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

In The
Supreme Court of the United States

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF
SOUTHERN CALIFORNIA, INC., *et al.*,

Respondents.

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*,

Respondents.

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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

STANLEY L. FRIEDMAN
445 S. Figueroa St., 27th Fl.
Los Angeles, CA 90071-1631
(213) 629-1500
friedman@friedmanlaw.org

LYNN S. CARMAN*
8 Waterbury Lane
Novato, CA 94949-8239
(415) 927-4023
(415) 499-1687 (fax)
lynnscarman@hotmail.com
**Counsel of Record*

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

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Supremacy Clause supports an equitable cause of action under the Constitution, to prevent injury to Medicaid beneficiaries and providers, by enjoining state officials to refrain from implementing state legislation that contravenes 42 U.S.C. § 1396a(a)(30)(A) of the federal Medicaid Act.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PART ONE

PROCEEDINGS BELOW

The respondents in the two *Independent Living Center* ("ILC") cases in 09-958 and 09-1158 are two disabled Medicaid beneficiaries; three pharmacies who participate in the Medicaid program; and an independent living center and two Gray Panther groups who were the plaintiffs below.[1]

The various providers and organizations who were plaintiffs below, sued on behalf of themselves and for the benefit of the thousands of Medicaid beneficiaries who are their patients, clients, or members, as the case may be.

The respondents in the ILC cases in 09-958 and 09-1158 shall sometimes be referred to, collectively, as the "ILC plaintiffs."

Also, the ILC plaintiffs who are Medicaid beneficiaries, and the Medicaid beneficiaries who are the patients, clients, and members of the other ILC

---

[1] The party respondents filing this brief in 09-958 are Independent Living Center of Southern California, Inc.; Margaret Dowling; Mark Beckwith; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Tran Pharmacy, Inc.; Gray Panthers of San Francisco; and Gray Panthers of Sacramento.

The party respondents filing this brief in 09-1158 are Independent Living Center of Southern California, Inc.; Gerald Shapiro, dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; and Tran Pharmacy, Inc.

plaintiffs, shall sometimes be referred to, collectively, simply as "beneficiaries."

And, the ILC plaintiffs who are pharmacies who serve beneficiaries shall sometimes be referred to as "providers."

THE MEDICAID PROGRAM

The Medicaid Act is a federal-state funded health services program, whose purpose is to enable the poor in this country to have access to the same minimum level of medical care as do the non-poor, called "mainstream medicine."

The Act, and the Medicaid fee-for-service program in California (called "Medi-Cal") are described in other briefs in these consolidated cases; hence need no repeat description in this brief.

PROCEDURAL STATEMENT IN RE 09-958

Since before 2008 a payment schedule ("Base Fee Schedule") has existed in the Medi-Cal program to pay the various providers in the fee-for-services part of the federal-state Medicaid program in California, called "Medi-Cal."

In February 2008 the California Legislature enacted Assembly Bill ("AB 5") which required the Director to withhold ten percent from all payments to

providers in the Medi-Cal fee-for-service program for services on or after July 1, 2008.

A petition for a writ of mandamus was filed by the ILC plaintiffs in state court, under the Supremacy Clause, to prevent injury to the beneficiary and provider plaintiffs, and to the thousands of beneficiaries who are the patients, clients, and members of the plaintiff pharmacies, independent living center, and Gray Panther groups.

The suit was removed by the Director to the federal court.[2] On June 25, 2008, the district court denied the ILC plaintiffs' motion for preliminary injunction to enjoin the Director from implementing AB 5. Joint App. 139, 125-139.

On July 11, 2008, the appeals court reversed;[3] followed by a full opinion on September 17, 2008.[4]

NOTE: This September 17, 2008, opinion became, formally or informally, the law of the case, so as to be the decision upon which all the subsequent rulings in the ILC cases in 09-958 and 09-1158 were based (whether or not the subsequent district court and appeals court decisions make any reference to the

---

[2] Doc. 1 (Joint App. 1).

[3] *Independent Living Center v. Shewry,* 543 F.3d 1047 (9th Cir. 2008).

[4] 09-958 Pet. App. 58-93; also, same decision: 543 F.3d 1050 (9th Cir. 2008), *cert. denied,* 129 S.Ct. 2828 (2009).

initial, controlling, September 17, 2008, appeals court opinion).

Also, this September 17, 2008, decision became, by default, the *ratio decidendi* of all the other cases in 09-1158, which are but followers of the lead case, 09-958.

Subsequent procedural history in 09-958

On August 18, 2008, the district court, on remand, granted the ILC plaintiffs a preliminary injunction to enjoin the Director from implementing the preempted AB 5, including refraining from withholding ten percent from payments to certain providers for services after July 1, 2008.[5]

This was a negative injunction, not an affirmative injunction.

The district court found that AB 5 was enacted, contrary to Section 30A, for purely budgetary reasons,[6] as alleged by the ILC plaintiffs,[7] and that the

---

[5] The August 18, 2008 order provided in relevant part:

> "The Court hereby orders the respondent Director . . . to refrain from enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day care health care centers, clinics, . . . for services provided on or after July 1, 2008."

09-958 Pet. App. 124, 94-124.

[6] 09-958 Pet. App. 106-108, and 107 n. 10.

beneficiaries and pharmacies who were plaintiffs, and the thousands of beneficiaries who were patients, clients, and members of several of the ILC plaintiffs, would be injured irreparably if preliminary injunction were not granted,[8] as alleged by the ILC plaintiffs.[9]

The declarations of the ILC plaintiff beneficiaries and the plaintiff pharmacies, independent living center, and Gray Panther groups showed the irreparable harm threatened to them as beneficiaries and to the thousands of beneficiaries whom the plaintiff providers serve.[10]

On August 27, 2008, the district court amended the August 18, 2008, order to provide that it not apply retroactively to July 1, 2008.[11]

The appeals court affirmed the August 18, 2008, preliminary injunction, but reversed the subsequent August 27, 2008, order – so that the August 18, 2008,

---

[7] First amended complaint ("FAC"), 09-958; set forth in Pars. 45-46, at Joint App. 109-111.

[8] The irreparable injury to the ILC plaintiffs, and to the thousands of beneficiaries who are the patients, clients, and members of various of the ILC plaintiffs is set forth in detail in the findings. 09-958 Pet. App. 108-120.

[9] Irreparable injury was pleaded in detail in the FAC. Joint App. 99-108, 112.

[10] These declarations, are set forth in the Excerpts of Record as Documents 102, 98, 95, 88, 86, 84, 83, 82, 81, 80, 56, 55, 54, 53, 52, 51, 50, 15, 14, 13, and 1, in *Independent Living Center v. Shewry*, Appeal No. 08-56422, Ninth Circuit.

[11] 09-958 Pet. App. 125-126.

order applied retroactively to July 1, 2008, the operative date of AB 5.

(**NOTE:** This retroactivity of the initial August 18, 2008 preliminary injunction is not challenged before this Court.)[12]

The home health and NEMT services injunction in 09-958

On November 17, 2008, a second negative preliminary injunction was issued in 09-958 which enjoined the Director from implementing AB 5 in respect to home health agencies, and non-emergency medical transporters ("NEMT").

This negative injunction tracked the wording of the initial August 18, 2008, order, except that it was

---

[12] The appeals court found on the cross-appeal by the ILC plaintiffs that the State waived sovereign immunity because (1) the State statute which permits mandamus against State officials for refund of moneys unlawfully withheld, and (2) the Director in removing the 09-958 action to district court, therein waived the State's sovereign immunity in the 09-958 case. See, 09-958 Pet. App. 29-38.

The ILC plaintiffs' position in the district court was, also, that the ILC initial motion was timely and an order would have issued in June, 2008 to restrain implementing AB 5, but for the error invited by the Director; so that the August 18, 2008 order should in equity, and by estoppel, operate *nunc pro tunc* so as to be deemed effective before July 1, 2008. (See Excerpts of Record, Document 12, in *Independent Living Center v. Shewry,* Appeal No. 08-56422, Ninth Circuit.)

only effective from the date of the order, November 17, 2008, prospectively.[13]

The findings again found that AB 5 violated Section 30A, due to being enacted solely for budgetary reasons, 09-958 Pet. App. 144-145.

The district court also found, upon the declarations, that in addition to its findings in the August 18, 2008 order, that as a result of the payment reduction to home health agencies and NEMT transporters, that beneficiaries were being denied access to home health and NEMT transportation services throughout the state. 09-958 Pet. App. 147-151.

On July 9, 2009, the appeals court affirmed the August 18, 2008 preliminary injunction, 09-958 Pet. App. 2-29, 38.

The same July 9, 2009, decision also reversed the August 27, 2008, order which had denied retroactivity

---

[13] The November 17, 2008 order provided:

> The Court hereby orders the respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for NEMT and home health services provided on or after November 17, 2008.

09-958 Pet. App. 153. (See findings, 09-958 Pet. App. 139-153).

of the injunction for the period of July 1, 2008 to August 18, 2008. 09-958 Pet. App. 29-38.[14]

On August 7, 2009, the appeals court affirmed the November 17, 2008, preliminary injunction. 09-958 Pet. App. 54-57.

The appeals court and the parties did not, in the latter two appeals in 09-958, revisit the issues which are the subject of the First Question Presented, because manifestly those same issues had been ruled upon by the appeals court in its September 17, 2008, opinion, which preceded the two appeals of the Director which are today the subject of 09-958.

[14] See n. 11 of this brief. I.e., the appeals court concluded that the State, in the state procedural statute under which the ILC plaintiffs sued in state court, waived the State's immunity to suits in respect to retroactive monetary obligations; and, that State immunity to suit for retroactive payments was also waived by the removal of the state suit, in 09-958, to federal court.

Again, violation of State sovereignty as to these retroactive payments, in respect to services furnished between July 1, 2008 and August 18, 2008, the date of the preliminary injunction in 09-958, is not a subject of contention in these certiorari proceedings.

PROCEDURAL STATEMENT IN RE 09-1158

The State legislature enacts AB 1183, a five percent payment reduction to pharmacies, to replace AB 5 eff. March 1, 2009: again, for solely budgetary reasons, again, in violation of Section 30A

The California Legislature then enacted Assembly Bill ("AB") 1183 to terminate AB 5 in respect to Medicaid services furnished after February 2009.[15]

AB 1183 also enacted a successor provider payment reduction for Medicaid services furnished on or after March 1, 2009 – again, purely for budgetary reasons.[16]

The arbitrary reduction in payment to pharmacies, this time, was five percent, under AB 1183. (09-1158 Pet. App. 206).

The same ILC plaintiffs then filed a new complaint under the Supremacy Clause, which alleged, again, that the new AB 1183 was contrary to hence preempted by Section 30A, for the same reason as AB 5: that it was enacted solely for budgetary reasons,

---

[15] This part of AB 1183 is set forth at 09-1158 Pet. App. 201-204.

[16] This part of AB 1183, which enacted the new payment-reducing State law, Cal. Welf. & Inst. Code § 14105.191, is set forth at 09-1158 Pet. App. 205-217.

contrary to Section 30A,[17] which would injure them and the beneficiaries who were their patients and clients, irreparably.[18] They again requested injunctive relief to prevent irreparable injury.

---

[17] Par. 24 alleged (Joint App. 150), that:

> (T)he State's sole purpose, and the conclusive factor, in enacting the 5% Rate Reduction was to reduce the budget deficit.

Par. 25 alleged that:

> Accordingly, . . . the action of the Legislature to enact the aforesaid provisions of § 14105.191 Welf. & Inst. Code, and the 5% Rate Reduction in respect to Pharmacy providers, were contrary to and in violation of the quality and access provisions of Section 30A, such that the Defendant Director will be acting in excess of and without jurisdiction to implement § 14105.191 Welf. & Inst. Code, including the 5% Rate Reduction for Pharmacy providers, commencing March 1, 2009.

[18] Par. 21 (Joint App. 148-149) alleged that:

> Further, unless restrained . . . the defendant Director will implement the aforesaid 5% Rate Reduction . . . which in turn will thereby result in injury to the Plaintiffs; to . . . [pharmacies] . . . and to their Medi-Cal patients – which injury will foreseeably result in Pharmacy providers . . . not accepting new Medi-Cal patients, or stopping serving Medi-Cal patients at all, or by reducing kinds, amounts, locations and levels of services to Medi-Cal beneficiaries, or by going out of business, so that thereby Medi-Cal beneficiaries . . . will be caused and threatened to be caused, denial and reduction of access to life-vital Pharmacy services and treatment in the Medi-Cal FFS program, resulting in great physical suffering and injury to beneficiaries who are patients of Plaintiffs . . . ; all to [their] irreparable injury[.]

The ILC plaintiffs' motion for preliminary injunction[19] was supported by declarations showing irreparable injury to beneficiaries and providers which was threatened by the new payment reduction law, AB 1183.[20]

On February 27, 2009, the district court:

- ruled that the new State law had been enacted for purely budgetary reasons, contrary to Section 30A;[21]
- found that irreparable harm to both beneficiaries and providers would result,[22] and,
- issued a negative injunction, ordering the Director to refrain from implementing AB 1183 in respect to pharmacies,

---

[19] Joint App. 39 (being Docket No. 10 in the district court).

[20] These declarations are set forth in Document 11 in the Docket of *Independent Living Center v. Maxwell-Jolly,* 2:09-cv-0382, C.D. Cal.

[21] 09-1158 Pet. App. 143.

The district court found:

> Here the legislative history shows no indication that the Legislature considered any of the relevant factors before implementing AB 1183. Instead, it appears that the Legislature enacted the rate reduction purely for budgetary reasons.

[22] 09-1158 Pet. App. 143-149.

> including refraining from reducing by five percent payments to pharmacies for prescription drugs.

09-1158 Pet. App. 151.

The new injunction tracked the language of the first injunction, so as to be a negative injunction.[23]

On March 3, 2010, the appeals court affirmed the February 27, 2009, preliminary injunction to enjoin implementation of the five percent deduction from pharmacy payments, of AB 1183 (09-1158 Pet. App. 53-58) in a short ruling that the Director failed to show any error in the district court's findings and conclusions. 09-1158 Pet. App. 53-58.

Thus, the appeals court affirmed the district court's rulings that the State Legislature enacted the AB 1183 reduction in provider payments, contrary to supreme federal law, Section 30A, for purely budgetary reasons; and that the reduction would injure providers directly by impacting the amounts paid to

---

[23] The February 27, 2009 order provided:

> The Court hereby orders the respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191(b)(3), as modified by AB 1183 beginning on March 1, 2009, by refraining from reducing by five percent payments to pharmacies for prescription drugs and traditional over-the-counter drugs provided by prescriptions) provided under the Medi-Cal fee-for-service program.

09-1158 Pet. App. 151.

them, and, would adversely impact access of beneficiaries to prescription drugs in the State's Medicaid program.

Again, the parties and the appeals court did not, in this appeal in re AB 1183, revisit the issues which are the subject of the First Question Presented, because manifestly those same issues had been ruled upon by the appeals court in its September 17, 2008, opinion, and bound the result.

* * *

NOTE: The 09-983 case has not been rendered moot by the termination by the State Legislature of AB 5 effective at the close of February 2011.

Neither has the 09-1158 case been rendered moot by either of two State laws, AB 97, sections 93.2 and 93.5, which are mentioned by the Intervenors in 09-958 as having been recently enacted by the State Legislature, in March and June of 2011.

This is because voluntary termination of the preempted implementation by the State of AB 5 or AB 1183 by the passage of the new State laws mentioned by the Intervenors, would still leave unresolved the question, in the final analysis, of whether the Director is entitled to recoupment of the amounts ordered by the district court to be paid to providers.

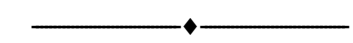
NOTE ALSO: In November 2010 the federal Centers for Medicare and Medicaid Services ("CMS")

did deny the State Plan Amendments ("SPAs") submitted by the California Dept. of Health Care Services ("DHCS") to CMS for approval of the AB 5 and AB 1183 Medicaid provider payment reductions.

These rulings are not any final ruling against the State, because DHCS filed an administrative appeal.

A briefing schedule has been set which takes the appeal through November 2011, before any final decision will be made by the Secretary on this DHCS appeal.

Hence, nothing has happened so far in the administrative proceedings between the Secretary and DHCS, which is any cause for the ILC cases in 09-958 and 09-1158 to be stayed, or for the Court to surrender jurisdiction over the causes in the ILC cases, to the Secretary, in any way.



PART TWO

A. THE GENERAL HISTORY OF LITIGATION UNDER THE MEDICAID ACT

The "pre-1983" period

Before it became recognized in 1980 that the "laws" in 42 U.S.C. § 1983 included the Medicaid Act, suits by beneficiaries and providers under the Supremacy Clause to obtain injunctive or declaratory relief, to prevent being injured from a State's violation of the Medicaid Act were commonplace.

See, the following Supremacy Clause cases, before § 1983 came into use in 1980:

Eligibility rules change:

– *Bass v. Rockefeller,* 331 F.Supp. 945 (S.D.N.Y. 1971).

– *Webb v. Aggrey,* 447 F.Supp. 17 (W.D. Ohio 1977).

Payments to nursing homes:

– *Harmony Nursing Home, Inc. v Anderson,* 341 F.Supp. 957, 958 (D. Minn. 1972).

Inclusion of eye-glasses:

– *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977).

Transportation services:

– *Smith v. Vowell,* 379 F.Supp. 139 (D. Tex. 1974).

Payments to health care facilities:

– *Minn. Assn. of Health Care Facilities v. Minn. Dept. of Public Welfare,* 602 F.2d 150, 154 (8th Cir. 1979).

Supplemental benefit:

– *Hayes v. Stanton,* 512 F.2d 133 (7th Cir. 1975).

The "§ 1983 period"

Medicaid beneficiaries and providers sued under § 1983 once it became available in 1980, by the *Thibotout* decision.[24]

This fashionable use of § 1983 was not because Congress commanded its use or prohibited any Supremacy Clause suit to be filed, but because 42 U.S.C. § 1988, permitted attorneys' fees to be awarded in a § 1983 case, but not if the pleader sued only under the Supremacy Clause.

"Post-1983" Medicaid actions

More recently –when a number of Circuits "abolished" § 1983 suits in respect to Section 30A – the Medicaid litigation bar simply returned to their horse-and-buggy vehicle – the Supremacy Clause cause of action – which they had prior used, long before the sleek Cadillac § 1983 jurisdictional vehicle came into, and went out of, use.

B. THE HISTORY OF SECTION 30A LITIGATION

The litigation in respect to Section 30A, both in California and elsewhere, is set forth below.

---

[24] *Maine v. Thibotout,* 448 U.S. 1 (1980).

Section 30A:

- *Illinois Hospital Assn. v. Illinois Dept. of Pub. Aid,* 576 F.Supp. 360, 368-369 (N.D. Ill. 1983) (provider payment reduction, based solely on budgetary considerations, enjoined);
- *California Hospital Assn. v. Schweiker,* 559 F.Supp. 110, 114 (C.D. Cal. 1982) (provider payment limit, based solely on budgetary considerations, enjoined);
- *Arkansas Medical Society, Inc. v. Reynolds,* 6 F.3d 519, 531 (8th Cir. 1993) (provider payment reduction, based solely on budgetary considerations, enjoined);
- *Wisconsin Hospital Assn. v. Reivitz,* 733 F.2d 1226, 1236 (7th Cir. 1984) (provider payment limit, based solely on budgetary considerations, enjoined);
- *Clayworth v. Bonta,* 295 F.Supp.2d 1110, 1119 (E.D. Cal. 2003) (five percent provider payment reduction, based solely on budgetary considerations, enjoined) *rev'd,* for not qualifying as a § 1983 suit (9th Cir. 2004);
- *ILC v. Shewry,* 543 F.3d 1050 (9th Cir. 2008), AB 5 case (ten percent provider payment reduction, based solely on budgetary considerations, enjoined);
- *ILC v. Maxwell-Jolly*, 09-1158 App. 53 (9th Cir. 2010), AB 1183 case (five percent

provider payment limit, based solely on budgetary considerations, enjoined);

– *Cal. Pharm. v. Maxwell-Jolly,* 563 F.3d 847 (9th Cir. 2009), AB 1183 case (provider payment limit, based solely on budgetary considerations, enjoined).

In each of these cases the facts are always the same: the State legislature enacted a State law, solely for budgetary reasons, to reduce payments to the Medicaid providers in the State – which is promptly enjoined by a federal court, for violating the quality and equal access provisions of supreme federal law, Section 30A.

There is no question, under this unbroken line of decisions, that the quality and equal access clauses of Section 30A are violated whenever a State legislature reduces a Medicaid provider payment rate **for solely budgetary reasons**.

In any event, such suits by beneficiaries and providers (on their own account and as representatives of their Medicaid patients), to obtain compliance of a State with the minimum provider payment requirements of federal law are routinely filed today under the Supremacy Clause, just as other Supremacy Clause cases were routinely filed by the Medicaid litigation bar, long before §1983 was "discovered."

Congress, with knowledge that Supremacy Clause actions are litigated, has never acted to stop them. This signifies Congressional approval, not disapproval, of Supremacy Clause actions of the sort filed by the ILC plaintiffs in the ILC cases at bar

Congress was well aware throughout all the 13-year period before *Thibotout* was decided in 1980, that beneficiaries and providers were using the Supremacy Clause to prevent being injured from the usual State violations of the Medicaid Act.

Congress is well aware today, that these Supremacy Clause suits are being filed all over the country.

Congress' silence in face of this knowledge speaks approval, not disapproval, of such suits as the ILC suits at bar.

As reported by the Court in *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 516-517 (1990):

> During the 1970's provider suits in the federal courts were commonplace. In addition, in response to several States freezing their Medicaid payments to health care providers, Congress amended the Act in 1975 to require the States to waive any Eleventh Amendment immunity from suit for violations of the Act. (*See,* H.R. Rep. No. 94-1122, p. 4 (1976); *see* also 121 Cong. Rec. 42259 (1975) (remarks of Sen. Taft). Congress believed the waiver necessary because the existing means of enforcement –

> noncompliance procedures instituted by the Secretary or suits for injunctive relief by health care providers – were insufficient to deal with the problem of outright noncompliance because they included no compensation for past underpayments. *See* H.R. Rep. No. 94-1112, *supra,* at 4. The amendment required the Secretary to withhold 10% of federal Medicaid funds from any State that had not executed a waiver of its immunity by March 31, 1976. Pub. L. 94-182, § 111, 89 Stat. 10545. The provision generated a great deal of opposition from the States and was repealed in the next session of Congress. Pub. L. 94-552, 90 Stat. 2540, *see* H.R. Rep. No. 94-1122, *supra,* at 4. But Congress explained that it did not intend the repeal to "be construed in any way contravening or constraining the rights of providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive relief in a federal or a state judicial forum. Neither should the repeal of [the waiver section] be interpreted as placing constraints on the rights of parties involved to seek such prospective, injunctive relief."

As noted further by Alito, J., *Pennsylvania Pharmacists Assn. v. Houston,* 283 F.3d 531, 541 (3d Cir. 2002):

> (T)he House Committee Report on the 1981 amendments of (Section 30A) observed that

> "in instances where the States or the Secretary fail to observe these statutory requirements, **the courts would be expected to take appropriate remedial action**." H.R. Report 97-158, vol. II, at 301 (1981).

(Boldface emphasis supplied).

Thus, Congress has never enacted any provision to prevent beneficiary or provider litigation in respect to the minimum requirements which States must comply with in setting Medicaid provider payment rates under Section 30A.

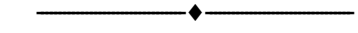
Hence, from the above, Congress has implicitly and expressly approved the Supremacy Clause cause of action in respect to State violations of Section 30A of the Medicaid Act, by never attempting to block its use by any Congressional enactments on the subject, and by comment in committee that Congress expected such litigation to be conducted, whenever a State failed to meet the minimum requirements, as in case at bar, of Section 30A.

The litigation history of Section 30A shows that it is Medicaid beneficiaries and providers, alone – not the Secretary at all – who customarily vindicate the supremacy of the Medicaid Act

The foregoing litigation history of Section 30A, set forth above, shows that for the life of the Act – and in the ILC cases – it has always been beneficiaries and providers – **never** the Secretary – who have

vindicated the federal interest in the supremacy of the Medicaid Act, against federally preempted State reductions of payments to Medicaid providers, contrary to Section 30A, which injure or threaten to injure access of beneficiaries to Medicaid services.

And again, it **has never been the Secretary**, in any of the reported cases – or in the ILC cases – who defended the ill, the aged, and the disabled beneficiaries in these cases: but, always, it has been, and still is in the ILC cases at bar, the beneficiaries and providers who bring to the attention of the federal court the fact of violations by States of the minimum payment requirements of federal law (Section 30A), and obtain the remedy of injunction against States' violations of this supreme federal law.



PART THREE

THE PRIMARY ISSUES OF THESE CASES

THE TWO CENTRAL ISSUES OF THESE CASES WERE RAISED, OR JOINED, IN THE FIRST MOTION OF THE ILC PLAINTIFFS FOR A PRELIMINARY INJUNCTION, TO ENJOIN THE DIRECTOR FROM IMPLEMENTING THE PREEMPTED STATE LAW, AB 5, IN 09-958

The precise base claims of the ILC plaintiffs under the Supremacy Clause, for a negative injunction to enjoin the Director from withholding ten percent from all payments to providers, commencing July 1,

2008, under State law, AB 5 (in 09-0958) are set forth in their amended petition for a writ of mandamus filed in the state court in the spring of 2008 (Joint App. 85-124). The action was removed by the Director to the district court. Joint App. 1, Document 1. See, first amended petition for mandamus. Joint App. 140-155.

These base claims are encapsulated in the ILC plaintiffs' memorandum in support of their initial motion for preliminary injunction,[25] of which a relevant part is set forth *en haec verba* below:

> The procedural violation was that the rates were reduced arbitrarily and capriciously, for budgetary reasons, without the Legislature considering whether the "reduction could be sustained by providers, in light of their costs, without a loss in quality or equal access for Medi-Cal recipients;" as required by the quality and access clauses of Sec. 30(A). (See, *Clayworth* [*v. Bonta*], *supra*, 295 F.Supp.2d at 1128.)
>
> Therein, under the Supremacy Clause as interpreted by the *Ex parte Young* line of decisions, not only is (1) the ten percent provider payment reduction statute (§§14105.19, subds. (a), (b)(1), (b)(2), and (c), and §14166.245, subd. (a), of the Welf. & Inst. Code), preempted by the contrary requirements of the

[25] Joint App. 2. This Memorandum is Document 11 in the District Court Clerk's docket in 2:08-cv-03315, C.D. Cal.

quality and equal access clauses of Sec. 30(A), but, also (2) the above [seven] plaintiffs have an implied right to injunctive relief against the Director, who is threatening to injure them, and subjecting them to risk of injury, by implementing the preempted 10% payment cut to Medi-Cal managed care plans in violation of federal law, namely, Sec. 30(A) . . .

NOTE: In so suing, the [seven] plaintiffs in the First Cause of Action are not exercising any private right of action right under 42 U.S.C. § 1983, as a sword, to enforce Sec. 30(A), but, to the contrary, are instead invoking the protection of the Supremacy Clause, as a shield, as permitted them by the doctrine of *Ex parte Young*. As held in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987):

"[A] claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law."

and, as held by *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997):

"Although there is some confusion in the cases, we agree with those commentators who have concluded that 'the best explanation of Ex parte Young and its progeny is 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.'"

13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d, § 3566, at 102 (1984); see also *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (quoting same). . . .

RELIEF REQUESTED IN
THE FIRST CAUSE OF ACTION

The aforesaid [seven] plaintiffs, in the First Cause of Action, request a preliminary injunction to restrain the Director from implementing subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code, and §14166.245, subd. (a), Welf. & Inst. Code; including, without limitation, refraining from implementing the 10% rate cut, or any rate cut, in respect to Medi-Cal fee-for-service providers for dates of service on and after July 1, 2008, or at any time, pending final determination of this action.[26]

---

[26] The preempted State statute in the ILC Plaintiffs' second case (No. 09-1158) was AB 1183.

AB 1183 was the successor to AB 5 when AB 5 sunset at the end of February 2009.

AB 1183 required the Director to deduct five percent from the Base Fee Schedule amount for Medi-Cal fee-for-service pharmacy providers (among other Medi-Cal services which were affected by AB 1183).

(End of quoted portion of ILC Plaintiffs' memorandum in support of preliminary injunction in the district court in 09-958.)

The Director's precise objection to this first ILC motion was his claim that no injunction could be issued under the Supremacy Clause, because the preempting federal law, Section 30A, created no "federal right" in the ILC plaintiffs to "enforce" Section 30A – which was claimed by the Director to be required by 42 U.S.C. § 1983 and the *Gonzaga* line of cases.[27]

The second objection of the Director to the first ILC motion for preliminary injunction case was his claim that there can be no cause of action because the ILC plaintiffs are unable to plead or show they have any "right" which was violated or threatened to be violated by the State's violation of the preempting federal law, Section 30A.[28]

* * *

---

[27] *Gonzaga Univ. v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992).

This objection is set forth in the Director's *Opposition* to the ILC plaintiffs' initial preliminary injunction motion, in June 2008. [Document 74 in Excerpts of Record in Appeals Case 08-56422, which is Document 35 in the docket of C.D. Cal, No. 2:08-cv-03315, in 09-958].

[28] The objection was that the ILC plaintiffs had no primary "right" to the performance of a corresponding "duty." Page 11 of the Director's *Opposition*. [This is Document 74 in Excerpts of Record in Appeals Case 08-56422, which is Document 35 in the docket of C.D. Cal. No. 2:08-cv-03315, in 09-958.]

The district court denied preliminary injunction; but was reversed by an appeals court order filed July 11, 2008, followed by an explanatory opinion filed September 17, 2008 (543 F.3d 1050).

The appeals court overruled the two objections of the Director, and remanded the case to the district court. The decision of the appeals court was precisely as set forth *en haec verba* below:

> The only issue before this court is . . . whether ILC may maintain a valid cause of action to enjoin implementation of AB 5 on the basis of federal preemption. (09-958 Pet. App. 67-68).
>
> . . .
>
> Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.
>
> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. They do not seek to enforce any substantive "right" conferred by the statute. Instead, they argue that the cuts mandated by AB 5 are themselves unenforceable, because they exceed the scope of the State's discretion under the

> Act and violate federal standards. As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.

(End of quotation, at 09-958 Pet. App. 92-93).[29]

This basic decision of the Ninth Circuit, 543 F.3d at 1056-57, Pet. App. 68-69 cited:

- *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 281 ("An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient" to seek injunctive relief under *Ex parte Young,* 209 U.S. 123 (1908);
- *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. 256, 259 n.6 (1985) (failure to distribute federal funds as required by the federal law under which the funds were granted), describing *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983) as reaffirming the general rule that a plaintiff asserting preemption under 28 U.S.C. § 1331 has stated a federal claim for relief;
- *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973): airport operator had no statutory right created by the preempting federal statute, but suffered economic or other adverse effect

[29] 543 F.3d at 1065-66.

from city ordinance that limited flight landing hours, which conflicted with a federal law;

– *Ray v. Atlantic Richfield Co.,* 436 U.S. 151 (1978): tanker owner had no statutory right created by the preempting federal statute, but suffered economic or other adverse effect from a State law regulating minimum ship operations in State waters, which conflicted with a federal law;

– *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992): hazardous waste operators had no statutory right created by the preempting federal statute, but, suffered economic or other adverse effect from a State hazardous waste operator licensing law, which conflicted with a federal law;

– *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.,* 461 U.S. 190 (1983): nuclear plant operator had no statutory right created by the preempting federal statute, but, suffered economic or other adverse effect from a State public safety and environment law, which conflicted with a federal law;

– *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963): avocado growers had no right created by the preempting federal statute, but, suffered economic or other adverse effect from a

State avocado marketing law, which conflicted with a federal law.

NOTE: This September 17, 2008 opinion became the law of the case, so as to be the decision upon which all the subsequent rulings in the ILC cases were based (whether or not the subsequent appeals court decisions under review in the ILC cases in 09-958 and 09-1158, mention this seminal September 17, 2008 opinion.

PART FOUR

THE DIRECTOR HAS IMPLICITLY CONCEDED THAT HIS FIRST MAJOR OBJECTION TO JURISDICTION AND CAUSE OF ACTION, HAS NO MERIT

The Director, by admitting in his merits brief (Dir. Brief 43) that a person may use the Supremacy Clause either as (1) a defense to a State suit against the person or (2) as the basis for a pre-emptive suit (mis-named as a "pre-enforcement suit" by the Director), to prevent being injured from prospective State implementation of a federally preempted State law, has conceded that both of his major premises, that:

– the ILC plaintiffs must have a *Gonzaga* "federal right" in order to file a Supremacy Clause pre-enforcement suit in the case at bar, and in any event,

– the ILC plaintiffs must have some "right" which was threatened to be

> violated by the State's violation of the preempting federal law, Section 30A,

are erroneous, so as to be no basis for the Court to overrule the affirmation by the appeals court of the preliminary injunctions of the district court in the ILC cases.

PART FIVE

ARGUMENT

THESE CASES ARE ABOUT INJURY

The ILC cases are about prevention of injury (i.e., adverse effect upon each of the ILC plaintiffs); and vindication of the federal interest in the supremacy of federal law; not, about "enforcement" of "rights"

Civil law is divided into two parts: the law of rights, and the law of injury.[30]

---

[30] *See:*

– *Marbury v. Madison,* 5 U.S. 137, 163 (1803):

> [I]t is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.

– *Western Pacific, Cal. R. v. Southern Pacific Co.*, 284 U.S. 47, 51-52:

> A person is a "party in interest":
>
> . . . if the bill discloses that some definite legal right possessed by the complainant is seriously threatened or that the unauthorized and therefore unlawful

(Continued on following page)

If one sues to enforce a right, then he must show he has the "right" he claims. Otherwise he is out of court. The ILC cases are not that case.

There is of course a large body of law dealing with the subject of "enforcement of rights," such as in the *Gonzaga*/*Freestone*/*Blessing* line of decisions.

Nevertheless there is a completely separate body of law which establishes that a person threatened with injury may, in the equity jurisdiction of the federal courts, obtain injunction to prevent being injured from on-going acts of a federal or a State officer which are contrary to, hence preempted (i.e., made void) by a federal law.

Below are just a few of the many decisions in which the cause of action has been that the plaintiff is threatened to be injured from federally preempted acts of a public officer.

First, the ILC plaintiffs list some of the many cases in which federal officers have been enjoined, or in which it was stated that injunction was available, to prevent injury from federal officers' acts contrary to supervening federal law:

– *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 108 (1902):

> action of the defendant . . . may directly and adversely affect the complainant's welfare[.]

> The acts of all its officers must be justified by some law and in case an officer violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. (187 U.S. at 108).

– *Abbott Laboratories v. Gardner,* 387 U.S. 136, 142-43 (1967):

> There is jurisdiction in equity for a suit to restrain the F.D.A., to prevent injury to a plaintiff, from implementing a regulation adopted contrary to the Federal Food, Drug, and Cosmetic Act of 1938. (387 U.S. at 142-43).

– The Department of Justice advised Congress in 1938:

> (A)ny citizen aggrieved by any order of the Secretary, who contends the order is invalid, may test the legality of the order by bringing an injunction suit against the Secretary, or the head of the Bureau, under the general equity powers of the court. 83 Cong. Rec. 7892 (1938). (*Abbott Laboratories,* 387 U.S. at 142-3).

– *Columbia Broadcasting System v. United States,* 316 U.S. 407, 422-423 (1942):

> Network broadcasting company may sue for injunction to prevent adverse effects on its economic welfare, from action of the FCC which are contrary to federal law.

– *Western Pacific,* 284 U.S. at 51-52:

> Railroad may sue for injunction, where unlawful action of a competitor adversely affected its economic welfare.

NOTE: *Abbott Laboratories* also held, 387 U.S. at 140, that judicial review of a final agency action **by an aggrieved person** will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

Abbott Laboratories also reported the fact that during Congress' consideration of various bills to provide, in the Food, Drug, and Cosmetic Act, that consumers may sue, that it was recognized that "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy at law. . . . H.R. Report No. 2755, 74th Cong. 2d Sess. 8. (387 U.S. at 142)."

Second, the ILC plaintiffs list some of the many cases in which injunctions were issued, or in which it was stated that injunction was available, to prevent injury from State officers contrary to, hence preempted under the Supremacy Clause by, a federal statute:

– *Golden State Transit Co. v. Los Angeles,* 475 U.S. 608, 619-620 (1986): Held: The pleadings established a Supremacy Clause cause of action for preemptive injunction to prevent injury to a taxi company, from a city's violation of the NLRA.

- *Idaho v. Coeur d'Alene Tribe,* 521 U.S. at 281 (1997) (An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to seek injunctive relief);
- *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. 256, 259 n.6 (1985);
- *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983);
- *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973);
- *Ray v. Atlantic Richfield Co.,* 436 U.S. 151 (1978);
- *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992);
- *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.,* 461 U.S. 190 (1983);
- *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963);
- The seven Supremacy Clause suits in respect to State violations of the Medicaid Act, listed prior in this brief.

Summary of this sub-point:

It is abundantly clear that to obtain an injunction to prevent injury – defined as an adverse effect upon the economic or other welfare of the Medicaid

beneficiaries and providers who are plaintiffs in the ILC cases, and, who are the patients, clients, and members of various of the ILC plaintiffs – the plaintiffs do not need to show any "right" created by the preempting federal statute, but, rather, need only plead or show that the State Legislature violated the preempting federal statute (Section 30A), and that implementing the preempted ten percent provider payment reduction of AB 5, and implementing the five percent provider payment reduction of AB 1183, would injure or threaten to injure the above-listed beneficiaries and providers.

***Bond v. United States*, 540 U.S. ___ (2011), resolves many issues in favor of the ILC plaintiffs in 09-958 and 09-1158.**

This is because it is implicit or a fair inference from *Bond* that:

First. The theory of the Director and the Government[31] that a plaintiff must plead a "right" in order to maintain Article III standing and a cause of action under the Supremacy Clause, is facially without merit.

Instead, as claimed by the ILC plaintiffs:

– An injury which is an adverse effect from a State or federal agency's action, as in the ILC cases, is sufficient for Article III standing and cause of action

[31] Govt. Brief 13-16.

purposes if the injury meets Article III prudential requirements (*Bond, slip opinion* 3-8);

– An individual has a direct interest in objecting to State laws that upset the constitutional balance between the Union and the States when the enforcement of these State laws, as in the ILC cases, is contrary to supreme federal law, and causes injury to the individual that is concrete, particular, and redressable. (I.e., here, the ILC cases are a mirror situation of the *Bond* situation. See, *Bond, slip opinion* 10-11).

Second. The theory of the Director and the Government that because generally a plaintiff "cannot rest his claim on the legal rights or interests of others,"[32] that *ergo,* only the Government may assert a claim for the within State violations of Section 30A, is irrelevant in the ILC cases at bar: due to the fact that in the ILC cases the ILC plaintiffs are asserting their own injury from State government action taken in excess of the limits on a State that federalism defines. (See *Bond, slip opinion* 8).

I.e., here the ILC plaintiffs assert their own injuries (and the injuries of beneficiaries who are their

[32] *Warth v. Seldin*, 422 U.S. 490, 499, 500 (1976); see also *Kowalski v. Tesmer,* 543 U.S. 125, 129-130 (2004).

patients, clients, or members), from State governmental action taken in excess of a limitation on State authority that federalism defines).

Third.

– (1) In *Bond* it was the United States who usurped a constitutional limit, whereas in the ILC cases it was a State who usurped a constitutional limit; and,

– (2) The federalism defense was raised by Bond as a defense in proceedings commenced against Bond; whereas, in the ILC cases, the ILC plaintiffs allege their Supremacy Clause defense in a preemptive suit in equity to prevent irreparable harm to themselves as Medicaid beneficiaries and providers, and to prevent harm to Medicaid beneficiaries who are the patients, clients, and members of various of the ILC plaintiffs.

Such preemptive suits to prevent irreparable injury are well established, under the equity jurisdiction afforded to the federal courts by Congress, and by 28 U.S.C. § 1331. *See, Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281 (1997) (an allegation of an ongoing violation of federal law with request for prospective injunctive relief is ordinarily sufficient under *Ex parte Young,* 209 U.S. 123); John Harrison, *Ex parte Young,* 60 Stan. L. Rev. 989, 997-999 (2008).

Conclusion

For the above reasons, the ILC plaintiffs have Article III standing and a cause of action to obtain injunctive or declaratory relief to prevent being injured from the Director's preempted acts to implement the State laws, AB 5 and AB 1183, contrary to, hence preempted under the Supremacy Clause, by Section 30A.

The case made by the ILC plaintiffs below, is that the ILC plaintiffs did *not* sue to "enforce" any "federal right" or any "right" enacted by the preempting federal law, Section 30A; but sued to obtain injunctive relief to prevent being injured from the Director implementing two State laws (AB 5 and AB 1183) which were enacted contrary to, hence were preempted under the Supremacy Clause by, a federal law (Section 30A)

Thus, in the view of the ILC plaintiffs – and as expressly held by the Ninth Circuit in its September 17, 2008, opinion which became the law of the case in these ILC cases – the error of the Director and his amici is their insistence that for lack of any "right" enacted in their favor by Congress, that the battle is lost by the ILC plaintiffs.

However, as correctly pointed out by the appeals court in the September 17, 2008, opinion, the ILC plaintiffs did not sue in the ILC cases under the

"rights" branch of jurisprudence, but, rather, sued instead under the "injury" branch of jurisprudence.

Thus, the appeals court held in its September 17, 2008, decision, exactly this (09-958 Pet. App. 67-68):

> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. **They do not seek to enforce any substantive "right" conferred by the statute.** Instead, they argue that the cuts mandated by AB 5 **are themselves unenforceable**, because they exceed the scope of the State's discretion under the Act and violate federal standards. **As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.**

(Boldface emphasis supplied).

Hence the continued objection of the Director that the ILC plaintiffs have no "right," is simply irrelevant to the "injury" case made by the ILC plaintiffs.

Finally on this score, the ILC plaintiffs simply contend that, by filing their suit **under the "injury" branch of jurisprudence**, and alleging they were threatened with injury from on-going acts of a State officer contrary to the supreme law of the land (Section 30A), that they have satisfied the requirements

for standing and a Supremacy Clause cause of action, in the ILC cases.

These cases established that to state a cause of action for injunctive or declaratory relief to prevent injury by acts of a public officer, which are contrary to a federal law, there need not be any "injury" to a "right," but, only that some interest of the plaintiff be "adversely affected."

PART FIVE

THERE ARE AT LEAST THREE SUPREMACY CLAUSE CAUSES OF ACTION, ARISING FROM THE PLEADINGS AND MOTIONS OF THE ILC PLAINTIFFS

WHAT IS NOT AT ISSUE

There is no issue before the Court that the State laws in the ILC cases conflict with, hence are preempted by the Medicaid payment-setting statute, Social Security Act § 1902(a)(30)(A) – "Section 30A" – and that beneficiaries and providers would be injured by implementation of the preempted State laws in question.

This issue was resolved when the Court denied certiorari on exactly that question, in these ILC cases, and, granted certiorari only as to the First Question Presented.

THE CAUSES OF ACTION WHICH AROSE OUT OF THE FACTS IN EACH OF THE THREE ILC PLAINTIFFS' PRELIMINARY INJUNCTIONS

Several types of Supremacy Clause causes of action arose out of the ILC pleadings in the two complaints and three motions for preliminary injunctions in the ILC cases in Nos. 09-958 and 09-1158. These are described below.

FIRST CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158

1. The facts pleaded and shown for each of three preliminary injunctions in the ILC cases, established a "pre-emptive" cause of action, respectively, under the Supremacy Clause for an injunction to prevent prospective injury

Such a pre-emptive type cause of action in equity is well recognized. See, Harrison, *Ex parte Young*, 60 Stanford L. Rev. 989 (2008); Kennedy, J., dissenting, in *Golden State,* 493 U.S. at 113, 115-118, and in *Dennis v. Higgins*, 498 U.S. 439, 457-458 (1991): a person has an immunity, which is a legal interest, from State action which violates a limit of the Constitution on State powers (*Golden State,* 493 U.S. at 113-114); which immunity provides the person the implicit right to obtain adjudication in litigation with

the State, that the State's action is a nullity (*Dennis,* 498 U.S. at 457).

Also, see, decisions which established the pre-emptive Supremacy Clause cause action (albeit in a Contracts Clause context) such as *Carter v. Greenhow,* 114 U.S. 317 (1895); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *Allen v. Baltimore & Ohio R. Co.,* 114 U.S. 311 (1885); and of course, *Ex parte Young,* 209 U.S. 123, 159-160 (1908).

The ILC plaintiffs submit that these authorities and case law established that:

(1) In a pre-emptive suit in equity to obtain protection against injury from preempted State action, the Supremacy Clause is self-executing, so as to automatically void any State law which is contrary to a federal law. This *inter alia* strips state officers of all authority and power to implement the preempted state law. *Ex parte Young,* 209 U.S. at 159-160.

(2) The officer's lack of authority and power gives rise to a correlative legal defense – which is a legal interest or an immunity – which can be used by the citizen – just as the ILC plaintiffs did use it in each of their three preliminary injunction motions in their cases at bar – as the basis of a cause of action in equity to obtain injunctive relief to restrain the officer from further preempted acts to implement the void, preempted state law.

NOTE: The ILC plaintiffs reason, and contend, that these characteristics dictate who may be the plaintiff in such a suit.

I.e., it is manifest that once the officer is stripped of all authority and power by the *in rem* preemptive effect of supreme federal law, to act, that the officer thereafter acts *sans law,* so as to be acting tortiously in the premises.

As such, all those who can or should be allowed to sue to restrain the officer from acting *sans law* in the premises, are those in the range of fire from the officer's lawless acts. Hence under this view, all persons adversely affected (i.e., injured) by the lawless acts of the officer, have a manifest right in equity for an injunction to restrain the officer from performing the acts which are injuring or threatening to injure the plaintiff.

It therefore is the case that in the ILC cases, both Medicaid beneficiaries and providers have a cause of action for injunction to prevent the Director from lawlessly acting, to injure them, because both are in the direct line of fire to be injured, were the Director to be permitted by the court to continue his lawless acts, contrary to federal law.

I.e., as noted by the appeals court, providers are injured simply because moneys otherwise payable to them, are withheld, under AB 5 and AB 1183.

And beneficiaries, *inter alia*, are injured or threatened to be injured, by the loss of access to

life-saving health care services, caused by providers not serving them, due to the reduced level of compensation for their professional services.

Conclusion:

For the above reasons, beneficiaries and providers have a cause of action for injunction to prevent injury from preempted prospective acts of the Director, contrary to supreme federal law, Section 30A: **irrespective of whether or not** they were intended beneficiaries of the preempting federal law, and **irrespective also** of whether or not, within a zone of reasonableness, Section 30A was enacted to protect them.

This result is compelled because the injury in a Supremacy Clause case is not the injury to some right which sounds in contract or the law of statute, but, rather, is an injury prospectively to be inflicted by the defendant, which sounds in tort law because in the premises, the officer is acting tortiously, *sans* any law to justify his lawless acts.

In any event, beneficiaries were clearly intended by Congress to be benefitted by the Medicaid Act and by Section 30A; and as such, had a cause of action for an order protecting them from injury caused by the Director's preempted acts.

Pennsylvania Pharm. Assn. v. Houstoun, 283 F.3d 531, 543-544 (3d Cir. 2002), Alito, J., held that

Medicaid beneficiaries "plainly satisfy the intended-to-benefit requirement," in respect to Section 30A.

The same reasons why beneficiaries are intended beneficiaries of Section 30A, also persuade that beneficiaries are well within the zone of interests to be protected by Section 30A (*Assn. of Data Proc. Service Org. v. Camp,* 397 U.S. 150, 153 (1970)).

Accordingly, it is manifest that under the principles of a Supremacy Clause pre-emptive suit, set forth above, beneficiaries clearly have Article III standing and a pre-emptive cause of action, in the ILC cases in 09-958 and 09-1158.

Injured providers and beneficiary organizations and member groups also have standing and a pre-emptive cause of action, in a representative capacity, for their patients, clients and members who are beneficiaries.

It follows that because beneficiaries have a pre-emptive cause of action in the ILC cases, so also do providers (here, the three pharmacy plaintiffs), and the Independent Living Center and the Gray Panthers groups, who are plaintiffs, have the same cause of action, to sue in a representative capacity, to advance the interests of the Medicaid beneficiaries who are their patients, clients, or members.

The decision of Hon. David Levi, former chief judge of the Eastern District of California, now the Dean of Duke Law School, in *Clayworth v. Bonta,* 295

F.Supp.2d 1110, 1117-20 (E.D. Cal. 2002), *reversed other grds.,* is definitive on this subject.

Summary

For the reasons given, each of the ILC plaintiffs had Article III standing, and a cause of action for a Supremacy Clause pre-emption suit, in equity, for injunction to prevent injury from on-going acts of the Director contrary to, hence preempted by, Section 30A.

———♦———

SECOND CAUSE OF ACTION ARISING OUT OF THE FACTS IN THE ILC CASES IN 09-958 AND 09-1158

The facts pleaded and shown also established a cause of action in the ILC plaintiffs for injunctive relief, to enjoin on-going acts of the Director contrary to, hence preempted under the Supremacy Clause by, a federal law (Section 30A): – which cause of action is based on the principle that a plaintiff (1) showing Article III injury and (2) asserting preemption under the Supremacy Clause has stated a claim for relief.

Discussion

This specific Supremacy Clause cause of action in 09-958 was before the Court of Appeals and was **judicially approved** by the Court of Appeals in its

first decision in the ILC cases, filed September 17, 2008 (09-958 Pet. App. 58-93).[33]

The ILC plaintiffs here quote this September 17, 2008 appeals court decision verbatim, in its relevant part:

> Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.
>
> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. They do not seek to enforce any substantive "right" conferred by the statute. Instead, they argue that the cuts mandated by AB 5 are themselves unenforceable, because they exceed the scope of the State's discretion under the Act and violate federal standards. As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.

(Quotation from 09-958 Pet. App. 67-68, 92-93).[34]

which decision cited the same cases which were prior cited by the ILC plaintiffs in Part Three of this brief:

---

[33] 543 F.3d 1050.

[34] 543 F.3d at 1055-1056.

– *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. at 359 n.6; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624; *Ray v. Atlantic Richfield Co.,* 436 U.S. 151; *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86; *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.,* 461 U.S. 190; *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); and *Green v. Monsour,* 474 U.S. 64, 68,

and in Part Five of this brief.

The ILC plaintiffs submit that these cases, and the appeals court decisions in 09-958 and 09-1158 were based on principles developed in case law in mid-last century, epitomized in cases such as *Abbott Laboratories v. Gardner, supra.*

These cases held, and their principle was, that persons aggrieved by administrative action, State or federal, had standing and a cause of action for injunctive relief to prevent harm from agency action in excess of and without authority of federal law.

The ILC plaintiffs suggest, also, that this standard Supremacy Clause cause of action is simply a manifestation and implementation – although not articulated as such – of the principle that the King must obey the law of the land, hence, may not injure a subject by acts which are contrary to the law of the land; (a rule in respect to which Magna Carta, clause 39 in the 1215 charter, the ILC plaintiffs submit, is but an example, and not a full statement of the rule).

Standing to sue

The ILC plaintiffs submit that they believe that their standing to sue should be based on the same criteria as the criteria for standing in the pre-emptive Supremacy Clause cause of action described prior in this brief, as in the First Cause of Action just prior discussed.

———♦———

THIRD CAUSE OF ACTION THE FEDERALISM CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158

A

The ILC plaintiffs as citizens have a right and recognizable interest – in their capacity as the intended and protected beneficiaries of federalism – to sue to protect themselves against injury from a State's violations of limits placed upon it by the power-allocating provisions of the Constitution – here, the Supremacy Clause.

This cause of action is implicit in the federalism system created by the division, allocation, and limits of and upon federal and state powers by the Constitution; hence shall be referred to in the ILC Brief as the "federalism cause of action."

Federalism is, simply, the allocation in the Constitution of powers to the national government, the reservation of all other powers to the states, and the provisions, which include the Supremacy Clause,

which allocate federal/state powers by limiting state powers, which created the boundaries between, and the spheres of power of, the national government and the states.

Central to federalism are the principles, which the Court has recognized since the beginning, both that a state, and a state law, must yield to a contrary federal law, whenever a state law conflicts with a federal law.

Also, the doctrine of federalism is based on the premise that the Constitution is not a compact between and for the benefit of sovereign states, but, rather, was stated to be and was adopted by the People, for *their* protection.

This system of federalism was adopted by the People for the protection of themselves, i.e., individuals. *See, New York v. United States,* 505 U.S. 144, 181 (1992), O'Connor, J.:

> "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments **for the protection of individuals**."

(Boldface emphasis supplied).

In this respect, the ILC submit that it is manifest also that federalism, with its division of powers and authority between the national and state government,

and its limitations on state powers when they conflict with federal law, was adopted by the People for the *inter alia* benefit, also, of citizens, i.e., individuals, as well as for their protection (which latter is noted by O'Connor, J., for the majority in *New York*).

de Toqueville is informative on this subject:

In *Democracy in America* (1839) he reported on and analysed the allocation of and the conflicts between federal and state powers. He reported that a chief concern of the Framers was "to arm the Federal government with sufficient power to enable to resist, within its sphere, the encroachments of the several states," but, at the same time, to avoid confrontation of the Union directly against a state, wherever possible.

He observed that to that end, that suits by private citizens were deemed to be the **means** by which state laws contrary to the interests of the Union could be attacked without having to bring in the Union as the litigant. Thus:

> The Americans hold that it is nearly impossible that a new law should not injure some private interests by its provisions. **These private interests are assumed** by American legislators **as the means of assailing such measures as may be prejudicial to the Union**, and it is to these [private] interests that the protection of the Supreme Court is extended.

(Boldface emphasis supplied).

Summary of this sub-point:

The federalism cause of action to protect individuals who were intended to be protected by the Constitution in respect to usurpation of limits of power imposed on states by provisions of the Constitution, including the Supremacy Clause, which allocated federal and state powers by limiting state powers, should be affirmed and validated by the Court in the ILC cases at bar, Nos. 09-958 and 09-1158.

B

Several factors suggest to the ILC plaintiffs that there is a federalism cause of action, or that such a cause of action may be recognized as such in cases such as the case at bar.

One factor is that the Court itself has signaled to the profession, and the public, as it were, that there may be such a cause of action, or a need for one, in order, by "giving life to the Supremacy Clause," to preserve in good working order the system of checks and balances, between the federal government and the States, and within the three branches of the federal government.

Thus, the Court in *Green v. Mansour* stated, in a case which had been mooted, that:

> Prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to

> vindicate the federal interest in assuring the supremacy of federal law.

As pointed out by de Toqueville, it is unwieldy at best and risky at worst, for States and the federal government to only confront each other in courts, full-scale, *qua* Union, *qua* State.

In Social Security Act cases, in particular, Congress has apparently been unwilling to give the Secretary, its administrator of the various programs of the Act, all the powers to confront a State to enforce the Act, that even a corporate president has, to carry out a corporation's pledged purposes.

Thus the Secretary cannot (as the ILC plaintiffs read the Medicaid Act) even sue to obtain an injunction, when payment rates are too low, to require a State to conform its rate-setting practices, as one example, to the supreme federal law, Section 30A.

All that the Secretary can do is to withdraw all federal funds from a State, if the Secretary finds the State plan or its practices, contrary to the Medicaid Act. This is an atom bomb which no one, obviously, would ever want to be necessary to be used.

It is in this context then, that Medicaid beneficiaries and providers have a role – which, as noted by Alito, J., in the *Pennsylvania Pharm.* case – Congress indicated was a role they were expected by Congress to play. Thus, the House Committee report on 1981 amendments to Section 30A stated that:

> [I]n instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action. (*Id.,* 283 F.3d at 541).

Such a role to be played, of citizens affected by a given federal law or its administration being expected to come to court to prevent their injury therefrom, was reported by de Toqueville as being an expectation of the early legislatures of the Union.

Further, no matter how filled the tax coffers of the Union may be, they can never be enough by which to adequately fund a Secretary to police 50 States in their various administrations of the Act.

And since it is a given that federal funds are short in today's recession environment, the deployment of Medicaid beneficiaries and providers to guard, as it were, their own hen house by salutary suits, which complement and implement the supremacy of federal Medicaid law, is to the great advantage of not only the Federal fisc, but the ability of the Secretary, with limitations of funding, to adequately police the outskirts of the great Roman system known as the Medicaid Act.

Another factor which suggests the viability of a federalism cause of action, is the observation of Kennedy, J., in *Golden State,* 493 U.S. at 118, that the preemption immunity of the taxi company under the Supremacy Clause, (in the prior case, *Golden State*,

475 U.S. 608), "does not benefit the company as an individual."

This being so – that the Supremacy Clause acts *in rem* rather than *in personam* – it follows that the Supremacy Clause is an army with no soldiers to fulfill its function, unless individuals are allowed to defend themselves under the Supremacy Clause in response to violations of the Medicaid Act which injure them, – which vindicates the federal interest in assuring the supremacy of federal law, – for which such a need has been demonstrated, over the half-century life of the Act.

The result of all this is, that Medicaid beneficiaries and providers are the perfect match to the needs of the Secretary (to police transgressions of the States of the Medicaid Act's minimum requirements), and to the function of the Court, of giving life to the supremacy of federal law, in order to preserve the checks and balances of the federalism system.

Summary

The ILC plaintiffs therefore suggest and respectfully request the Court to address, recognize, and articulate in an appropriate order or decision, in the ILC cases in 09-958 and 09-1158, that there is an implied federalism cause of action, arising in favor of beneficiaries and providers in the Medicaid program, to be allowed (when they show the injury requisite for the "stake" requirement of Article III) to file challenges against State violations of the Medicaid Act as

preempted by the Supremacy Clause: which would vindicate the federal interest in assuring the supremacy of federal law.

The wording of Section 30A clearly prohibited the State from reducing provider payments for purely budgetary reason; and, there is no "vague or amorphous" or "broad and non-specific" language in Section 30A which authorizes the State to reduce Medicaid provider payments for purely budgetary reasons, or counsels against injured beneficiaries or providers defending themselves in court whenever the State cuts provider payments for purely budgetary reasons – in flat and deliberate violation of the quality and equal access clauses of Section 30A.

The fact is, which the ILC plaintiffs have chronicled in Part Two, that there have been at least eight lawsuits since the Act began, in which a State was enjoined by a court for enacting a Medicaid provider payment cut not in compliance with Section 30A, but in defiance of Section 30A: by enacting the payment cut for purely budgetary considerations.

Five of those injunctions, for flagrantly violating Section 30A by cutting provider payments for purely budgetary considerations, were against the Director and his predecessors.

(Three of these have occurred in the past three years.)

These payment cuts, for purely budgetary reasons, cannot possibly have been caused by any "ambiguous" or "vague and amorphous" wording of Section 30A, which the Director, joined by the United States, seek to tag Section 30A: even though this "ambiguous" claim was removed as a claim for review when the Court denied certiorari to the Director, on this issue (which was the central part of the Second Question Presented by Director).

To put it another way: There is nothing so vague and ambiguous about Section 30A, that prevented eight successive courts to eight times rule, that Section 30A clearly precludes a State from basing provider payment rate cuts, solely on budgetary considerations.

So to this degree – which is the only relevant degree to which this comes into these cases at all – Section 30A is very, very clear: so clear that the Director has been told five times over by the federal courts, that Medicaid provider payments cannot be cut, solely for budgetary reasons.

What is there not to understand about that?

In sum, Section 30A is a very clear statement that the State may not do what it did in these cases – namely, ignore the provisions of Section 30A, and reduce provider payments for purely budgetary reasons.

Conclusion

The purported issue of "ambiguity" is irrelevant in the case at bar because it is manifest that California always knew, from reading Section 30A and the injunctions served on it, that it is federally illegal to cut Medicaid payment rates again, solely for budgetary reasons (indeed, in the ILC cases, without even a pretense by the State, otherwise).

"Clear statement" is not at issue in the ILC cases, because the injunctions only speak prospectively.

I.e., it is the impression of the ILC plaintiffs that in past cases defendants were asked to pay damages or attorneys fees or do other future acts, for failure to be informed, **before these obligations were incurred**, that the State would have to undertake such burden when it accepted federal funding in a federal program.

That is not the case at bar. Here the Director is only being ordered to refrain from doing specified acts in the future. If the State wishes to avoid what it claims is a "cost," it can avoid the "cost" by not taking the federal money in the future.

———♦———

THE DIRECTOR AND THE GOVERNMENT JOIN IN THEIR BRIEFS TO RAISE A DEFAULT DEFENSE WHICH IS WITHOUT MERIT

The new defense of the Director and Government is that there can be no implied Supremacy Clause cause of action, to prevent being injured from State violation of a supreme federal law, unless the State law in question regulates the conduct of the plaintiff in some way, and the "regulated person" sues to enjoin the preempted State regulatory law. (Dir. Brief 43-44; Govt. Brief 19-24).

This new proposed limitation on the scope of the Supremacy Clause, to only situations where a person is regulated by some State regulatory law, may be called, for convenience, a "pre-enforcement suit," to separate it from the broader, unlimited "preemption suit" which the Supremacy Clause authorizes and permits.

1. The all-inclusive wording of the Supremacy Clause repels the construction proposed by the Director and the Government: that only "pre-enforcement" causes of action exist under the Supremacy Clause

The words of the Supremacy Clause are clear: they include **all** preemption suits to prevent injury to a person from a State's violation of a supreme federal law, such as Section 30A, not, just "pre-enforcement" suits which the Director and the Government, in

vain, assert to the Court for the first time in its history, are the only suits which may possibly be filed under the Supremacy Clause, to prevent being injured from preempted State action.

There being no words of limitation or exception from this clear sentence, it follows that the Clause applies to all preemption suits in equity which seek a remedy in equity to prevent being injured from a State's violation of a federal law, **not, just to some** preemption suits – i.e., only to so-called "pre-enforcement suits" – (save and except of course, such Supremacy Clause suits in which the claims may not meet prudential standards, or, some insurmountable Eleventh Amendment problem is encountered).

Hence this defense of the Director and the Government is facially contradictory to the plain meaning of the words of the Supremacy Clause: hence should be rejected by the Court on this basis alone.

2. Supremacy Clause cases include many cases in which the preempted State law does not involve "regulation" of the plaintiff's conduct

The following are just a few of the many Supremacy Clause cases in which the preempted State law did not regulate the conduct of the plaintiff: *Golden State,* 475 U.S. 608 (1986), – in which summary judgment against a Supremacy Clause preemption action was overruled by the Court – the defendant's conduct was regulated by the NLRA, not,

the conduct of the plaintiff); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Board of Liquidation v. McComb,* 92 U.S. 531, 540-541 (1876) (Contracts Clause); and *Baltimore & Ohio R. Co.,* 114 U.S. 311, 314-317 (1885) (Contracts Clause).

(A Contracts Clause violation claim necessarily involves the Supremacy Clause.)

The Constitution also prohibits a State from entering into any treaty, alliance, or confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; ex post facto law, or grant any title or nobility.

But, none of these – all of which come under the Supremacy Clause if violated by a State – involve any State regulation of the conduct of a putative plaintiff.

In sum, the many Supremacy Clause cases or types of cases which do not fit the Government's default theory, destroy the theory.

3. Nothing in any of the cases or authority cited by the Director discuss or support this new proposition of the Director. Hence the proposal is entirely unsupported by the decisions which are cited for its support.

4. The proposed classification would facially violate the Due Process and Equal Protection rights of all persons so excluded, **including the ILC plaintiffs**, by depriving them of their right to sue to prevent being injured from State action which

violates the Constitution, a federal law, or a treaty of the United States.

THE CLAIM THAT THE MEDICAID ACT FORECLOSED SUPREMACY CLAUSE SUITS, HAS ALREADY BEEN REJECTED BY THE COURT SEVERAL TIMES

There is no evidence in the text or structure of the Medicaid Act that Congress intended to specifically foreclose any ability of beneficiaries or providers to sue to obtain a remedy under any provision of the Act. *See Blessing v. Freestone,* 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 521 (1990), that federal government's power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, accompanied by limited state grievance procedures for individuals was insufficient to preclude reliance on a cause of action for preemption.

Also, *see,* the seminal case of *Rosado, supra,* 397 U.S. at 420

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are not reluctant to

assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). We adhere to *King v. Smith*, 3921 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief."

———♦———

THE BRIEF OF THE UNITED STATES (PAGES 31-32), JOINED IN BY THE DIRECTOR, IS ESSENTIALLY A MOTION TO DISMISS THE PENDING ILC CASES IN 09-958, AND 09-1158, ON THE BASIS THAT SECTION 30A FORECLOSES THESE CLAIMS

THIS *DE FACTO* REQUEST SHOULD BE DENIED

The objection of the United States (Govt. Brief 31-32) is too late, and disregards that Congress, in Section 30A, did not foreclose access to the courts to Medicaid beneficiaries and providers to prevent injury from State action contrary to, hence preempted by, Section 30A.

First

As stated in the preceding Point, Congress did not foreclose access to the courts to beneficiaries and providers in respect to the provider-payment statute, Section 30A. Hence, it follows that Congress intended the courts to be open to them, not closed, as erroneously proposed by the United States.

Second

The Government's proposal furnishes no remedy to beneficiaries or providers.

The Medicaid Act affords no right to beneficiaries or providers to apply to or obtain any relief from the Secretary, when as has been repeatedly done during the past 47 years (see the cases cited by the ILC plaintiffs prior in this Brief), a State reduces provider payments solely for budgetary reasons, in knowing violation of Section 30A.

Please note that neither Medicaid nor the Secretary allow beneficiaries or providers any administrative remedies, such as FERPA allowed students in *Gonzaga,* such as: right to file a written complaint, which the agency then investigates; with the school required to respond in writing; with the agency then prescribing in writing, if a violation is found, what steps the institution must take to comply with FERPA, as to which *Gonzaga* held (536 U.S. at 289-290):

> "These administrative procedures squarely distinguish this case from *Wright* and *Wilder,* where an aggrieved individual lacked any federal review mechanism . . . "

Third

The United States is guilty of laches here.

It only objects after thousands of providers in California have been paid, and taken ownership rights in the ten percent or the five percent amounts which were required by the injunctions in these cases, to be paid to them.

So for the Court to in effect order the dismissal of the complaints of the ILC plaintiffs in these ILC cases in 09-958 and 09-1158, by reversing the appeals court decisions, not on the merits but **for the reasons stated by the United States** (Govt. Brief 31-32), would result tomorrow in the Director simply deducting an amount equal to the millions of $$$ which the Director paid under the relevant injunctions, from the warrants which are issued at regular intervals to providers in the Medicaid program in California.

This would in turn thrust the courts of California into another paroxysm of litigation between providers and the State over who owns those amounts which were paid out under the injunctions issued in these ILC cases: – when instead, the whole issue of who is entitled to those funds, could instead be effectively

determined in the within two lawsuits of the ILC plaintiffs, in 09-958 and 09-1158, on the merits.

Thus, since the federal courts first acquired and responsibly exercised jurisdiction on the issue of who should be paid these millions of $$$, it follows that (1) the Court should reject this late objection of the United States, and (2) **not** reverse the appeals court on **such non-merits** ground, but instead, (3) decide all issues relevant to these two cases, including who, ultimately, owns the funds which have been paid to providers as a result of the injunctions issued in 2008 and 2009 in 09-958 and 09-1158.

CONCLUSION AND PRAYER

For the reasons stated, the judgments below should be affirmed.

Dated: July 29, 2011

Respectfully submitted,

LYNN S. CARMAN
8 Waterbury Lane
Novato, CA 94949-8239

STANLEY L. FRIEDMAN
445 S. Figueroa St., 27th Floor
Los Angeles, CA 90071-1631