

---

---

**In The  
Supreme Court of the United States**

—◆—  
DAVID MAXWELL-JOLLY, DIRECTOR OF  
THE DEPARTMENT OF HEALTH CARE SERVICES,  
STATE OF CALIFORNIA, ET AL., PETITIONERS,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

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

—◆—  
**JOINT SUPPLEMENTAL BRIEF OF  
RESPONDENTS CALIFORNIA PHARMACISTS  
ASSOCIATION, ET AL., INDEPENDENT LIVING  
CENTER OF SOUTHERN CALIFORNIA, ET AL.,  
AND LYDIA DOMINGUEZ, ET AL.**

STEPHEN P. BERZON  
SCOTT A. KRONLAND  
\*STACEY M. LEYTON  
PEDER J. THOREEN  
ALTSHULER BERZON LLP  
177 Post Street, Suite 300  
San Francisco, CA 94108  
(415) 421-7151  
sleyton@altshulerberzon.com

*Counsel for Respondents  
Lydia Dominguez, et al.*

*\*Counsel of Record*

\*DEANNE E. MAYNARD  
SETH M. GALANTER  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 887-8740  
dmaynard@mofoc.com

CRAIG J. CANNIZZO  
LLOYD A. BOOKMAN  
BYRON J. GROSS  
JORDAN B. KEVILLE  
FELICIA Y SZE  
HOOPER, LUNDY &  
BOOKMAN, INC.  
1875 Century Park East,  
Suite 1600  
Los Angeles, CA 90067

*Counsel for Respondents  
California Pharmacists  
Association, et al.*

[Additional Counsel Listed On Inside Cover]

DECEMBER 16, 2010

\*LYNN S. CARMAN  
MEDICAID DEFENSE FUND  
8 Waterbury Lane  
Novato, CA 94949  
(415) 927-4023  
lynnscarman@hotmail.com

STANLEY L. FRIEDMAN  
445 S. Figueroa Street,  
27th Floor  
Los Angeles, CA 90071

ROCHELLE BOBROFF  
NATIONAL SENIOR CITIZENS LAW CENTER  
1444 EYE STREET, NW  
Washington, DC 20005

*Counsel for Respondents  
Independent Living Center  
of Southern California, et al.*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
SUPPLEMENTAL REASONS THE PETITION SHOULD BE DENIED.....	1
CONCLUSION.....	4

TABLE OF AUTHORITIES

Page

CASES:

*Forbes Health Sys. v. Harris*, 661 F.2d 282 (3d Cir. 1981).....2

*Oregon Ass’n of Homes for Aging, Inc. v. Oregon*, 5 F.3d 1239 (9th Cir. 1993).....2

*Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991), cert. denied, 502 U.S. 1032 (1992) .....2

STATUTES & REGULATIONS:

42 C.F.R. § 447.253(i) .....1

Cal. Welf. & Inst. Code § 12306.1(d)(7)(B) .....2

Respondents, who previously filed separate briefs in opposition, offer this joint supplemental brief to respond to two new assertions made by petitioners with respect to this case in their supplemental brief of December 14, 2010 filed in *Maxwell-Jolly v. Independent Living Center of Southern California, Inc.*, No. 09-958 (“Supp. Br.”).

**SUPPLEMENTAL REASONS  
THE PETITION SHOULD BE DENIED**

The United States Department of Health and Human Services (HHS) recently disapproved California’s proposed state plan amendments (SPAs) that reflected the various rate cuts challenged by respondents. Petitioners claim (Supp. Br. 5-6, 13) that, absent the preliminary injunctions obtained by respondents, the rate cuts would be in effect while their administrative appeal of the disapproval is pending. That claim is not supported by anything in their brief, and there is in fact no support for it.

To the contrary, HHS’s disapproval is an independent bar to the rate cuts taking effect. The relevant federal regulation provides that States that participate in the Medicaid program “*must* pay for \* \* \* services using rates determined in accordance with methods and standards specified in an *approved* State plan.” 42 C.F.R. § 447.253(i) (emphases added). Because HHS disapproved the proposed amendments to implement the rate cuts, petitioners cannot

currently pay for services using any rates but the unreduced rates previously approved by the federal government. See *Oregon Ass'n of Homes for Aging, Inc. v. Oregon*, 5 F.3d 1239, 1241 (9th Cir. 1993) (“A [state] law that effects a change in payment methods or standards without HCFA approval is invalid.”); *Temple Univ. v. White*, 941 F.2d 201, 214 (3d Cir. 1991) (“Without an approved State plan, there can be no approved rates and, therefore, no payments available to be made by [the State] to the hospitals.”), cert. denied, 502 U.S. 1032 (1992); *Forbes Health Sys. v. Harris*, 661 F.2d 282, 286 (3d Cir. 1981) (amended state regulation “makes a change in the state reimbursement scheme which is of ‘sufficient substance’ to warrant HHS review prior to becoming effective”). That is so without regard to the preliminary injunctions entered in these cases.

Petitioners further assert (Supp. Br. 6) that the rate cut in one of the four separate appeals that petitioners combined into this single petition (*Dominguez*) is not affected by the disapproval of the SPAs. That particular cut, however, has been subject to intervening state legislative action that bars its implementation until at least July 1, 2012. See Cal. Welf. & Inst. Code § 12306.1(d)(7)(B) (signed by Governor on Oct. 19, 2010). Even after that date, the rate cut would take effect “only \* \* \* if a court of competent jurisdiction has issued an order, that is not subject to appeal or for which the time to appeal has expired, upholding its validity.” *Ibid.* In their action, the *Dominguez* respondents have also challenged the

validity of the rate cuts under the Americans with Disabilities Act and Rehabilitation Act, and those claims are still pending in the district court. Thus, the State cannot implement that rate cut until at least July 1, 2012, and until after a final disposition resolving *all* challenges to the validity of that rate cut, including challenges that are not affected at all by the issues raised in the petition.

Accordingly, because of subsequent HHS and state legislative action, the preliminary injunctions are not presently a but-for cause of the State not being able to implement any of the challenged rate cuts. Setting aside those injunctions would not allow implementation of the rate cuts, and review on an incomplete record is unwarranted at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN P. BERZON  
 SCOTT A. KRONLAND  
 \*STACEY M. LEYTON  
 PEDER J. THOREEN  
 ALTSHULER BERZON LLP  
 177 Post Street, Suite 300  
 San Francisco, CA 94108  
 (415) 421-7151  
 sleyton@altshulerberzon.com

*Counsel for Respondents*  
*Lydia Dominguez, et al.*

\*LYNN S. CARMAN  
 MEDICAID DEFENSE FUND  
 8 Waterbury Lane  
 Novato, CA 94949  
 (415) 927-4023  
 lynns carman@hotmail.com

STANLEY L. FRIEDMAN  
 445 S. Figueroa Street,  
 27th Floor  
 Los Angeles, CA 90071

ROCHELLE BOBROFF  
 NATIONAL SENIOR CITIZENS  
 LAW CENTER  
 1444 Eye Street, NW  
 Washington, DC 20005

*Counsel for Respondents*  
*Independent Living Center*  
*of Southern California, et al.*

DECEMBER 16, 2010

\*DEANNE E. MAYNARD  
 SETH M. GALANTER  
 MORRISON & FOERSTER LLP  
 2000 Pennsylvania Ave., NW  
 Washington, DC 20006  
 (202) 887-8740  
 dmaynard@mofocom

CRAIG J. CANNIZZO  
 LLOYD A. BOOKMAN  
 BYRON J. GROSS  
 JORDAN B. KEVILLE  
 FELICIA Y SZE  
 HOOPER, LUNDY &  
 BOOKMAN, INC.  
 1875 Century Park East,  
 Suite 1600  
 Los Angeles, CA 90067

*Counsel for Respondents*  
*California Pharmacists*  
*Association, et al.*

*\*Counsel of Record*