

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

—◆—

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

*Petitioner,*

v.

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

*Respondents.*

—◆—

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—◆—

**BRIEF FOR RESPONDENTS IN OPPOSITION**

—◆—

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**BRIEF IN OPPOSITION****INTRODUCTION**

This petition should be denied. The Ninth Circuit below, in an interlocutory order, judgment and opinion filed July 11, 2008 (to which the September 17, 2008 Opinion, reprinted by petitioner at Pet. App. 1a-36a, simply “more fully sets forth the rationale,” *id.* at 10a), applied settled law to hold that respondents may maintain a valid cause of action for injunctive relief to prevent injury from a state law which is contrary to, and hence preempted under the Supremacy Clause by, a federal statute.<sup>1</sup>

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<sup>1</sup> Oddly, petitioner has not sought *certiorari* from the interlocutory order and judgment of July 11, 2008 of the Ninth Circuit in this case below, but has instead petitioned the Court for relief solely from the further opinion filed September 17, 2008—which is not itself an order or judgment from which *certiorari* could lie in the case at bar. Nor is the September 17, 2008 Opinion a new or dispositive *de facto* judgment or order which changed or amended anything in the already-filed July 11, 2008 dispositive order.

The Opinion states that it is only an opinion:

We heard argument on July 11, 2008, and issued an order the same day reversing the district court’s decision and remanding for consideration of the merits of [respondents’] motion for preliminary injunction. *This opinion more fully sets forth the rationale of our July 11 order.*

Pet. App. 9a-10a (internal footnote omitted, emphasis added). Petitioner has also, inexplicably, failed to include the court of appeals’ dispositive order of July 11, 2008, in his Appendix—thus leaving the Court, in effect, no dispositive order or judgment to review.

This holding is consistent with the holdings of every other circuit and with the rulings and conduct of this Court, which for more than a century have permitted persons to bring and maintain a cause of action for injunctive or declaratory relief to prevent injury from state action which is preempted, under the Supremacy Clause, by contrary federal law.

Neither the Ninth Circuit's order nor its subsequent September 17, 2008 Opinion ruled on the merits of respondents' preemption claim. Pet. App. 36a. On remand from the Ninth Circuit's July 11, 2008 order, the district court did, on August 18, 2008, and on November 17, 2008, preliminarily enjoin as preempted petitioner's implementation of the state law—known as AB 5—that cut reimbursement rates for providers of services under the California Medicaid program (Medi-Cal) with respect to doctors, dentists, prescription drugs, adult day health care centers, clinics, home health agencies, and non-emergency medical transporters in the Medi-Cal fee-for-service program.

Petitioner has appealed the August 18, 2008, and the November 17, 2008, preliminary injunctions of the district court to the Ninth Circuit. Those appeals (Nos. 08-56422 and 08-57016) were orally argued and submitted on February 18, 2009. Subsequently, also, AB 5 was repealed in respect to services furnished on or after March 1, 2009. Review of the September 17, 2008 Opinion is thus even more inappropriate than is review by this Court of the average interlocutory decision.

## STATEMENT

### 1. Statutory Framework

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

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

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

b. On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 (“AB 5”) in a special session. Pet. App. 54a-66a. AB 5 makes the legislative findings that the “state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures”; that AB 5 was enacted to “address[ ] the fiscal emergency declared by the Governor” and to “implement cost containment measures affecting health services, at the earliest possible time.” Pet. App. 64a-66a (AB 5 §§ 15-17).

Section 14 of AB 5 added Section 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the Department of Health Care Services, as the state agency which administers California’s state Medicaid plan, to cut by ten percent reimbursement rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, clinics, and other providers. See Pet. App. 60a (codified as Cal. Welf. & Inst. Code § 14105.19(b)(1) (2008)). AB 5 provided that the ten percent rate cuts were to go into effect on July 1, 2008. *Ibid.*

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

payments and benefits, including pharmacies and adult day health care centers, and a one percent rate reduction for all other fee-for-service benefits.<sup>2</sup>

## 2. Factual Background

a. Respondents are two Medi-Cal beneficiaries, three Medi-Cal pharmacies with more than 5,000 Medi-Cal beneficiaries, and an independent living center and Gray Panther groups with more than 5,000 clients or members who are Medi-Cal beneficiaries, in the Medi-Cal fee-for-service program. On April 22, 2008, they sued petitioner Sandra Shewry, Director of the California Department of Health Care Services, in California state court to prevent the implementation of AB 5.<sup>3</sup> Respondents alleged that the action of the State to enact and implement the ten percent payment reduction of AB 5 was void, contrary to and preempted under the Supremacy Clause by the federal quality of services and equal access clauses of Section 30A, due to the fact that the Legislature had enacted AB 5

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<sup>2</sup> The cuts required by AB 1183 are not being challenged in this action, and separate actions are currently pending against petitioner challenging the cuts imposed in AB 1183. *See, e.g., Managed Pharmacy Care et al. v. Maxwell-Jolly*, No. 2:08-cv-03315 (C.D. Cal.), *appeal pending*, No. 09-55692 (9th Cir. filed May 7, 2009); *California Pharmacists Ass'n et al. v. Maxwell-Jolly*, No. 2:09-cv-00722 (C.D. Cal.), *stay pending appeal granted*, No. 09-55365, 2009 WL 975458 (9th Cir. Apr. 6, 2009), *pet. for reh'g en banc filed* (Apr. 20, 2009).

<sup>3</sup> David Maxwell-Jolly has since succeeded Sandra Shewry as the Director.

without considering—as required by Section 30A—the relevant factors of whether providers could sustain the payment reduction without loss of quality of services and equal access of beneficiaries to quality services; so that by such violation AB 5 was contrary to, and hence preempted under the Supremacy Clause, by Section 30A; and that irreparable injury in the form of reduction and denial of access to services to Medi-Cal beneficiaries (including the respondents Medi-Cal beneficiaries and the 10,000-plus Medi-Cal beneficiaries who are patients and clients of the other respondents in the Medi-Cal fee-for-service program) would result. Pet. App. 6a-7a.

Respondents also alleged that, prior to the enactment of AB 5, a substantial percentage of medical care providers, including 45% of primary care providers and 50% of specialists, were unwilling to participate in the Medi-Cal program because of low reimbursement rates; 90% of dentists refused to accept Medi-Cal patients; and Medi-Cal's reimbursement rates for prescription drugs only gave pharmacies earnings of less than a ten percent net profit. Pet. App. 6a. By reducing reimbursement rates further, respondents asserted that AB 5 would cause additional primary care physicians, specialists, dentists, and pharmacies to opt-out of the Medi-Cal program, and force existing providers to reduce services. Pet. App. 7a. As a result, Medi-Cal recipients would thereby be denied quality medical services and access to quality medical services in violation of Section 30A.

Respondents sought a writ of mandate or injunction to prohibit the Director of the Department of Health Care Services from implementing AB 5.

b. On May 19, 2008, petitioner removed respondents' suit from state to federal court. On June 25, 2008, the district court denied respondents' motion for injunctive relief.

In reaching its decision, although the district court acknowledged that respondents filed suit under the Supremacy Clause, the court relied heavily on a case brought under 42 U.S.C. § 1983, *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). In *Sanchez*, the court of appeals held that Section 30A does not "create an individual right that either Medicaid recipients or providers would be able to enforce under § 1983." *Id.* at 1062. The district court focused on *Sanchez* and reasoned that the Supremacy Clause "is not a source of any federal rights." Pet. App. 50a (citation omitted).

The district court also rejected respondents' argument that they were entitled to seek prospective injunctive relief on the basis of federal preemption pursuant to *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Pet. App. 46a-48a.

c. Respondents appealed. The Ninth Circuit heard oral argument on July 11, 2008 and issued an order on July 11, 2008, reversing the district court and remanding for consideration of the merits of

respondents' motion for preliminary injunction. Pet. App. 9a-10a.<sup>4</sup>

Then on September 17, 2008, after the district court on remand had already, on August 18, 2008, issued its first preliminary injunction in this case, the Ninth Circuit filed a further opinion—captioned as an “OPINION” and not as an order—which stated: “This opinion more fully sets forth the rationale for our July 11 order.” Pet. App. 1a-36a; Pet. App. 10a. This further opinion did not change or amend the dispositive July 11, 2008 order of the Ninth Circuit in this case, in any respect.

d. In the further opinion filed September 17, 2008, the Ninth Circuit stated that “[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met.” The court cited in detail the numerous cases holding that claims for injunctive relief based on federal preemption may be brought absent any express right or cause of action. Pet. App. 11a-18a (citing, *inter alia*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); and *Shaw*).

The Ninth Circuit also rejected petitioner's argument that a claim of preemption under a federal

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<sup>4</sup> No petition to the Court for *certiorari* has been filed in respect to this order of July 11, 2008. The time allowed for filing such a petition has expired.

statute enacted pursuant to Congress's spending power, like the Medicaid Act, should be treated differently. Pet. App. 20a-26a. The Ninth Circuit noted that this Court and other circuits that have addressed the argument flatly rejected it. *Ibid.*

Petitioner's petition for rehearing and rehearing *en banc* were denied without recorded dissent. Pet. App. 52a-53a.

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

The district court found that respondents demonstrated a likelihood of success on the merits because the Legislature enacted the rate reduction without any consideration of the relevant factors required by Section 30A to be considered—efficiency, economy, quality of care, and equality of access, as well as the effect of providers' costs on those relevant factors—and failed to show any justification other than purely budgetary concerns for rates that substantially deviate from the providers' costs. Dt. Ct. Dkt. 121 at 8-10. Also, it found that respondents demonstrated irreparable harm resulting from implementation of AB 5 because the cuts would cause "pharmacies to stop, or at least limit, dispensing prescription medications to Medi-Cal beneficiaries," would cause doctors and other service providers (who

had not received a rate increase since 2001) to “turn away” new Medi-Cal patients, and force adult day health care centers to close. *Id.* at 15, 16-17, 18.

Weighing the balance of the hardships and the public interest, the district court concluded that the “significant threat to the health of Medi-Cal recipients” that “reducing payments to health-care service providers will likely cause” outweighed any expected fiscal savings, which the district court noted were unlikely to materialize because “many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care.” *Id.* at 20 & n.14.

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

The district court again found respondents had shown a likelihood of success on the merits of their claim that petitioner had acted contrary to Section 30A. Dt. Ct. Dkt. 238 at 5-11.

The district court also found that the ten percent payment reduction of AB 5 had or would force medical transportation services and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients and close their business altogether. *Id.* at 11-12. This curtailment of services had “already prevented altogether some

Medi-Cal beneficiaries from obtaining needed [medical] services,” *id.* at 13, and forced others to enter nursing homes, *ibid.*

f. Petitioner appealed the district court’s August 18 and November 17 preliminary injunctions. These appeals were orally argued and submitted on February 18, 2009, and are currently pending.

## **REASONS THE PETITION SHOULD BE DENIED**

### **I. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS THE NINTH CIRCUIT’S INTERLOCUTORY RULING BECAUSE OF EVENTS OCCURRING SUBSEQUENT TO THE COURT OF APPEALS’ DECISION**

This case is not an appropriate vehicle to address any legal questions for the simple reason that the September 17, 2008 Opinion was plainly interlocutory and subsequent appeals in the Ninth Circuit in this action, currently pending after briefing and oral argument, could resolve the controversy in petitioner’s favor.

The ruling petitioner seeks to review is interlocutory, a posture that “of itself alone furnishe[s] sufficient ground” for the denial of *certiorari*. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993)

(opinion of Scalia, J., respecting the denial of *certiorari*). The Ninth Circuit in its September 17, 2008 Opinion was clear in stating that it was expressing no opinion on the merits of the respondents' preemption claim. Pet. App. 36a.

The inherently interlocutory nature of the September 17, 2008 Opinion is demonstrated by the following:

As noted above, the district court issued a preliminary injunction on August 18, 2008 prohibiting enforcement of AB 5's ten percent rate reduction for doctors, dentists, prescription drugs, adult day health care centers, and clinics, and on November 17, 2008, issued a similar preliminary injunction for home health agencies and non-emergency medical transportation providers in the Medi-Cal fee-for-service program. Petitioner's appeals from the preliminary injunctions were argued and initially submitted on February 18, 2009, to the same panel that authored the September 17, 2008 Opinion for which petitioner seeks *certiorari*.<sup>5</sup> The appeals are still pending.

It is because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters," *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148

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<sup>5</sup> On April 28, 2009, one of the members of the panel recused herself due to a change in circumstances and a new judge was appointed to the panel.

U.S. 372, 384 (1893), that *certiorari* of interlocutory decisions is strongly disfavored. If petitioner wins his pending Ninth Circuit appeals, for example, then petitioner will have prevailed without regard to anything ruled upon in the interlocutory September 17, 2008 Opinion.

And, further merits proceedings in this case following the pending appeals are unlikely because AB 5 has expired, and separate federal lawsuits have been filed to challenge the supervening state law (AB 1183) which set new reduced Medi-Cal provider rates effective March 1, 2009. *See* note 2, *supra*.

There is thus no point to expending judicial resources to review the interlocutory Opinion filed on September 17, 2008, from which Opinion petitioner seeks *certiorari*.

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

### **A. Petitioner's Claim That The Courts Of Appeals Are Divided Is Wrong Because The Courts Have Uniformly Reached The Same Conclusion As The Panel Below**

There is no split in the circuits. To the contrary, every court of appeals is in accord with the Ninth Circuit's holding that a federal court may resolve, on

the merits, a claim that a plaintiff will be injured unless injunction or declaratory relief is issued to enjoin a preempted state law.

1. As petitioner documents in great detail (Pet. 22-28), and so this brief does not repeat, the First, Second, Fifth, Eighth, Tenth, D.C., and Federal Circuits have all reached the same conclusion as the Ninth Circuit did below.

In addition, the Third, Fourth, Sixth, and Seventh Circuits have all reached the same conclusion. *See St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 368-369 (4th Cir. 2004); *GTE North, Inc. v. Strand*, 209 F.3d 909, 916 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000); *Illinois v. General Elec. Co.*, 683 F.2d 206, 211 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

Thus, 12 of the 13 federal courts of appeals have unequivocally reached the same conclusion, all without dissent.

2. Petitioner asserts (Pet. 29-31) that the Eleventh Circuit has reached a different conclusion than its sister circuits in *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990). That assertion misapprehends *Pegues* and ignores a subsequent *en banc* decision that demonstrates that petitioner's view of the law has also been rejected by the Eleventh Circuit.

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

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

*Id.* at 644 (emphasis added).

The court noted that Congress had created an express cause of action against the federal agency, but the plaintiffs had not relied on that cause of action. The court therefore rejected the plaintiff's attempt "to bootstrap a statutory claim that should be asserted against the Administrator into a constitutional issue" of preemption. *Ibid.* Premised as it was on the conclusion that plaintiff was simply suing the wrong government, *Pegues* did not conflict with the decisions of the other 12 circuits.

The Eleventh Circuit's subsequent *en banc* decision in *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003), demonstrates that petitioner has misread *Pegues*. *BellSouth* involved a suit by a phone company against a state public service commission claiming that the commission's decision was contrary to federal law—there the Federal Telecommunications Act of 1996. The *en banc* court held that, apart from any

express cause of action available under the statute, “[f]ederal courts must resolve the question of whether a public service commission’s order violates federal law and any other federal question as well as any related issue of state law under its pendent state jurisdiction.” *Id.* at 1278 (citing *Verizon Maryland Inc. v. Public Serv. Comm’n*, 535 U.S. 635 (2002)); *see also id.* at 1296 (Tjoflat, J., dissenting on other grounds) (“litigants may assert a private right of action for preemption under the Supremacy Clause”).

Although the Eleventh Circuit has not yet had the opportunity to address expressly the effect of *BellSouth* on *Pegues* (and indeed, has never cited *Pegues* for any proposition related to preemption), *Pegues* does not support petitioner’s call for this Court’s review. Moreover, *Pegues* does not support petitioner’s contention that preemption claims arising from Spending Clause statutes cannot be enforced, as the environmental statute in *Pegues* was not conditioned in the receipt of federal funds.

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

1. This Court has long permitted private parties to obtain declaratory and injunctive relief to protect from injury threatened by state laws that are preempted by federal law. “This Court \* \* \*

frequently has resolved pre-emption disputes in a similar jurisdictional posture,” often reaching the merits. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

In *Shaw*, employers sought a declaration that a New York statute was preempted. The federal statute provided no cause of action against the State. Yet, the Court reached the merits of the employers’ preemption claim. It explained:

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

463 U.S. at 96 n.14.

Subsequently, this Court unanimously reaffirmed the availability of injunctive relief on the basis of federal preemption. In *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), the Court again sustained the jurisdiction of the federal courts to hear claims that state conduct (there, an order of the public service commission) was preempted by federal law. In *Verizon*, the state commission argued that Verizon’s preemption claim could not proceed, because the federal Telecommunications Act “does not create a private cause of action to challenge the Commission’s

order.” *Id.* at 642. The Court dismissed this argument, stating:

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

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

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

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

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<sup>6</sup> The Second and Fifth Circuits have identified the Supremacy Clause itself as the basis of a cause of action for preemption claims, see *Burgio and Campofelice, Inc. v. NYS Dep’t of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997); *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005), while other courts of appeals (such as the Seventh Circuit in *Illinois v. General Electric Co.*, 683 F.2d 206, 211 (1982), *cert. denied*, 461 U.S. 913 (1983)), have rooted it in the federal All Writs Act and analogized it to the so-called “non-statutory review” that this Court has approved to ensure that federal officials comply with federal statutes. See, e.g., *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110-111 (1902); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

2. Petitioner nonetheless argues that respondents' claim should be dismissed, because the federal statute at issue in this case, Medicaid, is a Spending Clause statute. Pet. Br. 12-13.

That assertion is contrary to this Court's recent practice. This Court has repeatedly adjudicated claims by private parties asserting preemption by virtue of the Medicaid statute and other federal spending statutes. In *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), a Medicaid recipient sought a declaratory judgment that a state law was preempted by the Medicaid Act, and this Court unanimously agreed. In *PhRMA v. Walsh*, 538 U.S. 644 (2003), drug makers also brought an action asserting preemption of a state law under the Act. A plurality of four Justices concluded on the merits that the state law was not preempted, while three Justices argued in dissent that the state law was indeed preempted.<sup>7</sup>

Furthermore, petitioner's claim appears to rely on the assumption that federal Spending Clause

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<sup>7</sup> Justice Thomas's concurrence suggested that the Court might want to consider "whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). Justice Scalia concurred separately, proposing initial enforcement by the federal government. *Id.* at 675 (Scalia, J., concurring in judgment). Nevertheless, both Justices joined without reservation the Court's subsequent decision in *Ahlborn*, resolving a private action asserting preemption under Medicaid.

statutes cannot preempt state statutes under the Supremacy Clause. But that is contrary to a host of this Court's holdings. *See, e.g., Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (preemption under Medicaid); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Lawrence County v. Lead-Deadwood Sch. Dist. 40-1*, 469 U.S. 256, 269-270 (1985); *see also Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.).<sup>8</sup>

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

Preemption claims such as respondents' are consistent with the voluntary nature of States'

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

participation in federal spending programs. Petitioner's assertion of a "sovereign right to choose not to comply," with such statutes, Pet. 32, is erroneous. States have a sovereign right to choose not to participate in federal programs and to choose not to take federal monies. But once they have made those choices, the State "must comply with [the federal statute's] mandates." *Winkelman v. Parma City School District*, 550 U.S. 516, 520 (2007).

**C. There Is No Basis For Petitioner's Assertion That A Preemption Claim Must Satisfy The Standards Of 42 U.S.C. § 1983**

Petitioner suggests that respondents' preemption claim should be dismissed because it does not meet the standards for a cause of action under 42 U.S.C. § 1983 ("Section 1983"). Pet. 15-16.

Section 1983 when enacted was a new, separate, and express special cause of action to enforce statutory and constitutional rights that provided various remedies against individuals acting under color of state law and municipal corporations.

Nothing in the legislative history or the decisions construing Section 1983 suggest—nor does petitioner point to any such history or suggestion—that the intent of Congress in enacting Section 1983 was to supplant or repeal all prior causes of action and remedies then available under the Constitution and the laws of the United States for injunctive or

declaratory relief to protect a person from injury from state action which is contrary to, and hence preempted under the Supremacy Clause by, a federal statute. “Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.” *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Thus, the federal remedies available for a proven violation of Section 1983 include compensatory and punitive damages against individuals in their individual capacities, compensatory damages against municipal corporations, and attorneys’ fees against all individuals or municipal corporations (save for, in some circumstances, judicial officers). See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988. Preemption claims, by contrast, seek only to enforce the structural relationship between federal and state law by obtaining prospective equitable relief against state and local officials in their official capacities.<sup>9</sup>

Several members of this Court have stressed that preemption cause of action and Section 1983 serve different purposes and have different requirements. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), for example, Justice Kennedy explained that even though he would have held that

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<sup>9</sup> See *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987).

the plaintiff could not bring its action under Section 1983, that nevertheless:

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

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

Thus, it is not surprising, as the Ninth Circuit observed, that this Court “has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met.” Pet. App. 11a (citing, *inter alia*, *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *see also Hagans v.*

*Lavine*, 415 U.S. 528, 553 (1974) (Rehnquist, J., dissenting) (a claim that state welfare regulations conflict with federal regulations would properly invoke federal question jurisdiction to determine whether the state regulations are “invalid under the Supremacy Clause of the United States Constitution”).

Indeed petitioner, in contending, on the basis of no supporting precedent, the novel view that the rules applicable to whether a person injured by preempted state action may obtain injunctive relief are solely those rules applicable to Section 1983, ignores statements in *Golden State Transit* in which the Court has specifically recognized that there is life before and after Section 1983; *i.e.*, that whether or not a cause of action for injunctive relief against preempted state action exists does not depend exclusively or at all upon whether there is a cause of action therefore under Section 1983.

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

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

There are thus more causes of action in the federal statutory and constitutional universe for injunctive relief against preempted state action, than

are dreamt of or included within the provisions of Section 1983.

Petitioner also asserts (Pet. 19) that continued judicial recognition of a cause of action such as the preemption cause of action found to exist in the case at bar by the September 17, 2008 Opinion of the Ninth Circuit—the elements of which are different from the elements of a cause of action which may arise under Section 1983—might have the effect to by-pass the relevant federal administrative agency.<sup>10</sup> But this argument has long been resolved against petitioner. In the seminal case of *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court held that it had “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.” *Id.* at 420. The Court explained that it was “most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.” *Ibid.*

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<sup>10</sup> This argument is particularly ironic in that petitioner did not submit his proposed plan amendment to the federal government reflecting the rate cuts until September 30, 2008 (Pet. App. 76a), even though the state law imposing the rate cuts went into effect on July 1, 2008 (for those not protected by the preliminary injunctions subsequently issued in this litigation).

As in *Rosado*, there is no evidence in the text or structure of the Medicaid Act that Congress intended to close this existing avenue of judicial review to respondents. Cf. *Blessing v. Freestone*, 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 521 (1990), that the 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 an existing private cause of action).<sup>11</sup> Further, to the extent that a private lawsuit should raise novel questions about the interpretation or application of a federal law, a federal court may invite the pertinent agency to participate as *amicus curiae* or otherwise in the court proceedings. See *Rosado*, 397 U.S. at 406-407.

Petitioner also fears that judicial recognition of preemption causes of action, outside the purview of Section 1983, will unduly interfere with state programs. Pet. 19. But this case was not the first time the Ninth Circuit has recognized this cause of action. To the contrary, it expressly reached the same conclusion long ago, as did many other courts of

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<sup>11</sup> Although petitioner asserts (Pet. 18, 32) that Congress amended Medicaid to withdraw certain substantive requirements related to setting rates, the argument has so little flesh on its bones as to be no argument at all, and was, as noted above, not reached by the court of appeals in this case.

appeals. As petitioner himself acknowledged below, the Ninth Circuit “has recognized that ‘the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.’” C.A. Pet. Opening Br. 5-6 (quoting *Guaranty Nat’l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990)); *see also Bernhardt v. Los Angeles County*, 339 F.3d 920, 929 (9th Cir. 2003); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994). Yet petitioner has pointed to no untoward results that have occurred over this 20-year period and there have been none.

### CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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