No. 22-957

IN THE
Supreme Court of the United States

LAURIE A. DERMODY,
Petitioner,

v.

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,
Respondent.

LINDA MARIE MONDOR, ET AL.,
Petitioners,

v.

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

SUPPLEMENTAL BRIEF FOR PETITIONERS

LISA M. NEELEY
RUBIN AND RUDMAN LLP
53 State Street, 15th Floor
Boston, MA 02109
(617) 330-7033

BRIAN E. BARREIRA
118 Long Pond Rd., Suite 206
Plymouth, MA 02360
(508) 747-8282

ADAM G. UNIKOWSKY
Counsel of Record
JONATHAN J. MARSHALL
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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The United States' recommendation to deny certiorari should not come as a surprise. These are Medicaid cases that implicate the United States' responsibility to reimburse States—for significant sums—out of the federal Treasury. As a faithful steward of the public fisc, the United States has an interest in preserving judicial decisions that save the government money. So the United States cannot be faulted for the exceedingly strained arguments it advances against certiorari.

But strained they are. On the split, the United States offers its hope that the Sixth Circuit might one day retreat from *Hughes v. McCarthy*, 734 F.3d 473 (2013), which unmistakably conflicts with the decisions below. The United States offers no real reason to think this will happen beyond identifying a new (and exceptionally weak) argument the Sixth Circuit did not consider—one that the United States itself did not bother raising when the Department of Health and Human Services (HHS) briefed the question presented in *Hughes*.

As to the vehicles, the United States merely observes that there are arguments the Commonwealth of Massachusetts could theoretically advance on remand were this Court to reverse. The United States does not even *endorse* these alternative arguments; it simply notes that they *exist*. If this were a sufficient basis for denying certiorari, this Court's docket would shrivel.

On the merits, the statutory text is utterly unambiguous in Petitioners' favor. The United States makes literally no argument as to how the text can possibly bear its preferred meaning. Instead, it urges the Court to

rewrite the statutory text on purposivist grounds, or perhaps based on an oblique inference from a technical amendment's cryptic ratification of an irrelevant agency guidance document. That is not how this Court interprets statutes.

Crucially, the United States nowhere disputes Petitioners' argument that "[t]he proper interpretation of the Medicaid Act provisions at issue here is extraordinarily important to elderly couples planning for end-of-life care" and for States, which "face uncertainty over how federal law will compel them to expend their budgets." Pet. 22. This Court should grant certiorari to resolve that extraordinarily important question.

I. THERE IS A CLEAR SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

There is an unmistakable split of authority on the question presented here. In *Hughes*, the Sixth Circuit held that an asset transfer satisfying 42 U.S.C. § 1396p(c)(2)(B) need not comply with Section 1396p(c)(1)(F)'s requirement to name the State as primary remainder beneficiary. 734 F.3d at 483-86. In the decisions below, the Supreme Judicial Court expressly rejected *Hughes*' conclusion and reached the opposite result. Pet. App. 11a-15a, 13a n.18. The United States' arguments (Br. 19-20) as to why the split can be ignored are implausible.

The United States' lead argument (Br. 19) is that *Hughes*' "reversal of the district court rested primarily on its interpretation of" a different provision of the Medicaid Act that is not at issue here.

That is a misleading characterization. In *Hughes*, the district court had ruled in the state agency's favor on the basis of the other provision, and that is why the Sixth Circuit began there. *See* 734 F.3d at 478. *Hughes* rejected the state agency's argument that this provision overrode Section 1396p(c)(2)(B), and of necessity proceeded to analyze the agency's alternative theory under Section 1396p(c)(1)(F)—the exact same argument the Commonwealth advances here. *Id.* at 479-84. After a lengthy analysis of the relationship between Subparagraphs (c)(1)(F) and (c)(2)(B), *Hughes* sided with the plaintiffs, in direct conflict with the decisions below. *Id.* at 483-86. This split is not illusory just because the Sixth Circuit also addressed a different issue in an earlier part of its opinion.

The United States next surmises (Br. 19) that the question presented "had little practical significance" in *Hughes*. But the issue was *case-dispositive*. Had the Sixth Circuit come out differently on the question, the state agency would have won. Instead, the plaintiffs won. How then could the issue possibly be described as having "little practical significance"?

True, the United States notes (Br. 19) that because of the way the *Hughes* annuity was structured, there was a chance the State would have recouped the withheld funds anyway had the annuitant died prematurely. But the annuitant was expected to outlive the annuity, in which case the State would lose money. That is why the state agency applied the transfer penalty, and under the Sixth Circuit's holding, the state agency was not permitted to do so. The "practical significance," *id.*, of the

question presented in *Hughes* was thus ten months' worth of nursing-home costs. 734 F.3d at 477.

Finally, the United States identifies (Br. 19) one particular argument that *Hughes* did not address: the United States' creative effort to draw an oblique inference from a late-2006 amendment to Section 1396p(c)(1)(F). As discussed below, this argument is completely meritless—which is perhaps why HHS *itself* did not raise it in its *Hughes* brief. *See* pp. 10-11, *infra*. The fact that the United States has come up with a new, incorrect argument for why the Sixth Circuit should have disregarded the statutory text does not affect the split.[1]

II. THESE CASES ARE IDEAL VEHICLES.

The United States' suggestion of a vehicle problem (Br. 20-21) is decidedly unorthodox.

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[1] The United States (but not the Commonwealth) also quibbles (Br. 20 n.3) with whether *Hutcherson v. Arizona Health Care Cost Containment System Administration*, 667 F.3d 1066 (9th Cir. 2012), is part of the split. But lower courts have treated *Hutcherson* as dispositive of the question presented, *see, e.g., Am. Nat'l Ins. Co. v. Breslouf*, No. 2084CV02374, 2021 WL 2343024, at *9 & n.7 (Mass. Super. Ct. Suffolk Cnty. June 3, 2021), and the Commonwealth treated it the same way below, *see* EEOHS Sup. Jud. Ct. Br. 44 (Nov. 8, 2021) ("*Hutcherson* is squarely on point . . . ."). In any event, as explained in the petition (at 26-27), this Court has not generally awaited decades of percolation to resolve clear splits of authority involving the Medicare and Medicaid statutes. And that practice is especially appropriate here, given the mismatch between the practical importance of the question presented and the infrequency with which it generates appellate rulings. *See* Pet. 25-26.

Typically, a "vehicle problem" is a case-specific defect that might prevent this Court from reaching the question presented. The United States does not contend that such an obstacle exists here. It is undisputed that the Supreme Judicial Court's resolution of the question presented was dispositive, thus squarely teeing up that question for this Court's review.

Sometimes, the asserted "vehicle problem" is that the petitioner will lose on remand anyway, rendering this Court's decision inconsequential. But the United States does not suggest that these cases contain that type of vehicle problem, either.

Instead, the United States merely observes (Br. 20-21) that the Commonwealth has alternative arguments *available* on remand. It does not suggest that they are *correct*—just that they *exist*. This is a feature of many, if not most, Supreme Court cases. It is not a "vehicle problem" in any conventional sense.

As to the *Mondor* annuities, the United States suggests (Br. 20) that the Commonwealth may prevail on remand on state-law grounds based on the annuities' language. Petitioners have consistently argued, however, that a Commonwealth statute would preclude that argument, *see* Pet. 28, and the United States cannot even bring itself to disagree—it simply observes (Br. 20) that the Supreme Judicial Court "did not determine whether that interpretation of state law was correct." Nor does the United States suggest that this open question of Commonwealth law would complicate this Court's review in any way.

As to the *Dermody* annuity, the trial court expressly *rejected* the Commonwealth's state-law argument based on the annuity's language. Pet. App. 44a-45a. The United States therefore points (Br. 20) to a different argument the Commonwealth might make on remand: that because the annuities at issue named remainder beneficiaries, they were not for the "sole benefit" of the community spouse and thus fall outside of Section 1396p(c)(2)(B)'s safe harbor. But the United States does not endorse this argument—which is unsurprising given that HHS contended (and the Sixth Circuit held) in *Hughes* that it is wrong. 734 F.3d at 482; *see* Pet. 30 n.13. Indeed, HHS and *Hughes* are correct; an annuity satisfies Section 1396p(c)(2)(B)(i) "so long as the financial instrument is actuarially sound and payments are made only to the spouse during his life." 734 F.3d at 482. Because everyone dies eventually, no interest could ever be *guaranteed* for anyone's "sole benefit": even with no named remainder beneficiary, if an annuitant dies earlier than expected, the remaining funds must go either to his estate or inure to the issuer. The Commonwealth's argument would therefore suggest that "sole benefit" annuities *never* exist, which cannot be right. *Id.* at 483; *accord Mertz ex rel. Mertz v. Houstoun*, 155 F. Supp. 2d 415, 427 n.14 (E.D. Pa. 2001).

The United States observes (Br. 20-21) that "addressing the meaning and scope of paragraph (2)(B) could also shed important light on any interaction between that paragraph and paragraph (1)(F)," but that is hardly cause for denying review. If this Court denies certiorari, these cases are over and there will be no further interpretation of Section 1396p(c)(2)(B). Moreover,

no court adopting the position of the Supreme Judicial Court on the question presented would ever need to address Section 1396p(c)(2)(B)'s scope. On the other hand, if the Court grants review and reverses, arguments about the meaning of "sole benefit" can be aired on remand. And if the Supreme Judicial Court sides with the Commonwealth, that would create an additional split with the Sixth Circuit that would again be ripe for this Court's review, just as the United States advocates.

III. THE DECISIONS BELOW ARE WRONG.

The question presented is whether, when an annuity is purchased for the "sole benefit," 42 U.S.C. § 1396p(c)(2)(B)(i), of a community spouse, Paragraph (1) of Subsection 1396p(c) can nonetheless create a period of Medicaid ineligibility. Section 1396p(c)(2)(B)(i) states that in such a case, "[a]n individual shall not be ineligible for medical assistance *by reason of paragraph (1)*." *Id.* (emphasis added). That unambiguous text easily resolves these cases in Petitioners' favor, and the United States' defenses of the Supreme Judicial Court's contrary conclusion (Br. 12-17) are meritless.

A. The United States' primary argument (Br. 12-13) requires obfuscation of the statutory text. It claims (Br. 13) that Section 1396p(c)(1)(F) "imposes a specific eligibility requirement where either the institutionalized spouse or community spouse purchases an annuity, with either spouse as the annuitant." Thus, in the United States' telling, the provision speaks directly to the situation here: an annuity purchased for the sole benefit of a community spouse. This interpretation comes out of nowhere. The provision simply refers to "the purchase of an annuity." 42 U.S.C. § 1396p(c)(1)(F).

It says nothing about spouses. Indeed, Subparagraph (c)(1)(F)(i) refers to an "institutionalized *individual*," *id.* § 1396p(c)(1)(F)(i) (emphasis added), underscoring the provision's applicability to single individuals who purchase annuities as well. Subparagraph (c)(1)(F) is simply a default annuity rule, subject to override if any of the conditions in Subparagraph (c)(2) is met.[2]

The United States barely acknowledges the existence of Subparagraph (c)(2)(B) and entirely refuses to engage with its text. Instead, the United States blithely asserts (Br. 14) that following the plain meaning of Subparagraph (c)(2)(B) "would erase the core application of the later-enacted paragraph (1)(F)." And the United States represents that its interpretation better purports with Congress's alleged purpose "to prevent 'affluent individuals' from 'engag[ing] in schemes to hide assets.'" *Id.* (alteration in original) (quoting Pet. App. 14a). In other words, rather than explain how the text of Subparagraph (c)(2)(B) could possibly bear the meaning the United States assigns to it, the United States recommends that the Court ignore that subparagraph so that

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[2] The United States' reading of Subparagraph (c)(1)(F) would apparently eviscerate *all* the exceptions in Subparagraph (c)(2), not just the "sole benefit" exception. For instance, a different exception overrides the transfer penalty where "the denial of eligibility would work an undue hardship." 42 U.S.C. § 1396p(c)(2)(D). And another overrides the penalty if it is shown that "the assets were transferred exclusively for a purpose other than to qualify for medical assistance." *Id.* § 1396p(c)(2)(C). In the United States' view, these commonsense exceptions would apply to all asset transfers *except* annuity purchases. That is not remotely plausible.

the Commonwealth (and the federal government) can save money.

This unadorned purposivist approach has nothing to recommend it. In enacting Section 1396p(c)(1)(F), Congress "did not eliminate but only curtailed" the use of annuities to obtain Medicaid eligibility. *Pulsifer v. United States*, 144 S. Ct. 718, 737 (2024). The debate in these cases is exactly which annuity arrangements Congress continued to permit. "And to determine the exact contours of that class, [this Court] can do no better than examine [the] text." *Id.*

To the extent the United States is arguing that Subparagraph (c)(1)(F) would be "inoperative or superfluous" if Subparagraph (c)(2)(B) applied here, Br. 14 (quoting *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 699 (2022)), that is simply incorrect. In fact, the addition of Subparagraph (c)(1)(F) changed the rule governing at least four categories of cases: (1) annuities purchased by an *unmarried* individual entering long-term care; (2) annuities purchased by a community spouse that pays benefits to *both* spouses; (3) annuities purchased for the benefit of someone outside the marriage (*e.g.*, a nondependent adult child); and (4) annuities that are not actuarially sound. *See Hughes*, 734 F.3d at 485 (invoking hypotheticals (3) and (4) as proof that "Section 1396p(c)(1)(F) is not rendered illusory" by following Subparagraph (c)(2)(B)'s text).

Subparagraph (c)(2)(B) is plainly inapplicable in each case: there is no "individual's spouse" at all in the first hypothetical, and in the others the purchase of the annuity is not "for the sole benefit of the [institutionalized] individual's spouse," 42 U.S.C. § 1396p(c)(2)(B)(i).

Before Section 1396p(c)(1)(F) was added in February 2006, *see* Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, § 6012(b), 120 Stat. 4, 63, the institutionalized individuals in each case could become eligible for Medicaid through such asset rearrangements. Following the DRA, they could still do so—but only if they named the State as primary remainder beneficiary. In short, Section 1396p(c)(1)(F) does plenty of work under Petitioners' interpretation—and the fact that it does not do *as much* work as the United States would prefer does not justify jettisoning the statute's text.

B. The United States also emphasizes (Br. 15-17) the late-2006 technical amendment to Section 1396p(c)(1)(F) that changed the word "annuitant" to "institutionalized individual." *See* Pet. 5-7. But this amendment provides no support for the United States' atextual position.

The United States appears concerned (Br. 15-16) that Petitioners' reading of the statute might deprive the technical amendment of any effect. But those concerns are easily allayed by considering the second and third hypotheticals listed above. To illustrate, take hypothetical two. The identity of "the annuitant" is ambiguous when an annuity benefits multiple individuals. So a couple could have complied with Subparagraph (c)(1)(F) as initially enacted by naming the State as remainder beneficiary to the extent benefits had been paid on behalf of the *community* spouse (who is *an* "annuitant"). That was obviously not what Congress intended, so it clarified that if an annuity has multiple annuitants—and thus is *not* within the scope of Subparagraph (c)(2)(B)'s sole-benefit exception—it is the benefits paid

on behalf of the *institutionalized* annuitant for which the State is (potentially) entitled to recoup.

The United States also argues (Br. 16-17) that the technical amendment to Section 1396p(c)(1)(F) was meant to ratify "the Secretary's interpretation" in a July 2006 letter from the Centers for Medicare & Medicaid Services (CMS). *See* Ctr. for Medicaid & State Operations, Ctrs. for Medicare & Medicaid Servs., Enclosure, Sections 6011 and 6016: New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005, at 13-14 (2006), https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/toaenclosure.pdf (CMS Letter). This is an exceptionally strained view.

Even on the questionable premise that Congress was aware of this obscure, informal guidance document, it is difficult to see how the CMS Letter has any relevance to the question presented here. The CMS Letter does not even mention the potential conflict between Subparagraphs (c)(1)(F) and (c)(2)(B), much less state that the former overrides the latter (contrary to Subparagraph (c)(2)(B)'s plain text). *See* CMS Letter 13-14.

Indeed, the United States' ratification argument rests entirely on the wafer-thin observation (Br. 16) that CMS, in discussing the effect of newly added Section 1396p(c)(1)(F), "made no mention of an exception for an annuity that named the community spouse as the annuitant." Suffice it to say that agencies lack power to eliminate statutory provisions through the magic of not discussing them. In any event, it is difficult to credit the notion that Congress decoded CMS' hidden message about sole-benefit annuities and then cryptically codified it through a two-word amendment to the statute.

C. Finally, the United States repeats (Br. 13) the Commonwealth's argument as to the relevance of Section 1396p(e), which mandates disclosure of annuities in which an institutionalized individual or community spouse has an interest. *See* 42 U.S.C. § 1396p(e)(1); Br. in Opp. 19. As Petitioners have explained, the class of annuities for which disclosure is required under Section 1396p(e) is not coextensive with those in which the State must be named as a remainder beneficiary, as Subsection (e) also covers annuities purchased prior to the lookback period, even though those purchases cannot be penalized. *See* Cert. Reply 9-10. That is why the State "shall notify the issuer of the annuity" of its right to collect as a remainder beneficiary only "[i]n the case of disclosure concerning an annuity under subsection (c)(1)(F)," 42 U.S.C. § 1396p(e)(2)(A)—*i.e.*, an annuity purchased within the lookback period and not otherwise exempted from the transfer penalty under one of the exceptions in Subparagraph (c)(2). As *Hughes* observed, Subsection (e) thus "reenforces the conclusion that § 1396p(c)(1)(F) does not control all annuities." 734 F.3d at 485 n.15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA M. NEELEY
RUBIN AND RUDMAN LLP
53 State Street, 15th Floor
Boston, MA 02109
(617) 330-7033

BRIAN E. BARREIRA
118 Long Pond Rd., Suite 206
Plymouth, MA 02360
(508) 747-8282

ADAM G. UNIKOWSKY
Counsel of Record
JONATHAN J. MARSHALL
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com