No. 09-1158

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MAXWELL-JOLLY, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, PETITIONER,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC.; GERALD SHAPIRO, PHARM.D, D/B/A UPTOWN PHARMACY AND GIFT SHOPPE; SHARON STEENE, D/B/A CENTRAL PHARMACY; AND TRAN PHARMACY, INC., D/B/A TRAN PHARMACY IN OPPOSITION

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MAY 24, 2010

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PARTIES TO THE PROCEEDING

Petitioner is David Maxwell-Jolly, Director of the Department of Health Care Services, State of California (DHCS).

Respondents in this Opposition brief are Independent Living Center of Southern California, Inc.; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; and Tran Pharmacy, Inc., d/b/a Tran Pharmacy, who are the plaintiffs-appellees in Case No. 09-55692, *Independent Living Center of Southern California v. Maxwell.-Jolly*.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

None of the corporations who were plaintiffs-appellees below in Case No. 09-55692 have a parent corporation and no public corporation owns any stock in these corporations.

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STATEMENT

A. Statutory Framework

1. Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (hereinafter "Medicaid Act"), is a cooperative federal-state program that provides federal financial assistance to participating States to enable them to provide medical treatment for the poor, elderly, and disabled.

A State's participation in Medicaid is voluntary. However, if a State chooses to participate, then it must comply with the Medicaid Act and its implementing regulations. To receive federal funds, States are required to establish and administer their Medicaid programs through individual "state plans for medical assistance" approved by the federal Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396.

The Medicaid Act provides specific requirements for state plans and reimbursement rates, *see* 42 U.S.C. § 1396a(a)(1)-(71), including those set out in § 1396a(a)(30)(A) (hereinafter "Section 30A"), the specific provision at issue in this case. Section 30A requires that a state plan must provide such methods and procedures relating to payments for care and services to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers to ensure that care and services are as available to recipients as is available to the public in the same geographical area.

2. On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 (hereinafter

"AB 5"). AB 5 added § 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the Department of Health Care Services, as the state agency which administers California's state Medicaid plan, to cut by ten percent reimbursement rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, optometrists, clinics, and other providers. AB 5 provided that the ten percent rate cuts were to go into effect on July 1, 2008. *See* Cal. Welf. & Inst. Code § 14105.19(b)(1) (2008).[1]

The California Legislature subsequently enacted Assembly Bill 1183 (hereinafter "AB 1183"), on September 30, 2008. Section 44 of AB 1183 amended § 14105.19 to make the rate reductions of AB 5, excluding non-contract hospitals, expire on February 28, 2009. Cal. Welf. & Inst. Code § 14105.19(b). Section 45 of AB 1183 added a new § 14105.191 (2009) that, effective March 1, 2009, required a five percent rate cut for pharmacies under Medi-Cal's fee-for-service program. Section 57 of AB 1183 makes the legislative finding that the "state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures." Pet. App. 210. The Legislature provided that the act would "take effect immediately." Pet. App. 216-17 (§ 76).

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[1] The ten percent cuts of AB 5 were challenged in another case with the same caption. The instant suit does not address the cuts in AB 5.

B. Factual Background

1. The Respondents are an independent living center with more than 5,000 clients or members who are Medi-Cal beneficiaries in the Medi-Cal fee-for-service program, and three Medi-Cal pharmacies with more than 8,000 Medi-Cal beneficiaries. On January 16, 2009, they sued David Maxwell-Jolly, Director of the California Department of Health Care Services, in the United States District Court of the Central District of California to prevent the implementation of AB 1183. Pet. App. 128-29.

The complaint alleged that the action of the State to enact and implement the five percent payment reduction of AB 1183 was void, contrary to and preempted under the Supremacy Clause by the federal quality of services and equal access clauses of Section 30A, due to the fact that the Legislature had enacted AB 1183 without considering—as required by Section 30A—the relevant factors of whether providers could sustain the payment reduction without loss of quality of services and equal access of beneficiaries to quality services; and that irreparable injury in the form of reduction and denial of access to services to Medi-Cal beneficiaries would result. Pet. App. 130.

The relief sought by Respondents was an injunction to prohibit the Director of the Department of Health Care Services from implementing AB 1183. Pet App. 130.

2. On February 27, 2009, the district court granted respondents' motion for injunctive relief. Pet. App. 151.

In holding that respondents could bring their claim under the Supremacy Clause, the district court relied on the Ninth Circuit's decision in *Indep. Living Ctr. of S. California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) *cert. denied,* 129 S. Ct. 2828 (U.S. 2009) (hereinafter "*ILC I*"). In that opinion, the Ninth Circuit stated that "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." The court cited in detail the numerous cases holding that claims for injunctive relief based on federal preemption may be brought absent any express right or cause of action. *Id.* at 1055-1056 (citing, *inter alia*, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). *Id.* at 1055-1056.

In *ILC I*, the Ninth Circuit also rejected petitioner's argument that a claim of preemption under a federal statute enacted pursuant to Congress' spending power, like the Medicaid Act, should be treated differently. *Id.* at 1059-1062. The Ninth Circuit noted that this Court and other circuits that have addressed the argument flatly rejected it. *Id.* Petitioner's petitions for rehearing, rehearing *en banc* and certiorari for this decision were denied.

The first question of this present petition for certiorari (No. 09-1158) is essentially, therefore, another bite of the same apple, without any change in circumstances or new law cited by petitioner to

justify or explain why the Court should now re-visit and re-review its prior decision to deny certiorari on the facts and legal claims in respect to which certiorari was previously denied, in 2009.

3. In the instant case, the district court concluded that respondents had met their burden of demonstrating that a preliminary injunction should issue to enjoin implementation of AB 1183.

The district court found that respondents demonstrated a likelihood of success on the merits because the Legislature enacted the rate reduction without any consideration of the relevant factors required by Section 30A to be considered—efficiency, economy, quality of care, and equality of access, as well as the effect of providers' costs on those relevant factors—and failed to show any justification other than purely budgetary concerns for rates that substantially deviate from the providers' costs. Pet. App. 139, 143.

Also, it found that respondents demonstrated a substantial likelihood of irreparable harm resulting from implementation of AB 1183, because the cuts would limit Medi-Cal beneficiaries' access to many brand and generic drugs. Pet. App. 144-49. In addition, the evidence established that independent pharmacies represent thirty-three percent of the licensed community pharmacies in California and many of these pharmacies with higher than average costs would be "hard-hit" by the cut, causing a discontinuation or severe reduction in services to Medi-Cal beneficiaries. Pet. App. 148-49.

Weighing the balance of the hardships and the public interest, the district court concluded that the

"significant threat to the health of Medi-Cal recipients" that "reducing payments to health-care service providers will likely cause" outweighed any expected fiscal savings, which the district court noted were unlikely to materialize because "many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care." Pet. App. 147 n.7.

On April 3, 2009, the district court denied petitioner's motion to amend, alter, or clarify the preliminary injunction of February 27, 2009. Pet. App. 152.

4. On March 3, 2010, the Ninth Circuit affirmed the district court's issuance of a preliminary injunction. Pet. App. 53. In an unreported decision, the court referenced the reasoning supplied in another case decided that day, *California Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010) (hereinafter "*California Pharmacists*"), which rejected petitioner's arguments on the likelihood of success on the merits. Pet. App. 54.

Petitioner argued in both *California Pharmacists* and the instant case that while the state Legislature enacted the rate cuts, nevertheless, the Legislature did not need to comply with the mandate of Section 30A. Instead, petitioner contended, only the Department was required to consider the factors set forth in Section 30A. Pet. App. 11.

The Ninth Circuit held in *California Pharmacists* that whichever state body sets the rates must comply with the federal requirements for setting them. The court explained: "[S]uch an approach is

consistent with that of our sister circuits, where in the context of legislative, as opposed to agency, rate-setting, they too have focused on ensuring that the legislative body had information before it so that it could properly consider efficiency, economy, quality of care, and access to services *before* enacting rates." Pet. App. 15-16 (emphasis in original) (citing cases from the Eighth Circuit).

Next, petitioner argued in *California Pharmacists* that the state Legislature did actually consider the factors of Section 30A. The Ninth Circuit upheld the district court's conclusion that the legislative history showed that the Legislature did not in fact consider the Section 30A factors but rather was "concerned solely with budgetary matters." Pet. App. 20.

The Ninth Circuit then reiterated its holding from *Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009)(hereinafter "*ILC II*"), which is consistent with all the courts of appeals to consider the issue, that Section 30A mandates that state Medicaid rate reductions "may not be based solely on state budgetary concerns." 572 F.3d at 659 (citing cases from the Third, Eighth, Ninth, and Tenth Circuits).

Petitioner further argued in *California Pharmacists* that the Department had retained the discretion not to implement the rate cut and that the Department's post-enactment study complied with the requirements of Section 30A. The Ninth Circuit noted that this argument had been waived because it was not raised in petitioner's opening brief, but further rejected the argument on the merits. Pet. App. 22-24.

The court concluded that the Department's contention that it had discretion not to implement the cuts was rebutted by the clear text of the state law as well as the state's published notice announcing that the Department "is mandated" to implement the rate reductions. Pet. App. 26-28.

5. In the instant ILC Plaintiffs case, petitioner did not contest, at the preliminary injunction hearing, nor in his appeal briefs, that the Legislature did not in fact consider the relevant quality and equal access factors of Section 30A, in enacting AB 1183. Pet. App. 141, 54-55. At oral argument at the Ninth Circuit, petitioner did assert, for the first time, that the legislature had considered the Section 30A factors with regard to pharmacies. Yet, the only evidence proffered by petitioner was a comment on the May 30, 2008 agenda of Assembly Budget Subcommittee stating: "Dec. 2007 Myers and Stauffer study found that current Medi-Cal drug pricing averages around 5 percent over cost," (Pet. App. 54-55), the veracity of which comment was challenged by the ILC Plaintiffs at the oral argument. The Ninth Circuit, without ruling on the veracity issue, noted that petitioner did not even argue in his briefing, in either the district court or on appeal, that the citation to a study is sufficient to comply with Section 30A. *Id.* The Ninth Circuit concluded that a one-sentence citation to the May 30, 2008 agenda "does not show adequate consideration of the § 30(A) factors." *Id.* at 55-56.

In addition, the Ninth Circuit found that the cited study did not demonstrate that the rate cut complied with Section 30A. The court noted that while the study addressed costs, "it is bereft of any

analysis of the remaining § 30(A) factors – efficiency, economy, quality, and access to care." Pet. App. 56. The study indicated that in setting an appropriate reimbursement formula, costs and market dynamics should be "balanced with the need to maintain sufficient access to services for Medi-Cal recipients throughout the state." *Id.* Further, the study instructed that the rate setter should "consider issues of access to services." *Id.* The study also did not address whether "the costs observed are reflective of providers operating in the most efficient manner possible." *Id.* The Ninth Circuit therefore affirmed the district court's holding that respondents were likely to succeed on their claim that the rates were not set in compliance with Section 30A.

The Ninth Circuit similarly found that the district court did not abuse its discretion in holding that respondents had demonstrated irreparable harm. The appeals court explained: "The district court concluded that even if, on average pharmacies would be compensated above their acquisition costs, the Director had not refuted Plaintiffs' showing that many brand and generic drugs would be reimbursed at a level below cost, limiting Medi-Cal patients' access to those drugs." *Id.*

REASONS THE PETITION SHOULD BE DENIED

I. *CERTIORARI* SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE THERE IS NO DIVISION IN THE LOWER COURTS AND THE DECISION BELOW IS A CORRECT APPLICATION OF THIS COURT'S SETTLED SUPREMACY CLAUSE JURISPRUDENCE

A. The Courts Of Appeals Have Uniformly Reached The Same Conclusion As The Panel Below

While petitioner's previous petitions have alleged conflict in the courts of appeals, the present petition contains no such claim. To the contrary, the present petition seeks review based on the harmonious interpretation of law among the Ninth, D.C., Fifth and Eighth Circuits. Pet. 27. Indeed, every court of appeals is in accord with the Ninth Circuit's holding that a federal court may resolve, on the merits, a claim that a plaintiff will be injured unless injunctive or declaratory relief is issued to enjoin a preempted state law.

The unanimity among courts of appeals follows naturally from the clarity of the Court's preemption decisions, such as *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002). Petitioner's assertion that the Court has failed to address pertinent questions of law is rebutted by the widespread agreement among courts of appeals regarding the appropriate standards for permitting a preemption claim.

Verizon established that a statutory cause of action is not needed for a preemption claim. Any change in this holding would impact a wide range of preemption claims, including those frequently brought by businesses. Indeed, "most federal statutes that are at issue in ... preemption cases do not create an express private cause of action for injunctive relief against state officers." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 406-7 (2004).

Petitioner suggests that preemption claims under Spending Clause statutes should be treated differently, but petitioner does not cite a single case that so holds. And there is no basis in the text of the Constitution for differentiating the Spending Clause from any other constitutional provision under which Congress legislates. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 Duke L.J. 345, 392-93 (2008).

A change in the standards for preemption would have widespread implications, reducing the primacy of federal law in our system of government. As Justice Kennedy has observed, "the whole jurisprudence of preemption" is of vital importance to "maintaining the federal balance." *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

Petitioner provides citations for the decisions of the D.C., First, Fifth, and Eighth Circuits that have permitted preemption claims to be considered on the merits in the context of Spending Clause statutes. Pet. 27. Petitioner has previously conceded in its earlier petition that in cases brought under non-

Spending Clause statutes, several other Circuits have permitted preemption claims "regardless of whether the federal statutes create privately enforceable rights," giving as examples cases from the Second, Third, and Tenth Circuits. Petition in *ILC II* at 22, n.6.

Indeed, the Tenth Circuit held that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004). Accord *Burgio & Campofelice, Inc. v. New York State Dept. of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997). The Third Circuit similarly concluded that "a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption." *St. Thomas--St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000).

Moreover, the Fourth, Sixth, Seventh and Eleventh Circuits have also held that preemption claims do not depend upon a cause of action in the preempting federal statute. The Fourth Circuit stated: "we need not inquire into whether [the federal statute] provides a cause of action" for a preemption claim. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 368-369 (4th Cir. 2004). The Seventh Circuit rejected the argument advanced by petitioner in this case that *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), is applicable to a preemption claim. *Illinois Ass'n of Mortg. Brokers v. Office of*

Banks & Real Estate, 308 F.3d 762, 765 (7th Cir. 2002). The Sixth Circuit held that there is "a cause of action for prospective injunctive relief" for federal preemption claims. *GTE N., Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000). Finally, the Eleventh Circuit held *en banc* that, apart from any express cause of action available under the statute, "[f]ederal courts must resolve the question of whether a public service commission's order violates federal law and any other federal question." *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003) (citing *Verizon Maryland, Inc.*, 535 U.S. 635); *see also id.* at 1296 (Tjoflat, J., dissenting on other grounds) ("litigants may assert a private right of action for preemption under the Supremacy Clause").

B. The Decision Below, Like The Decisions Of All The Other Courts Of Appeals, Followed Numerous Precedents Of This Court Permitting Preemption Claims To Enjoin State Law, Including In Cases Involving Spending Clause Statutes

1. This Court has long permitted private parties to obtain declaratory and injunctive relief to prevent injury from state laws that are preempted by federal law. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), employers sought a declaration that a New York law was preempted by a federal statute providing no cause of action. The Court unanimously reached the merits of the employers' preemption claim. It explained:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96 n.14.

Subsequently, this Court unanimously reaffirmed the availability of injunctive relief on the basis of federal preemption. In *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002), the Court again sustained the jurisdiction of the federal courts to hear claims that state conduct (there, an order of the public service commission) was preempted by federal law. In *Verizon*, the state commission argued that Verizon's preemption claim could not proceed, because the federal Telecommunications Act "does not create a private cause of action to challenge the Commission's order." 535 U.S. at 642. The Court dismissed this argument, stating:

> We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." As we have said, "the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they

> are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Id. at 642-643 (citations and some quotation marks omitted).

As in *Shaw* and *Verizon*, respondents seek declaratory and injunctive relief against an allegedly preempted state law. Respondents' entitlement to relief will unquestionably depend on the construction of a federal statute. Petitioner does not argue that the claim is immaterial or wholly insubstantial and frivolous. The Ninth Circuit dutifully followed *Shaw* and *Verizon* in reaching the merits of the preemption claim.

It is true that these cases speak in terms of jurisdiction, rather than in terms of a cause of action. But petitioner does not dispute the existence of a federal cause of action to enforce the Supremacy Clause. Indeed, petitioner himself conceded below that there were "circumstances under which a party may properly seek relief under the Supremacy Clause." C.A. *ILC I* Pet. Opening Br. 6. This sensible concession is in accord with the repeated and consistent actions of this Court in adjudicating preemption claims on the merits even in the absence of an express or implied statutory cause of action. It is also consistent with the understandings of leading federal courts treatises. *See* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003); 13D Charles A. Wright, Arthur R.

Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566 (3d ed. 2008).[2]

2. Petitioner nonetheless argues that respondents' claim should be dismissed, because the federal statute at issue in this case, Medicaid, is a Spending Clause statute. Pet. 26-27. That assertion is contrary to this Court's recent practice.

This Court has repeatedly adjudicated claims by private parties asserting preemption by virtue of the Medicaid statute and other federal spending statutes. In *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), a Medicaid recipient sought a declaratory judgment that a state law was preempted by the Medicaid Act, and this Court unanimously agreed. In *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), drug makers also brought an action asserting preemption of a state law under the Act. A plurality of four Justices concluded on the merits that the state law was not preempted, while three Justices argued in dissent that the state law was indeed preempted.[3]

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[2] The Second and Fifth Circuits have identified the Supremacy Clause itself as the basis of a cause of action for preemption claims. *See Burgio & Campofelice, Inc. v. New York State Dept. of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005).

[3] Justice Thomas's concurrence suggested that the Court might want to consider "whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in judgment). Justice

(Footnote continued on following page)

Furthermore, petitioner's argument appears to rely on the assumption that federal Spending Clause statutes cannot preempt state statutes under the Supremacy Clause. But that is contrary to a host of this Court's holdings. *See, e.g., Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 476 (1996) (per curiam) (preemption under Medicaid); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269-270 (1985); *see also Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.).[4] In essence, petitioner makes a policy argument against enforcement of the Medicaid statute, but this policy argument has no basis in law.

Scalia concurred separately, proposing initial enforcement by the federal government. *Id.* at 675 (Scalia, J., concurring in judgment). Nevertheless, both Justices joined without reservation the Court's subsequent decision in *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), resolving a private action asserting preemption under Medicaid.

[4] Every court of appeals to consider the argument that Medicaid as a whole is unenforceable (arising largely in the context of suits under § 1983) because of its nature as Spending Clause legislation, has rejected that argument as contrary to extensive Supreme Court precedent. *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002); *Frazar v. Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002) *rev'd sub nom. Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).

Indeed, this Court has consistently held that the Eleventh Amendment is not a bar to private parties seeking prospective injunctive relief against state officials to enforce Medicaid and other Spending Clause statutes because such suits are necessary in order to vindicate the Supremacy Clause. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (Medicaid); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Aid to the Aged, Blind, and Disabled).

3. Petitioner also suggests (Pet. 37) that because of the oversight role of the federal government in the Medicaid program, a preemption claim should not be permitted. As this Court explained in *Verizon*, a preemption claim may proceed as long as the statute "does not *divest* the district courts of their authority" under federal question jurisdiction to review the state's "compliance with federal law." *Verizon Maryland, Inc.*, 535 U.S. at 642 (emphasis in original). There is nothing in the text or structure of the Medicaid Act that divests the courts of their authority to resolve a preemption claim. The federal government's ability to withhold federal funds does not preclude other federal remedies. *Rosado v. Wyman*, 397 U.S. 397 (1970). *See also Blessing v. Freestone*, 520 U.S. 329, 346-348 (1997); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990).

4. Preemption claims such as respondents' are consistent with the voluntary nature of states' participation in federal spending programs.

Petitioner's assertion of a "sovereign right to choose not to comply," with such statutes, Pet. in *ILC I* at 32 (April 1, 2009), is erroneous. States have a sovereign right to choose not to participate in

federal programs and to choose not to take federal monies. But once they have made those choices, the State "must comply with [the federal statute's] mandates." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 520 (2007).

Although petitioner complains of the cost to comply with federal law, (*see,* Pet. Br. 28), the federal government matches or exceeds state dollars for Medi-Cal. The federal government paid half of Medi-Cal expenditures prior to October 2008, and will pay more than half for the period of October 2008 to December 2010 pursuant to the American Recovery and Reinvestment Act of 2009 (hereinafter "ARRA"), Pub. L. No. 111-5, 123 Stat. 115. Under ARRA, the federal government is expected to spend over $11 billion on Medi-Cal for that period. Kaiser Commission on Medicaid and the Uninsured, *American Recovery and Reinvestment Act (AARA): Medicaid and Health Care Provisions* (Mar. 2009), at http://www.kff.org/medicaid/upload/7872.pdf. In return for this infusion of billions of federal dollars to provide health insurance for California residents, it is fitting that the state be required to comply with federal law.

Moreover, this is not the first time the Ninth Circuit has recognized this cause of action. To the contrary, the court of appeals and many other courts of appeals expressly reached the same conclusion long ago. As petitioner himself acknowledged below, the Ninth Circuit "has recognized that 'the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.' " C.A. *ILC I* Pet. Opening Br. 5-6 (quoting

Guar. Nat. Ins. Co. v. Gates, 916 F.2d 508, 512 (9th Cir. 1990)); *see also Bernhardt v. Los Angeles County*, 339 F.3d 920, 929 (9th Cir. 2003); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

5. Petitioner argues that under the Ninth Circuit's ruling in *ILC I*, any alleged conflict between federal and state law is sufficient to "enjoin state conduct," thereby opening "the door to a flood of lawsuits." Pet. 27. Yet, petitioner refutes his own argument by citing a recent California case applying *ILC I* in which the district court dismissed the Supremacy Clause claim, finding no preemption of state law. Pet. 28 (citing *Gray Panthers of San Francisco v. Schwarzenegger*, C 09-2307 PJH, 2009 WL 2880555 (N.D. Cal. Sept. 1, 2009)). Similarly, in other Supremacy Clause cases involving Spending Clause statutes in which the court found no conflict between federal and state law, claims have been dismissed in accordance with this Court's clear directions for preemption cases. *See, e.g., Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d 724 (5th Cir. 2009).

C. There Is No Basis For Petitioner's Assertion That A Preemption Claim Must Satisfy The Standards Of an Implied Private Right of Action and 42 U.S.C. § 1983

Petitioner suggests that respondents' preemption claim should be dismissed because it does not meet the standards for a cause of action under an implied private right of action and under 42 U.S.C. § 1983 ("Section 1983"). Pet. 27. This Court has never

utilized either standard for a preemption claim, and indeed, petitioner cites no case which has so ruled.

1. Petitioner suggests that Congress did not intend to create a private remedy under an implied private right of action. Pet. 27. The remedy in this case is a declaration that federal law preempts state law and an injunction preventing enforcement of a preempted state law. This remedy is supplied by the Supremacy Clause, not an implied private right of action, and does not depend upon an express declaration by Congress. As this Court has explained, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). Thus, the cases cited by petitioner requiring express statements by Congress to create an implied private right of action are simply inapposite to respondents' preemption claim.

Indeed, *Verizon* rejected the assertion that a district court could not reach the merits of a preemption claim unless the plaintiff had demonstrated a statutory cause of action. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002). Dutifully following *Verizon*, the Fourth Circuit rejected the argument advanced by petitioner in the instant case (Pet. 17) that *Cort v. Ash*, 422 U.S. 66 (1975), applies to a preemption claim. *Verizon Maryland, Inc.*, 377 F.3d at 368-369. As noted *supra*, a claim under the Supremacy Clause is not dependent upon a statutory cause of action, either express or implied.

2. Section 1983 is an express cause of action to enforce statutory and constitutional rights that provides various remedies against individuals acting under color of state law and municipal corporations. It does not supplant or repeal remedies available under the Constitution and the laws of the United States for injunctive or declaratory relief.

Preemption and § 1983 are completely distinct and separate avenues of enforcing federal law. The remedies available under § 1983 are far more extensive than under preemption, including compensatory and punitive damages against state actors in their individual capacities, compensatory damages against municipalities, and attorneys' fees. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988. Preemption claims, in contrast, seek only to enforce the structural relationship between federal and state law by obtaining prospective equitable relief against state and local officials in their official capacities.

"Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). For a non-frivolous preemption claim, "denial of a judicial remedy would undermine federal supremacy and subvert the rule of law by enabling state officers to proceed with enforcement of an invalid state law, to the detriment of private parties." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 409 (2004).

Several members of this Court have stressed that preemption claims and § 1983 serve different

purposes and have different requirements. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), for example, Justice Kennedy explained that even though he would have held that the plaintiff could not bring its action under § 1983, nevertheless:

> we would not leave the [plaintiff] without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 *does not provide the exclusive relief* that the federal courts have to offer. * * * [P]laintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.

Id. at 119 (Kennedy, J., dissenting) (some citations omitted, emphasis added).

Petitioner asserted in its reply brief in *ILC II* that Justice Kennedy's *Golden State* dissent indicates that an "immunity" is needed for a preemption claim. Pet. Reply in *ILC II* at 6. In fact, Justice Kennedy said precisely the opposite: "Pre-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals." 493 U.S. at 117. *See also Hagans v. Lavine*, 415 U.S. 528, 553 (1974) (Rehnquist, J., dissenting) (a claim that state

regulations conflict with federal regulations would properly invoke federal question jurisdiction to determine whether the state regulations are "invalid under the Supremacy Clause of the United States Constitution").

Indeed, petitioner, in contending on the basis of no supporting precedent, the novel view that the rules applicable to whether a person injured by preempted state action may obtain injunctive relief are those rules applicable to § 1983, ignores statements in *Golden State* in which the Court has specifically highlighted the differences between § 1983 and preemption:

> Given the *variety of situations* in which preemption claims may be asserted, in state court and in federal court, it would be obviously incorrect to assume that a federal right of action *pursuant to § 1983* exists every time a federal rule of law pre-empts a state regulatory authority.

Golden State Transit Corp., 493 U.S. at 107-108 (emphasis added).

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION BECAUSE THE DECISION BELOW IS A CORRECT APPLICATION OF THE MEDICAID ACT AND THERE IS NO RELEVANT DIVISION IN THE LOWER COURTS

1. Petitioner asserts that the Ninth Circuit's opinion does not comport with the text of the Medicaid statute. Pet. 3-7, 30-33. This claim is without basis. The opinion in this matter is mindful of the textual provisions of Section 30A, concluding

the evidence showed that the state statute conflicted with federal statutory requirements.

The Medicaid statute, in Section 30A, requires states to utilize "methods and procedures...to assure that payments are consistent with efficiency, economy, quality of care, and are sufficient to enlist enough providers" so that beneficiaries have the same access to services as the general population.

The evidence demonstrated that the state Legislature which enacted the rate cut never considered the impact of the rate cut on the Section 30A factors of efficiency, economy, quality, and access to care. Because the Legislature did nothing to assure that payments were sufficient to provide access to services comparable to the general population, the state statute conflicted with federal law.

Petitioner mischaracterizes the Ninth Circuit's evidentiary holding as setting numerous "specific requirements" for a study to comply with Section 30A. Pet. 31-33. In fact, the Ninth Circuit's opinion does not set forth any specifications for procedures or studies that would comply with Section 30A. On the contrary, the Ninth Circuit merely evaluated the evidence proffered by the parties and concluded the setting of the pharmaceutical rates lacked any consideration of numerous Section 30A factors. Instead, the evidence demonstrated that the rates were set for purely budgetary reasons. Pet. App. 20.

Further, the Dec. 2007 Myers and Stauffer cost study filed by petitioner as proof of the Legislature's compliance with Section 30A explicitly stated that the study did not contain any information about

access to services and that the "evaluation" of fees should include consideration of access to services. Pet. App. 55-56. The study similarly noted that it did not address efficiency and that this should be considered in setting rates. *Id.* Thus, the Ninth Circuit properly held that the study does not show that the rate cut was enacted in accordance with Section 30A.

Petitioner suggests that the Ninth Circuit erred in holding that the Legislature, as distinguished from the Department, was required to comply with Section 30A. Pet. App. 31-32. This Court held in *Ahlborn* that when a state *Legislature* enacts a statute that conflicts with the federal Medicaid law, the state statute is "unenforceable." *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268, 292 (2006). It is well established that the enactments of state Legislatures may be preempted by federal law. *See, e.g., Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Ninth Circuit properly analyzed the text and legislative history of the state law and found it conflicted with the textual requirements of Section 30A.

2. All Circuits which have ruled on the subject have unanimously concluded that although budgetary considerations, - which are not listed in the text of Section 30A as a relevant factor at all - may be considered by the rate setter along with the relevant factors of efficiency, economy, quality of care, and equal access, nevertheless, rates based purely on budgetary considerations, or in which budgetary considerations are the conclusive factor,

violate Section 30A. *See, e.g., Rite Aid of Pennsylvania, Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999); *Minnesota HomeCare Ass'n, Inc. v. Gomez*, 108 F.3d 917, 917 (8th Cir. 1997).

This being so, the claim of the petitioner that the Ninth Circuit is out of step with other Circuits on the basic issue of whether a State may reduce Medicaid provider payments purely for budgetary reasons, is without merit. Cases from the Fifth and Seventh Circuit addressed only the "equal access" provision of Section 30A. Those courts described the plaintiffs' appeal as not raising a failure of the state to consider the factors of efficiency, economy and quality of care. *See Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 932 (5th Cir. 2000); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996). Similarly, the First Circuit did not address these requirements in rejecting the enforceability of Section 30A under 42 U.S.C. § 1983. *See Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 59-60 (1st Cir. 2004). There is no split among the Circuits on whether the requirements of Section 30A can be disregarded; therefore, no review is warranted in respect to the Second Question asserted by petitioner.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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