Nos. 09-958, 09-1158, and 10-283

IN THE

Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner,*
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents.*

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *et al.*, *Petitioners,*
v.
CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents.*

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner,*
v.
SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents.*

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

BRIEF OF RESPONDENTS SANTA ROSA MEMORIAL HOSPITAL, ET AL., NO. 10-283

MICHAEL S. SORGEN
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton Street, 9th Fl.
San Francisco, CA 94108
(415) 956-1360

DEAN L. JOHNSON
DEAN L. JOHNSON, INC.
6863 Tanzanite Drive
Carlsbad, CA 92009
(760) 603-0022

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
LOWELL J. SCHILLER
AMY L. HANKE
JOSHUA J. FOUGERE
LYNDSAY N. HUOT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents in No. 10-283

* Counsel of Record

July 29, 2011

QUESTION PRESENTED

Whether there is an equitable right of action under the Constitution to enjoin state officials from implementing and enforcing state laws that violate Section 30(A) of the Federal Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A).

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the brief in opposition of respondents Santa Rosa Memorial Hospital et al., No. 10-283, is incorporated herein by reference. No amendments to that statement are necessary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Federal Medicaid Program.	3
B. California Medi-Cal Program.	5
C. Procedural Background.	7
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE SUPREMACY CLAUSE SUPPORTS A RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.	12
A. A Preemption Claim Under The Supremacy Clause Is Consistent With The Original Understanding Of The Framers.	13
B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.	18
C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.	22
1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.	22

TABLE OF CONTENTS—Continued

Page

2. The Analysis Applied In Statutory Right Of Action Cases, Including *Gonzaga* and *Sandoval*, Does Not Apply To Constitutional Claims. 26

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE. 31

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted. 32

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim. 36

III. CONGRESS DID NOT BAR RESPONDENTS' CLAIMS FOR INJUNCTIVE RELIEF AND PRUDENTIAL STANDING PROVIDES NO BASIS FOR DENYING RESPONDENTS ACCESS TO THE FEDERAL COURTS. 41

A. Section 30(A) Does Not Bar These Claims. 42

B. The Prudential Standing Doctrine Does Not Bar These Claims. 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 10, 27, 30, 39
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 25
Ark. Dep't of Health & Human Servs. v. *Ahlborn*, 547 U.S. 268 (2006) 18, 33, 39, 43
Astra USA, Inc. v. *Santa Clara Cnty.*, 131 S. Ct. 1342 (2011) 38
Baker v. *Carr*, 369 U.S. 186 (1962) 24, 48
Barnes v. *Gorman*, 536 U.S. 181 (2002) 36
BellSouth Telecomms., Inc. v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270 (11th Cir. 2003) 19
Bennett v. *Arkansas*, 485 U.S. 395 (1988) 33
Bennett v. *Ky. Dep't of Educ.*, 470 U.S. 656 (1985) 36
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 23, 24
Blessing v. *Freestone*, 520 U.S. 329 (1997) .. 29, 30
Blum v. *Bacon*, 457 U.S. 132 (1982) 11, 33, 34
Bond v. *United States*, 131 S. Ct. 2355 (2011) ..... *passim*
Bush v. *Lucas*, 462 U.S. 367 (1983) 24
Callam Cnty. v. *United States*, 263 U.S. 341 (1923) 18
Cannon v. *Univ. of Chi.*, 441 U.S. 677 (1979) 10, 39, 40
Carlson v. *Green*, 446 U.S. 14 (1980) 23, 24, 43
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 49
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 20
City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 18

TABLE OF AUTHORITIES—continued

Page

Cloverleaf Butter Co. v. *Patterson*, 315 U.S. 148 (1942) 18
Corfield v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) 15
Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) ..... *passim*
Crosby v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) 11, 32, 33
CSX Transp., Inc. v. *Williams*, 406 F.3d 667 (D.C. Cir. 2005) 19
Cummings v. *City of Chi.*, 188 U.S. 410 (1903) 18
Davis v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) 25
Davis v. *Passman*, 442 U.S. 228 (1979) 20, 23
Dobbins v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842) 18
Douglas v. *Seacoast Prods., Inc.*, 431 U.S. 265 (1977) 31
Elizabeth Blackwell Health Ctr. For Women v. *Knoll*, 61 F.3d 170 (3d Cir. 1995) 19
Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 49
Exeter Mem'l Hosp. Ass'n v. *Belshe*, 145 F.3d 1106 (9th Cir. 1998) 46
Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112 (1896) 25
First Nat'l Bank of E. Ark. v. *Taylor*, 907 F.2d 775 (8th Cir. 1990) 19
Fla. Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 18
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 25

TABLE OF AUTHORITIES—continued

Page

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 25, 26, 30
Gade v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) 18
Gen. Talking Pictures Corp. v. *W. Elec. Co.*, 304 U.S. 175 (1938) 49
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 10, 21, 29, 32
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 10, 26, 28
GTE N., Inc. v. *Strand*, 209 F.3d 909 (6th Cir. 2000) 19
Hodel v. *Irving*, 481 U.S. 704 (1987) 25
Houston v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820) 18
Hui v. *Castaneda*, 130 S. Ct. 1845 (2010) 24
Ill. Ass'n of Mortgage Brokers v. *Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002) 19
King v. *Smith*, 392 U.S. 309 (1968) 33, 36, 37
Lawrence Cnty. v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) ... 18, 21, 33
Local Union No. 12004 v. *Massachusetts*, 377 F.3d 64 (1st Cir. 2004) 19
Loyal Tire & Auto Ctr., Inc. v. *Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006) 19, 29
Maine v. *Thiboutot*, 448 U.S. 1 (1980) 29
MedImmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118 (2007) 48
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 30, 32
Monroe v. *Pape*, 365 U.S. 167 (1961) 27
Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 46

TABLE OF AUTHORITIES—continued

Page

Mintz v. *Baldwin*, 289 U.S. 346 (1933) 18
Osborn v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) 18, 19, 34
Pac. Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) 18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 33, 36
Perez v. *Campbell*, 402 U.S. 637 (1971)..... 18
PhRMA v. *Walsh*, 538 U.S. 644 (2003) 18, 34, 35
Planned Parenthood of Houston & Se. Tex. v. *Sanchez*, 403 F.3d 324 (5th Cir. 2005) .. 19
PLIVA, Inc. v. *Mensing*, 131 S. Ct. 2567 (2011) ..... *passim*
Powell v. *McCormack*, 395 U.S. 486 (1969) 25
Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) 19
R.R. Co. v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873) 18
Raines v. *Byrd*, 521 U.S. 811 (1997)..... 48
Ray v. *Atl. Richfield Co.*, 435 U.S. 151 (1978) 18
Rosado v. *Wyman*, 397 U.S. 397 (1970).... *passim*
Rowe v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) 18
Rumsfeld v. *FAIR*, 547 U.S. 47 (2006)..... 35
Schweicker v. *Chilicky*, 487 U.S. 412 (1988) 24
Shaw v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983) 18, 21
Soc'y for the Propogation of the Gospel v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823) 18

TABLE OF AUTHORITIES—continued

Page

S.-Cent. Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 10, 25
Suter v. *Artist M.*, 503 U.S. 347 (1992) 29, 30
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 21, 24
Townsend v. *Swank*, 404 U.S. 282 (1971) 33
U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 25
United States v. *Stanley*, 483 U.S. 669 (1987) 24
Va. Office for Prot. & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 21
Verizon Md., Inc. v. *Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004) 19
Verizon Md. Inc. v. *Pub. Serv. Comm'n*, 535 U.S. 635 (2002) 21, 32
Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 21
Weston v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829) 18
Wilder v. *Va. Hosp. Ass'n*, 496 U.S. 498 (1990) ..... *passim*
Wright v. *Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) 39
Wyeth v. *Levine*, 129 S. Ct. 1187 (2009) 32
Ex parte Young, 209 U.S. 123 (1908) 20
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 25

CONSTITUTIONS

Art. of Confed., art. XIII 13
U.S. Const., art. VI, cl. 2 ..... 29, 32

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS Page

42 U.S.C. § 1316 ..... 4, 12, 44
§ 1320a-7b(d)..... 35
§ 1320a-10 45
§ 1396a(a) 3, 45
§ 1396c..... 4, 5, 12
Cal. Welf. & Inst. Code § 14019.4(a) & (c).... 35
42 C.F.R. § 430.12 ..... 4, 46
§ 430.14..... 4
§ 430.15..... 4
§ 430.16(a) 4, 46
§ 430.18..... 4, 7
§ 430.20..... 4
§ 430.35(d) 5
§ 430.38..... 4
§ 430.66..... 4
§ 430.76(b) 4
§ 447.256(c)..... 4

RULE

Sup. Ct. R. 14.1(a) 49

LEGISLATIVE HISTORY

H.R. Rep. No. 105-149 (1997) 43
Cong. Globe, 42d Cong., 1st Sess. (1871) 27, 28

SCHOLARLY AUTHORITIES

Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977)..... 27
Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009) 15

TABLE OF AUTHORITIES—continued

Page

Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085 (2000)..... 15

Christopher R. Drahozal, *The Supremacy Clause* (2004)..... 13, 14

Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991)..... 16

Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* (5th ed. 2003) ..... *passim*

James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998)..... 15

John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930)..... 21

Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429 (2003)..... 17

John E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007)..... 37

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000)..... 31

Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (1915)..... 17

Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279 (1913)..... 17

Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909)..... 21

TABLE OF AUTHORITIES—continued

Page

David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004) 14

Charles A. Wright et al., *Federal Practice and Procedure* (3d ed. 2008) 12

OTHER AUTHORITIES

The Debates in the Several State Conventions on the Adoption of the Constitution (Elliot ed., 2d ed. 1836) 16

The Federalist No. 33 17

The Federalist No. 44 17

The Federalist No. 80 17

The Records of the Federal Convention of 1787 (Farrand ed., 1911) 13, 14, 15, 16, 18

Restatement (Second) of Contracts (1981)... 38

James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345 (1975) 13

Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918) 17

Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of Legal History* 167 (1965) 17

INTRODUCTION

Two centuries of this Court's precedents support a right of action to enjoin state legislation that is invalid under the Supremacy Clause. See, *e.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003) (*Hart & Wechsler*). The claims in this case—to enjoin the California Department of Health Care Services from enforcing reductions in Medicaid reimbursement rates that California enacted in violation of Section 30(A) of the Medicaid Act—fit comfortably within that line of authority. Neither petitioners nor their *amici* offer any persuasive reason why the availability of preemption claims arising under the Supremacy Clause should now be called into question.

They nevertheless argue that, even if these claims exist generally, they should be disallowed in this particular case because Section 30(A) does not confer a private right of enforcement. Petrs. Br. 15-16; U.S. Br. 10-11. These preemption claims do not, however, seek to "enforce" that provision, or to assert rights granted thereunder. Rather, they vindicate the structural, constitutional interest in the supremacy of national laws. That interest is enforceable in the federal judiciary as a matter of constitutional law, as this Court has "long ... recognized." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001); see also *Bond* v. *United States*, 131 S. Ct. 2355, 2364-66 (2011). Statutory enforcement procedures may provide alternative means by which state violations of federal law can be addressed, but those procedures do not displace a right of action for equitable relief under the Supremacy Clause.

At bottom, it is properly the judiciary's role to decide when injunctive relief should be available to prevent or halt violations by state officials of the Constitution. Thus, the default rule is that traditional equitable power exists to enforce the Constitution's commands, particularly when Congress has not acted expressly and unequivocally to seek to limit the courts' inherent equitable authority.

The need for judicial intervention is particularly evident here. California enacted the rate reductions challenged in this case for the sole purpose of addressing budget concerns, without considering their impact on health care services as required by Section 30(A) of the Act. Those reductions have been squarely held to violate the Act, and this Court has declined to review that question. Indeed, the federal agency responsible for administering Medicaid, the Centers for Medicare and Medicaid Services (CMS), has itself found that these reductions violate the Act. U.S. Pet. Br. App. 1a-3a (No. 09-958).

Yet, absent the injunctions issued in this case, the State could have and would have imposed these unlawful reductions *for the past three years*.[1] CMS does not have the authority to compel compliance with the Act; rather, the only penalty it can impose for a violation is to withdraw the State's federal Medicaid funding. This draconian sanction is rarely sought, however, because it would lead to a result that is contrary to the primary purpose of the Medicaid Act—*i.e.*, to facilitate the provision of health care services to those otherwise unable to obtain them. And, even when sought, this sanction can be imposed only after a lengthy series of negotiations and hearings, a process that can (and often does) take years.

---

[1] The first of these reductions took effect on July 1, 2008.

Permitting California to continue violating federal law with impunity would result in irreparable harm to those least able to bear the burden and would seriously undermine the constitutional structure in a fashion fundamentally inconsistent with two unbroken centuries of this Court's precedent. The claims in this case should be upheld, and the judgment below affirmed.

STATEMENT OF THE CASE

A. Federal Medicaid Program.

Enacted in 1965, the Medicaid Act establishes a cooperative federal-state program under which the federal government assists States to furnish medical assistance for poor, elderly, and disabled individuals. *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (citing 42 U.S.C. § 1396). A State's participation is voluntary, but if it chooses to participate, it must comply with the Act's requirements and implementing regulations. *Id.* A participating State must establish and administer the Medicaid program through a "plan for medical assistance" that has been approved by the Secretary for Health and Human Services (HHS). *Id.* (quoting 42 U.S.C. § 1396a(a)).

A state plan must, among other things, ensure that payments to health care providers "are consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers so that care and services are available ... to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). This provision, Section 30(A) of the Act, requires that a State, before reducing reimbursement rates payable to health care providers, must first consider the effect on "the relevant statutory factors [of] efficiency, economy, quality of care, and access." Pet. App. 10-11 (No. 09-958). In particular, the State must make a

determination, based on "responsible cost studies ... that provide reliable data as a basis for its rate setting," that the new rates "bear a reasonable relationship to efficient and economical hospitals' costs of providing quality services, unless the [State finds] some justification for rates that substantially deviate from such costs." *Id.*[2]

Material changes to prescribed reimbursement rates require an "amendment" to the State's Medicaid plan, and generally cannot be implemented until reviewed and approved by CMS (the operating department in HHS which oversees Medicaid). 42 C.F.R. §§ 430.12, 430.14, 430.15, 430.20, 447.256(c). An amendment submitted to CMS is deemed approved unless the agency takes formal action within 90 days, either by rejecting the amendment or requesting additional information. 42 U.S.C. § 1316(a); 42 C.F.R. § 430.16(a). A State whose plan is disapproved may seek reconsideration through administrative appeals and, ultimately, judicial review. 42 U.S.C. § 1316(a)(2)-(5), (b); 42 C.F.R. §§ 430.18, 430.38.

A participating State that administers its plan in violation of statutory requirements may be subject to funding-withdrawal proceedings under the Medicaid Act. 42 U.S.C. § 1396c; 42 C.F.R. § 430.66. The State must be afforded "reasonable notice and opportunity for hearing" in these proceedings, 42 U.S.C. § 1396c, to be conducted by a designated agency official, 42 C.F.R. § 430.66. Other interested parties may seek to intervene, *id.* § 430.76(b), but Medicaid providers and beneficiaries cannot initiate these proceedings, *id.* If the State is found to violate the Act, then (contingent on rights to administrative and judicial review) fed-

---

[2] This interpretation of Section 30(A), applied by the courts below, *see, e.g.*, Pet. App. 10-11 (No. 09-958), is not at issue here.

eral Medicaid funding "shall" be withheld until the State demonstrates "that there will no longer be any such failure to comply." 42 U.S.C. § 1396c; see 42 C.F.R. § 430.35(d).

B. California Medi-Cal Program.

California is a participant in the federal Medicaid program. *E.g.*, Pet. App. 2-5 (No. 09-1158). It accepts funding under the Medicaid Act, and is bound by the Act's provisions, including Section 30(A). *Id.* The California implementation plan, as approved by CMS, designates the California Department of Health Care Services (DHCS) as the entity responsible for administering the State's Medicaid program, known as "Medi-Cal." *Id.*

In 2008 and 2009, the California legislature passed three bills reducing Medi-Cal reimbursement rates. The first, Assembly Bill 5 (AB 5), imposed an across-the-board 10% reduction on payments and reimbursement rates for hospitals, physicians, pharmacies, and other health care providers, to be effective July 1, 2008. *Id.* at 190-97 (enacted Feb. 16, 2008). The second, Assembly Bill 1183 (AB 1183), directed that the initial rate reductions would expire on February 28, 2009; thereafter, reimbursement rates would generally be reduced 1% from their pre-2008 levels, except that certain health facilities and pharmacies would be subject to a 5% reduction and hospitals not under contract with the State would be subject to the greater of a 10% reduction in allowable costs or 95% of the applicable average contract rate. *Id.* at 198-217 (enacted Sept. 30, 2008). Finally, Senate Bill 6 (SB 6) reduced the maximum contribution paid by Medi-Cal for wages and benefits relating to

in-home supportive services after July 1, 2009.[3] *Id.* at 218-27 (enacted Feb. 20, 2009). All of these reductions were enacted for the express purpose of addressing the State's budget deficit. See, *e.g.*, *id.* at 197.

Neither the California legislature nor DHCS studied the impact of these rate reductions on health care services prior to their enactment, as required by Section 30(A). Pet. App. 11-12 (No. 09-958); Pet. App. 17-29 (No. 09-1158); Pet. App. 2-3 (No. 10-283). The changes also were not submitted to CMS for approval prior to their initial implementation, as required by the Medicaid program. Pet. App. 11-12 (No. 09-958); Pet. App. 17-29 (No. 09-1158); Pet. App. 2-3 (No. 10-283). Not until September 2008, three months after AB 5 went into effect, did DHCS notify CMS of the changes. U.S. Pet. Br. App. 1a-3a (No. 09-958).

On December 24, 2008, CMS formally responded to DHCS's submission by requesting additional information concerning the State's justification for the rate reductions. *Id.* That request had the effect of postponing the review process, and CMS asked that DHCS provide the relevant information within 90 days. *Id.* DHCS, however, never replied. *Id.* Nearly two years later, on November 18, 2010, CMS notified DHCS that it was denying the amendments. *Id.* CMS explained that it could not approve the amendments because, among other things, "California has not demonstrated that it would meet the conditions set out in [Section 30(A)]." *Id.* The same day, DHCS requested reconsideration, *id.* at 2a, 5a-7a, thereby

---

[3] The California legislature subsequently passed a bill that delays implementation of SB 6 until July 2012, and requires a court to validate the reduction prior to implementation. U.S. Br. 4.

triggering a formal administrative hearing, 42 C.F.R. § 430.18. To date, those proceedings remain pending.

C. Procedural Background.

The claims in this case, challenging AB 5, AB 1183, and SB 6 as inconsistent with Section 30(A) of the Medicaid Act, were brought in five separate lawsuits filed in (or removed to) federal courts in California on behalf of a diverse group of health care providers, Medicaid beneficiaries, and others adversely affected by the rate reductions. Pet. App. 1-38, 54-57 (No. 09-958); Pet. App. 53-54, 61, 95-96, 106-08, 111-12, 128-33 (No. 09-1158); Pet. App. 10-13 (No. 10-283).

In all of these actions, the district courts ultimately entered orders preliminarily enjoining DHCS from implementing the rate reductions. *E.g.*, Pet. App. 94-124 (No. 09-958). The courts held that the reductions were inconsistent with Section 30(A) of the Medicaid Act, and found that the plaintiffs would suffer irreparable harm if the reductions were allowed to go into effect. *E.g.*, *id.* These harms included not only revenue losses to health care providers—which might not be compensable, given the State's sovereign immunity—but also loss of services available to Medi-Cal beneficiaries, as providers would be forced to "turn away" new Medi-Cal patients and restrict services available to those individuals.[4] *Id.* at 108-21. These hardships, the courts found, outweighed the

---

[4] In one of the actions, *California Pharmacists Association* v. *Maxwell-Jolly*, No. 09-722 (C.D. Cal.), the district court initially denied injunctive relief to certain plaintiffs on grounds of insufficient evidence of irreparable harm. Pet. App. 126-27 (No. 09-1158). The Ninth Circuit subsequently reversed that judgment as an abuse of discretion, because courts have recognized that the rate reductions would have precisely those effects. *Id.* at 38-39.

State's budgetary concerns. *Id.* at 121-22; see also Pet. App. 91-104, 133-50, 169-74 (No. 09-1158); Pet. App. 23 (No. 10-283).

In a series of appeals, the Ninth Circuit affirmed the preliminary injunction orders. On the threshold issue of whether plaintiffs had asserted a valid cause of action, it held that these claims were properly brought directly under the Supremacy Clause, without regard to whether they might also be brought under 42 U.S.C. § 1983 or through an implied statutory cause of action. *E.g.*, Pet. App. 58-93 (No. 09-958). "For more than a century, federal courts have entertained suits seeking to enjoin state officials from implementing state legislation allegedly preempted by federal law, and we see no reason to depart from the general rule in this case, or in this category of cases." *Id.* at 83. On the merits of the preemption claims, the court of appeals held that the rate reductions were inconsistent with Section 30(A) of the Medicaid Act, and therefore preempted under the Supremacy Clause, because the reductions had been enacted without the requisite "stud[y of] the[ir] impact ... on the statutory factors of efficiency, economy, quality, and access to care" or "consider[ation of] reliable cost studies when adjusting ... reimbursement rates." *Id.* at 11-12. It also affirmed the district courts' balancing of the equities, and their decision to grant preliminary injunctive relief, notwithstanding the State's assertion that the reductions were necessary in light of budget constraints. *Id.* at 12-13, 28-29.[5]

---

[5] Although not all of the appeals were consolidated, they were all decided consistently and based on substantially the same reasoning. *See, e.g.*, Pet. App. 11-13, 58-93 (No. 09-958); Pet. App. 10-36, 38-40, 44-51, 54-57, 69-82 (No. 09-1158); Pet. App. 1-4 (No. 10-283).

Petitions for writ of certiorari were timely filed with respect to each of the appeals. Two questions were presented: (i) whether the Ninth Circuit properly had held, as a threshold matter, that the Supremacy Clause supports a constitutional preemption claim, and (ii) whether the Ninth Circuit properly had held, on the merits, that the California rate reductions contravene Section 30(A) of the Medicaid Act and are therefore preempted. This Court consolidated the petitions, and granted review only as to the first question. Thus, there is no question now that the state statutes violate Section 30(A) and are preempted; the only issue is whether a federal court has authority to issue injunctive relief to remedy California's established violation of the Supremacy Clause.

SUMMARY OF ARGUMENT

The claims in this case, to enjoin California from enforcing preempted state legislation, are supported by a long and unbroken line of precedent recognizing an equitable right of action under the Constitution to address ongoing constitutional violations. *E.g.*, *Malesko*, 534 U.S. at 74. The claims at issue here cannot be distinguished, as petitioners and the United States would have it, Petrs. Br. 15-17; U.S. Br. 10-11, merely because the federal statute on which they are based also provides an administrative process to withdraw federal funding in response to a statutory violation. That process offers the federal government a means to vindicate its own interests in ensuring a State's compliance with the Act, but they do not affect the rights of individuals adversely affected by unconstitutional state legislation to seek equitable relief in federal court.

1. It is "well-established" that the Constitution itself supports a right of action seeking prospective

equitable relief to address constitutional violations. *Hart & Wechsler*, *supra*, at 903. Scores of opinions from this Court have recognized such claims, and never has the Court so much as suggested that this constitutional right of action depends for its existence on congressional authorization. *Infra* Part I.B-C. Such a prerequisite would be flatly inconsistent with this Court's approach to other structural constitutional provisions that, like the Supremacy Clause, have always been understood to support a claim for prospective equitable relief without need for an authorizing statute. *E.g.*, *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984); see also *Bond*, 131 S. Ct. at 2364-66.

To reaffirm the longstanding recognition of this constitutional right of action would not be an "end run" (Petrs. Br. 35) around decisions like *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), which require "rights-creating" language as a precondition to a statutory cause of action. *Infra* Part I.C.2. Claims seeking to enforce a *statute*, whether 42 U.S.C. § 1983 or any other, arise under the statute and thus are available only when authorized thereby. *E.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). Claims seeking to enforce the *Constitution*, by contrast, arise as a necessary incident of the constitutional structure. *E.g.*, *S.-Cent. Timber*, 467 U.S. at 87; see also *Golden State*, 493 U.S. at 116-17 (Kennedy, J., dissenting); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting). Whatever role Congress may have in crafting adjudicatory mechanisms and remedies for constitutional claims, the Constitution itself empowers the judiciary to entertain suits alleging ongoing constitutional violations, including violations of the Supremacy

Clause, and to abate them when appropriate through prospective equitable relief.

2. This right of action is no less available when the preemption claim implicates a federal statute enacted under authority of the Spending Clause. *Infra* Part II.A. The only relevant issues in the preemption analysis are whether the federal statute is constitutionally applicable to the State and, if so, whether it conflicts with the challenged state law. *E.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The constitutional basis for the federal statute has never been held relevant to this inquiry, or to the antecedent question of whether a cause of action is available. To the contrary, this Court has repeatedly upheld equitable relief on claims that alleged a conflict between state legislation and requirements of federal spending programs. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 145-46 (1982).

The possibility that federal funding might be withdrawn, or that the State might opt out of the program, does not render an individual preemption claim unnecessary or unavailable. *Infra* Part II.B. So long as the State remains a participant in the federal program, it is subject to the conditions imposed by federal law, and state legislation in contravention thereof is invalid under the Supremacy Clause, whether or not it is "possible" that the conflict might be avoided by a future change in circumstances. *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579 (2011). Regardless of what administrative remedies might be available to the federal government to allow it to vindicate its own interest in enforcing compliance with a federal program, individuals who are adversely affected by unconstitutional state legislation retain the right to seek prospective equitable relief in the federal courts.

3. A right of action under the Supremacy Clause is, in any event, fully consistent with the administrative process contemplated by the Medicaid Act. *Infra* Part III.A. The Act grants CMS authority to review state plans and, when appropriate, to reject those that do not comply with federal law. 42 U.S.C. §§ 1316(a)(1), 1396c. However, it does not define that process as exclusive, or otherwise suggest that individual preemption claims should be precluded. To the contrary, because administrative claims under the Act and preemption claims under the Supremacy Clause pursue complementary objectives—one to enforce compliance with federal law, and the other to enjoin state legislation in conflict with that law—both forms of action can and should be allowed.

The plaintiffs in this case are adversely affected by state laws that have been held unconstitutional and invalid under the Supremacy Clause. *Supra* pp. 7-9. Notwithstanding petitioners' late-raised (and waived) objection based on "prudential standing," Petrs. Br. 49-52, there is no reason that these parties should be denied a right of equitable relief to enjoin operation of those laws. *Infra* Part III.B. The judgment below should be affirmed.

ARGUMENT

I. THE SUPREMACY CLAUSE SUPPORTS A RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.

It has long been accepted, as the United States acknowledges, U.S. Br. 17-18, that the Supremacy Clause supports a claim for individuals to challenge preempted state legislation. *Hart & Wechsler*, *supra*, at 903; see also 13D Charles A. Wright et al., *Federal Practice and Procedure* § 3566, at 289-92 (3d ed. 2008). That principle, although disputed by petition-

ers, Petrs. Br. 33-45, accords with the original understanding of the Supremacy Clause, and two centuries of caselaw thereafter, as well as this Court's decisions in statutory rights cases such as *Gonzaga* and *Sandoval*.

A. A Preemption Claim Under The Supremacy Clause Is Consistent With The Original Understanding Of The Framers.

There is no evidence, notwithstanding petitioners' claims to the contrary, Petrs. Br 35-45, that the Framers of the Constitution would have thought that individuals adversely affected by state legislation invalid under the Supremacy Clause would be unable to seek equitable relief from the federal judiciary. To the contrary, the historical record suggests that they expected and intended such a right of action to be available.

1. The Framers' principal objective in crafting the Supremacy Clause was to establish an effective mechanism by which States could be compelled to adhere to federal law. Christopher R. Drahozal, *The Supremacy Clause* 6-7 (2004); see also, *e.g.*, 3 *The Records of the Federal Convention of 1787*, at 524-29 (Farrand ed. 1911) (Farrand). Although the Articles of Confederation had declared the principle of national supremacy and directed the States to "abide by" and "inviolably observe[ ]" national law, Art. of Confed., art. XIII, they provided no method to enforce that principle, with the result that several States had enacted legislation or exercised powers (such as negotiating treaties with foreign countries) in direct contravention of national law. Drahozal, *supra*, at 6-7; see also James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345, 348-58 (1975).

To remedy this defect, each plan offered at the Constitutional Convention would have given authority to one or more branches of the federal government to invalidate state legislation that was inconsistent with national policy—and, when necessary, to compel adherence. *E.g.*, 3 Farrand, *supra*, at 524-29; see also Drahozal, *supra*, at 6-7. For instance, one plan, offered by the delegates from New Jersey, would have allowed the executive to call forth the military against a recalcitrant State, 1 Farrand, *supra*, at 245; another, associated with the Virginia delegation, would have vested in Congress the power to "negative" state legislation deemed inconsistent with national law, *id.* at 21, 54, 164-65. The proposal ultimately adopted, embodied in the Supremacy Clause, shared the same purpose as other plans but delegated responsibility for enforcing the principle of national supremacy to the judiciary. *E.g.*, *id.* at 168, 313, 322; 2 Farrand, *supra*, at 28-29, 144, 169, 183, 389-91, 417, 603; see also 3 Farrand, *supra*, at 524-29; Drahozal, *supra*, at 20-23.

A private right of action to challenge preempted state legislation is necessary to allow the judiciary to satisfy this constitutional purpose. State legislation can be presented to federal courts only in the context of "cases" or "controversies," *e.g.*, 2 Farrand, *supra*, at 430, and the parties most able to bring these cases—in modern terms, those with "standing"—are those adversely affected by the state legislation. See, *e.g.*, David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 401-03 (2004). Without a right of action, there would be no mechanism by which unconstitutional state laws could be addressed, except in those cases where the State itself elected to bring an enforcement action in the courts, thereby implicating the Supremacy Clause as a defense.

It is inconceivable, given the Framers' recent experience under the Articles of Confederation, *e.g.*, 1 Farrand, *supra*, at 166-67, 316-17, 326, that they would have intended the enforcement of national supremacy to depend on voluntary action by the States. Nor would they likely have viewed the Supremacy Clause as nothing more than a "rule of decision," Petrs. Br. 35, directing States to follow national law—as had the Articles previously—but giving the federal courts no actual authority to invalidate unconstitutional state legislation. See, *e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 762 (1998). The Framers understood and intended that the federal judiciary would be open to individuals injured by unconstitutional state legislation and empowered to issue orders declaring state legislation invalid and prospectively enjoining its enforcement. See, *e.g.*, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 706-07 (2009).[6]

2. This understanding is reflected at the Convention and ratification debates. Throughout those proceedings, the Supremacy Clause was consistently described as giving judges authority affirmatively to "set aside" and "declare void" (not merely "decline to

[6] There is no support (even in the single source petitioners cite, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085 (2000)) for the suggestion that placement of the Supremacy Clause in Article VI, rather than Article I, somehow militates against recognition of a cause of action to enforce that Clause. Petrs. Br. 41; *cf.*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (addressing claim to enforce Privileges and Immunities Clause of Article IV); *infra* Part I.C.1 (citing cases addressing other constitutional claims).

enforce") state legislation that contravenes federal law. *E.g.*, 2 Farrand, *supra*, at 27-28, 391. Although constitutional remedies and rights of action were not a focus of the Convention, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991), several delegates expressed the understanding that the federal judiciary should entertain claims by "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State," 3 Farrand, *supra*, at 55-56 (Randolph), and that federal judges, when presented with an unconstitutional state law, would be able to grant prospective equitable relief in the form of a "supersedeas," *id.* at 524-29 (Madison).[7] During the ratification debates, both supporters and opponents of the Constitution assumed that the *federal* judiciary would be empowered "in the first instance" to decide the constitutionality of state laws—presumably in actions commenced by individuals, as it would have been unlikely for a State to bring an enforcement action in federal court. *Id.* at 286-87; see also *id.* at 205-07; 3 *The Debates in the Several State Conventions on the Adoption of the Constitution* 266 (Elliot ed., 2d ed. 1836).

This is consistent with the views set forth in *The Federalist Papers*. Petitioners heavily rely (Petrs. Br. 39-40) on a statement by Alexander Hamilton that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institu-

---

[7] The proposal by Edmund Randolph would have allowed the judiciary to invalidate not only state legislation found to be inconsistent with federal law but, further, any state laws deemed "contrary to the principles of equity and justice." 3 Farrand, *supra*, at 55-56; *see also* 1 Farrand, *supra*, at 97-98; 2 Farrand, *supra*, at 73-80.

tion of a federal government." *The Federalist No. 33* (Hamilton). But Hamilton did not state or even suggest that this "truth" was an unenforceable one. On the contrary, in light of the views expressed elsewhere by both Hamilton and James Madison, this statement suggests that they understood a right of action to challenge unconstitutional state statutes to be inherent in the constitutional structure, just as they understood the right of judicial review of federal legislation to be inherent in that same structure. See *The Federalist No. 44* (Madison); *The Federalist No. 80* (Hamilton).

This understanding fits squarely within contemporary legal practice. At the time of the Founding, colonial and English judicial practice permitted individuals to seek redress in equity for injuries resulting from an *ultra vires* act or void law. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-50 (2003).[8] For example, the English Board of Trade accepted and addressed petitions from colonists challenging local acts as inconsistent with English law. *E.g.*, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 50-52 (1915). The English Privy Council adjudicated appeals by colonists alleging that local provisions were "repugnant" to English law. *E.g.*, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279, 287-88 (1913). Petitioners' *amicus* seeks to downplay these procedures as "fundamentally political and administrative in nature," Br. of Nat'l Gov. Ass'n 13, but does not explain

---

[8] *See generally* Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of Legal History* 167, 176 (1965); 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918).

why these analogous practices would not have informed the Framers' understanding of the role of the judiciary in reviewing local legislation. *E.g.*, 1 Farrand, *supra*, at 105, 138-40; 2 Farrand, *supra*, at 73-80 (referring to English practice in addressing judicial review).

B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.

Consistent with this understanding, for nearly 200 years the Court has addressed claims seeking equitable relief against the operation of a preempted state law. *Hart & Wechsler*, *supra*, at 903. There are scores of such cases in this Court alone, just a sampling of which are set forth in the margin,[9] in addition to the unanimous recognition of such a cause of action by every single federal court of appeals to ad-

---

[9] *See, e.g.*, *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *PhRMA* v. *Walsh*, 538 U.S. 644 (2003); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray* v. *Atl. Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942); *Mintz* v. *Baldwin*, 289 U.S. 346 (1933); *Callam Cnty.* v. *United States*, 263 U.S. 341 (1923); *Cummings* v. *City of Chi.*, 188 U.S. 410 (1903); *R.R. Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873); *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *cf. Dobbins* v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842); *Weston* v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829); *Soc'y for the Propogation of the Gospel* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820).

dress the question.[10] These cases were decided in each critical period in the evolution of enforcing constitutional claims against state actors—including, among others, the eras shortly after the Founding; before and after the Civil War and the enactment of § 1983; and throughout the Twentieth Century, both before and after this Court's decisions in cases like *Gonzaga* and *Sandoval*.

As early as 1824, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court held that an entity could seek equitable relief against a state official acting under a state law preempted by the Supremacy Clause. *Id.* at 838. The Court expressly rejected the argument (similar to that offered by petitioners here, Petrs. Br. 35-36) that an individual who "perceives the approaching danger" of an invalid state law "can obtain no protection from the judicial department of the government." 22 U.S. (9 Wheat.) at 847. This Court instead held that it is the "province of [the judiciary], in such cases, to arrest the injury, and prevent the wrong." *Id.* at 845, 847.

---

[10] *See, e.g.*, *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 672-74 (D.C. Cir. 2005) (per curiam); *Planned Parenthood of Houston & Se. Tex.* v. *Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Verizon Md., Inc.* v. *Global NAPS, Inc.*, 377 F.3d 355, 368-69 (4th Cir. 2004); *Local Union No. 12004* v. *Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-78 (11th Cir. 2003) (en banc); *Ill. Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *GTE N., Inc.* v. *Strand*, 209 F.3d 909, 916 (6th Cir. 2000); *Elizabeth Blackwell Health Ctr. For Women* v. *Knoll*, 61 F.3d 170, 185 (3d Cir. 1995); *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 776 n.3 (8th Cir. 1990).

Cases after *Osborn* continued to adjudicate claims for equitable relief directly under provisions of the Constitution, including the Supremacy Clause. See *supra* note 9. These include, among others, *Ex parte Young*, 209 U.S. 123 (1908), which upheld an individual's claim to enjoin state officials from enforcing an unconstitutional state law. *Id.* at 145-65. Certainly a key issue in *Young* was whether such a suit could be brought consistent with the Eleventh Amendment, Petrs. Br. 41, but what is significant here is the Court's acceptance of the fundamental, underlying right of action to enforce the Constitution. Indeed, the decision went out of its way to note the long history of such claims in the federal courts. 209 U.S. at 145-52. And, of course, the very purpose of *Young* was to preclude States from deterring potential plaintiffs from protecting their constitutional rights by threatening to penalize them for non-compliance with the State's unconstitutional requirement. See *id.* By holding that the private party could go to court to enforce the Constitution against state officials, this Court rejected the argument that constitutional provisions are enforceable only as a defense to an enforcement action.[11]

Through the last century and into this one, and despite changing views of the meaning and relevance of the phrase "cause of action," *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 236-44 (1979), this Court has repeatedly entertained affirmative claims to enjoin state officials from implementing preempted state legislation.

---

[11] *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 75-80 (1831) (Thompson, J., dissenting) (a claim for equitable relief against a preempted state law "presents a case for judicial consideration, arising under the laws of the United States," and "an injunction is a fit and proper writ to be issued, to prevent the further execution of such [state] law[ ]").

E.g., *Verizon Md. Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638-39 (2011).[12] In *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for example, the Court held that "[a] plaintiff who seeks injunctive relief from state regulation[ ] on the ground that such regulation is pre-empted [under] the Supremacy Clause ... presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.* at 96 n.14. These decisions "reaffirm[ ] the general rule" that equitable relief is available in the federal judiciary to enjoin state officers from implementing a state law preempted under the Supremacy Clause. *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985).

To be sure, many of these decisions "assum[ed]" the existence of a claim under the Supremacy Clause, while focusing directly on questions of jurisdiction or the like. U.S. Br. 18-19; see, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114-29 (1965). But, it cannot be disputed that these cases reflect an unbroken history of allowing individuals to "vindicate ... preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (concluding that the "long tradition of *qui tam* actions," which the Court had "routinely entertained," was "well nigh

---

[12] *See also supra* note 9; Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930).

conclusive" as to the justiciability of those claims). To hold otherwise, as petitioners request, Petrs. Br. 17-18, would cast doubt upon, if not directly overrule, the holdings of these cases and scores more.

Nor will reaffirmation that preemption claims may be brought directly under the Constitution result in the flood of new lawsuits petitioners and their *amici* prophesize. Petrs. Br. 26-33; Br. of States 12-15. This is for the simple reason that courts uniformly have recognized the availability of claims under the Supremacy Clause. See *supra* notes 9-10; U.S. Pet. Br. 16 (No. 09-958). Respondents merely ask this Court to confirm what is *already* "well-established." *Hart & Wechsler*, *supra*, at 903. Justiciability doctrines will, in any event, properly limit the scope of potential plaintiffs able to bring these challenges. See *infra* Part III.B.

C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.

In none of the cases discussed above did this Court demand "rights-creating" or other authorizing statutory language as a prerequisite to a right of action under the Supremacy Clause. See *supra* note 9. Such a requirement would run counter to a large corpus of cases approving direct claims under other provisions of the Constitution and, contrary to petitioners' claims, Petrs. Br. 14-15, is not mandated by statutory rights cases such as *Gonzaga* and *Sandoval*.

1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.

Claims arising directly under provisions of the Constitution have "long been recognized" by this Court, without need for statutory authorization. *Malesko*,

534 U.S. at 74. Whatever role Congress has in defining and limiting the scope of remedies that are available in these actions, particularly with respect to monetary damages, a claim seeking purely equitable relief to abate an ongoing constitutional violation arises as a necessary incident of the Constitution.

1. This principle underlies *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case, and those that followed from it, held that an individual whose constitutional rights are infringed by a federal official may bring an action in federal court for monetary damages. *Id.* at 392-97; see also *Carlson* v. *Green*, 446 U.S. 14, 19-21 (1980); *Davis*, 442 U.S. at 245-49. No statute authorized these actions, and in some cases Congress had provided alternative remedial schemes for the violations at issue. *E.g.*, *Green*, 446 U.S. at 19-21. Nevertheless, the Court reasoned that a damages remedy should be available to individuals injured by constitutional violations committed by federal officials, in part because 42 U.S.C. § 1983 provides a comparable remedy for violations committed by state officials. *Id.* at 21-22 & n.6, 24-25.

The availability of a *damages* remedy for constitutional claims has, of course, been circumscribed in the years since *Bivens*. *E.g.*, *Malesko*, 534 U.S. at 68. A damages remedy is retrospective in nature, intended to compensate the injured party and deter future violations, and is not strictly necessary to abate an ongoing constitutional violation. *Green*, 446 U.S. at 19-21. For that reason, the Court has generally limited it to circumstances in which the violation could not otherwise be addressed, and has held it unavailable when Congress provided a "meaningful" and "effective" alternative remedial scheme—even if the relief available under that scheme is not precisely the

same. *E.g.*, *Schweicker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 385-86 (1983); see also *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1852 (2010).

The Court has consistently reaffirmed, however—even when disallowing a damages claim under *Bivens*—that claims for equitable relief remain available. *Malesko*, 534 U.S. at 74; *United States* v. *Stanley*, 483 U.S. 669, 682-83 (1987); see also, *e.g.*, *Green*, 446 U.S. at 39 (Rehnquist, J., dissenting). Such claims exist as a matter of constitutional structure and necessity. See *Stanley*, 483 U.S. at 683 (claims for equitable relief "[do] not ask the Court to imply a new cause of action") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983)). While Congress may by statute prescribe procedures for the adjudication and review of constitutional claims, see, *e.g.*, *Swift*, 382 U.S. at 114-15 (three-judge panels), and justiciability doctrines may independently restrict their availability in particular circumstances, see *infra* Part III.B; see also, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), prospective equitable relief is "presumed availab[le] ... against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring).

2. Cases outside the *Bivens* context likewise recognize "direct" constitutional claims seeking equitable relief for violations of the Constitution. *Malesko*, 534 U.S. at 74. Contrary to petitioners' argument, these claims have been approved not only for constitutional provisions that "confer ... substantive 'rights'" but also those—like the Supremacy Clause—that define the "structural relationship between the state and federal governments." Petrs. Br. 17-19.

In fact, there are numerous cases in which this Court has addressed claims arising directly under

"structural" provisions of the Constitution. These include, among others, claims under the Qualifications and Compact Clauses, *e.g.*, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969), as well as under more abstract constitutional principles such as separation of powers, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952).[13] These cases confirm that "structural" provisions of the Constitution, no less than "rights-creating" ones, are enforceable through direct actions in federal courts.

This principle was strongly reaffirmed in a pair of this Court's recent decisions. In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the Court expressly upheld "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." *Id.* at 3151 n.2. It noted that a right to equitable relief for a constitutional violation "has long been recognized" and "[exists] as a general matter, without regard to the particular constitutional provisions at issue." *Id.* (quoting *Malesko*, 534 U.S. at 74).

Just last Term, in *Bond* v. *United States*, 131 S. Ct. 2355 (2011), this Court similarly held that "structural" constitutional provisions like the Tenth Amendment—which do not confer individual "rights" but ra-

---

[13] *See also, e.g., Hodel* v. *Irving*, 481 U.S. 704 (1987) (Takings Clause); *S.-Cent. Timber*, 467 U.S. 82 (Dormant Commerce Clause); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Contracts Clause); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (Dormant Commerce Clause); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896) (Takings Clause); *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) (Contracts Clause).

ther define the relationship between federal and state governments—are nevertheless intended to "protect[ ] the liberty of ... persons" and for that reason may be asserted by an individual in a challenge to government action. *Id.* at 2364-65. In language particularly relevant here, the Court explained that, "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or check-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Id.*

These opinions reject the distinction that petitioners would draw between "rights-creating" and "structural" provisions of the Constitution. Petrs. Br. 17-19. On the contrary, they properly recognize that the Constitution's structural provisions protect individual liberties. *Bond*, 131 S. Ct. at 2363-64. They also explicitly recognize that negative restrictions on governmental power, like the Supremacy Clause, can support a challenge against government action and a claim for prospective equitable relief to abate an ongoing constitutional violation. *Free Enter.*, 130 S. Ct. at 3151 n.2. In arguing that the Supremacy Clause "should be treated differently than every other constitutional claim," petitioners—like the parties in *Free Enterprise* and *Bond*—"offer[ ] no reason and cite[ ] no authority why that might be so." *Id.*

2. The Analysis Applied In Statutory Right Of Action Cases, Including *Gonzaga* And *Sandoval*, Does Not Apply To Constitutional Claims.

"Rights-creating" language is not a prerequisite to claims asserted directly under the Constitution, including preemption claims under the Supremacy Clause. That requirement is applied to claims under 42 U.S.C. § 1983, see *Gonzaga*, 536 U.S. at 282, and

claims implied under federal statutes, see *Sandoval*, 532 U.S. at 286, but it has never been—and, contrary to petitioners' argument, Petrs. Br. 17-19, cannot be—applied to constitutional claims.

a. The remedy provided by § 1983 has, since its enactment, been understood to supplement and complement—but not to supplant—equitable relief already available through a claim under the Constitution itself. *E.g.*, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1154, 1170 (1977); see also *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961). Throughout the debates on the bill that would become § 1983, legislators explained that the statute would offer "*further* redress for violations ... of constitutional rights" and an "*additional*" remedy for individuals injured thereby. Cong. Globe, 42d Cong., 1st Sess. app. 315, 460 (1871) (emphasis added); see, *e.g.*, *id.* at 374, 429, 653. There is no evidence that Congress intended § 1983 to limit or disturb the traditional scope of preemption claims under the Supremacy Clause. To the contrary, supporters and opponents of the bill recognized the historical propriety of claims seeking prospective injunctive relief for constitutional violations, including actions to void unconstitutional state laws. *E.g.*, *id.* at app. 259 ("[T]he remedy [for a State's violation of the Constitution is that t]he Federal courts … declare[] the statute null and void."); see also, *e.g.*, *id.* at app. 83, app. 221, app. 259, app. 315, 429.

This distinction finds further support in the fact that § 1983 was deemed necessary precisely because it addressed a different class of harms—injuries to federally conferred "rights"—than those remedied by a claim for injunctive relief under the "negative limitations" of the Constitution. *Id.* at app. 83. As one of the bill's sponsors explained:

> [Constitutional] prohibitions upon the political powers of the States are all of such nature that they can be ... enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.... [T]hese [are] the only provisions where it was deemed that legislation was required to enforce the[m] ....

Id. at app. 69; see also *id.* at app. 70. Prospective equitable relief is often not an effective remedy for a completed infringement of an individual's personal "rights," and for that reason a damages remedy was provided in § 1983, both to compensate the individual and deter future violations.[14] *E.g.*, *id.* at app. 50.

This rationale has been understood to justify limiting claims under § 1983 (and analogous damages claims under *Bivens*) to deprivations of federally conferred "rights," *Gonzaga*, 536 U.S. at 285-90, but it has no application to direct constitutional claims for prospective equitable relief. Whereas § 1983 by its

---

[14] The three statements cited by petitioners' *amicus*, far from showing that the framers of § 1983 "believed that its equitable remedies were *new*," Br. of Nat'l Gov. Ass'n 29, establish only that they believed that equitable remedies, in addition to monetary damages, could and should be provided under § 1983 to protect against a violation of federally guaranteed "rights." *See* Cong. Globe, 42d Cong., 1st Sess. at 501 (noting that Congress has authority to enact § 1983, to provide "an original action in our Federal courts [for an] injunction [or] recovery of damages"); *see also id.* at 577 (referring to need to protect federally guaranteed "rights"); *id.* at 376 (same).

terms protects only "rights" guaranteed to individuals under federal law, *id.*, the Supremacy Clause declares broadly that "any Thing in the Constitution or Laws of any State" contrary to the "Constitution[ ] and the Laws of the United States" shall be invalid, without regard to whether the provisions at issue confer "rights." U.S. Const., art. VI, cl. 2; see *Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) ("Preemption [does not] concern[] … the securing of rights, privileges, and immunities to individuals.").

It is certainly the case, as petitioners and the United States point out, that *some* preemption claims might also be brought under § 1983 because they implicate a particular "right" guaranteed by federal law. Petrs. Br. 34; U.S. Br. 26-27. But that additional, sometime avenue for relief is no reason to hold that § 1983 displaces constitutional preemption claims, any more than it displaces the myriad other constitutional claims that "ha[ve] long been recognized" to coexist with § 1983 (and *Bivens*) claims.[15] *Malesko*, 534 U.S. at 74. And, contrary to the United States' assertion, U.S. Br. 26-27, not all constitutional preemption claims could simply be restyled as § 1983 claims, or vice versa. See, *e.g.*, *Golden State*, 493 U.S. at 107-08; *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006).[16] There

---

[15] The statement in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that when a statute provides no private right of enforcement § 1983 represents the "exclusive statutory cause of action," *id.* at 6, does not on its face suggest that § 1983 is the exclusive vehicle for *non-statutory* claims, *contra* U.S. Br. 28-29, and *Thiboutot* has never been read to support displacement of constitutional claims for equitable relief. *See supra* Part I.C.1.

[16] Indeed, neither of the § 1983 cases cited by the United States for this point—*Suter* v. *Artist M.*, 503 U.S. 347 (1992), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997)—would be ame-

is no basis to restrict preemption claims under the Supremacy Clause to those based on a "rights-creating" statute.

b. Much the same can be said for petitioners' associated argument that constitutional preemption claims should be allowed only when authorized by the underlying federal statute, under the rationale of implied right of action cases like *Sandoval*. Petrs. Br. 20-26. Because the claims at issue in those cases were brought directly under *statutes*, the scope and availability of any cause of action depended on the statute itself. *E.g.*, *Sandoval*, 532 U.S. at 286. Claims under the Supremacy Clause, by contrast, are brought under the Constitution, and exist as a necessary incident of the Constitution's structure. See, *e.g.*, *Free Enter.*, 130 S. Ct. at 3151 n.2; see also *Malesko*, 534 U.S. at 74.

This argument exposes most clearly the flawed premise on which petitioners' position rests: that a preemption claim seeks to "enforce" a federal statute. *E.g.*, Petrs. Br. 20-22; U.S. Br. 30-31; see also Br. of States 2. Although a preemption claim commonly relies for its substance on the scope of a federal statute—to determine, for instance, whether the challenged state legislation impermissibly conflicts with federal law, see *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996)—it does not seek to "enforce" the sta-

---

nable to such restyling. The claims in those cases did not seek to *invalidate* state laws under the Supremacy Clause and enjoin state officials from acting thereunder, as would a traditional preemption claim, but instead sought to *compel* state officials to take affirmative actions under federal statute. *Suter*, 503 U.S. at 352-53; *Blessing*, 520 U.S. at 337. In contrast, the claims in this case are classic preemption claims, in that they seek to declare the challenged legislation invalid and to prohibit petitioners from implementing it.

tute, as would a claim asserting an implied statutory right of action, *Sandoval*, 532 U.S. at 286. Rather, what is "enforced" in a preemption claim is the structural constitutional principle of supremacy, as declared in the Supremacy Clause. *E.g.*, *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 271-72 (1977) (preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"); see also Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234 (2000). The rule that compels preemption of contrary state legislation arises not from the federal statute but from the Constitution itself. See, *e.g.*, *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.); cf. U.S. Br. 12 ("The question in these cases … does not concern the States' substantive obligations under Section 1396a(a)(30)(A)."). It is the Constitution, therefore, that supports a right of action for these claims, without regard to whether the underlying statute might also provide one.

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE.

Petitioners argue in the alternative that, even if preemption claims are generally available under the Supremacy Clause, they should be precluded when the underlying federal statute was enacted under authority of the Spending Clause. Petrs. Br. 46-49. That rule finds no support in this Court's decisions, and is at odds with the constitutional principle of supremacy.

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted.

The Supremacy Clause declares simply that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof," shall be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It does not distinguish between federal statutes based on which constitutional provision authorized Congress to act, and this distinction has never played a role in preemption analysis. See, *e.g.*, *Crosby*, 530 U.S. at 372; see also *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.). Nor is this distinction relevant to whether a preemption claim is available. Such a claim seeks not to "enforce" the underlying statute, but to vindicate the federal structural interest in supremacy. See *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); *Bond*, 131 S. Ct. at 2365; see also *supra* pp. 30-31. That constitutional interest is enforceable in the federal judiciary regardless of the particular authority under which Congress acted, or intended to act.

To be sure, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194 (2009). But this inquiry into congressional intent, to determine "the scope of the statute's pre-empti[ve effect]," *Medtronic*, 518 U.S. at 485-86, goes to the merits of the preemption question, not to the antecedent question of whether a cause of action is available to enjoin the operation of preempted state law. See, *e.g.*, *Verizon Md.*, 535 U.S. at 642-43 (addressing merits of preemption claim without expressly resolving validity of the cause of action). This Court has never held that a state law may operate in contravention of a valid federal sta-

tute because of the particular power under which Congress proceeded. To the contrary, so long as the federal statute is constitutional and applicable, and is contrary to the state law, the state law is invalid, *Crosby*, 530 U.S. at 372, and a preemption cause of action is available.

Federal statutes enacted pursuant to Congress's Article I spending power are no exception. It is well-established that Congress "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), and once a State accepts federal money subject to such conditions, a state law contravening those conditions "runs afoul of the Supremacy Clause." *Lawrence Cnty.*, 469 U.S. at 270; see *Bacon*, 457 U.S. at 145-46 ("Because [the state rules] conflict with a valid federal regulation, they are invalid under the Supremacy Clause.").[17] The only difference between a federal statute enacted under the Spending Clause and one enacted under another constitutional provision, such as the Necessary and Proper Clause, is that a Spending Clause statute is constitutionally applicable to a State only insofar as the State satisfies the condition precedent of accepting federal funding.[18]

---

[17] *See also Ahlborn*, 547 U.S. at 292; *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

[18] There is no merit to petitioners' novel suggestion that the principle of federal supremacy "does not belong" outside areas in which Congress exercises "exclusive ... authority." Petrs. Br. 48. When Congress acts pursuant to its constitutional authority, it displaces conflicting state law, regardless of whether the State would otherwise have authority to maintain that law. *See, e.g.*, *PLIVA*, 131 S. Ct. at 2581-82.

It is therefore unsurprising that, in *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), seven Justices agreed that a plaintiff may bring a preemption claim to challenge a state law as invalid under the Medicaid Act. While these Justices differed over whether preemption had been established on the merits, they agreed on the threshold issue that the claim was available. *Id.* at 662 (plurality); *id.* at 671 (Breyer, J., concurring); *id.* at 687 (O'Connor, J., dissenting). The United States suggests that *PhRMA* "arose in a different context" because the plaintiffs there sought to invalidate a regulation affecting their "primary conduct," U.S. Br. 24, but it is immaterial under the Supremacy Clause whether state legislation regulates "conduct" or limits "benefits." If that legislation contravenes federal law, it is invalid. See, *e.g.*, *Bacon*, 457 U.S. at 145-46 (holding state law excluding individuals from benefits of federal-state program, in violation of program conditions, "invalid under the Supremacy Clause").

To the extent the United States proposes that constitutional preemption claims should be available only when the challenged state law would be subject to affirmative enforcement in an action brought by the State against the individual, U.S. Br. 19-24, such a rule would run counter to a number of this Court's decisions, see, *e.g.*, *Osborn*, 22 U.S. at 838, and the fundamental purpose of the Supremacy Clause, see *supra* Part I.A, in that it would allow States to violate federal law with impunity so long as they crafted their legislation to be essentially self-executing. Moreover, even if adopted, this rule would not preclude all of the claims asserted in this case. The reimbursement rate changes at issue here not only reduce the amounts paid by the State to providers, but also limit the amounts that providers may charge their

patients for services; a provider that charges patients in excess of those rates may be subject to liability in a claim brought by state officials under California law (as well as under federal law). See Cal. Welf. & Inst. Code § 14019.4(a) & (c); see also 42 U.S.C. § 1320a-7b(d). The reductions challenged in this case, thus, regulate the providers' "primary conduct," rendering them potentially subject to state enforcement actions if they do not comply. These parties would therefore be entitled, even under the United States' theory, to assert a preemption claim.

Tellingly, neither the United States nor petitioners cites any support for their suggested distinctions, and for good reason—there is none. No decision of this Court supports the proposition that judicial enforceability of a preemption claim depends on whether the displaced state law regulates "conduct" as opposed to limits "benefits," or on whether the federal law was enacted under authority of one constitutional provision rather than another.[19] In any event, if these considerations were relevant in preemption analysis, they would go to the *merits* of the preemption claim, not its threshold availability. Whether Congress framed a regulatory program as voluntary or cooperative, or only as an "assistance" plan, might influence the interpretation of particular statutory provisions and their preemptive scope. See, *e.g.*, *PhRMA*, 538 U.S. at 662. Those considerations would not, however, affect the existence of a preemption claim, and they offer no ground for denying its availability in one scenario rather than another.

---

[19] Indeed, it is hard to see how such a rule would work in practice, as many federal statutes could be supported under multiple constitutional provisions. *Cf.*, *e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 58-59 (2006) (Solomon Amendment could be upheld under either Spending Clause or War Powers Clauses).

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim.

Nor can statutes enacted pursuant to Spending Clause authority be treated differently merely because they are "conditional," and based on a State's continued participation in the federal program. See Petrs. Br. 46-49; see also U.S. Br. 27-31.

1. Petitioners argue that a State's ability to stop accepting federal money—and thereby escape the reach of conditions imposed by a Spending Clause statute—precludes an action under the Supremacy Clause by parties injured as a result of the State's noncompliance. But, although this Court has analogized federal-state programs such as Medicaid to a "contract" between sovereigns, *e.g.*, *Pennhurst*, 451 U.S. at 17, that analogy has not been used to limit the federal statutes' preemptive reach, *e.g.*, *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Indeed, the Court has specifically counseled against extending the analogy in that way. *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) ("[W]e have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation."). Petitioners' argument on this score fails for several reasons.

First, petitioners contend that, because States voluntarily accept the conditions imposed through federal spending legislation, no claim is available to enjoin violations of those conditions. Petrs. Br. 46-49. But, this Court has consistently maintained the propriety of injunctions that compel a State's compliance with federal funding conditions, so long as the State remains subject to those conditions. See, *e.g.*, *King*, 392 U.S. at 333; *Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970); cf. *Pennhurst*, 451 U.S. at 30 n.23 (noting that the Court "would have little difficulty" upholding

an injunction that forced the State to choose between "rejecting federal funds ... or complying with" the conditions placed upon those funds). A State has no right to accept federal funding while at the same time claiming immunity from the federal obligations attached to those funds. *E.g.*, *King*, 392 U.S. at 333. If it finds those conditions unduly burdensome, it may discontinue accepting the funds to which the burden is attached. See *Rosado*, 397 U.S. at 420-21 (explaining that an injunction leaves a State with the "alternative choices of assuming the additional cost of [complying with the federal condition] or not using federal funds").

For this reason, state entities—like petitioners here—have less rather than more reason to complain about a cause of action seeking to hold them to compliance with the federal statute. If the State wishes to avoid the consequences of acting in a fashion inconsistent with federal law, including an action under the Supremacy Clause, it at all times holds the key to its own prison.

Second, there is no basis for allowing only "intended third-party beneficiaries" of the statute to bring a preemption claim when a State violates that statute. Petrs. Br. 34-51; see also U.S. Br. 27-28; Br. of APA Watch 8-14. Although contract law generally allows a third party to "enforce [a] contract" only when it was "made for his benefit," 9 John E. Murray, Jr., *Corbin on Contracts* § 44.1, at 45 (rev. ed. 2007), that principle—even if it were properly applied by analogy in this context—would affect only actions brought under the quasi-contractual statute itself, not preemption actions brought under the Supremacy Clause. As discussed earlier, *supra* pp. 30-31, a preemption action under the Supremacy Clause seeks not to "enforce" the statute, but to prevent injury

caused by operation of a constitutionally invalid state law.[20] In any event, there are affirmative reasons to conclude that Section 30(A), which requires a State to utilize "methods and procedures" that safeguard (among other things) the availability of care and services, was intended to benefit at least some of the diverse plaintiffs in this case. See *infra* Part III.A.

If anything, the analogy to contract law supports the availability of preemption claims based on Spending Clause enactments. Contracting parties operate against a backdrop of default legal rules that govern the interpretation of their agreement. See, *e.g.*, Restatement (Second) of Contracts § 5(2) & cmt. b (1981). When a State accepts federal funding and agrees to be bound by certain conditions, the terms of the relevant "contract" include the constitutional provisions that structure relations between the federal and state governments—including the Supremacy Clause. And, because the Supremacy Clause has for two centuries been treated as providing a cause of action for individuals aggrieved by a preempted state law, *supra* Part I.B, a State that accepts funding under a federal statutory program should understand that a cause of action under the Supremacy Clause will be available to enjoin state action that violates the federal law.

2. A preemption claim under the Supremacy Clause is no less available when, as here, the State's noncompliance with federal law might also trigger a

---

[20] For this reason, the decision in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011), on which both petitioners and the United States rely, Petrs. Br. 34-35; U.S. Br. 25-26, is inapposite. There, the plaintiffs sought to enforce the terms of the statute itself, as embodied in a form contract through which the statute was implemented. 131 S. Ct. at 1345. Here, the claims at issue arise under the Constitution.

withdrawal of funding by the federal government. Whatever authority Congress might have to displace particular constitutional remedies for certain constitutional violations, this Court never has held that an administrative funding-withdrawal mechanism, without more, is sufficient to demonstrate congressional intent to displace a right of action under the Constitution. To the contrary, the Court repeatedly has held that the possibility of federal funding withdrawal does not preclude judicial relief for parties injured by non-complying States. See, *e.g.*, *Rosado*, 397 U.S. at 420 ("We have considered and rejected the argument that a federal court is without power to ... prohibit the use of federal funds by the States in view of the fact that Congress has [delegated] the power to cut off federal funds for noncompliance with statutory requirements."); see also *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 272 (2006) (state law "contravened federal [Medicaid provision] and was therefore unenforceable").[21]

These cases confirm that the possibility of funding withdrawal does not substitute for, and cannot displace, a constitutional preemption claim. Whereas a preemption claim seeks to declare a state law void, the withdrawal of funding effectively accomplishes

---

[21] These decisions are consistent with this Court's approach to claims under § 1983, which this Court consistently has held not to be displaced by funding-withdrawal provisions. *See, e.g.*, *Wilder,* 496 U.S. at 522; *Wright* v. *Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987). Similarly, the possibility of administrative funding withdrawal, without more, is insufficient to override evidence that Congress intended to provide a private right of action under a statute. *See Cannon*, 441 U.S. at 704-06. In this latter category of cases, of course, the relevant inquiry is not whether Congress intended to preclude an action otherwise available, but whether it intended to create a right of action in the first instance. *See, e.g.*, *Sandoval*, 532 U.S. at 286.

the opposite, eliminating the applicability of the federal regulatory program. See *Rosado*, 397 U.S. at 420 ("[The State] is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution."). And, although the *threat* of funding withdrawal may be a useful tool in inducing compliance, its actual implementation ultimately harms, rather than helps, those who would bring a preemption cause of action under the Supremacy Clause—the individuals who depend upon or otherwise benefit from federal regulatory programs. Cf. *Cannon*, 441 U.S. at 704-06 (explaining that funding withdrawal is a "severe" tool that "often may not provide an appropriate means" of addressing "isolated violation[s]").

This case clearly illustrates the inadequacy of funding withdrawal as an alternative to preemption claims. Without some mechanism for parties who are injured by the violation of federal law to vindicate federal supremacy, States would be able to enact and enforce unconstitutional reductions in prescribed Medicaid reimbursement rates unless and until a federal administrative body undertook the process necessary to effectuate a withdrawal of federal funds. *Supra* pp. 4-5. That process is often lengthy; here, for example, the administrative process regarding the disapproval of California's *2008* plan amendment is still underway. *Supra* pp. 6-7. Were funding withdrawal the only available option, affected individuals would be left unable to prevent an ongoing constitutional violation in the meantime, including to prevent irreparable harm, and would face the perverse result that the sole "relief" they could hope to achieve—the termination of federal funding—might well leave them even worse off.

More fundamentally, petitioners' argument that the *possibility* of funding withdrawal might displace a preemption claim reflects a critical misunderstanding of the Supremacy Clause. That Clause renders state law that is inconsistent with any currently applicable federal statute invalid and void, whether or not that inconsistency might at some later date be resolved. Just last Term, this Court recognized precisely this point, refusing to uphold a preempted state law based on "conjectures" regarding "hypothetical federal action[s]" that might later validate that law. *PLIVA*, 131 S. Ct. at 2579 & n.6. Likewise here, although there is always a possibility that a withdrawal of federal funding may render the Medicaid Act inapplicable—just as it is hypothetically possible that California may withdraw from the federal program and terminate the Medi-Cal system—those imagined possibilities cannot serve to validate state laws that currently conflict with a federal statute. Nor can they preclude a right of action to challenge those laws under the Supremacy Clause.

III. CONGRESS DID NOT BAR RESPONDENTS' CLAIMS FOR INJUNCTIVE RELIEF AND PRUDENTIAL STANDING PROVIDES NO BASIS FOR DENYING RESPONDENTS ACCESS TO THE FEDERAL COURTS.

In their final alternative argument, petitioners and the United States assert that these particular claims should be disallowed, either because Section 30(A) of the Medicaid Act is inconsistent with a private right of action, U.S. Br. 24-33, or because respondents do not have prudential standing, Petrs. Br. 49-52. Neither point is valid.

A. Section 30(A) Does Not Bar These Claims.

It is axiomatic that claims for equitable relief against ongoing constitutional violations arise under the Constitution itself, not any statute. *Supra* Part I.C.1. The substantive preemption analysis may rest on underlying federal statutes, but the right of action exists separate and apart from those provisions.

That point alone is enough to defeat the argument that Section 30(A) bars these claims. Petrs. Br. 23-32; U.S. Br. 24-33. Because a constitutional preemption claim does not depend on the federal statute at issue, the scope and purpose of Section 30(A) are irrelevant in assessing the availability of these claims.[22] However, even assuming the contrary—*i.e.*, that a preemption claim might be displaced in certain circumstances by the underlying federal statute—nothing in Section 30(A), or the Medicaid Act more generally, has that effect.

1. It is clear, as an initial matter, that Congress did not explicitly preclude these claims. The Medicaid Act contains no express limitation on the rights of injured parties to seek injunctive relief to remedy constitutional violations, based on Section 30(A) or otherwise, and neither petitioners nor their *amici* point to any such language.

---

[22] This is, again, not to say that Congress could not prescribe certain adjudicatory and remedial procedures for constitutional claims. *See supra* p. 23-24. Here, however, petitioners and the United States are arguing not that Congress has defined particular procedures for seeking relief under the Supremacy Clause but, rather, that Congress has precluded that relief entirely, through implicit repeal by operation of Section 30(A). Petrs. Br. 23-32; U.S. Br. 24-33.

If any inference is to be drawn from the statute itself, then, it is that Congress did not intend to disallow private rights of action that would otherwise be available to private plaintiffs. See, *e.g.*, *Rosado*, 397 U.S. at 420 (addressing preemption claim based on Spending Clause statute); *Ahlborn*, 547 U.S. at 272 (same); see also *Green*, 446 U.S. at 20-22. Indeed, this Court so held in *Wilder*, concluding that a cause of action under 42 U.S.C. § 1983 to enforce "rights" created by certain provisions of the Medicaid Act was available because, among other reasons, Congress had not expressly prohibited such claims in the Act. 496 U.S. at 520-21.[23] The same reasoning confirms the availability of the constitutional claims asserted in this case.

2. Notwithstanding the lack of express statutory support for their position, petitioners and their *amici* contend that these claims should be disallowed because they would be "in tension" with the Medicaid Act's regulatory scheme. Petrs. Br. 26. That scheme, they assert, suggests an intent to "centraliz[e] enforcement authority in HHS[ ] and protect[ ] the States from private lawsuits." *Id.*; see also U.S. Br. 25, 30. Nothing in the statute, however, supports this inference or indicates that a preemption claim would interfere with the administrative process.

---

[23] The legislative report cited by petitioners, relating to the 1997 repeal of the so-called "Boren Amendment," Petrs. Br. 32-33, indicates that Section 13(A) of the Act should not "be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive," H.R. Rep. No. 105-149, at 590-91 (1997), but it does not address constitutional preemption claims generally, or those based on Section 30(A) specifically, and provides no basis to hold such claims displaced by the Act.

That process is notably limited in scope. CMS is afforded only the opportunity to review state plans that are formally submitted for its consideration. 42 U.S.C. § 1316(a). Nowhere does the statute address whether or how CMS or others may seek an order directing a State to comply with statutory or regulatory requirements; nor does it set forth any procedures by which CMS could review constitutional violations that may exist independent of, or in connection with, statutory and regulatory violations. And at no point does the Act indicate that those administrative proceedings constitute the exclusive means by which statutory violations may be addressed.

Indeed, in reviewing this very scheme in *Wilder*, the Court concluded that it "*cannot* be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." 496 U.S. at 522 (emphasis added). The Medicaid Act, the Court explained, gave the agency only "limited oversight" over States and was therefore "insufficient" to support the conclusion that Congress intended to foreclose other remedies. *Id.* Petitioners offer no basis to conclude—and there is none—that the same enforcement scheme that was insufficient to displace a statutory claim is, by contrast, sufficient to displace one under the Constitution.

Tellingly, neither petitioners nor their *amici* read the statute as precluding *all* private remedies. For example, petitioners acknowledge that private parties may bring actions against state agencies under § 1983 to enforce other state plan conditions of the Medicaid Act, Petrs. Br. 46-47 n.17, even though those conditions appear in the same general section and are subject to the same administrative enforce-

ment scheme as Section 30(A).[24] That petitioners agree that some private claims are available under the Act, and may be pursued without obstructing the administrative enforcement process, fatally undermines their argument that the claims in this case would somehow "interfere with" or "disrupt" (Petrs. Br. 28) that process.[25]

Nor does any nebulous goal of "national uniformity, consistency, and predictability" in the administration of the Medicaid program, *id.* at 27, compel rejection of these claims. It is clear, as *Wilder* itself recognized, that Congress did not intend to vest "exclusive" authority in HHS to enforce the Act, U.S. Br. 32, but instead anticipated that the federal courts would have a role in the interpretation and enforcement of the Act's provisions. 496 U.S. at 522. Concerns over conflicting judicial interpretations are properly addressed not through *ad hoc* limitations on private rights of action, of the type petitioners and the United States seek, but through standard avenues of judicial and administrative review. If the United States believes that the courts below or others have misconstrued or misapplied Section 30(A), it may ask CMS

---

[24] For example, the same mechanism of plan review and funding withdrawal applies whether a State's noncompliance involves a system-wide failure to provide required process when setting rates, 42 U.S.C. § 1396a(a)(30)(A), or a system-wide failure to provide required process when reviewing denials of benefits, *id.* § 1396a(a)(3). Yet, according to petitioners, the latter provision could support a preemption claim while the former would impermissibly conflict with the administrative review scheme. Petrs. Br. 46-47 & n.17.

[25] Indeed, the Act explicitly preserves such claims, stating that a "provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-10.

to issue a formal interpretation of that provision, which then (if otherwise proper and reasonable) would presumably be binding on federal courts. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). And, to the extent petitioners complain they cannot "predict" what Section 30(A) requires, Petrs. Br. 16, the answer is that they may seek agency review *before* implementing scheduled changes in Medicaid rates—something the State here did not do. *Supra* pp. 6-7. Preemption claims addressing Section 30(A) will not in any way impede the ability of the agency to construe and implement the statute, or of States to operate thereunder.

3. This case vividly illustrates why the enforcement scheme provided by Section 30(A) cannot substitute for a constitutional preemption claim.

States are required to submit plan amendments for approval by CMS whenever there are "[m]aterial changes in State law," 42 C.F.R. § 430.12(c)(1), and CMS must approve an amendment *before* a State may change its reimbursement rates. *E.g.*, *Exeter Mem'l Hosp. Ass'n* v. *Belshe*, 145 F.3d 1106, 1108 (9th Cir. 1998). In this case, however, the State did not submit amendments regarding the changes required by AB 5 and AB 1183 until approximately three months *after* each set of changes went into effect. *Supra* pp. 6-7. As a result, plaintiffs here began to suffer injury from the changes to the State's reimbursement rates before CMS could even begin its review. See 42 C.F.R. § 430.16(a). With no administrative enforcement action possible, and retrospective relief unavailable, a private judicial action seeking injunctive relief is the only means by which plaintiffs like these could avoid irreparable injury as a result of a state law that is void under the Supremacy Clause.

Moreover, the potential for injury is far greater than the several months' lag between implementation of the plan changes and submission of the plan amendments to CMS. In this case, the State ignored CMS's request for additional information on its plan amendment regarding AB 5; yet, CMS did not act to disapprove the amendment until more than *two years* after it was initially submitted. *Supra* pp. 6-7. That decision is now subject to reconsideration proceedings requested by the State, which are still ongoing—more than half a year later. Thus, if petitioners were correct that no claim under the Supremacy Clause was available, there *still* would be nothing to prevent the State from implementing the rate reductions. States seeking to achieve cost savings through acts of noncompliance could do so for years without the possibility of injunction or practical enforcement.

All of this simply confirms what is already required as a matter of constitutional law: a claim seeking injunctive relief against state laws in violation of the Medicaid Act, including Section 30(A), is available to these plaintiffs. That right of action exists separate and apart from the underlying statute and, in any event, is fully consistent with the structure and purpose of Section 30(A) and the Medicaid Act.

B. The Prudential Standing Doctrine Does Not Bar These Claims.

In the final pages of their brief, and for the first time before this Court, petitioners suggest that these claims might be dismissed based on justiciability concerns relating to the prudential standing doctrine. Petrs. Br. 49-52. This argument is raised far too late to be considered now, and in any event is without merit.

It is true as a general matter that justiciability doctrines apply to and limit claims under the Supremacy Clause, just as they limit other causes of action brought in the federal courts. *E.g.*, *Bond*, 131 S. Ct. at 2364-66. Political questions will be dismissed as non-justiciable, *e.g.*, *Baker*, 369 U.S. at 217, and plaintiffs suffering no injury-in-fact from the challenged government action will lack standing under Article III, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 821-26 (1997). It is these doctrines—and not the artificial and unprecedented limitations on Supremacy Clause claims proposed by petitioners—that properly ensure that courts are not "transform[ed] ... into all-purpose regulatory enforcers of Spending Clause enactments." Petrs. Br. 14-15; see also Br. of States 12-15.

One of these doctrines—and the only one that petitioners mention, Petrs. Br. 49-52—is prudential standing. That doctrine, petitioners now argue, bars these claims because they purportedly (i) rest on the rights of a third party (*i.e.*, the federal government), (ii) are not within the "zone of interests" protected by the Medicaid Act, and (iii) constitute "generalized grievances." *Id.*

These arguments have, as an initial matter, been waived. Petitioners acknowledge that they did not raise them in all of the appeals below, and that the Ninth Circuit did not "overtly" address them. *Id.* at 50 & n.19. In fact, the only opinion by the court of appeals to mention "prudential standing" specifically states that the issue has been waived. Pet. App. 90 n.17 (No. 09-958) ("By failing to articulate any argument challenging [plaintiffs'] prudential standing, the Director has waived that argument."); cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 138 (2007) (Court will not consider issues that were not pressed or passed upon below). Not surprisingly,

therefore, prudential standing was raised in none of petitions for certiorari as a ground for challenging the judgment below. There is no reason for the Court to address this late-raised objection for the first time now. See *Gen. Talking Pictures Corp.* v. *W. Elec. Co.*, 304 U.S. 175, 179 (1938) ("One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue.").[26]

The prudential standing arguments offered by petitioners also lack merit. These claims do not rest on the rights of the federal government, as petitioners allege, Petrs. Br. 51, but are based on individual injuries suffered by these plaintiffs. *Supra* pp. 7-9; see also *Bond*, 131 S. Ct. 2364-66 (claims that secondarily advance interests of federal government do not implicate the prohibition on third-party claims). Nor is this suit outside the relevant "zone of interests": these plaintiffs are seeking to enforce not the Medicaid Act, but the Supremacy Clause, *supra* pp. 30-31, and in any event there is no doubt that they will be injured as a direct result of the State's violation of the Act, *supra* pp. 7-9. And, although those injuries may be "widely shared" among Medicaid providers and beneficiaries, the losses alleged are concrete and real,

---

[26] There would be no basis for petitioners to argue that the question of whether a right of action exists under the Supremacy Clause "fairly include[s]" the separate question of whether these particular claims are barred by the prudential standing doctrine. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Nor could that issue be deemed a "necessary predicate" to resolution of this case, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 389-90 (1994), given that prudential standing is a discretionary doctrine and, even if properly raised and applicable, would not necessarily preclude a court from adjudicating the claims, *see, e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004).

supra pp. 7-9, and are not remotely an abstract "generalized grievance."

These plaintiffs will suffer irreparable harm from the rate reductions challenged in this case. See *supra* pp. 7-9. They are entitled to seek relief from those reductions through a claim arising under the Supremacy Clause.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL S. SORGEN
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton Street, 9th Fl.
San Francisco, CA 94108
(415) 956-1360

DEAN L. JOHNSON
DEAN L. JOHNSON, INC.
6863 Tanzanite Drive
Carlsbad, CA 92009
(760) 603-0022

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
LOWELL J. SCHILLER
AMY L. HANKE
JOSHUA J. FOUGERE
LYNDSAY N. HUOT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents in No. 10-283

July 29, 2011 * Counsel of Record