No. 11-1197

IN THE

Supreme Court of the United States

VERNON HADDEN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

REPLY BRIEF FOR PETITIONER

There cannot be serious question that the proper construction of the Medicare Secondary Payer Act ("MSPA" or "the Act") is an issue of national importance. Nor can there be serious dispute that two federal courts of appeals have reached conflicting interpretations—even on the predicate question whether the MSPA is ambiguous—of the Act's scope. The Government's opposition virtually ignores the circuit split and misassembles disparate pieces of the MSPA in an effort to evade review of the court of appeals' erroneous holding. Because this issue will frequently recur—indeed, after this case was docketed another petition was filed raising the issue in the Medicaid context—this Court's review is urgently needed.

I. THE QUESTION PRESENTED HAS DIVIDED THE COURTS OF APPEALS, IS OF NATIONAL IMPORTANCE, AND IN NEED OF THIS COURT'S REVIEW.

A. The Court of Appeals' Holding Conflicts with the Eleventh Circuit's Holding on the Same Issue.

The opposition asserts that "there is no circuit conflict." Opp. at 18. The Government is mistaken. As discussed in the petition (at 7-13), in *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010), the Eleventh Circuit construed the same statute, concluded it was ambiguous, determined that the MSP Manual was not entitled to deference, the government was not entitled to full recovery, and that the plaintiffs were entitled to allocation. The court of appeals here ruled the statute unambiguously prohibited allocation of settlements

and required full reimbursement—the opposite result of *Bradley*.

Rejecting the Government's "reli[ance] upon the language contained in one of its many field manuals," the Eleventh Circuit refused to defer to the Government's interpretation that the MSPA forbids allocation. *Id.* at 1338. To do otherwise, the court concluded, "would lead to an absurd Catch-22 result," and "[f]orcing counsel to file a lawsuit would incur additional costs, further diminishing the already paltry sum available for settlement." *Id.* at 1338-39 (footnote omitted).

As discussed in the petition, Pet. at 7-8, the court of appeals in this case and the Eleventh Circuit in *Bradley* began their analysis from fundamentally different places. The court here held that "we . . . think that the Medicare statute itself requires Hadden to reimburse Medicare to the full extent that the government advocates." Pet. App. at 1a-2a. By contrast *Bradley* found the text neither plain nor dispositive; both the majority and the dissent proceeded immediately to the deference analysis. 621 F.3d at 1337-38; *see also id.* at 1341 (Martin, J., dissenting) (considering whether deference is appropriate). The Ninth Circuit likewise concluded that the pre-amendment text of the statute did not address whether allocation is required. *Zinman v. Shalala*, 67 F.3d 841, 845 (9th Cir. 1995) ("Although the beneficiaries proffer creative constructions of the MSP legislation, we conclude the statute does not address the issue of apportioned recovery of conditional Medicare payments . . . .").

The Government dismisses *Bradley*'s holding, claiming it "involved unusual facts and a fundamen-

tally different kind of settlement." Opp. at 18. There is nothing unusual about those facts, which are similar to those here in that Mrs. Hadden also settled with the utility company. AR. at 39-40 (settlement agreement). Thus, like in *Bradley*, the Hadden's settlement had a Medicare beneficiary and a non-Medicare beneficiary as well as damages in addition to past medical expenses. *See id.*; Opp. at 18 (citing 621 F.3d at 1337). Moreover, there is no principled reason—and neither the Government nor the court of appeals offered one—to interpret the MSPA differently in situations where multiple plaintiffs are aligned against a single defendant (*Bradley*) as compared to a single plaintiff against multiple defendants (here); the question of whether the government must allocate an undifferentiated settlement among "items and services" and other damages will repeatedly remain.

Like the *Bradley* plaintiffs, the Haddens reached a pre-litigation settlement. *Compare* AR. at 39-40, *with* 621 F.3d at 1332 (the claim was presented "in a demand letter to [the decedent's] nursing home"). The plaintiffs in *Bradley* went to the probate court to seek an adjudication of their rights to the apportionment of the settlement, but the Secretary refused to participate, claiming (as here) that the MSPA does not permit allocation. *Id.* at 1332-33. Moreover, the probate court order in *Bradley* was not "on the merits of the case" and was not treated as such by the Secretary. In *Bradley*, as here, the Secretary relied on the MSP Manual (and not the plain language of the statute) to support her position that the statute prohibits equitable allocation. *Id.* at 1334.

The MSPA should be applied uniformly for the tens of millions of Medicare beneficiaries. Because the Act is now being implemented differently depending solely on which side of the Georgia border the beneficiary resides, this Court's review is needed.

B. The Amici Demonstrate that Proper Construction of the MSPA is an Issue of National Importance.

The four amici briefs amply demonstrate the national importance of the issue. Retailers, defense attorneys, insurers, and entities that settle workers' compensation claims all agree that this Court should not wait any longer to decide the proper scope of the MSPA.

For its part, the Government ignores these diverse amici, notwithstanding the retail industry's proclamation that the court of appeals' holding "makes resolution of personal injury claims short of full litigation almost impossible." Retail Litigation Center Amicus Br. at 11; *see also id.* at 15 ("The inevitable consequence of such a rule is that parties cannot reach reasonable compromise settlements."). The Government also ignores the defense bar, which makes clear that it will be increasingly difficult to settle cases with the more than 47.5 million Medicare beneficiaries because of the rule laid down in this case. DRI Amicus Br. at 9. That problem is compounded by the increased reporting of Medicare-covered injuries that began in January 2012. *See id.*; *see also* Pet. at 32 (discussing reporting requirements). The DRI brief confirms that "the conflict between the Sixth and Eleventh Circuits will frustrate settlement in countless cases involving Medicare-covered injuries." DRI Br. at 10. This "de-

terring [of] settlement . . . will force more cases to trial—with a corresponding increase in the cost of litigation (and the risk of zero recovery if the jury returns a defense verdict)." *Id.* at 16. This conundrum encourages beneficiaries "to reject reasonable settlement offers and 'roll the dice' in a jury trial," putting "the government's Medicare reimbursement at risk." *Id.* at 17.

Members of the insurance industry "who do business across the United States" are concerned that the court of appeals' interpretation of the MSPA "will have a disastrous effect on the well-established policy of the law to favor amicable resolution of tort claims." Property Casualty Insurers Association of America Amicus Br. at 1, 5. Workers' compensation attorneys have expressed similar concern. Workers' Comp. Section of the State Bar of Michigan Amicus Br. at 3-4.

Given this assemblage of amici who interact with the MSPA across the spectrum and will be harmed by the court of appeals' interpretation of the MSPA, and the nearly 11 million Medicare beneficiaries currently subject to opposing constructions of the MSPA (Pet. at 30 n.14), this Court's review is warranted. There should not be two classes of litigants—the under-65 who can settle claims, and Medicare beneficiaries, who cannot. The Court recognizes the need for review when many people are affected by differing applications of federal law. *See, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision."); *Quern v. Mandley*, 436 U.S. 725, 733-34 (1978) ("We granted certiorari . . . to consider . . .

important questions affecting the nationwide administration of a major federal welfare program.").

C. The Court Currently has Before it Several Cases Concerning Equitable Allocation in Federal Benefits Schemes.

Notwithstanding the circuit split on equitable allocation in the Medicare context, the Court currently has pending at least two cases—one granted—on proper allocation under the Medicaid and ERISA schemes.

As discussed in the petition, Pet. at 15 n.6, the Fourth Circuit determined that "federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to past medical expenses." *E.M.A. ex rel. Plyler v. Cansler*, 674 F.3d 290, 312 (4th Cir. 2012). The Fourth Circuit concluded that, "[i]n the event of an unallocated lumpsum settlement exceeding the amount of the state's Medicaid expenditures, as in this case, the sum certain allocable to medical expenses must be determined by way of a fair and impartial adversarial procedure that affords the Medicaid beneficiary an opportunity to rebut the statutory presumption in favor of the state." *Id.* The State of North Carolina has filed a petition for certiorari seeking review of that holding. *See Delia v. E.M.A.*, No. 12-98 (docketed July 20, 2012).

Similarly, in *US Airways, Inc., in its Capacity as Fiduciary and Plan Administrator of the US Airways, Inc. Benefit Plan v. McCutchen*, No. 11-1285 (cert. granted June 25, 2012), the Court granted certiorari to consider the question whether ERISA Section 502(a)(3) permits equitable allocation, even where the language of the plan requires full reimbursement.

Put simply, the courts of appeals are struggling with the issue of equitable allocation. These questions will frequently recur, particularly under the MSPA, given our growing Medicare population. Because equitable allocation under federal benefits schemes will not go away—and, indeed, will increase as the baby boomer generation becomes Medicare-eligible—the Court should provide definitive guidance with respect to the MSPA.

II. THE DECISION BELOW IS INCORRECT AND THE GOVERNMENT'S ATTEMPTS TO DEFEND IT ARE UNPERSUASIVE.

The Government, Opp. at 10-11, repeats the court of appeals' strained analysis that the 2003 amendments to the MSPA prohibit equitable allocation. Nowhere in the MSPA does the right to recovery of a settlement appear. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii).[1] Nor does the statute read that "responsibility" for "item[s] and service[s]" should mean "full responsibility." Nothing in the court of appeals' opinion explains

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[1] The Government and court of appeals' efforts to give the sheen of impropriety to Mr. Hadden's setting aside $62,000 to reimburse Medicare are misguided. Opp. at 4; Pet. App. at 3a. It is routine to request an estimate from Medicare of the trust fund's repayment demand. That was done here to avoid Medicare's burdensome penalty provisions, since invalidated. *See Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1190 (D. Ariz. 2011), *appeal docketed*, No. 11-16606 (9th Cir.). Mr. Hadden sought this information from a Medicare contractor, and the contractor's estimate is a part of the administrative record. AR. at 38. Further, Mr. Hadden's payment of the penalty under protest, Pet. App. at 3a, is also no surprise, since until recently Medicare demanded payment within 60 days, irrespective of whether the beneficiary had arguments reducing his obligations. 42 C.F.R. § 411.24(h).

this, and the Government's opposition merely parrots the majority's analysis. (The Government's misuse of the word "any," plucking it from one sentence of the statute and importing it into another, is particularly strained.) The only support the government can muster for this tortured statutory analysis is that Mr. Hadden must repay Medicare in full because he "made a 'claim against' the primary plan for the full amount of his medical expenses."[2] Opp. at 6. As explained in the petition, Pet. at 14-15, if Congress sought to require full payment, it could have said so in the statute. This Court has been clear that "[t]o supply omissions transcends the judicial function." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quotation omitted).

The Government also fails in its use of *Zinman* to support the court of appeals' holding as "eminently reasonable." Opp. at 11. The reliance on *Zinman*'s holding that "[m]andating '[a]pportionment of Medicare's recovery in tort' settlements would contravene those purposes [of reducing the outlay from Medicare] and increase costs, because it 'would either require a factfinding process to determine actual damages or would place Medicare at the mercy of a victim's or personal injury attorney's estimate of damages" is misplaced. *Id.* (quoting *Zinman*, 67 F.3d at 846). It is not difficult—nor does it contravene the statute—to have

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[2] Contrary to the Government's argument, Mr. Hadden never "sued the public utility company, seeking compensation for all of his medical expenses, as well as other damages, and the parties reached a settlement." Opp. at 4. Mr. *and* Mrs. Hadden reached a pre-complaint settlement with the utility company. *See* AR. 39-40 (settlement agreement).

Medicare and the beneficiary address the allocation issue directly, and, in the event there is not agreement, for the Administrative Law Judge hold a hearing to determine the proper apportionment of a settlement in this or similar cases. This type of hearing is required in both Medicaid and other federal benefits statutes, as discussed below. Moreover, this Court unanimously rejected the settlement-manipulation argument in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), recognizing that "the risk that parties to a tort suit will allocate away the State's interest can be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id.* at 288. *Zinman* interprets a now-superseded statute and, more importantly, it highlights the split among the courts of appeals. *Zinman* held that the statute does not speak to allocation, 67 F.3d at 845, (conflict with the Sixth Circuit) and that the Secretary's interpretation of the Act—as expressed in the MSP Manual—is reasonable, *id.*, (conflict with the Eleventh Circuit).

The opposition moves seamlessly between the Code of Federal Regulations and the MSP Manual, hoping to transfer deference to the latter from the former. Its attempt falls short. For the reasons expressed in *Bradley* and in the dissent below, the government's reliance on its internal MSP Manual is not entitled to deference. *Bradley*, 621 F.3d at 1338 ("[T]he deference given to the language in the field manual in this case by the Secretary . . . is misplaced").

Quite apart from its strained reading of the MSPA and misplaced attempts at deference, the Government

unpersuasively attempts to distinguish the similar allocation schemes present in Medicaid (42 U.S.C. § 1396k(a)(1)(A)) and the Medical Care Recovery Act (42 U.S.C. § 2651(a)) ("MCRA"). Opp. at 15-18. The Government points to the fact that under Medicaid "a third party's 'legal liability' is determined as a matter of state law" whereas, it contends, "under the Medicare statute, a primary plan's 'responsibility' for reimbursing Medicare is exclusively a matter of federal law." Opp. at 15. Of course, the only reason the utility company had an obligation to repay Medicare at all in this case is that state tort law made it liable to Mr. Hadden for his injuries.[3] A unanimous Court in *Ahlborn*, 547 U.S. 268, and the Fourth Circuit's recent decision in *E.M.A.*, 674 F.3d 290, confirm that equitable allocation is required under the federal Medicaid statute. *E.M.A.* concluded that "[i]n the event of an unallocated lump-sum settlement exceeding the amount of the state's Medicaid expenditures, . . . the sum certain allocable to medical expenses must be determined by way of a fair and impartial adversarial procedure." *Id.* at 312.[4]

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[3] Responsibility to repay Medicare's outlays on behalf of tort victims will always be predicated on state tort law. Had the Government brought a direct action against the utility, its recovery would have been governed by the same Kentucky comparative fault principles to which Mr. Hadden was subject. Medicare should not be awarded a windfall for doing nothing and having its "beneficiary" do all the work and take all the risk.

[4] The Government makes much of the proposed allocation in this case. Opp. at 12. The precise allocation is not the relevant point; in fact, Mr. Hadden seeks only to be able to proceed before either the district judge or the Administrative Law Judge and be permitted a chance to prove the precise allocation, as required by the similar Medicaid and MCRA schemes. Mr. Hadden raised this

The MCRA similarly requires that allocation apply. For instance the court in *Cockerham v. Garvin*, 768 F.2d 784 (6th Cir. 1985), held that if a beneficiary "has accepted a discounted settlement for his claims of wage loss, pain and suffering, loss of future earning potential, and the like, it is not equitable to require full reimbursement for services the government was duty-bound to render," then "[i]f Cockerham establishes on remand that his settlement was discounted, the government's portion should be reduced accordingly." *Id.* at 787.

There is no reason to treat the MSPA—which has the same purpose for the elderly as Medicaid does for the poor and the MCRA does for veterans—differently than those two benefits statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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point in the court of appeals. C.A. Reply Br. at 14 & n.6.