No. 09-958

In The
Supreme Court of the United States

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

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A NONPROFIT CORPORATION, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ALABAMA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, LOUISIANA, MAINE, MARYLAND, MISSISSIPPI, NEVADA, NEW JERSEY, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law reducing Medicaid reimbursement payments because the State failed to produce evidence that it had complied with requirements that do not appear in the text of the statute, and because the reductions were motivated by budgetary considerations. The questions presented are:

I. Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law reducing reimbursement rates?

II. Whether a state law reducing Medicaid reimbursement rates may be

held preempted by § 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute?

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INTEREST OF AMICI CURIAE

When the *amici* States administer jointly-funded federal-state programs such as Medicaid, adoption assistance, and food assistance, they partner with a federal agency such as the Department of Health & Human Services, which assures the States' compliance with the governing statutes, regulations, and other conditions on federal "matching" funds.[1] When a private party is dissatisfied with one of the partnership's program decisions, it often sues only the State. Despite the Court's clear guidance that, under 42 U.S.C. § 1983, private entities may judicially enforce only those rights that Congress has unambiguously created, the *amici* States routinely defend against these kinds of lawsuits every year. Some courts disregard whether Congress has unambiguously created a private right of action and permit the litigation to proceed on some other legal theory. And when these lawsuits are successful, the courts order both the defendant State and the (often) non-defendant federal supervising agency to increase spending for the affected program.

Under this Court's § 1983 jurisprudence, the *amici* States can raise at least two defenses to such actions: First, they argue that Congress did not create a private right of action by which the plaintiff entity can enforce the federal statute, regulation, or guidance at issue. Second, they argue that the supervising federal agency has approved the challenged State

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[1] In each of these three programs, the federal agency reimburses the States for 50% or more of the States' costs under that program, making the continuity of federal funding critical to the success of the program.

action or policy, and ask the Court to defer to that approval.[2]

In recognizing a private cause of action predicated on the Supremacy Clause, the Court of Appeals for the Ninth Circuit has circumvented this Court's jurisprudence. In a series of decisions, this Court has limited private causes of action to those that enforce federal laws that Congress has expressly intended to be privately enforceable. If the supervising federal agency concludes that a State is non-compliant, the typical remedy would be to withdraw or reduce funding to the State.[3] By allowing a private cause of action to serve as the basis on which to impose new, unforeseen obligations, the federal courts usurp the authority that Congress has bestowed on the federal-state partnership under Medicaid. And these

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[2] After submitting a proposed change to the federal Medicaid agency, States may implement changes to their Medicaid programs pending federal approval. *See*, 42 C.F.R. § 447.256(c). If a suit is filed and the supervising agency has not yet decided whether the State's proposed action is acceptable, the State may ask the Court to invoke the doctrine of primary jurisdiction. *See Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 673 (2003) (Breyer, J., concurring) ("In addition, the legal doctrine of 'primary jurisdiction' permits a court itself to 'refer' a question to the Secretary. That doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime.")

[3] As this Court recognized in *Gonzaga University v. Doe*, 536 U.S. 273, 280 (2002), "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." (Citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981).)

obligations create unpredictable new funding burdens on the States.

In fact, where the supervising federal agency agrees with the State regarding the lawsuit's claims, that agency may not be involved in the defense. As a result, States are then often caught between Scylla and Charybdis. They must first satisfy the federal agency in order to maintain ever-scarcer funding for their public assistance programs, yet that funding is still at risk in private litigation if a court determines that an individual is entitled under federal law to relief that is greater than, or different from, what the federal agency approved. Yet, to push the federal agency into playing a formal role – as a witness or as a co-defendant – in such an action further erodes the federal-state partnership that Congress created and consumes additional scarce public resources.

The Ninth Circuit decision allows private entities that had no enforceable rights under 42 U.S.C. § 1983 to bring essentially identical actions based on alleged violations of the Supremacy Clause.[4] By eliminating one of the *amici* States' two key legal

[4] On March 3, 2010, the Ninth Circuit issued three rulings reaffirming the decision as to which Petitioner seeks Certiorari. *Dominguez v. Schwarzenegger*, No. 09-16539 (3/3/10); *California Pharmacists Ass'n v. Maxwell-Jolly,* No 09-55532 (3/3/10) ("We have now handed down multiple decisions instructing the State on § 30(A)'s procedural requirements. We trust that the State now understands that in order for it to comply with § 30(A)'s 'requirement that payments for services must be consistent with efficiency, economy, and quality of care, and sufficient to ensure access'") (Slip Op. at 3360, PACER p. 28 of 29); *California Pharmacists Ass'n and California Hospital Ass'n v. Maxwell-Jolly*, No. 09-55365 (3/3/10).

defenses, the decision puts greater pressure on the States to drag their supervising federal agencies into the litigation. But because neither the federal agencies nor the *amici* States should be forced to defend litigation based on alleged violations of laws where Congress did not intend to create private rights of action, *amici* States have a compelling interest in supporting the Petition for Writ of Certiorari in this case.[5]

[5] Consistent with Rule 37(2), the State of Michigan notified the counsel for Respondents of its intention to file an *amicus* brief in support of the State of California.

INTRODUCTION

Last year, this Court emphasized the importance of the federal courts allowing the States flexibility when they defend federal court actions that seek to enforce federal requirements across a major State department or program. In *Horne v. Flores*, 557 U.S. __; 129 S. Ct. 2579, 2593-2596 (2009), this Court discussed whether a school district in the State of Arizona should be relieved from a 2000 declaratory judgment entered to enforce provisions of a federal law. It recognized that the States must often balance among multiple budgetary priorities:

> Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. [*Horne*, 129 S. Ct. at 2593-2594.][6]

Many States are experiencing severe budget shortfalls. One source suggests that, in 2010, 43 states face budget shortfalls ranging up to 30% of their general fund budgets.[7] Meanwhile, the States'

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[6] The Court cited the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). 129 S. Ct. at 2588.

[7] http://sunshinereview.org/index.php/State_budget_issues,_2009-2010#cite_note-NCSL_Post-6, citing National Conference of State

Medicaid budgets are growing rapidly: "On average, states adopted budgets that accounted for Medicaid spending growth of 6.3% and enrollment growth of 6.6% in FY 2010."[8] In view of these financial crunches, Petitioner and the *amici* States must make difficult choices regarding the federal programs they administer in conjunction with federal agencies.

One of these critical choices involves the States' costs for maintaining their Medicaid programs, which increase because: (A) the costs of health care are rising nationwide;[9] and (B) the number of persons eligible for Medicaid due to disability or due to reduced or lost income is increasing. States may seek to reduce their Medicaid costs through several means, e.g., cuts in provider reimbursement rates or the elimination of "optional" areas of Medicaid coverage. As a rule, if these proposed reductions are acceptable to the U.S. Department of Health & Human Services' Centers for

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Legislatures, FY 2010 Post-Enactment Budget Gaps & Budget Cuts (as visited 3/9/10).

[8] "As a result of the recession, and an increased caseload, Medicaid spending and enrollment growth accelerated in FY 2009 and FY 2010. Total Medicaid spending growth averaged 7.9% in FY 2009, a higher rate than the original projections and the highest rate of growth in six years. Enrollment growth also increased more than in prior years, averaging 7.5% in FY 2009, significantly higher than the 3.6% growth that was projected. On average, states adopted budgets that accounted for Medicaid spending growth of 6.3% and enrollment growth of 6.6% in FY 2010." Kaiser Commission on Medicaid and the Uninsured, February 2010 update, http://www.kff.org/medicaid/upload/7580-06.pdf (as visited 3/10/10), at 3.

[9] Health-care reform legislation currently before Congress contemplates an expansion of Medicaid coverage that will further increase costs to the States.

Medicare & Medicaid Services (CMS), the States may implement them without judicial intervention.

Regardless whether CMS already approved such a change in State policy, a private party may seek to enforce a different reading of statutory Medicaid requirements. But over the past decade, the Courts have concluded that, before such a suit may go forward, the private party must meet a threshold. As this Court stated: "We now reject the notion that our cases permit anything short of an *unambiguously conferred* right to support a cause of action brought under § 1983." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) (emphasis added). While this formulation does not wholly foreclose private litigation to enforce federal requirements,[10] it allows the States – in conjunction with their partner federal agencies – to predict their costs when they plan changes in their federal programs. Their budgets reflect the growing body of appellate decisions that have identified those statutes in which Congress has or has not unambiguously created a private right of action.

The Ninth Circuit decision, however, eliminates this threshold; a private litigant need only allege a conflict between: (A) federal law that requires a State to maintain (or increase) Medicaid reimbursement or coverage: and (B) the State's proposed change to that reimbursement or coverage. Even when CMS approves the State's proposed change, that State will no longer

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[10] For instance, the Sixth Circuit Court of Appeals found that 42 U.S.C. § 1396a(a)(23), which affords individual recipients the freedom to choose among qualified healthcare providers, created a private right of action. *Harris v. Olszewski*, 442 F.3d 456, 462 (6th Cir. 2006).

have any budgetary certainty if a litigant can simply bring a private cause of action under the Supremacy Clause for the same relief courts have hitherto refused to allow under § 1983.

If the courts are free to enforce such policy-driven determinations, the rules they fashion become unpredictable to the States. Here, the Ninth Circuit based its decision on a Supremacy Clause theory to create a detailed-study requirement from whole cloth. Such an unprecedented theory may then be used as a judicial tool to create new requirements that the States could not reasonably have anticipated. Those requirements are not clearly laid out in federal statute. This is contrary to this Court's ruling in *Gonzaga*. Consistent with this concern, this Court in *Pennhurst* eschewed judicial imposition of liability on the States if they failed to anticipate a funding condition that federal law does not explicitly require.[11] Where the States' budgets are beleaguered – particularly with respect to such federal-state programs as Medicaid – the States cannot survive the resulting uncertainty.

If the Supremacy Clause can open this door with respect to a single section of Medicaid law, 42 U.S.C. § 1396a(a)(30)(A), it can do so for any other provision in federal spending clause statutes. Private enforcement

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[11] As the *Pennhurst* Court explained, "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U.S. at 17 (citations deleted).

of federal provisions should be limited to those statutes where Congress has unambiguously created a private right of action.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Supremacy Clause theory, if unaddressed, will undermine the limitations that this Court has imposed on private enforcement of spending clause statutes, and will lead private plaintiffs through the back door to judicially-imposed resolutions of policy-laden issues that should be resolved by the congressionally-created supervising federal agency.

In partnership with federal agencies, States voluntarily administer a variety of public assistance programs and services to individuals. In many of these programs, including Medicaid, Congress has designated a federal agency to assure the States' compliance with federal law by approving State Plans and controlling funding. In 42 U.S.C. § 1983 cases, this Court has limited private rights of action to enforce federal law to only those laws that Congress unambiguously intended to be privately enforceable. The Ninth Circuit's decision allows private suits under the Supremacy Clause without such congressional authority. This Court should grant the Petition for Writ of Certiorari to clarify that the Supremacy Clause does not create a separate private right of action if Congress has not unambiguously conferred that right.

The *amici* States depend on their partnerships with federal agencies to assure the continuity of the public funding available for their jointly-funded entitlement programs. Any cut in reimbursement or services is likely to trigger litigation. When the courts

adjudicate these cases, they should not have free rein to impose their readings of federal statutory requirements without regard to whether Congress intended those requirements to be privately enforceable.

1. **Under both the Court's implied right of action and § 1983 decisions, a plaintiff must show that Congress intended to create a private right of action.**

The Ninth Circuit's decision disregards this Court's decades-long jurisprudence explaining the limits of private rights of action under 42 U.S.C. § 1983 and renders those limits nugatory. Under that decision, a plaintiff may cite 42 U.S.C. § 1983 to allege deprivation of a federal right, and rely on 28 U.S.C. § 1331 as the jurisdictional basis of a claim under the Supremacy Clause. But if, under this Court's *Gonzaga* analysis, federal law does not create such a right of action, thus foreclosing suit under § 1983, a plaintiff should not be free to enter the Court through the back door of the Supremacy Clause. When federal law creates no private right of action, the courthouse door should remain closed.

In 1975, this Court cataloged four factors that it considers "[i]n determining whether a private remedy is implicit in a statute not expressly providing one." *Cort v. Ash*, 422 U.S. 66, 78 (1975). It explained that one must examine legislative intent and purpose, the text of the statute, and traditions of state and federal causes of action, identifying four considerations:

> - does the statute create a federal right in favor of the plaintiff
>
> - is there an indication of legislative intent, to create such a remedy or to deny on
>
> - is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff
>
> - is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law?
>
> [*Cort v. Ash,* 422 U.S. at 78 (citations omitted).]

Although *Cort v. Ash* did not arise under 42 U.S.C. § 1983, this Court considered similar factors in determining whether a private party may bring an action under 42 U.S.C. § 1983. *See Gonzaga University*, 536 U.S. at 282-285. In reviewing the parameters of this theory, the *Gonzaga* Court stated: "A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context." *Gonzaga*, 536 U.S. at 285.

Gonzaga requires examining Congressional intent, the effect on judicial resources, and whether the

statute uses mandatory language in determining whether a statute confers a right of action: "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial resources." *Gonzaga*, 536 U.S. at 282, citing *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997).

In so doing, the *Gonzaga* Court recognized that the judiciary is not the proper branch to resolve certain disputes. If a problem does not involve explicit statutory requirements so much as it requires a careful weighing of policy considerations, that problem falls into the competence of the federal supervising agency and the State.

Gonzaga noted some confusion in the lower courts regarding the proper interpretation of *Blessing*, which had incorrectly allowed some plaintiffs "to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action." *Gonzaga*, 536 U.S. at 282-283. To address this confusion, *Gonzaga* emphasized that nothing short of "an unambiguously conferred right" is sufficient:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights,

> privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983. [*Gonzaga*, 536 U.S. at 283.]

Applying the *Gonzaga* analysis, many of the *amici* States have secured appellate court rulings that limit the ability of individuals or entities to sue under 42 U.S.C. § 1983 to enforce particular sections of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, which governs the administration of their Medicaid programs.[12]

Decisions arising under the Supremacy Clause have followed a separate line of analysis. Twenty years ago, this Court held that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983. We agree. That clause is not a source of any federal rights; it secures federal rights by according them priority whenever they come in conflict

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[12] For example, Michigan secured such a ruling from the Sixth Circuit Court of Appeals in *Westside Mothers v. Olszewski*, 454 F.3d 532, 541-43 (6th Cir. 2006) (42 U.S.C. § 1396a(a)(30)(A)) is not enforceable by providers or recipients of services). Petitioner provides examples from six other Circuits. Pet. 6.

with state law." *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103, 107 (1989).

The *amici* States contend that where – for at least the past decade – the courts have consistently held under *Gonzaga* there is no private right of action under 42 U.S.C. § 1396a(a)(30)(A), this Court should not now permit a private party to bring a virtually identical claim for relief based on the Supremacy Clause.[13] The courts have recognized that, when making decisions based on policy rather than statute, "[j]udges are not experts in the field," and "policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 864-65 (1984). This is especially true in the context of the Social Security Act, where the Courts have long accorded particular deference to the administrators:

> "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated." *Schweiker v Gray Panthers*, 453 U.S. 34, 43 (1981), *quoting Friedman v. Berger*, 547 F.2d 724, 727, n. 7 (2nd Cir. 1976), *cert. denied*, 430 U.S. 984 (1977).

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[13] This subparagraph of Title XIX of the Social Security Act provides that a State plan for medical assistance must "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan."

The *amici* States are facing a spate of new litigation from Medicaid providers seeking to use the courts to compel more favorable reimbursement rates. And this increase comes at a time when most States are facing record deficits, exacerbated by their expanding Medicaid costs. To allow private litigants to bring such actions would devastate the *amici* States' financial ability to provide public assistance to its ever-growing lower income citizens in the current economic climate.

2. As construed by the courts and as expressed by Congress itself, Congress did not intend to create a private right of action for alleged violation of § 1396a(a)(30)(A).

As Petitioner explains, the Courts of Appeals have held that Congress did not intend § 1396a(a)(30)(A) to create a private right of action. Pet. 27. Congress has not addressed these holdings in any recent legislation. But it is free to do so. In other areas, Congress has responded to judicial rulings – whether it agrees or disagrees with them – so as to make explicit whether an individual has a right to enforce a particular federal law provision. For instance, two years after the Court concluded in *Suter v. Artist M.*, 503 U.S. 347, 363 (1992), that no private right of action existed to enforce a provision of the Adoption Assistance Act, 42 U.S.C. § 671(a)(15), Congress amended the overarching Social Security Act. Congress explained that "this section is not intended to alter the holding in [*Suter*] that section 671(a)(15) of this title is not enforceable in a private right of action." 42 U.S.C. § 1320a-2.

In addition, as Petitioner observed, Congress has explicitly addressed Medicaid rate-setting provisions. Pet. 5-6. When Congress repealed the so-called Boren Amendment, 42 U.S.C. § 1396a(a)(13), via the Balanced Budget Act of 1997, Pub. L. 105-33, § 4711(a)(1), 111 Stat. 251, 507-08 (1997), it expressly stated its intent not to create a cause of action:

> Under the so-called Boren Amendment, States are required to pay hospitals, nursing facilities, and intermediate care facilities for the mentally retarded (ICFs/MR) rates that are "reasonable and adequate" to cover the costs which must be incurred by "efficiently and economically operated facilities." A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations.
>
> Section 3411 repeals the Boren Amendment and establishes a public notice process for setting payment rates for hospitals, nursing facilities, and ICFs/MR . . .
>
> It is the Committee's intention that, following enactment of this Act, *neither this nor any other provision of Section 1902 will 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 1230 (1997) (emphasis added).]

In the Medicaid rate-setting context, Congressional intent is clear: there is no cause of action under Title XIX regarding the adequacy of those rates. Consistent with this, a federal appellate court first concluded a decade ago that § 1396a(a)(30)(A) is not privately enforceable. *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000). With respect to this particular section of Title XIX, virtually all of the other Circuits have since ruled to the same effect. In the interim, Congress has not amended the provision to disavow court rulings since 2000 or otherwise expressed its intention that this provision be privately enforceable. Since Congress created no privately-enforceable right, this Court should grant certiorari to make it clear that a private litigant cannot sue to enforce that "right" under *either* § 1983 or the Supremacy Clause.

3. To permit the Supremacy Clause to substitute for § 1983 to support a private right of action creates uncertainty for the States and erodes the state-federal partnerships that Congress created to administer public benefits programs.

Because Congressional intent dictates whether a statute creates any private cause of action, and because Congress clearly did not intend § 1396a(a)(30)(A) to do so, the *amici* States urge the Court to grant the Petition for Writ of Certiorari to resolve the conflict among the Circuit Courts. In

contrast to the Ninth Circuit's decision in this matter, the Eleventh Circuit Court of Appeals unambiguously held that the Supremacy Clause does *not* secure rights to individuals: "The Supremacy Clause does not secure rights to individuals; it states a fundamental structural principle of federalism." *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640, 643 (11th Cir. 1990), citing *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975).

The Eleventh Circuit distinguished between rights derived from the Constitution and those rights that are mere statutory creatures. In the former instance, it is incumbent upon courts to determine both the scope of the right and the adequacy of the remedy. Where the right at issue is wholly *statutorily*-based, however, the judicial role is limited to enforcing Congress's specific intent:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. . . . In each case, however, the question is the nature of the legislative intent informing a specific statute, and *Cort* set out the criteria through which this intent could be discerned. [*Legal Environmental Assistance Foundation, Inc.*, 904 F.2d at 644, quoting *Davis v. Passman*, 442 U.S. 228, 240 (1979).]

On the other hand, the Tenth Circuit recently concluded that the Supremacy Clause did support a private right of action. *Wilderness Society v. Kane County, Utah,* 581 F.3d 1198 (10th Cir. 2009), reh'g granted 2/5/10. In that appeal, two environmental organizations sued a county, claiming that an ordinance was preempted by various federal laws and regulations and therefore violated the Supremacy Clause.

The dissent in *Wilderness Society* provides thoughtful analysis of the issue. Relying in part on *Legal Environmental Assistance Foundation,* it observed: "If 'preemption' were a sufficient basis for a cause of action, then every federal statute would implicitly authorize a private cause of action against a state or local governmental defendant. That is not the law." *Wilderness Society,* 581 F.3d at 1233-1234.

Indeed, Title XIX frames the federal-state Medicaid partnership, which combines federal and state funds to assist eligible indigents. When an *amici* State administers such a public assistance program in partnership with a federal agency, Congress intended that that federal agency be the principal enforcer of the statute, regulations, and other directives. Like CMS, each such federal agency has multiple tools to assure the State's compliance, the principal of which is its authority to withhold federal funds. Acknowledging that Congress may identify particular statutory provisions that an individual may enforce through litigation, private enforcement should be strictly limited to just those provisions. Applying the *Cort v. Ash* analysis, as refined in *Gonzaga*, a private individual can only secure judicial enforcement of

provisions as to which Congress has identified a private right of action. In the present case, the Ninth Circuit allowed a private entity – a Medicaid provider – to assert a claim under 42 U.S.C. § 1396a(a)(30), even though the appeals courts have consistently concluded that this section did *not* create a private right of action. Regardless whether the individual seeks to base the claim on § 1983, the Supremacy Clause, or some other theory, the result should be the same: there is no cause of action.

CONCLUSION

The *amici* States, therefore, ask this Court to grant the Petition for Writ of Certiorari and to reverse the Ninth Circuit's decision in this matter.

Respectfully submitted,

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