviving spouse's estate. *Id.* There is no evidence, however, that Congress intended its amendment, which addressed the *Kizer* decision, to impose a *new* limit on the scope of recovery from marital or jointly-owned property in a surviving spouse's estate. *Barg* and *Gullberg* should accordingly be reversed and partially overturned, to the extent they invalidate in part or in whole Minnesota's estate recovery statute.

A. Preemption By The Phrase "To The Extent Of Such Interest" Is Not Supported By The Circumstances Leading To Its Inclusion In The Federal Statute.

The Court of Appeals appears to have concluded that the phrase "to the extent of such interest" unambiguously preempts Minnesota from recovering Medicaid costs from the full extent of marital or jointly owned property in a surviving spouse's estate. *Gullberg*, 652 N.W.2d at 714; *accord*, *Barg*, 722 N.W.2d at 497. However, because preemption analysis is grounded in Congressional intent, a court must examine a particular enactment's language against the background of its legislative history and historical context. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). This contextual analysis is important because what may appear to be "within the letter of the statute" may, however, not be "within the statute, because [it is] not within its spirit, nor within the intention of its makers." *Id.* The historical and legislative context of OBRA 1993's estate recovery amendments support the conclusion that Congress never intended the expanded estate option, in which the phrase "to the extent of such interest" is

used parenthetically, to impose a limitation on recoveries from the estates of surviving spouses.

OBRA 1993 was the culmination of a process begun in 1987 when Congress directed the Secretary of Health and Human Services to study estate recovery as a means of funding Medicaid long-term care. U.S. Dep't of Health & Human Servs., *Issues In Medicaid Estate Recoveries: A Report to the United States Congress* at 2 (1989) ("HHS, *Issues In Medicaid Estate Recoveries*"). This process included a national inspection of estate recovery programs. See HHS, *National Program Inspection*. Congress also directed the General Accounting Office to study estate recoveries. GAO, *Medicaid Recoveries* at 1. The explicit purpose of these studies and reports was to identify how to expand estate recovery. *Id.* None of the studies or reports indicates that restricting recovery was one of the pre-OBRA 1993 objectives. During this same time period, the Ninth Circuit decided *Citizens Action League v. Kizer*, which had the effect of limiting estate recoveries. Thus, when Congress enacted the estate recovery amendments (along with asset transfer amendments), it had dual goals: to expand estate recovery in states without such programs following through on the reports and to remove the barrier presented to already active states by *Kizer*.

The U.S. Supreme Court's decision in *California Federal* is particularly useful in a preemption analysis involving the interpretation of a provision Congress enacted in order to supersede an earlier court decision narrowly interpreting the statute. *California Federal* involved a challenge to a California statute requiring employers to provide leave

and reinstatement for employees disabled by pregnancy. *Id.* at 275-77. The challengers argued that the state law, which gave greater protection than Title VII of the Civil Rights Act of 1964, was preempted by that federal law. The specific federal law in question in *California Federal* had been passed by Congress in order to overturn a U.S. Supreme Court decision narrowly interpreting the scope of Title VII protections. *Id.* at 276-77.

The Supreme Court rejected the claim that the amended federal statute's language unambiguously preempted California's different treatment of pregnancy discrimination. *Id.* at 284. Instead, the Court concluded that, based on the circumstances leading to the amendment, Congress did not intend to impose a limitation when it overruled the earlier decision. Rather, Congress intended the amendment to establish the floor, not the ceiling, for pregnancy discrimination benefits. *Id.* at 284-85. The Court also reasoned that Congress did not intend the amendment to preempt the state law in question because the reports and legislative history associated with the amendment were devoid of any discussion supporting that intent. *Id.* at 286-87. The Court also noted that Congress was aware of state laws similar to the one under review, but did not consider them inconsistent with federal law or otherwise "evinced the requisite 'clear and manifest purpose' to supersede them." *Id.* at 287-88.

The same analysis and conclusions apply here to the OBRA 1993 estate recovery amendments. First, the tone of the amendments was of expanding and strengthening recovery-not restricting recovery. Second, Congress's inclusion of an amendment that demonstrated its disagreement with *Kizer's* limitation on recovery only suggests an intent

to remove that barrier to recovery, not to create a new hurdle. Third, the reports and legislative history surrounding the OBRA 1993 amendments are devoid of any discussion of a need or desire to place restrictions on recovery. Finally, Congress was aware, through the various reports and studies, that a number of states were pursuing spousal recoveries, yet Congress did not find those practices inconsistent with federal Medicaid law or objectives. The purposes of OBRA 1993 are discussed in further detail below.

B. Congress Intended To Leave States Wide Latitude In Developing And Defining Their Medicaid Estate Recovery Programs.

Congress's purpose in enacting OBRA 1993's Medicaid estate recovery amendments was to strengthen estate recovery. It did this by requiring *all* states to do *some* level of recovery. Congress also provided a tool, the expanded estate option, for use by states with already active recovery programs. This purpose—to strengthen state estate recovery programs—is revealed in the text of the amendments and the legislative history surrounding those amendments. No evidence suggests that Congress clearly intended to displace already-existing laws, such as Minnesota's, that exceeded the minimum mandate set by Congress, concerning recovery from Medicaid recipients' probate estates.

- 1. Congress adopted the Senate's proposed estate recovery amendments that were grounded in federalism's allowance of individual state autonomy within least restrictive federal boundaries, eschewing a uniform national program.**

In 1988, twenty-six states did not have any programs and supporting laws to recover correctly paid Medicaid benefits from estates. HHS, *National Program Inspection* at 28. Congress was aware that this absence of recovery left hundreds of

millions of dollars in non-tax revenue untapped each year. *See, e.g., GAO, Medicaid Recoveries* at 17-24.

Some states, such as Oregon, had active and established recovery programs. *See GAO, Medicaid Recoveries* at 25-39. As first proposed in the House by California Representative Henry Waxman, OBRA 1993's estate recovery amendments would have required states to adopt programs similar to Oregon's. *See H.R.2138, 103rd Cong. §5112 (1993)*. In Waxman's proposal, as a condition of receiving federal matching funds, states were required to establish systems for tracking assets for future recovery and for tracking the deaths of recipients and their surviving spouses. *Id.* They were also required to recover from the estates of both recipients and surviving community spouses and to use a definition of "estate" that reached far beyond traditional probate definitions. *Id.* Thus, the Waxman proposal would have established an aggressive uniform national system of recovery that all states would have been required to implement.

This uniform recovery regime would have forced at least half of the states to go from having no recovery programs to having aggressive recovery programs. Representative Waxman apparently believed that such a mandatory uniform system was necessary because states found it too politically difficult to exercise the discretion already afforded by Medicaid law. During hearings on health program proposals leading up to OBRA 1993, Waxman stated, "States have discretion now to do anything they want, as I understand the Medicaid law, to recover assets and to make sure that people are, in fact, eligible. The problem is, the States don't always decide to get involved in this area. So if

you give States discretion, they just may find it so politically unattractive that they just won't act." *Medicare and Medicaid Budget Reconciliation: Hearing Before the Subcomm. on Health and the Environ. of the House Comm. on Energy and Commerce*, 103rd Cong. at 424 (1993) (Rep. Henry A. Waxman). Waxman's proposal was later passed by the House. *See* H.R. 2264, 103rd Cong. §5102 (1993); *see also* H.R.Rep. No.103-111, at 208-09 (1993); *as reprinted in* 1993 U.S.C.C.A.N. 378, 535-36.

In contrast to Waxman's prescriptive uniform national program, the Senate version of Medicaid estate recovery amendments left the mechanics and scope of recovery to the states. The Senate version simply amended Medicaid law to require recovery from a recipient's probate estate. S.1134, 103rd Cong. §7421 (1993). The Senate version was silent as to how states were to structure their estate recovery programs. *Id.* The Senate version, nevertheless, retained Waxman's expanded definition of estate, but only as a state option that could be added onto the default probate definition. *Id.* The House and Senate Conference Committee adopted the Senate's version. *See* H.R.2264, 103rd Cong. §13612 (1993) (as passed by House and Senate); H.R.Rep. No.103-213, 834-35 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1088, 1523-24 (Conf.Rep.).

In adopting the Senate's approach, Congress chose a version of mandatory estate recovery that best suited a federalist system with widely varying political receptiveness to estate recovery. Many states had reported, via the studies and reports submitted to Congress before OBRA 1993, that their efforts to either pass recovery legislation or to implement recovery programs were stymied by local opposition. *See, e.g.*, GAO,

Medicaid Recoveries at 41-42; HHS, *National Program Inspection* at 20, 42-43; see also M. Ann Miller, *Your Money For Your Life: A Survey and Analysis of Medicaid Estate Recovery Programs*, 11 T.M. Cooley L.Rev. 585, 596-97 (1994) (describing the blocking of estate recovery in Florida and Texas); Burton D. Dunlop, *et al.*, *Medicaid Estate Planning And Implementation of OBRA '93 Provisions In Florida: A Policy Context*, 19 Nova L.Rev. 533, 558 (1995) (describing the successful opposition to estate recovery in Massachusetts and Wisconsin).

Other states, however, had already established aggressive estate recovery programs. Oregon, California, and Minnesota, for example, were among the top states in estate recoveries. See, e.g., GAO, *Medicaid Recoveries* at 24-39. Both Minnesota and Oregon already had estate recovery programs and supporting legislation allowing for recovery from the estates of spouses. *Id.* at 34; Miller, *Your Money For Your Life*, 11 T.M. Cooley L.Rev. at 605; *In re Estate of Jobe*, 590 N.W.2d 162, 164 n.1 (Minn.Ct.App) rev. denied (Minn. 1999) (summarizing the 1987 Minnesota statutory changes explicitly authorizing recovery from the estates of spouses). Oregon and Minnesota also had political environments in which public welfare recovery laws were long-established and accepted. GAO, *Medicaid Recoveries* at 26 (Oregon recovery legislation first enacted in 1949); *Dimke v. Finke*, 295 N.W. 75, 77-78 (Minn. 1940) (describing 1935 law allowing claim against estate of either spouse for public assistance paid to one or both spouses).

The fact that resistance to estate recovery in a number of states co-existed with an established acceptance of robust recovery in other states inevitably shaped Congress's effort to enhance estate recovery. Indeed, the GAO had recommended that as part of its report, commissioned by Congress, that estate recovery legislation "address the appropriate balance between state flexibility and detailed federal requirements." GAO, *Medicaid Recoveries* at 41.

Overall, OBRA 1993 was a "carefully crafted, rational and constructive compromise" between various House and Senate bills. H.R.Rep. No.103-213, at 399, 1993 U.S.C.C.A.N. at 1088. Such carefully crafted compromise is reflected in OBRA 1993's estate recovery provisions as well. Rather than mandating aggressive recovery across the nation following uniform requirements, Congress simply mandated a minimum level of recovery for all states.⁵ Yet, Congress also recognized that already active states were being held back by the decision in *Citizens Action League v. Kizer*. *Kizer* prevented states from recovering from property held in joint tenancy. *Medicare and Medicaid Budget Reconciliation*, at 350 (statement of Gerald Rohlfs, California Department of Human Services). To remedy *Kizer*, Congress included the open-ended expanded estate option now found at 42 U.S.C. §1396p(b)(4)(B).

⁵ Even this moderate mandate has encountered resistance, such as West Virginia's unsuccessful suit against the federal government in an effort to declare the OBRA 1993 recovery requirement to be unconstitutionally coercive. *West Virginia v. U.S. Dep't of Health & Human Servs.* ("West Virginia II"), 289 F.3d 281 (4th Cir. 2002).

Such attention to variations among the states was not uncharacteristic for Medicaid. Medicaid is “based upon historic principles of federal-state cooperation.” S.Rep. No.86-1856, 1960 U.S.C.C.A.N. at 3610. Medicaid accomplishes the objective of providing health care to those without adequate resources “within the framework of a federal-state program with broad discrimination allowed to the states as to the programs they will institute, improve, and administer.” *Id.* Medicaid’s preamble also reflects Congress’s recognition that the conditions in each state will practically affect how Medicaid operates. 42 U.S.C. §1396 (stating that Medicaid funds are appropriated for the “purpose of enabling each State, as far as practicable under the conditions in such State to provide medical assistance”). Indeed, federalism “profoundly shapes Medicaid. The joint responsibility of the national and state governments . . . has enmeshed it in perennial debates about the appropriate division of labor, or balance of power, between levels of government in the federal system.” Michael H. Armacost, Forward, in *Medicaid and Devolution: A View From the States*, at vii (Frank J. Thompson & John J. DiIulio, Jr., eds., 1998); *see also* HHS, *Issues In Medicaid Estate Recoveries* at 4 (stating that Medicaid is “firmly grounded in Federalism principles”).

As with other Spending Clause-based legislation, tension exists in Medicaid between encouraging states to adopt uniform federal policy choices and requiring the accountability of a state’s officials to its citizens; these factors affect the conditions to which federal aid is tied. *Cf. New York v. United States*, 505 U.S. 144, 167-68 (1992) (discussing the federalism considerations involved when Congress tries to encourage

states to adopt federal policies). Congress resolved this tension by mandating recovery from probate property, but not prescribing how the recovery was to be accomplished and not requiring more extensive recovery. Congress also accommodated the needs of states like California and Minnesota with advanced recovery programs by superseding *Kizer*.

2. The OBRA 1993 amendments did not displace the traditional police powers of states in the area of recovery of public welfare benefits.

A specific presumption against preemption applies when Congress legislates in an area that is historically the province of state police powers. *Medtronic*, 518 U.S. at 485. The Medicaid estate recovery statutes at issue here address matters of public health, property interests, and inheritance that are traditionally within a state's police powers. "The provision of medical care for the needy has long been a responsibility of the State and local public welfare agencies." S.Rep. No.89-404, U.S.C.C.A.N. at 1943, 2014. Medicaid clearly operates in an area traditionally occupied by state police powers. *Downhour v. Somani*, 85 F.3d 261, 265-66 (6th Cir. 1996). Estate recovery, in particular, is a traditional state area. David C. Baldus, *Welfare As A Loan*, 25 *Stan. L.Rev.* 123, 125 (1973) ("Recovery laws have existed in the United States for more than 150 years."). "It is well settled that the descent and distribution of property of a decedent is a matter within the exclusive control of the [state] legislature." *In re Estate of Eggert*, 72 N.W.2d 360, 362 (Minn. 1955). The presumption can only be overcome by a clearly stated Congressional intent to preempt the specific area of state law. For example, in the case of preexisting state employment programs, the U.S. Supreme Court has held that, if

Congress had intended to preempt them with a Federal program, "such intentions would in all likelihood have been expressed in direct and unambiguous language. *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 414 (1973); see also *Rice v. Sante Fe Elev. Corp.*, 331 U.S. 218, 237 (1947) (requiring more than mere speculation for a finding of preemption). No such expression exists, however, either in the federal statute or in the committee reports.

Congress, as described above, was well aware of both the political resistance to recovery and the existence in other states of well-accepted practices that went beyond the minimum of recovery from a recipient's probate estate. Interests in property and inheritance are matters over which states have traditional power. Some states, such as Minnesota, exercised this power to enhance estate recovery even before OBRA 1993. See, e.g., *In re Estate of O'Keefe*, 354 N.W.2d 531, 533-34 (Minn.Ct.App. 1985) (describing 1982 amendments removing homestead exemption as a bar to Medical Assistance claims); *Jobe*, 590 N.W.2d at 164 n.1 (1987 statutory changes authorizing Medical Assistance recovery from the estates of spouses). Congress's OBRA 1993 amendments did not displace these exercises of state power.

C. No Conflict Exists Between Minnesota's Spousal Recovery Provisions And Federal Law.

"State law is preempted if that law actually conflicts with federal law." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Such actual conflict may exist when compliance with both federal and state law is impossible or because the state law is an obstacle to the accomplishment of the purposes of the federal statutory scheme.

English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990). “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Minnesota’s estate recovery statutes, as applied to a claim for recovery of benefits paid on behalf of a recipient spouse from the estate of a surviving spouse, pose no obstacle to the accomplishment and purposes of the federal Medicaid estate recovery statutory scheme.

1. Compliance with both federal and state law is possible.

Here, compliance with both state and federal law is possible. The federal law mandates recovery from the estates of recipients, but does not prohibit recovery from the estates of surviving community spouses. The federal law mandates that a state’s probate law be used as a minimum definition of estate, but then gives states the open-ended option to include other property and interests. 42 U.S.C. §1396p(b)(4). Thus, federal law prescribes a minimum level and scope of recovery without prohibiting states from going beyond that scope. Federal statutes limit *when* recovery can be attempted (i.e., only after the death of a surviving spouse), but they do not limit *what* can be used to satisfy recovery or *how* recovery can be made. Minnesota’s approach is entirely consistent with the latitude given by a reasonable interpretation of the federal statutes. *Cf. Jobe*, 590 N.W.2d at 166-67.

2. Minnesota law furthers federal objectives.

Congress's purpose for the OBRA 1993 amendments was to increase recoveries using means sensitive to the different starting points among the states. Minnesota's use of marital property and jointly owned property as the basis for identifying the scope of recoverable interests from a surviving spouse's estate furthers that purpose by maximizing recovery of Medicaid funds. Moreover, Minnesota's use of a stronger approach to estate recovery than the default national approach required by Congress cannot be held to be an obstacle to federal objectives when Congress has specifically declined to require states to follow one uniform national program of estate recovery

III. RECOVERY FROM THE ENTIRETY OF MARITAL PROPERTY AND JOINTLY OWNED PROPERTY IS CONSISTENT WITH HOW MEDICAID TREATS THE RESOURCES OF SPOUSES.

From its very beginning, Medicaid has incorporated the principle that spouses are responsible for the support of each other. This principle is found both in Medicaid's legislative history and in Medicaid statutes. *Schweiker v. Gray Panthers*, 453 U.S. 34, 44-45 (1981); *see also* S.Rep. No.89-404, 1965 U.S.C.C.A.N. at 2018. ("The [Senate Finance] committee believes it is proper to expect spouses to support each other."). Thus, state eligibility standards are expressly permitted to consider the financial responsibility of a spouse, even though states are prohibited from considering the availability of any other individual's resources. 42 U.S.C. §1396a(a)(17)(D) (2000). The U.S. Supreme Court has labeled spousal support a "background principle" of Medicaid. *Wisconsin Dep't of Health & Family Services v. Blumer*, 534 U.S. 473, 494 (2002).

In determining the availability of a couple's resources for purposes of Medicaid long-term care eligibility, Medicaid requires that "all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse." 42 U.S.C. §1396r-5(c)(2)(A) (2000) (emphasis added). From these resources, an amount is set aside for a "community spouse resource allowance" ("CSRA"). 42 U.S.C. §1396r-5(c)(2)(B). The purpose of the CSRA is to allow the non-recipient spouse to continue to live in the community with dignity and without impoverishment. *See* H.R.Rep. No.100-105 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 857, 888 ("The purpose of the Committee bill is to end this pauperization

by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available to her while her spouse is in a nursing home at Medicaid expense.”). The amounts protected by these spousal anti-impoverishment provisions are relatively modest, but “far exceed the income and asset levels that may be retained in the case of unmarried recipients of Medicaid long-term care services.” U.S. Dep’t of Health & Human Servs., *Policy Brief: Spouses of Medicaid Long-Term Care Recipients* at 1 (2005). During eligibility, after this set aside has been made, spousal anti-impoverishment reforms require that the resources be considered unavailable to the institutionalized spouse (so that they may be used for the community spouse’s support). *See* 42 U.S.C. §1396r-5(c)(4).

Medicaid’s treatment of a married couple’s resources is, in operation, similar to the federal Estate Tax in that it collects property for a particular purpose and is not limited by formal ownership. *See* 26 U.S.C. §2051 (2000) (defining “taxable estate”). The Estate Tax brings into the taxable estate even property and interests the decedent did not formally own at time of death, due to prior transfers, and includes interests that transferred on death. *See* 26 U.S.C. §2045 (2000); *see generally* John A. Miller & Jeffrey A. Maine, *Fundamentals of Estate Tax Planning*, 32 Idaho L.Rev. 197 (1996). Similarly, Medicaid creates the functional equivalent of a “Medicaid Estate” that collects all of the resources of a married couple together for Medicaid purposes. This Medicaid estate is then used to determine the eligibility of the recipient spouse and to determine the specific application of spousal anti-impoverishment protections. Even assets that are not initially

counted as available, such as the home, are included in the Medicaid Estate because they are not counted solely in order to support the non-recipient spouse in the community

An increasingly important element of Medicaid law are prohibitions on the transfer of assets by either spouse to a third party. *See* 42 U.S.C. §1396p(c). Consistent with the concepts of spousal support and a Medicaid Estate, Medicaid's asset-transfer provisions treat a married couple as one unit, even though only one spouse may be the actual Medicaid recipient. So, although transfers between a couple generally do not trigger penalties, transfers by *either* spouse outside the couple are treated as a transfer by the single unit. *See* 42 U.S.C. §1396p(c)(1)(A) (2000) (applying the "look back" period to transfers by the institutionalized spouse *or* the community spouse). Medicaid also defines assets broadly to "include all income and resources of the individual [institutionalized spouse] and of the individual's [community spouse]." 42 U.S.C. §1396p(e)(1) (2000).

The result of the asset-transfer prohibition is the creation of a closed-system around the Medicaid estate. The purpose of the closed-system is to ensure that a couple's resources are either used for the care of the sick spouse, used to support the community spouse, or are available for later estate recovery. *See* GAO, *Medicaid Recoveries* at 3

The resources that are set aside or excluded for purposes of eligibility, are set-aside and excluded *for the sole purpose of being used by the community spouse during his or her lifetime*. This policy serves the important interest of preventing the destitution of a community spouse. As the Court of Appeals has recognized, after the community spouse dies and that interest is no longer served, the recovery of Medicaid benefits from those

assets that were temporarily excluded is a public policy interest that takes over as paramount to the private interests of heirs. *See Jobe*, 590 N.W.2d at 166.

In summary, overall Medicaid policy contains an inherent symmetry in the availability of marital assets. For purposes of eligibility, marital assets are presumptively available for use toward meeting the institutionalized spouse's medical and nursing expenses. Some marital assets are temporarily excluded from availability, but only because of the policy interest in allowing the community spouse to use those assets to meet that spouse's needs during his or her lifetime. In other words, a Medicaid Estate exists for purposes of applying Medicaid policies to a couple. Abuse of Medicaid is prevented by the insulation of the Medicaid Estate within a closed system, allowing interspousal transfers, but generally prohibiting transfers of value to third parties.

What remains of the Medicaid Estate is available for recovery to pay, after the fact, the costs of the institutionalized spouse's medical care. A symmetry of availability is maintained by estate recovery from the marital assets that remain, largely due to Medicaid's protection of those assets for the community spouse, in the community spouse's estate. This principle of symmetry of availability recognizes that when one spouse applied for Medicaid, all of the couple's assets were presumptively available to be spent down before that spouse became eligible for Medicaid. *Those assets that were spared from spenddown were only so spared because they were necessary to support the community spouse.* Thus, when both spouses have died, all remaining marital assets must

be considered available for purposes of estate recovery. Failure to honor this principle causes Medicaid's treatment of married couples to be thrown out of balance.

IV. FEDERAL APPROVAL OF STATE MEDICAID PLANS DEMONSTRATES THAT MINNESOTA'S ESTATE RECOVERY LAW DOES NOT CONFLICT WITH FEDERAL LAW OR OBJECTIVES.

Preemption analysis in the Medicaid context must reflect the cooperative federal-state relationship that is Medicaid's hallmark. Particular attention and deference must be given to the determinations of the Secretary of the U.S. Department of Health and Human Services ("HHS") in evaluating a state's compliance with federal Medicaid requirements.

A. Deference Must be Given To Federal Interpretations And Applications Of Medicaid Statutes.

1. Congress delegated the administration and interpretation of Medicaid laws to the Secretary of Health & Human Services.

Congress expressly delegated to the Secretary the responsibility for administering federal financial participation and oversight of Medicaid. 42 U.S.C. §1396. The Secretary, in turn, has delegated authority for overseeing Medicaid to the Centers for Medicare and Medicaid Services ("CMS") within HHS. *Blumer*, 534 U.S. at 473, 479 n.1 ; *West Virginia* ("*West Virginia III*") v. *Thompson*, 475 F.3d 204, 208 (4th Cir. 2007); 42 C.F.R. §430.15(b) (2006).

To qualify for federal assistance, participating states must submit to the Secretary, and have approved by CMS, a "plan for medical assistance" that complies with Medicaid requirements. 42 U.S.C. §1396a(a) (2000); *West Virginia II*, 289 F.3d at 284. "The State plan is a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with [federal Medicaid requirements]. The State plan contains all information necessary

for the Department to determine whether the plan can be approved.” CMS, State Medicaid Manual (“SMM”) §13025.⁶ Congress has directed that the Secretary “shall approve” any plan or amendment to a plan that complies with federal law. 42 U.S.C. §1396a(b) (2000).

CMS regional staff review state plans and amendments to plans.⁷ 42 C.F.R. §430.14 (2006). “Determinations as to whether State plans (including plan amendments and administrative practice under plans) originally meet or continue to meet the requirements for approval are based on relevant Federal statutes and regulations.” 42 C.F.R. §430.15(a)(1). To be approved, state plans specifically must “comply with the provisions of section 1396p with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts.” 42 U.S.C. §1396a(a)(18). Federal payments are contingent upon state plan approval.

Particular deference should be given regarding the Secretary’s enforcement of federal Medicaid requirements. Congress specifically vested authority for the enforcement of Medicaid with the Secretary. 42 U.S.C. §1396c (2000). If the Secretary finds that a state plan does not comply with section 1396a’s provisions (which incorporates section 1396p(b) through section 1396a(a)(18)), or that the plan is administered in a way that results in “a failure to comply substantially with any such

⁶ Available at <http://www.cms.hhs.gov/Manuals/PBM/list.asp>

⁷ CMS regional staff also “initiate discussion with the State agency on clarification of significant aspects of the plan State plan material on which the regional staff has questions concerning the application of Federal policy is referred ... [to the CMS] central office.” CMS, SMM §13026 (B).

provision,” the Secretary may enforce the Medicaid statute by ending or limiting federal matching payments until there is compliance. *Id.*; *see, e.g., West Virginia III*, 475 F.3d at 208 n.1 (recounting history of CMS compliance efforts directed toward West Virginia regarding estate recovery).

The Secretary, through CMS, actively monitors compliance with federal requirements. Compliance is determined by CMS “review[ing] State and local administration through analysis of the State’s policies and procedures, on-site review of selected aspects of agency operation, and examination of samples of individual case records.” 42 C.F.R. §430.32(a) (2006). CMS’s monitoring is not limited to the contents of the state plan, CMS monitors each state’s actual administrative practice. *See* 42 C.F.R. §430.35(c) (2006) (explaining that “A question of noncompliance in practice may arise from the State’s failure to actually comply with a Federal requirement, regardless of whether the plan itself complies with that requirement.”).

2. The Secretary’s interpretations of Medicaid laws must be given deference.

By delegating administrative and oversight authority to the Secretary, “Congress manifested its intent that *the Secretary’s determinations, based on interpretation of the relevant statutory provisions, should have the force of law.*” *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (emphasis added). “Such deference is particularly warranted with respect to interpretations of the Social Security Act, because of the Act’s intricate nature.” *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996); *see also Schweiker*, 453 U.S. at 34, 43 (noting the complexity of Medicaid provisions).

Deference to an administrative agency's interpretation of the statutes it is charged with implementing and overseeing is often referred to as "*Chevron*" deference, based on the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* involved deference to agency-drawn regulations. *Id.* *Chevron*-level deference, however, is not limited to rules and regulations, but includes the kind of case-by-case adjudication involved in the review and approval of individual state Medicaid plans by CMS. *Cf. Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96-97 (1995) (stating "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."); *Alaska Dep't of Health & Social Servs.*, 424 F.3d 931, 940 (9th Cir. 2005) ("The authority to elucidate the meaning of the [Medicaid] statute in this manner, via case-by-case adjudication, is well within the Secretary's mandate.").

Chevron deference is called for when Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. The federal statute here, section 1396p(b), is silent with respect to any prohibition on seeking recovery from a surviving spouse's estate or the scope of such a claim. Whether *Chevron* deference is called for is determined by examining the administrative interpretation answering the question. *Id.* at 843. Here, that answer is the approval of a state plan. At this stage, courts are not free to impose their own construction on a statute. *Id.* Instead, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Such deference to an agency's interpretation recognizes the administrative power and

obligation to formulate policy and rules to fill any gaps implicitly or explicitly left by Congress. *Id.* When Congress delegates authority to an executive agency on a particular question, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844.

This principle of deference is consistently followed by courts “whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.” *Id.* If an agency’s choice “represents a reasonable accommodation of conflicting policies,” courts will not disturb that choice unless “the accommodation is not one that Congress would have sanctioned.” *Id.* at 845.

B. CMS Approval Of State Plans With Express Spousal Recovery Provisions Requires A Holding Of No Preemption.

CMS’s approval of state plans with express spousal recovery provisions evidences that the federal agency charged with enforcing compliance with federal Medicaid law has determined that spousal recovery does not conflict with federal law or objectives. Medicaid is “designed to advance cooperative federalism,” and the U.S. Supreme Court has noted that it has “not been reluctant to leave a range of permissible choices to the States, *at least where the superintending federal agency has concluded that such latitude is consistent with the statute’s aims.*” *Blumer*, 534 U.S. at 495 (emphasis added). A CMS-approved state plan is a “product of state and federal agency interaction” and a court must view the plan with the deference accorded to other federal agency action.

Indiana Ass'n of Homes for the Aging, Inc. v. Indiana Office of Medicaid Policy & Planning, 60 F.3d 262, 266 (7th Cir. 1995). CMS's approval of a state plan or a state plan amendment reflects that agency's determination that the state's Medicaid program conforms to federal Medicaid statutes and the regulations developed to implement those statutes. 42 C.F.R. §430.15(a)(1); *Cnty Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 134 (2d Cir. 2002).

The Fourth Circuit recently explained that “[t]he Medicaid statute is a prototypical ‘complex and highly technical regulatory program’ benefiting from expert administration, which makes deference [to CMS interpretation] particularly warranted.” *West Virginia III*, 475 F.3d at 212 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The Fourth Circuit specifically held that the state plan approval process and monitoring of compliance “counsels deference.” *Id.* In the context of state plan amendment disapprovals, courts “have rightly granted *Chevron* deference to agency interpretations of statutes.” *Id.* at 212-13. By extension, *Chevron* deference should be given to agency interpretation and application of underlying statutes involved when CMS *approves* a state plan or plan amendments.

CMS has approved at least three state plans that contain express references to spousal recoveries. North Dakota Medicaid State Plan, Transmittal No. 95-016, §4.17-A (approved Dec. 12, 1995); Indiana Medicaid State Plan, Transmittal No. 05-012, §4.17-A (approved Mar. 10, 2006); Idaho Medicaid State Plan, Transmittal No. 01-006, §4.17-A (approved Jul. 13, 2001); attached as Exhibits A, B, & C, respectively, to Affidavit of Jan

Taylor (“Taylor Aff.”)⁸ All of these state plans expressly refer to states conducting spousal recoveries. *See, e.g.* Amicus Curiae Appendix at AC-App-4.

The Idaho plan, in particular, also contains a scope of recovery provision that is very similar to Minnesota’s scope of recovery from a surviving non-recipient spouse’s estate. Minnesota’s statute provides that such recovery is “limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage.” Minn.Stat. §256B.15, subd. 2. Idaho’s approved state plan includes a provision that parallels Minnesota’s, differing slightly because Idaho is a community property state: “A claim against the estate of a surviving spouse is limited to the value of the assets of the estate that were community property, or the deceased recipient’s share of the separate property, and jointly owned property.” AC-App-16. Thus, CMS has specifically approved a state plan that uses the same framework as Minnesota to determine the scope of spousal recovery claims.

C. The Secretary has specifically approved Minnesota’s State Plan And Is Fully Aware Of Minnesota’s Estate Recovery Law At Issue, And Has Taken No Compliance Action Against Minnesota.

CMS has approved Minnesota’s state plan. Minnesota Medicaid State Plan, Transmittal No. 06-10, §4.17-A (approved Nov. 28, 2006), Taylor Aff. Ex. D. Although

⁸ The Taylor Affidavit is in the Appendix to this brief. Please see the Commissioner’s Motion to Supplement the Record regarding inclusion of the affidavit in the record.

Minnesota's plan does not contain express references to spousal recoveries,⁹ CMS's approval does reflect CMS's determination that the state plan complies with federal requirements.

Moreover, CMS is fully aware of the scope of Minnesota's recovery from the estates of surviving spouses. In 1999, the chair of the Elder Law Section, one of the *amici curiae* in this matter, contacted CMS, described Minnesota's spousal recovery provisions in detail, asserted that those provisions conflicted with federal Medicaid provisions, and asked if CMS (then called the Health Care Finance Administration) would "do anything to eliminate these inconsistencies." Email from Jeffrey Schmidt to Ingrid Osborne and Phillip Otto, dated November 4, 1999, Taylor Aff. Ex. E. CMS's response to this inquiry was that "Minnesota's interpretation [of the federal provisions]" is correct. It is a State option for a State to elect to pursue spousal recoveries." *Id.*¹⁰

CMS has specific knowledge of Minnesota's provisions and has determined that they are not inconsistent with federal Medicaid requirements. Not surprisingly, CMS has not taken or threatened any compliance action against Minnesota,. See Taylor Aff. ¶ 4 (no compliance actions). Thus, the federal agency empowered to sanction noncompliance has not taken action against Minnesota regarding spousal recovery. In preemption

⁹ DHS is presently considering submitting to CMS clarifying state plan language that expressly reflects Minnesota's spousal recovery provisions.

¹⁰ The correspondence should be given consideration. See *Wilson-Coker*, 311 F.3d at 138 ("even relatively informal" CMS interpretations warrant "respectful consideration due to the complexity of the [Medicaid] statute and the considerable expertise of the administering agency.").

analysis, this decision, based on actual knowledge of Minnesota's statute, counsels against a finding of preemptive conflict.

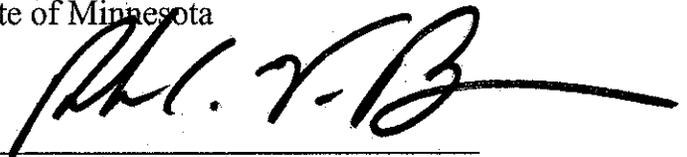
CONCLUSION

The Commissioner respectfully asks this Court to reverse the decision below and to partially overturn the Court of Appeals' earlier *Gullberg* decision.

Dated: March 19, 2007.

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



ROBIN CHRISTOPHER VUE-BENSON
Assistant Attorney General
Atty. Reg. No. 033408X

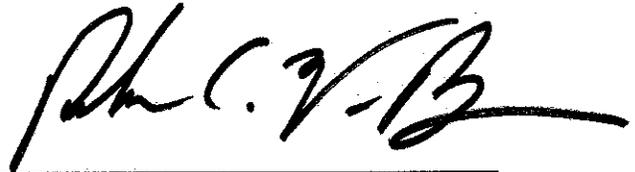
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR AMICUS CURIAE
COMMISSIONER OF HUMAN
SERVICES

CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 9,905 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132, as modified by the Court's February 6, 2007 order granting the Commissioner an extension of the type/volume limitations to 10,000 words or 30 pages. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2004, the word processing system used to prepare this Brief.



ROBIN CHRISTOPHER VUE-BENSON