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No. 09-958

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL., RESPONDENTS.

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

BRIEF OF RESPONDENTS IN OPPOSITION

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APRIL 19, 2010

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PARTIES TO THE PROCEEDING

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

Respondents who were plaintiffs-appellees below are Independent Living Center of Southern California, a nonprofit corporation; Gray Panthers of Sacramento, a nonprofit corporation; Gray Panthers of San Francisco, a nonprofit corporation; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc., a corporation d/b/a Tran Pharmacy; and Jason Young.

Respondents who were intervenor-appellees below are Sacramento Family Medical Clinics, Inc.; Theodore M. Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

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

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BRIEF IN OPPOSITION

STATEMENT

A. Statutory Framework

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

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

The Medicaid Act provides specific requirements for state plans and reimbursement rates, *see* 42 U.S.C. § 1396a(a)(1)-(71), including those set out in Section 1396a(a)(30)(A) (hereinafter "Section 30A"), the specific provision at issue in this case. Section 30A requires that a state plan establish reimbursement rates for health care providers that are both consistent with high quality medical care (the "quality of care" provision) and sufficient to enlist enough providers to ensure that medical services are as available to recipients as is generally available to the public in the same geographical area (the "equal access" provision).

2. On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in a special fiscal emergency budget session. Pet. App. 4. AB 5 makes the legislative findings that the "state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures; " that AB 5 was enacted to "address[ ] the fiscal emergency declared by the Governor" and to "implement cost containment measures affecting health services, at the earliest possible time." Pet. App. 64 (AB 5 §§ 15-17).

AB 5 added Section 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the Department of Health Care Services, as the state agency which administers California's state Medicaid plan, to cut by ten percent reimbursement rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, optometrists, clinics, and other providers. AB 5 provided that the ten percent rate cuts were to go into effect on July 1, 2008. *See* Pet. App. 43 (codified as Cal. Welf. & Inst. Code § 14105.19(b)(1) (2008)).

The California legislature subsequently enacted Assembly Bill 1183 ("AB 1183"), on September 30, 2008. Section 44 of AB 1183 amended Section 14105.19 to make the rate reductions of AB 5, excluding non-contract hospitals, expire on February 28, 2009. Cal. Welf. & Inst. Code § 14105.19(b) (2009). Section 45 of AB 1183 added a new Section 14105.191 (2009) that, effective March 1, 2009, required a five percent rate cut for certain Medi-Cal fee-for-services payments and benefits, including pharmacies and adult day health care centers, and a

one percent rate reduction for all other fee-for-service benefits.[1]

B. Factual Background

1. The Respondents Plaintiffs-Appellees (hereinafter, "Independent Living") are two Medi-Cal beneficiaries, three Medi-Cal pharmacies with more than 5,000 Medi-Cal beneficiaries, and an independent living center and Gray Panther groups with more than 5,000 clients or members who are Medi-Cal beneficiaries, in the Medi-Cal fee-for-service program. On April 22, 2008, they sued Sandra Shewry, Director of the California Department of Health Care Services, in California state court to prevent the implementation of AB 5.[2] Pet. App. 4.

The first amended complaint, filed in state court, alleged that the action of the State to enact and implement the ten percent payment reduction of AB 5 was void, contrary to and preempted under the Supremacy Clause by the federal quality of services and equal access clauses of Section 30A, due to the fact that the Legislature had enacted AB 5 without considering—as required by Section 30A—the relevant factors of whether providers could sustain the payment reduction without loss of quality of services and equal access of beneficiaries to quality

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[1] The cuts required by AB 1183 are not challenged in this action.

[2] David Maxwell-Jolly, petitioner, has since succeeded Sandra Shewry as the Director.

services; so that by such violation AB 5 was contrary to, and hence preempted under the Supremacy Clause, by Section 30A; and that irreparable injury in the form of reduction and denial of access to services to Medi-Cal beneficiaries (including the respondents Medi-Cal beneficiaries and the 10,000-plus Medi-Cal beneficiaries who are patients and clients of the other respondents in the Medi-Cal fee-for-service program) would result. Dt. Ct. Dkt. 6, Ex. A.; Pet. App. 63.

Independent Living also alleged that, prior to the enactment of AB 5, a substantial percentage of medical care providers, including 45% of primary care providers and 50% of specialists, were unwilling to participate in the Medi-Cal program because of low reimbursement rates; 90% of dentists refused to accept Medi-Cal patients; and Medi-Cal's reimbursement rates for prescription drugs only gave pharmacies earnings of less than a ten percent net profit. Pet. App. 63-64. By reducing reimbursement rates further, respondents asserted that AB 5 would cause additional primary care physicians, specialists, dentists, and pharmacies to opt-out of the Medi-Cal program, and force existing providers to reduce services. *Ibid.* As a result, Medi-Cal recipients would thereby be denied quality medical services and access to quality medical services in violation of Section 30A. *Ibid.*

The relief sought by Independent Living was a writ of mandate or injunction to prohibit the Director of the Department of Health Care Services from implementing AB 5. Dt. Ct. Dkt. 6, Ex. A. The suit, although filed in state court, contained no state cause of action because it alleged no violation of any

state law. Instead, the suit was filed exclusively under federal law, under the Supremacy Clause which provides that the Constitution, laws of the United States, and treaties under the authority of the United States, shall be the supreme law of the land; "and the judges in every state shall be bound thereby."

2. On May 19, 2008, petitioner removed respondents' suit from state to federal court. Pet. App. 67.

The District Court had jurisdiction because the suit arose, indeed exclusively, under the Constitution and laws of the United States.

On June 25, 2008, the district court denied respondents' motion for injunctive relief.

In reaching its decision, although the district court acknowledged that respondents filed suit under the Supremacy Clause, the court relied heavily on a case brought under 42 U.S.C. § 1983, *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). In *Sanchez*, the court of appeals held that Section 30A does not "create an individual right that either Medicaid recipients or providers would be able to enforce under § 1983." *Id.* at 1062. The district court focused on *Sanchez* and reasoned that the Supremacy Clause "is not a source of any federal rights." Pet. App. 65 (citation omitted).

The district court also rejected Independent Living's argument that they were entitled to seek prospective injunctive relief on the basis of federal preemption pursuant to *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Pet. App. 65-66.

3. Independent Living appealed. The Ninth Circuit heard oral argument on July 11, 2008 and issued an order on July 11, 2008, reversing the district court and remanding for consideration of the merits of Independent Living's motion for preliminary injunction. Pet. App. 66-67.

Then on September 17, 2008, after the district court on remand had already, on August 18, 2008, issued its first preliminary injunction in this case, the Ninth Circuit filed a further opinion—captioned as an "OPINION" and not as an order—which stated: "This opinion more fully sets forth the rationale for our July 11 order." Pet. App. 58, 67. This further opinion did not change or amend the dispositive July 11, 2008, order of the Ninth Circuit in this case, in any respect.

4. In the further opinion filed September 17, 2008, the Ninth Circuit stated that "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." The court cited in detail the numerous cases holding that claims for injunctive relief based on federal preemption may be brought absent any express right or cause of action. (citing, *inter alia*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); and *Shaw*). Pet. App. 68-77.

The Ninth Circuit also rejected petitioner's argument that a claim of preemption under a federal statute enacted pursuant to Congress' spending power, like the Medicaid Act, should be treated differently. Pet. App. 77-83. The Ninth Circuit noted

that this Court and other circuits that have addressed the argument flatly rejected it. *Ibid.*

Petitioner's petitions for rehearing and rehearing *en banc* were denied without recorded dissent. Petitioner then filed a petition for certiorari (*Maxwell-Jolly v. Ind. Living. Ctr. of S. Cal., Inc.*, No. 08-1223) in respect to the September 17, 2008, judgment of the Ninth Circuit (on the very same grounds as are now repeated in this newest petition for certiorari), which was denied.

The first question of this present petition for certiorari (No. 09-958) is essentially, therefore, a second bite of the same apple, without any change in circumstances or new law cited by petitioner to justify or explain why the Court should now re-visit and re-review its prior decision to deny certiorari on the facts and legal claims in respect to which certiorari was previously denied, in 2009.

5. On remand to the district court, a preliminary injunction was issued on August 18, 2008, to enjoin petitioner from implementing the AB 5 payment cuts with respect to doctors, dentists, prescription drugs, adult day health care centers, and clinics. Pet. App. 6.

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

substantially deviate from the providers' costs. Pet. App. 6, 106-108. Also, it found that respondents demonstrated irreparable harm resulting from implementation of AB 5 because the cuts would cause "pharmacies to stop, or at least limit, dispensing prescription medications to Medi-Cal beneficiaries," would cause doctors and other service providers (who had not received a rate increase since 2001) to "turn away" new Medi-Cal patients, and force adult day health care centers to close. Pet. App. 6, 114, 118.

Weighing the balance of the hardships and the public interest, the district court concluded that the "significant threat to the health of Medi-Cal recipients" that "reducing payments to health-care service providers will likely cause" outweighed any expected fiscal savings, which the district court noted were unlikely to materialize because "many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care." Pet. App. 6, 121-122.

On November 17, 2008, the district court issued a similar preliminary injunction for providers of non-emergency medical transportation services and providers of home health services in the Medi-Cal fee-for-service program. Pet. App. 55-57.

The district court again found respondents had shown a likelihood of success on the merits of their claim that petitioner had acted contrary to Section 30A. Pet. App. 139-147.

On November 17, 2008, the district court also found, in favor of Independent Living, that the ten percent payment reduction of AB 5 had or would

force medical transportation services and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients and close their business altogether. Pet. App. 149-151. This curtailment of services had "already prevented altogether some Medi-Cal beneficiaries from obtaining needed [medical] services," and forced others to enter nursing homes. Pet. App. 150.

6. On September 26, 2008, petitioner appealed the district court's August 18 injunction, Dt. Ct. Docket 127, and on December 12, 2008, petitioner appealed the November 17 preliminary injunction. Dt. Ct. Docket 243.

On September 15, 2008, Independent Living cross-appealed in respect to the August 26, 2008, order of the District Court which amended the August 18, 2008, injunction to delete the period from July 1 to August 17, 2008, from the effective period of the injunction.

The intervenor-appellees (hereinafter, "Intervenors") did not become a party to the action until intervention was granted on September 15, 2008, (Dt. Ct. Dkt. 174) —which was after the August 18, 2008 injunction was issued, and after the petitioner, on August 26, 2008, filed a notice of appeal from the August 18, 2008, injunction order. Dt. Ct. Docket 127. Accordingly, Intervenors did not plead, and do not have, any state cause of action which could be an alternate basis for an eventual final judgment in respect to the Intervenors, in this case.

These appeals were orally argued and submitted on February 18, 2009. On July 9, 2009, the Ninth Circuit affirmed in part, reversed in part, and remanded the August 18 preliminary injunction. Pet. App. 1-38. On August 7, 2009, it affirmed with regard to the November 17 preliminary injunction. *Id.* at 54-57.

7. The Ninth Circuit affirmed the August 18 order and held Independent Living had established a likelihood of success on the merits in addition to satisfying the other requirements for a preliminary injunction. Pet. App. 10-29.

First, consistent with all the courts of appeals to consider the issue, the court of appeals held that Section 30A mandates that state Medicaid rate reductions "may not be based solely on state budgetary concerns." Pet. App. 20 (citing cases from the Third, Eighth, Ninth, and Tenth Circuits). Second, the rate cut also failed the interpretation of Section 30A adopted by the Third and Eighth Circuits that the rate reductions be the result of a "reasonable and sound" decision-making process. Pet. App. 21-22 n.12. Third, the appellate court held that petitioner had not complied with Section 30A as interpreted by its decision in *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998). Pet. App. 10-12.

Finally, the Ninth Circuit noted that if Section 30A only required a rate that achieved a specified outcome, "the 10 percent rate reduction might still conflict with the quality of care and access provisions of § 30(A), as the cuts have apparently forced at least

some providers to stop treating Medi-Cal beneficiaries." Pet. App. 23.

8. On Independent Living's cross-appeal, the Ninth Circuit found that petitioner had waived its sovereign immunity by removing the case from state to federal court and remanded with instructions that "the district court's injunction should extend to all services covered by that injunction and provided on or after July 1, 2008." Pet. App. 33-37.

9. The Ninth Circuit affirmed the November 17 preliminary injunction in a separate unpublished opinion on the same grounds as its published opinion. Pet. App. 54-57. The Ninth Circuit denied petitioner's petitions for rehearing en banc without recorded dissent. Pet. App. 154-157.

10. On November 25, 2009, petitioner asked the court to vacate its opinion and dismiss the appeals as moot. Pet. App. 43.

Respondents opposed the motion to dismiss as moot, noting that petitioner in its June 2009 reply brief in this Court supporting its petition for certiorari in No. 08-1223 had taken precisely the opposite position regarding mootness; that petitioner could potentially seek to recover the "excess" payments made to providers between the time the preliminary injunction went into effect and the time when AB 1183 went into effect; and that respondents' cross-appeal seeking retroactive relief was not moot in any event. C.A. Dkt. 108, at 5, 11, 12.

The Ninth Circuit held that it had jurisdiction because respondents' request for retroactive relief for

full payments meant that "both parties retained an interest in the case despite the passage of AB 1183, which merely provided that the 10 percent rate reductions would not continue past February 28, 2009." Pet. App. 47.

The appellate court also "commented on the circumstances surrounding" petitioner's new argument as it was "particularly troubled" that petitioner claimed it became aware of this new argument only while preparing a potential petition for certiorari relating to the court's opinion even though that "explanation [was] belied by the record of proceedings." Pet. App. 48-49. In addition, the Ninth Circuit noted that petitioner had previously taken in this Court "the exact opposite position regarding mootness" of the appeals. Pet. App. 50.

REASONS THE PETITION SHOULD BE DENIED

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

A. Petitioner's Allegation of Confusion and Conflict Among Courts Of Appeals Is Wrong Because The Courts Have Uniformly Reached The Same Conclusion As The Panel Below

There is no "confusion and conflict" in the decisions of the circuit courts. Pet. 21. To the contrary, every court of appeals is in accord with the Ninth Circuit's holding that a federal court may resolve, on the merits, a claim that a plaintiff will be injured unless injunctive or declaratory relief is issued to enjoin a preempted state law.

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

Verizon established that a statutory cause of action is not needed for a preemption claim. Any change in this holding would impact a wide range of

preemption claims, including those frequently brought by businesses. Indeed, "most federal statutes that are at issue in ... preemption cases do not create an express private cause of action for injunctive relief against state officers." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 406-7 (2004).

Petitioner suggests that preemption claims under Spending Clause statutes should be treated differently, but petitioner and its *amici* do not cite a single case that so holds. While petitioner cites one panel decision and one dissent for its contention that there is "confusion" among courts of appeal, neither of those opinions concerns a Spending Clause statute and neither even mentions the Spending Clause. Thus, even the panel opinion and dissent relied upon by petitioner do not provide any support for distinguishing preemption claims under Spending Clause statutes from other preemption claims. And there is no basis in the text of the Constitution for differentiating the Spending Clause from any other constitutional provision under which Congress legislates. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L. J. 345, 392-93 (2008).

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

In its brief, petitioner acknowledges that the D.C., First, Fifth, and Eighth Circuits have permitted preemption claims to be considered on the merits in the context of Spending Clause statutes. Pet. 21. Petitioner further notes that in cases brought under non-Spending Clause statutes, several other Circuits have permitted preemption claims "regardless of whether the federal statutes create privately enforceable rights," giving as examples cases from the Second, Third, and Tenth Circuits. *Id.* at 22, n.6.

The Fourth, Sixth, and Seventh Circuits have also held that preemption claims do not depend upon a cause of action in the preempting federal statute. The Fourth Circuit stated: "we need not inquire into whether [the federal statute] provides a cause of action" for a preemption claim. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 368-369 (4th Cir. 2004). The Seventh Circuit rejected the argument advanced by petitioner in this case that *Gonzaga University v. Doe*, 536 U.S. 273 (2002), is applicable to a preemption claim. *Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002). In addition, the Sixth Circuit held that there is "a cause of action for prospective injunctive relief" for federal preemption claims. *GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000).

Petitioner does not even argue that there is any decision in eleven courts of appeals reaching a contrary conclusion. Petitioner relies heavily (Pet. 23) on a dissent in *Wilderness Society v. Kane County,* 581 F.3d 1198 (10th Cir. 2009), reh'g en banc granted (Feb. 5, 2010). The dissent's position was untenable, because it was contrary to the Tenth

Circuit's holding that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004). *Accord Day v. Bond*, 511 F.3d 1030, 1033 (10th Cir. 2007).

Petitioner contends that the Eleventh Circuit is confused about this issue, citing *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990). (Pet. 22-23.) That assertion misapprehends *Pegues* and ignores a subsequent *en banc* decision that demonstrates that petitioner's view of the law has also been rejected by the Eleventh Circuit.

In *Pegues*, the alleged violation of federal law arose from the EPA Administrator's interpretation of federal law, which Alabama merely followed. The actual holding of *Pegues* was:

> Both [plaintiff] LEAF and the state agree that the proposed permits *comply* with the federal statute and regulations as they have been interpreted by the EPA. * * * LEAF's real dispute, therefore, is not with the state, but with the Administrator.

Id. at 644 (emphasis added).

The court noted that Congress had created an express cause of action against the federal agency, but the plaintiffs had not relied on that cause of action. The court therefore rejected the plaintiff 's attempt "to bootstrap a statutory claim that should be asserted against the Administrator into a constitutional issue" of preemption. *Ibid.* Premised

as it was on the conclusion that plaintiff was simply suing the wrong government, *Pegues* did not conflict with the decisions of the other eleven circuits.

The Eleventh Circuit's subsequent *en banc* decision in *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003), demonstrates that petitioner has misread *Pegues*. *BellSouth* involved a suit by a phone company against a state public service commission claiming that the commission's decision was contrary to federal law—there the Federal Telecommunications Act of 1996. The *en banc* court held that, apart from any express cause of action available under the statute, "[f]ederal courts must resolve the question of whether a public service commission's order violates federal law and any other federal question as well as any related issue of state law under its pendent state jurisdiction." *Id.* at 1278 (citing *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635 (2002)); *see also id.* at 1296 (Tjoflat, J., dissenting on other grounds) ("litigants may assert a private right of action for preemption under the Supremacy Clause").

Although the Eleventh Circuit has not yet had the opportunity to address expressly the effect of *BellSouth* on *Pegues* (and indeed, has never cited *Pegues* for any proposition related to preemption), *Pegues* does not support petitioner's call for this Court's review. Moreover, neither *Pegues* nor *Wilderness Society's* dissent support Petitioner's contention that Spending Clause statutes cannot be enforced utilizing preemption, since the

environmental statutes in those cases were not conditioned on the receipt of federal funds.

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

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

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

463 U.S. at 96 n.14.

Subsequently, this Court unanimously reaffirmed the availability of injunctive relief on the basis of federal preemption. In *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), the Court again sustained the jurisdiction of the federal courts to hear claims that state conduct (there, an order of the public service commission) was

preempted by federal law. In *Verizon*, the state commission argued that Verizon's preemption claim could not proceed, because the federal Telecommunications Act "does not create a private cause of action to challenge the Commission's order." *Id.* at 642. The Court dismissed this argument, stating:

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

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

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

It is true that these cases speak in terms of jurisdiction, rather than in terms of a cause of action. But petitioner does not dispute the existence of a federal cause of action to enforce the Supremacy Clause. Indeed, petitioner himself conceded below that there were "circumstances under which a party may properly seek relief under the Supremacy Clause." C.A. Pet. Opening Br. 6. This sensible concession is in accord with the repeated and consistent actions of this Court in adjudicating preemption claims on the merits even in the absence of an express or implied statutory cause of action. It is also consistent with the understandings of leading federal courts treatises. *See* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566 (3d ed. 2008).[3]

Petitioner nonetheless argues that respondents' claim should be dismissed, because the federal statute at issue in this case, Medicaid, is a Spending Clause statute. Pet. 17-18, 21-22, 24. That assertion is contrary to this Court's recent practice.

This Court has repeatedly adjudicated claims by private parties asserting preemption by virtue of the

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

Medicaid statute and other federal spending statutes. In *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), a Medicaid recipient sought a declaratory judgment that a state law was preempted by the Medicaid Act, and this Court unanimously agreed. In *PhRMA v. Walsh*, 538 U.S. 644 (2003), drug makers also brought an action asserting preemption of a state law under the Act. A plurality of four Justices concluded on the merits that the state law was not preempted, while three Justices argued in dissent that the state law was indeed preempted.[4]

Furthermore, petitioner's argument appears to rely on the assumption that federal Spending Clause statutes cannot preempt state statutes under the Supremacy Clause. But that is contrary to a host of this Court's holdings. *See, e.g., Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (preemption under Medicaid); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Lawrence County v. Lead Deadwood Sch. Dist. 40-1,* 469 U.S. 256, 269-270 (1985); *see also Pennsylvania Prot. &*

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[4] Justice Thomas's concurrence suggested that the Court might want to consider "whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). Justice Scalia concurred separately, proposing initial enforcement by the federal government. *Id.* at 675 (Scalia, J., concurring in judgment). Nevertheless, both Justices joined without reservation the Court's subsequent decision in *Ahlborn*, resolving a private action asserting preemption under Medicaid.

Advocacy, Inc. v. Houstoun, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.).[5] In essence, petitioner makes a policy argument against enforcement of the Medicaid statute, but this policy argument has no basis in law.

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

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

Petitioner's assertion of a "sovereign right to choose not to comply," with such statutes, First Pet. 32 (April 1, 2009), is erroneous. States have a sovereign right to choose not to participate in federal programs and to choose not to take federal monies.

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[5] Every court of appeals to consider the argument that Medicaid as a whole is unenforceable (arising largely in the context of suits under Section 1983) because of its nature as Spending Clause legislation, has rejected that argument as contrary to extensive Supreme Court precedent. *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir.), *cert. denied*, 537 U.S. 973 (2002); *Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002); *Frazar v. Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002), *rev'd on other grounds*, *Frew v. Hawkins*, 540 U.S. 431 (2004).

But once they have made those choices, the State "must comply with [the federal statute's] mandates." *Winkelman v. Parma City School District*, 550 U.S. 516, 520 (2007).

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

Petitioner suggests that respondents' preemption claim should be dismissed because it does not meet the standards for a cause of action under an implied private right of action and under 42 U.S.C. § 1983 ("Section 1983"). Pet. 17-18. This Court has never utilized either standard for a preemption claim, and indeed, petitioner and its *amici* cite no case which has so ruled.

1. Petitioner argues that Congress did not intend to create a private remedy under an implied private right of action. Pet. 17. The remedy in this case is a declaration that federal law preempts state law and an injunction preventing enforcement of a preempted state law. This remedy is supplied by the Supremacy Clause, not an implied private right of action, and does not depend upon an express declaration by Congress. As this Court has explained, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000). Thus, the cases cited by Petitioner requiring express statements by Congress to create an implied private right of action

are simply inapposite to respondents' preemption claim.

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

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

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

obtaining prospective equitable relief against state and local officials in their official capacities.

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

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

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

> secured by federal law within the meaning of § 1983.

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

Thus, it is not surprising, as the Ninth Circuit observed, that this Court "has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." Pet. App. 68a-75a (citing, *inter alia*, *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *see also Hagans v. Lavine*, 415 U.S. 528, 553 (1974) (Rehnquist, J., dissenting) (a claim that state welfare regulations conflict with federal regulations would properly invoke federal question jurisdiction to determine whether the state regulations are "invalid under the Supremacy Clause of the United States Constitution").

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

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

493 U.S. at 107-108 (emphasis added).

Petitioner also suggests (Pet. 18) that because of the oversight role of the federal government in the Medicaid program, a preemption claim should not be permitted. As this Court explained in *Verizon*, a preemption claim may proceed as long as the statute "does not *divest* the district courts of their authority" under federal question jurisdiction to review the state's "compliance with federal law." 535 U.S. at 642 (emphasis in original). There is nothing in the text or structure of the Medicaid Act that divests the courts of their authority to resolve a preemption claim. The federal government's ability to withhold federal funds does not preclude other federal remedies. *Rosado v. Wyman,* 397 U.S. 397 (1970). *See also Blessing v. Freestone*, 520 U.S. 329, 346-348 (1997); *Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 521 (1990).

Although petitioner and 22 *amici* States complain of the cost to comply with federal law, (*see,* Pet. Br. 37-38), this is not the first time the Ninth Circuit has recognized this cause of action. To the contrary, the court of appeals and many other courts of appeals expressly reached the same conclusion long ago. As petitioner himself acknowledged below, the Ninth Circuit "has recognized that 'the Supremacy Clause creates an implied right of action for

injunctive relief against state officers who are threatening to violate the federal Constitution or laws.' " C.A. Pet. Opening Br. 5-6 (quoting *Guar. Nat. Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990)); *see also Bernhardt v. Los Angeles County*, 339 F.3d 920, 929 (9th Cir. 2003); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

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

1. Petitioner asserts that the Ninth Circuit's opinion does not comport with the text of the Medicaid statute. Pet. 6, 33. This claim is without basis.

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

The Ninth Circuit noted that the state Legislative Analyst's Office Report - which the petitioner failed to show was ever reviewed or considered by the Legislature before enacting AB 5, (Pet. App. 106-107 n. 10)[6] - concluded that:

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[6] "Respondent has not shown that the Legislature ever reviewed or considered the concerns raised therein." August 18, 2008 order, Pet. App. 106-107 n. 10.

> the ten percent rate reduction had "the potential to negatively impact the operation of the Medi-Cal Program and the services provided to beneficiaries by limiting access to providers and services," and on that basis recommended that the legislature "reject the Governor's proposal to reduce payments for all providers except hospitals." Nothing in the record indicates that any other State official considered-let alone studied-these possibilities prior to enacting the cuts.

Pet. App. 21.

The Ninth Circuit found that the 10% cut was enacted solely to save the state money, with total disregard for the textual requirements in Section 30A. Pet. App. 20.[7] The court of appeals noted that even if the state is given "considerable latitude" in its implementation of the federal law, that would not change the court's conclusion that AB 5 had violated the clear requirements of the Medicaid statute. Pet. App. 22 n. 12.

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[7] The court of appeals found, at Pet. App. 20:

> In this case the record supports the district court's conclusion that 'the only reason for imposing the cuts was California's current fiscal emergency. . . . Thus, quite apart from any procedural requirements established by *Orthopaedic Hospital*, the State's decision to reduce Medi-Cal reimbursement rates based solely on state budgetary concerns violated federal law.

Petitioner has never disputed this finding of both the district court and the court of appeals.

In addition, the Ninth Circuit noted that the case was brought by Independent Living not only on behalf of providers but also on behalf of beneficiaries who were at risk of being denied needed medical care. Pet. App. 26-27. The court of appeals explained:

> there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as "the most needy in the country." *Schweiker v. Hogan,* 457 U.S. 569, 590, 102 S.Ct. 2597, 73 L.Ed.2d 227, (1982) (quoting H.R.Rep. No. 213 89th Conf. 1st Sess., 66 (1965)).

Pet. App. 28-29.

Hence the court of appeals did not act contrary to Section 30A. Instead, the court compared the state law to the federal law and found irreconcilable conflict. As a result, the court upheld the district court's holding that the state law was preempted.

2. All Circuits which have ruled on the subject have unanimously concluded that although budgetary considerations, - which are not listed in the text of Section 30A as a relevant factor at all - may be considered by the rate setter along with the relevant factors of efficiency, economy, quality of care, and equal access, nevertheless, rates based purely on budgetary considerations, or in which budgetary considerations are the conclusive factor, violate Section 30A. *See, e.g., Rite Aid of Pennsylvania, Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999); *Minnesota HomeCare Ass'n, Inc. v. Gomez*, 108 F.3d 917, 917 (8th Cir. 1997).

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

CONCLUSION

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

Respectfully submitted,

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