No. _____

In the
Supreme Court of the United States

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

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A NONPROFIT CORPORATION, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ
Counsel of Record
JENNIFER M. KIM
Supervising Deputy Attorneys General
CARMEN SNUGGS
Deputy Attorney General

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email: Karin.Schwartz@doj.ca.gov

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

Counsel for Petitioner

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

QUESTIONS PRESENTED

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

QUESTIONS PRESENTED – Continued

The questions presented are:

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

2. Whether a state law reducing Medicaid reimbursement rates may be held preempted by § 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute?

TABLE OF CONTENTS

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

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of David Maxwell-Jolly, Director, Department of Health Care Services, State of California, respectfully petitions for a writ of certiorari to review two judgments of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This petition seeks review of two opinions of the Ninth Circuit, one reported at 572 F.3d 644 (*Independent Living II*), App., *infra*, 1, and one not reported (*Independent Living III*), App., *infra*, 54. A prior opinion in the case is reported at 543 F.3d 1050 (*Independent Living I*), App., *infra,* 58. The opinions of the district court that led to the Ninth Circuit decisions (App., *infra*, 94, 125, 127, 133) are unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision in *Independent Living II* on July 9, 2009, App., *infra*, 1, and denied DHCS's Petition for Rehearing and Rehearing En Banc on October 29, 2009. App., *infra*, 154. The Ninth Circuit issued its opinion in *Independent Living III* on August 7, 2009, App., *infra*, 54, and denied a Petition for Rehearing and Rehearing En Banc on September 23, 2009. App., *infra*, 157. On January 15, 2010, Justice Kennedy extended the time in which to

file a petition for writ of certiorari in *Independent Living II* and *III* to, respectively, February 22 and 19, 2010 (Justice Kennedy had previously extended the time to file in *Independent Living III* to January 22, 2010). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), states in pertinent part:

> (a) Contents
>
> A State plan for medical assistance must –
>
> * * *
>
> (30)(A) provide such methods and procedures relating to the utilization of, and the

> payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. . . .

STATEMENT OF THE CASE

At issue is a statutory reduction of the rates paid to certain Medicaid providers that California enacted in February 2008 as part of a comprehensive effort to address the State's fiscal crisis in a responsible manner. *See* App., *infra*, 162. California Welfare and Institutions Code § 14105.19(b)(1) reduced by 10 percent payments under the fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers of Medicaid services in California (known as Medi-Cal). Respondents contend that § 14105.19(b)(1) is preempted by the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), because the State purportedly failed to conduct a pre-enactment study to ensure that the reduced rates would comply with § 1396a(a)(30)(A) and bear a reasonable relationship to providers' costs, as they contended was required by Ninth Circuit precedent. Accepting respondents' arguments, the

Ninth Circuit affirmed injunctions of § 14105.19(b)(1) as to certain types of Medi-Cal providers. In so ruling, the Ninth Circuit has deprived the State of a critical method for dealing with its budget crisis, undermined the limitations on private rights of action this Court has recognized, and added requirements to § 1396a(a)(30)(A) that do not appear in the statute's text and that conflict with the holdings of five other circuits.

1. Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse certain costs of medical treatment for the poor, elderly, and disabled. 42 U.S.C. § 1396. A state's participation in Medicaid is voluntary, but if it chooses to participate, it must comply with the Medicaid Act and implementing regulations promulgated by the Secretary of Health and Human Services (HHS). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). To receive funds, a state must administer its Medicaid program through a state plan approved by HHS. 42 U.S.C. § 1396a. Receipt of federal funding is expressly conditioned on compliance with the Medicaid Act, and HHS may withhold funds for noncompliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Under the Medicaid Act provision at issue, 42 U.S.C. § 1396a(a)(30)(A), a state plan must include "methods and procedures" as necessary to, *inter alia*, assure that Medicaid reimbursement rates will neither be so high as to be inefficient or uneconomical, nor so low as to result in inadequate access to care or quality of care as described by the

statute. California submitted a State Plan Amendment for the reductions at issue to HHS on September 30, 2008, which remains pending. App., *infra*, 187.

This Court has not previously considered whether § 1396a(a)(30)(A) is privately enforceable. However, in *Wilder*, this Court considered whether a now repealed provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V), known as the Boren Amendment, could be privately enforced under 42 U.S.C. § 1983. The Boren Amendment required states, as part of their state plans, to find and make assurances that payments to hospitals under Medicaid were reasonable and adequate to meet the costs incurred by efficiently and economically operated facilities. *Wilder*, 496 U.S. at 502-03; *see also Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 537 (3d Cir. 2002). In *Wilder*, this Court held that the Boren Amendment conferred a "right" on providers, enforceable under § 1983, to "the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility." 496 U.S. at 510.

Congress subsequently repealed the Boren Amendment. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). In so doing, it stated its intent not only to reverse *Wilder*, but to preclude provider challenges to Medicaid rates. A House Report noted that under the Boren Amendment, "[a] number of Federal courts have ruled that State systems failed to meet the test of

'reasonableness' and some States have had to increase payments to these providers as a result of these judicial interpretations." H.R. Rep. No. 105-149, at 590 (1997). Therefore, the House Report stated: "It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of [§ 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." *Id.* at 591.

Since the Boren Amendment's repeal, eight circuits have considered whether § 1396a(a)(30)(A) may be enforced by Medicaid providers or beneficiaries under § 1983. The First, Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits have concluded that it may not, a conclusion that respondents do not dispute. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 56-59 (1st Cir. 2004) (not enforceable by providers); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147 (2d Cir. 2006) (not enforceable by providers); *Pa. Pharmacists*, 283 F.3d at 541-42 (not enforceable by providers) (Alito, J.); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 702-03 (5th Cir. 2007) (not enforceable by beneficiaries of services or providers), *cert. denied*, 129 S. Ct. 34 (2008); *Westside Mothers v. Olszewski*, 454 F.3d 532, 541-43 (6th Cir. 2006) (not enforceable by providers or recipients of services); *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (not enforceable by providers or recipients of services); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d

1139, 1146-48 (10th Cir. 2006) (not enforceable by providers or recipients of services), *cert. denied*, 549 U.S. 1305 (2007). The Eighth Circuit alone has reached a contrary result. *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013-16 (8th Cir. 2006) (enforceable by providers and recipients of services), *cert. granted, judgment vacated in part*, 551 U.S. 1142 (2007) (mem.).[1]

2. Nonetheless, on September 17, 2008, the Ninth Circuit held that a private lawsuit challenging a reduction in Medicaid reimbursement rates *could* proceed as a claim for purely prospective relief (*Independent Living I*). App., *infra*, 58. The Ninth Circuit held that "a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs." App. *infra*, 83. In support, the court cited several of this Court's decisions that permitted preemption claims to proceed without engaging in any threshold analysis of whether the federal statutes at issue created privately enforceable rights. App., *infra*, 68-72 (citing, *inter alia*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)). The Ninth Circuit also interpreted *Pharmaceutical Research and Manufacturers of America (PhRMA) v. Walsh*, 538 U.S. 644 (2003) as "affirm[ing a provider's] ability to

---

[1] Earlier this month, a Minnesota district court declined to follow *Pediatric Specialty Care*, citing intervening changes in the law. *Minn. Pharmacists Ass'n v. Pawlenty*, No. 09-2723, 2010 U.S. Dist. LEXIS 11620 (D. Minn. Feb. 10, 2010).

bring suit under the Supremacy Clause *sub silentio*," regardless of whether the suit could be brought under § 1983. App., *infra*, 81. Accordingly, the Ninth Circuit reversed a district court's order that denied respondents' first motion for preliminary injunction. App., *infra*, 93. DHCS filed a petition for writ of certiorari seeking review of this judgment, which this Court denied on June 22, 2009.[2]

3. The proceedings on remand led to the instant petition. On remand, the district court considered briefing and heard argument on two separate motions for preliminary injunction filed by different provider groups. In opposition to the motions, DHCS submitted 18 declarations that analyzed the reductions and their potential impact.[3] Among other things, DHCS demonstrated that beneficiaries' access to services would not decline as a result of the reductions, and had not declined in the first month after the

---

[2] In opposing certiorari in *Independent Living I*, respondents' lead argument was that the "case is not an appropriate vehicle to address" the question presented because "subsequent appeals in the Ninth Circuit in this action, currently pending after briefing and oral argument, could resolve the controversy in petitioner's favor." Brief for Respondents in Opposition at 11, *Maxwell-Jolly v. Ind. Living Ctr. of S. Cal., Inc.*, No. 08-1223 (S. Ct. May 22, 2009). That "vehicle" issue no longer exists. This petition seeks review of the Ninth Circuit's ruling on those subsequent appeals, which, as discussed below, were adverse to petitioner.

[3] DHCS filed a summary of the declarations filed in connection with the motion for preliminary injunction that led to the *Independent Living II* appeal. App., *infra*, at 166.

reductions took effect as compared to the same period in the previous year. *See* App., *infra*, at 168-86. Where provider cost data was available, DHCS determined that the 10% reduced payments would compensate a high percentage of provider costs. *See, e.g.,* App., *infra*, at 171, 177 (concluding that payments would cover 86 to 110% of costs of certain nursing facility services, and 93% to 135% of costs for prescription drugs). However, DHCS explained that, as to some forms of services – specifically physician, dental, home health, and non-emergency transportation (NEMT) services – there was no mechanism to collect cost data.

On August 18, 2008 and November 17, 2008, the district court entered two orders enjoining DHCS from implementing § 14105.19(b)(1) as to, *inter alia*, pharmacists, physicians, dentists, adult day health care centers, and providers of NEMT and home health services. App., *infra*, 94, 133; *see also* App., *infra*, 125, 127 (amending and correcting prior orders). The district court considered itself bound by the Ninth Circuit's prior decisions, including *Independent Living I.* App., *infra*, 102-06, 141-44. Despite the 18 declarations submitted by DHCS, the court concluded that DHCS had not "proffered any evidence showing that the Department considered any of the 'relevant factors,' in making the ten percent rate reduction challenged here." App., *infra*, 106, 144-45. On August 27, 2008, the district court amended its August 18, 2008 injunction to provide for only prospective relief. App., *infra*, 125-26.

DHCS appealed these orders, and certain providers appealed the August 27, 2008 order. The Ninth Circuit affirmed both injunctions in two opinions, one published, App., *infra*, 1 (*Independent Living II*), and one not, App., *infra*, 54 (*Independent Living III*). The court noted that it previously has "interpreted § 30(A) to require the Director to set reimbursement rates that 'bear a reasonable relationship to the efficient and economical hospitals' costs of providing quality services,'" unless DHCS shows a justification for deviating from such costs. App., *infra*, 11 (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998)); *see also* App., *infra*, at 56. The court then held that "it is clear" that the rate reductions violated § 1396a(a)(30)(A) given the State's failure "to provide any evidence that the Department or the legislature studied the impact of the ten percent rate reduction on the statutory factors of efficiency, economy, quality, and access to care prior to enacting AB 5," or to "demonstrate that the Department considered reliable cost studies when adjusting its reimbursement rates." App., *infra*, 11; *see also* App., *infra*, 56.

Notably, the court distinguished its "process-oriented" approach to § 1396a(a)(30)(A) compliance, with its emphasis on a pre-enforcement study, from the "'substantive compliance' standard espoused" by other circuits. App., *infra*, 23-24. Thus, the court faulted the State for the timing of its analysis (which it characterized as "*post hoc*"), App., *infra*, 11 n.9, without regard to whether the evidence demonstrated

that the reduced reimbursement payments complied "substantive[ly]" with § 1396a(a)(30)(A). App., *infra*, at 23. The Ninth Circuit also held that, "quite apart from any procedural requirements . . . , the State's decision to reduce Medi-Cal reimbursement rates based solely on state budgetary concerns violated federal law." App., *infra*, 20.

In addition to affirming the preliminary injunctions, the court held that providers in *Independent Living II* were entitled to "retrospective" monetary relief from the date that § 14105.19(b)(1) took effect (i.e., July 1, 2008) until the date that the injunction was entered (i.e., August 18, 2008). App., *infra*, 29-37; *see also* App., *infra*, 47.[4]

DHCS sought rehearing and rehearing en banc on numerous grounds, including those raised herein, in both *Independent Living I* and *II*. The Ninth Circuit denied both petitions.

By the time that the Ninth Circuit issued its decision in *Independent Living II* – affirming the preliminary injunction – the reductions at issue had sunset, meaning there was nothing left to enjoin. *See* App., *infra*, 162. On November 25, 2009, DHCS filed a motion to vacate the *Independent Living II*

---

[4] Although petitioner herein challenges the basis for a court to award *any* form of relief, petitioner is not seeking review at this time of the Ninth Circuit's holding that the State could be required to pay retroactive monetary damages because it purportedly had waived its sovereign immunity. App., *infra*, 37.

decision as potentially moot. However, DHCS conceded that its own appeal in the case was not moot because reversal of the preliminary injunction (by the Ninth Circuit or this Court) could result in an order directing respondents to reimburse DHCS for the additional payments it was forced to make while the 10 percent rate reduction was wrongly enjoined.[5] On December 21, 2009, the Ninth Circuit denied DHCS's motion, expressly holding that it had jurisdiction over DHCS's appeal because it continued to present a live controversy. App., *infra*, 44-48.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that a private litigant may invoke the Supremacy Clause to enforce a federal Spending Clause statute, § 1396a(a)(30)(A), even though that statute does not create any "rights" that are privately enforceable under § 1983, and despite evidence of Congressional intent to preclude private challenges to the adequacy of Medicaid payments. If the decisions in the present case remain unreviewed, the Ninth Circuit's holdings will negate

[5] Reply Brief in Support of Motions to Vacate/Rescind Opinion and Dismiss Appeal for Lack of Jurisdiction and to Recall the Mandate at 7, *Ind. Living Ctr. of S. Cal. v. Maxwell-Jolly*, Nos. 08-56422, 08-56554 (9th Cir. Dec. 14, 2009) ("'So long as the court may order relief responsive to the wrong alleged, the appeal is not moot.'") quoting *U.S. v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987)).

the limitations on private enforcement of federal statutes that this Court has carefully crafted and applied over several decades. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Under the reasoning adopted by the Ninth Circuit, a cause of action to enforce a federal statute and enjoin state conduct exists any time a private party alleges a conflict between state and federal law.

The need for this Court's review is compelling because the D.C., Fifth, Eighth, and Ninth Circuits have all now erroneously concluded that this Court already has resolved the question presented here. In holding that private litigants may sue directly under the Supremacy Clause, these circuits cited this Court's practice, in a series of preemption decisions culminating in *PhRMA v. Walsh,* of reaching the merits of plaintiffs' claims without analyzing whether such claims created "rights" enforceable under § 1983; the courts interpreted this Court's willingness to entertain such claims as carrying an "implicit" holding that such claims were valid. Three of these circuits went further, and held (incorrectly) that *Walsh* had foreclosed precisely the argument that petitioner advances here. However, *Walsh* did not address whether plaintiff had stated a valid cause of action under the Medicaid provision at issue, but simply rejected its claim on the merits. The courts of appeals' conclusions that this Court has already "implicitly" reached the validity of plaintiffs' causes of action in *Walsh* and

its other preemption cases, which they saw as "jurisdictional," were clear error under this Court's precedent. *See Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 642-43 (2002). Moreover, the Eleventh Circuit has squarely rejected the analysis adopted by the Ninth Circuit here, as did Judge McConnell in a dissent in a very recent decision issued by the Tenth Circuit in a non-Spending Clause context.

The Ninth Circuit also held that, in order to comply with § 1396a(a)(30)(A), a state must provide evidence that it studied of the potential impact of any statutory Medicaid reimbursement payment reduction on the § 1396a(a)(30)(A) factors, and on providers' costs, in order to ensure that the payments will bear a reasonable relationship to providers' costs, before enacting the reduction. The text of the statute does not require such a study, nor does it require any sort of relationship between reimbursement payments and providers' costs. And the Ninth Circuit held that the State's purported decision to reduce rates "based solely on state budgetary concerns violated federal law," even though nothing in the text of § 1396a(a)(30)(A) precludes such consideration so long as its substantive requirements are met. This Court's review is warranted to resolve a circuit split between the Ninth Circuit and virtually every other circuit to have addressed these issues, namely, the First, Third, Fifth, Seventh, and Eighth Circuits. In addition, the Ninth Circuit's willingness to preempt state law based on procedures and requirements that do not appear in any statute or implementing

regulation conflicts with this Court's precedent, including *Pennhurst*, which rejected the notion that states may be subject to "massive" liability based on conditions that are, at best, "implicit" in federal Spending Clause legislation.

The issues presented are important and recurring. The Ninth Circuit's decisions have already encouraged the filing of over 30 cases around the country espousing similar Supremacy-Clause theories. While many of these cases are premised on § 1396a(a)(30)(A), other Medicaid provisions have been invoked, as has the American Recovery and Reinvestment Act of 2009. California's losses from such suits is fast approaching $1 billion based on money paid or due providers under existing injunctions. The federalism concerns are significant: while Congress intended for HHS to be the primary arbiter of states' compliance with the Medicaid Act, the Ninth Circuit's approach has allowed private actors and courts to review and disapprove the states' actions instead.

I. REVIEW IS WARRANTED TO CONSIDER WHETHER A PRIVATE PARTY MAY BRING A PREEMPTION CHALLENGE UNDER A SPENDING CLAUSE STATUTE, 42 U.S.C. § 1396A(a)(30)(A), THAT MAY NOT BE ENFORCED BY PRIVATE PARTIES UNDER 42 U.S.C. § 1983

1. Review is warranted to prevent nullification of over 30 years of Court precedent establishing limitations on private suits against the states. Under

the Ninth Circuit's theory, to state a valid private cause of action, all a plaintiff need do is allege the existence of a conflict between a state statute (here, § 14105.19(b)(1)) and a federal law (here, § 1396a(a)(30)(A)). Such an exceptionally broad-brush approach cannot be reconciled with the limitations on private suits that this Court has recognized in two separate lines of causes: *Cort v. Ash* and its progeny, addressing when causes of actions may be implied directly under federal statutes; and *Pennhurst State School and Hospital v. Halderman* and its progeny, including *Gonzaga University v. Doe,* addressing when federal statutes may be enforced by a § 1983 suit.

While there are analytical differences, in both lines of cases this Court has explained that there must be clear and unambiguous evidence that Congress intended for the federal provision at issue to be privately enforceable before a private suit may be implied or recognized. *See Gonzaga*, 536 U.S. at 283 ("[T]he inquiries overlap in one meaningful respect – in either case we must first determine whether Congress *intended to create a [privately enforceable] federal right.*"). This is because Congress, as the authority that enacts federal statutes, has the prerogative to determine when and how they may be privately enforced. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *see also Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008).

Thus, in *Cort v. Ash*, this Court placed significant limitations on when a private cause of action may be implied directly under a federal statute. The relevant considerations are: (1) "does the statute create a federal right in favor of the plaintiff"; (2) "is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78. Since its decision in *Cort*, this Court has focused on the overarching importance of the second factor, requiring clear evidence of Congressional intent to create both a private right and a private remedy. *See, e.g., Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Transamerica Mortg. Advisors Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create any such remedy."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

The Court has also adopted significant limitations on when a private suit may be brought under § 1983. Here, specifically with respect to Spending Clause legislation such as the Medicaid Act, this Court has held that, "unless Congress 'speak[s] with a clear

voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28 & n.21). Thus, a "'plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence,'" and the provision "'must be couched in mandatory, rather than precatory, terms.'" *Id.* at 282 (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286.

These limitations are especially important as to Spending Clause legislation such as the Medicaid Act. Here, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28; *see also Gonzaga*, 536 U.S. at 280; *Walsh*, 538 U.S. at 675 (Scalia, J., concurring in judgment) ("I would reject petitioner's statutory claim on the ground that the remedy for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act . . . is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services." (citations omitted)); 538 U.S. at 682 (Thomas, J., concurring in judgment).

The theory adopted by the Ninth Circuit would undermine the *Cort* and *Pennhurst-Gonzaga* lines of cases by authorizing a Supremacy Clause-based cause of action that does not require consideration of Congressional intent, judicial enforceability, or any of the other factors considered so important by this Court. The potential impact of such a theory is dramatically demonstrated by its application in the present case, where the Ninth Circuit used it to revive a type of claim that heretofore was precluded by this Court's and the Ninth Circuit's own precedents. *See Sanchez*, 416 F.3d at 1059-61 (applying *Gonzaga* to hold that § 1396a(a)(30)(A) does not create rights enforceable under § 1983); *see also Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (concluding, based on structure and text of § 1396a(a)(30)(A), that "plan review by the Secretary is the central means of enforcement intended by Congress").

Dressing the lawsuit up as a preemption challenge should not change the conclusion that the statute is not privately enforceable. Here, too, Congressional intent is relevant and potentially dispositive. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (Congressional intent is the "'ultimate touchstone in every pre-emption case'"). It is entirely illogical to consider evidence of Congressional intent before permitting a cause of action to be implied directly under the statute itself (or to authorize suit under § 1983), but to ignore such evidence in a preemption case – indeed, to authorize a claim to

proceed despite evidence that Congress intended to preclude private suits. *See Pa. Pharmacists*, 283 F.3d at 540 n.15 (Alito, J.) (discussing Congressional intent in repeal of the Boren Amendment). Further, allowing private preemption claims to proceed based on any purported conflict with any and all federal statutes, independent of Congressional intent, would negate the principle that "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286.

Finally, this Court already has twice rejected efforts to convert what are, fundamentally, statutory claims into constitutional claims via the Supremacy Clause. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (agreeing that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983" (footnote omitted)); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979) (holding that "an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)"). Indeed, the Court has contrasted the Supremacy Clause, which cannot of its own force create a right of action, with the Commerce Clause, which can. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) ("By contrast, the Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations.").

2. Review also is justified by the need to resolve confusion and conflict among the courts of appeal regarding the issue presented here.

a. As the Ninth Circuit noted in *Independent Living I,* the D.C., Fifth, and Eighth Circuits have also recently permitted preemption claims to proceed based on the theory it adopted. App., *infra*, 81-83, 85-87; *see Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005) (authorizing preemption challenge based on Title X of the Public Health Service Act and Title XX of the Social Security Act, and rejecting the state's argument that, "even with federal jurisdiction over the claim, it was improper for the district court to resolve it because Appellees were not seeking to vindicate any right or to enforce any duty running to them"); *Lankford v. Sherman*, 451 F.3d 496, 509-13 (8th Cir. 2006) (holding that preemption claim based on regulation implementing 42 U.S.C. § 1396a(a)(17) could proceed even though the federal statute itself does not create an "individual right"); *see also PhRMA v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004) (rejecting claim that a state's prior authorization requirement was preempted by the Medicaid Act on the merits, despite State's argument that plaintiffs "have no private right of action for injunctive relief"). While not reaching the precise question presented here, the First Circuit also has indicated a willingness to entertain preemption claims based on Spending Clause statutes that are not enforceable under § 1983. *PhRMA v. Concannon,* 249 F.3d 66, 73 (1st

Cir. 2001) (stating, in the context of a Medicaid preemption challenge, that "a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption" (internal quotations omitted)), *aff'd on other grounds*, 538 U.S. 644 (2003).[6]

By contrast, in *Legal Environmental Assistance Foundation, Inc. v. Pegues,* 904 F.2d 640 (11th Cir. 1990), the Eleventh Circuit squarely rejected the notion that a "cause of action . . . may be implied from the Supremacy Clause" as to a federal statute that is not itself a source of privately enforceable rights. 904 F.2d at 642. The court recognized that some authorities have suggested that the Supremacy Clause creates an implied right of action for injunctive relief, and noted that "[plaintiff] cites dicta in footnotes from *Shaw v. Delta Air Lines* and *Franchise Tax Board v. Construction Laborers Vacation Trust*, which suggest that a federal cause of action might be

---

[6] The remaining circuits do not appear to have addressed whether a Spending Clause statute that does not create any privately enforceable rights may nonetheless be the basis for a preemption claim under the Supremacy Clause. However, several circuits have held that at least some preemption claims may be brought under non-Spending Clause statutes regardless of whether the federal statutes create privately enforceable rights. *See, e.g., W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225-26 (2d Cir. 1987); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands,* 218 F.3d 232, 241 (3d Cir. 2000); *Wilderness Soc'y v. Kane County,* 581 F.3d 1198, 1215-16 (10th Cir. 2009).

implied to permit a declaratory adjudication that federal law pre-empts a contrary state law, even if the federal statute does not expressly provide a cause of action." *Id.* at 643 (footnotes omitted). However, the court explained that "[t]hese expressions do no more than indicate that the Supremacy Clause provides federal jurisdiction . . . for a cause of action implied from the statute." *Id.* (citing 28 U.S.C. § 1331) (footnote omitted); *cf. Bellsouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169, 1189-92 (11th Cir. 2001) (applying *Cort* factors in assessing whether a pre-emption claim could proceed).

A recent decision from the Tenth Circuit deserves mention for its lengthy dissent by Judge McConnell also arguing against recognition of Supremacy Clause claims based on federal statutes that do not create privately enforceable rights. In *Wilderness Society v. Kane County*, 581 F.3d 1198 (10th Cir. 2009), environmental organizations sued to enjoin a county ordinance that opened federal land to off-highway vehicle use as preempted by federal law and regulations, including the Federal Land Policy and Management Act. In affirming summary judgment for plaintiffs, the court's opinion held that plaintiffs could sue directly under the Supremacy Clause even though they could not "establish[ ] an associated statutory right of action." *Id.* at 1216 & n.10 (citing *Shaw v. Delta Air Lines* and *Independent Living I*). However, Judge McConnell, in a dissenting opinion, rejected "the astounding idea that any time a state action arguably conflicts with a federal law, a cause of action

exists." *Id.* at 1233. He noted that the fact that some earlier Tenth Circuit decisions had allowed private parties to use a preemption theory, untethered from a "statutory right," as a "*defense*" to state enforcement proceedings did not mean that anyone "can bring a freestanding claim to enforce compliance with federal law, as if 'preemption' were a cause of action." *Id.* Most significantly, Judge McConnell observed that, under *Gonzaga* and *Stoneridge*, the obligation to provide for private enforcement of federal law falls to Congress, and suggested that the judiciary would improperly "'extend[ ] its authority to embrace a dispute Congress has not assigned it to resolve'" were it to recognize Supremacy Clause claims in the absence of a "right" created by Congress – exactly the argument that DHCS raises here. *Id.* at 1234.

b. Review also is justified because those circuits that have permitted the preemption claims similar to the present one to proceed under Spending Clause statutes have misinterpreted this Court's precedents, including *PhRMA v. Walsh, Shaw,* and *Golden State Transit,* as having already (at least implicitly) decided the issue presented here. *See* App., *infra*, at 68-72, 78-82; *Lankford*, 451 F.3d at 509-10; *Planned Parenthood*, 403 F.3d at 332; *Thompson,* 362 F.3d at 819 n.3. In reaching their holdings, both the Fifth and Ninth Circuit placed substantial weight on the fact that this Court has "repeatedly entertained" preemption claims without (expressly) requiring the standards for § 1983 claims to be met. App., *infra*, 68; *Planned Parenthood*, 403 F.3d at 332. That this

Court recently did so in a Medicaid preemption case, *PhRMA v. Walsh*, has led these courts of appeals to conclude that the Court has "implicitly" authorized preemption claims based on purported conflicts with the Medicaid Act, regardless of whether the purportedly preempting provision of the Act creates privately enforceable "rights." App., *infra*, 80-81; *Planned Parenthood*, 403 F.3d at 331-32; *Thompson,* 362 F.3d at 819 n.3.

This Court should intervene to set the law straight in these circuits. Because the absence of a valid cause of action is not a jurisdictional flaw, *see Verizon*, 535 U.S. at 642-43; *Bell v. Hood*, 327 U.S. 678, 682 (1946), this Court has often been willing to assume – without deciding – that a valid cause of action existed in order to reach the merits of plaintiffs' claims. *See, e.g.*, *Owasso Indep. Sch. Dist. v. Falvo,* 534 U.S. 426, 431 (2002). Each time the Court has proceeded on this basis, it has not "implicitly" recognized that a valid cause of action existed, but merely deferred reaching the issue. Thus, in *Owasso,* this Court assumed without deciding that a valid cause of action existed under a provision of the Family Educational Rights and Privacy Act, but then held later in the *same term* that no such cause of action actually existed. *Gonzaga,* 536 U.S. 273. Review is warranted, therefore, because only this Court can correct the lower courts' persistent misunderstanding of this Court's precedents.

II. REVIEW IS ALSO WARRANTED TO CONSIDER WHETHER A STATE STATUTE THAT REDUCES MEDICAID REIMBURSEMENT PAYMENTS TO CERTAIN PROVIDERS MAY BE PREEMPTED BASED ON REQUIREMENTS THAT DO NOT APPEAR IN THE TEXT OF THE STATUTE

Review also is warranted to address whether a state statute reducing Medicaid payments may be preempted based on requirements that do not appear anywhere in § 1396a(a)(30)(A) or its implementing regulations. The Ninth Circuit held that California failed to provide evidence that, prior to enactment of the reductions, it (1) studied the impact of the reductions on the federal statutory factors of efficiency, economy, quality, and access to care; and (2) considered reliable studies of providers' costs, to ensure that the reduced rates would bear a reasonable relationship to those costs. But, while § 1396a(a)(30)(A) arguably sets some substantive objectives – that rates not be set so high as to be inefficient or uneconomical, or so low as to create an access or quality of care problem for beneficiaries – it does not specify any procedure that the States must follow to achieve those objectives, leaving that issue to be addressed through the "methods and procedures" identified by each state in its state plan. The court also held that the rate reduction could be preempted because it was motivated "solely" by "budgetary concerns." But § 1396a(a)(30)(A) does not preclude a state from reducing rates to address a budgetary crisis, so long as the substantive requirements of the statute are

met. Review is warranted to resolve circuit splits between the Ninth Circuit and the other circuits that have considered these issues, and because the Ninth Circuit's atextual approach conflicts with this Court's precedent.

1.a. The Ninth Circuit's requirement that a state produce evidence that it conducted a pre-enactment study of the impact of any reduction, that includes an analysis of provider costs, conflicts with virtually every other circuit to consider the issue. *See Long Term,* 362 F.3d at 56; *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999); *Evergreen Presbyterian Ministries Inc. v. Hood,* 235 F.3d 908, 933 n.33 (5th Cir. 2000*), overruled in part on other grounds*, *Equal Access for El Paso*, 509 F.3d at 704; *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996); *Minn. HomeCare Ass'n v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997).[7]

The Seventh Circuit's decision in *Methodist Hospitals* was the first to expressly reject that any sort of pre-enactment study is required. There, hospitals and physicians challenged Indiana's decision to stop

---

[7] These cases from other circuits involved claims brought under 42 U.S.C. § 1983 at a time when there was uncertainty as to whether § 1396a(a)(30)(A) was enforceable under § 1983. After the majority view developed that § 1396a(a)(30)(A) is not privately enforceable under § 1983, there was a lull in such cases. The Ninth Circuit's decisions have revived § 1396a(a)(30)(A) as a vehicle for challenging the adequacy of Medicaid reimbursement rates, and the present issues along with it.

reimbursing Medicaid services at the provider's customary billing rate, and instead to base reimbursements on a new formula. 91 F.3d at 1028. Plaintiffs contended, in the court's words, that § 1396a(a)(30)(A) "require[s] comprehensive studies prior to any change in a state's plan of reimbursement – studies that would put an environmental impact study to shame and make it all but impossible for a state to amend its plan." *Id.* at 1029. In a decision by Judge Easterbrook, the court rejected this argument: "Nothing in the language of § 1396a(a)(30)(A), or any implementing regulation, requires a state to conduct studies in advance of every modification." *Id.* at 1030. Instead, "states may behave like other buyers of goods and services in the marketplace: they may say what they are willing to pay and see whether this brings forth an adequate supply. If not, the state may (and under § 1396a(a)(30)(A), must) raise the price until the market clears." *Id.*

Following the Seventh Circuit's decision, the Third and Eighth Circuits reached the same conclusion. *Rite Aid*, 171 F.3d at 851 ("We agree with the Court of Appeals for the Seventh Circuit that section (30)(A) requires the state to achieve a certain result but does not impose any particular method or process for getting to that result."); *Minn. HomeCare,* 108 F.3d at 918 (holding that the Medicaid Act "does not require the State to utilize any prescribed method of analyzing and considering said factors"); *see also id.* at 919 (arguing that § 1396a(a)(30)(A) does not impose any procedural requirements with respect to

Medicaid ratemaking by state legislators) (Loken, J., concurring). The First and Fifth Circuits also have concluded, at least implicitly, that no pre-enforcement study is required. *Long Term Care Pharmacy Alliance*, 362 F.3d at 56, 59 (stating that "the statute does not provide any procedure for the determination of such 'methods and procedures,'" and observing "[n]or, in the abstract, is there anything patently wrong with the [state's] arguing that it has power to act on an emergency basis, or its desire to see whether supply can be maintained after a 1% reduction"); *Evergreen*, 235 F.3d at 933 n.33 ("While we do not reach the merits of this conclusion, we note that studies, while helpful, are not required by the language of section 30(A). *Accord Methodist Hosps., Inc.*, 91 F.3d at 1030.").

The Eighth Circuit's decision in *Minnesota Homecare* left intact an earlier decision that held that a change in reimbursement procedures *could* be enjoined because the state failed to adequately "consider" the impact of the rate change before implementing it. *See Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 531 (8th Cir. 1993) (affirming judgment against state because, in reducing reimbursement rates to noninstitutional Medicaid providers by 20%, the state "failed to consider the rate reduction's impact on equality of access, efficiency, economy, and quality of care"); *Minn. HomeCare*, 108 F.3d at 918. *Arkansas Medical Society* is the *only* circuit court decision that even comes close to the Ninth Circuit's approach.

That said, if "consideration" is the test, then California met it here. *See* App., *infra*, App. 168-86. DHCS offered 18 declarations analyzing the impact of the reductions on the § 1396a(a)(30)(A) factors. This considered analysis was rejected as either untimely (i.e., "*post hoc*") or as insufficient because it failed, in some cases, to be based on cost data where DHCS conceded it had no mechanism in place to collect such data. App., *infra*, 11-12 & n.9. The Ninth Circuit's decisions require the State, before enacting a rate reduction, to conduct a study that, in the words of the Seventh Circuit, would "put an environmental impact study to shame."[8]

b. The Ninth Circuit's approach is unique among the circuits in two additional ways. First, because the Ninth Circuit characterized the requirements under § 1396a(a)(30)(A) as "process-oriented," it did not assess (or require the district court to assess) whether the reduced reimbursement rates are "substantively" adequate under § 1396a(a)(30)(A). DHCS submitted evidence to show that they were, App., *infra*, 166, which the Ninth Circuit apparently deemed irrelevant (as inappropriately "*post hoc*"). So far as DHCS can determine, the Ninth Circuit is the *only* circuit to have adopted a rule under which Medicaid reimbursement rates may be enjoined under

[8] Indeed, Medi-Cal rates are established for more than 12,000 different physician procedures covered by the program, and the Ninth Circuit's approach would appear to require the State to conduct a cost study for each of these procedures.

§ 1396a(a)(30)(A) based solely on a purported "process" defect: that is, without determining whether the new rates meet the substantive requirements of § 1396a(a)(30)(A).

Second, the Ninth Circuit stands alone in requiring state Medicaid reimbursement rates to bear a reasonable relationship to providers' costs. No other circuit has held that § 1396a(a)(30)(A) imposes such a requirement. To the contrary, the Third Circuit explained in *Pennsylvania Pharmacists* that "Section 30(A), unlike the Boren Amendment, does not demand that payments be set at levels that are sufficient to cover provider costs." 283 F.3d at 538. And in *Evergreen*, the Fifth Circuit explained that a state could set Medicaid reimbursement payments so low as to force some providers into bankruptcy, so long as other (presumably more efficient) providers remained to provide the services at issue. 235 F.3d at 929.[9] Moreover, the federal government previously advised this Court, in an invitation brief filed in *Orthopaedic*, that "[w]e agree . . . that the court of appeals [in *Orthopaedic*] erred in reading Section

---

[9] *Cf. Long Term Care*, 362 F.3d at 56-57 (noting that "nothing in subsection 30(A) expressly provides that those who furnish Medicaid services . . . have any specific rights to . . . substantive (e.g., just and reasonable rates) protections"); *Rite Aid*, 171 F.3d at 853 ("[W]e think it consistent with our reading of section 30(A) that a finding of the pharmacies' costs is not mandated: within the agency's discretion, pharmacies' costs may be considered or not, so long as its process of decision-making is reasonable and sound.").

1396a(a)(30)(A) as imposing on States an obligation to set payment rates for outpatient services that "'substantially reimburse providers their costs.'" Brief for the United States as Amicus Curiae at 6, *Belshe v. Orthopaedic Hosp.*, No. 96-1742 (S. Ct. Nov. 26, 1997), 1997 WL 33561790 (citing *Wilder* and the now repealed Boren Amendment).

c. Finally, there is conflict among the circuits regarding the role that budgetary concerns may play in a state's decision to reduce rates. The Ninth Circuit indicated that, "quite apart from any procedural requirements established by *Orthopaedic Hospital*, the State's decision to reduce Medi-Cal reimbursement rates based solely on state budgetary concerns violated federal law." App., *infra*, at 20. The Third and Eighth Circuits have made similar statements. *Ark. Med. Soc'y*, 6 F.3d at 531 (state "may take state budget factors into consideration," but that they "cannot be the conclusive factor"); *Rite Aid*, 171 F.3d at 856. The Fifth Circuit, however, reversed an injunction where "[t]he district court held that [the state's] primary reason for the rate reduction was budgetary," holding that the court had engaged in "the wrong inquiry." *Evergreen*, 235 F.3d at 932; *cf. id.* at 921 (holding that published statement that rate change was "being taken in order to avoid a budget deficit in the medical assistance program" was "sufficient" to satisfy Medicaid Act's public notice requirement, 42 U.S.C. § 1396a(a)(13)(A)).

2. Review is also warranted because the Ninth Circuit's decisions are erroneous and conflict with

this Court's precedent. None of the bases for preemption identified by the Ninth Circuit – the State's failure to conduct a pre-enactment study, the requirement for a State to show a "reasonable relationship" between costs and rates, the prohibition on budget-motivated rate reductions – is set forth in the text of the statute or in its implementing regulations. Rather, § 1396a(a)(30)(A) sets some substantive objections and leaves to the States the means to accomplish them (subject to approval by HHS). *See Methodist Hosps.,* 91 F.3d at 1030; *see also Rite Aid,* 171 F.3d at 851-52; *Minn. HomeCare*, 108 F.3d at 918. And while a full description of the legislative history of § 1396a(a)(30)(A) is beyond the scope of this petition, DHCS notes that the relevant history reflects Congress's intention to give the states more flexibility in their rate-setting rather than to impose the type of formal fact-finding requirements that existed under the Boren Amendment (at least as it was judicially construed until its repeal). *See Pa. Pharmacists*, 283 F.3d at 540-43.

The Ninth Circuit's decisions also conflict with this Court's precedent. In *Pennhurst,* this Court made clear that, with respect to Spending Clause legislation such as the Medicaid Act, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U.S. at 17. This is because such legislation "is much in the nature of a contract," and only if an obligation is imposed unambiguously may a state exercise its choice to enter into the contract "knowingly [and] cognizant of the

consequences of [its] participation." *Id.* Thus, "we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* The Ninth Circuit disregarded these principles when it read into § 1396a(a)(30)(A) requirements for which Congress did not "unambiguously" provide, therefore subjecting California to massive liability that it did not anticipate.

Worse, the atextual requirements imposed by the Ninth Circuit have expanded with each successive judicial opinion, making it impossible for the State to anticipate and comply with them, thereby exposing the State to more and more liability. While *Orthopaedic* required the State to "rely on responsible cost studies, its own or others," in setting rates, that decision did not require any study to be completed pre-implementation; rather, the State was permitted to implement the rate reductions while its cost analysis was underway. *See* 103 F.3d at 1494, 1496. To comply with *Orthpaedic*, in the present case, DHCS submitted declarations that analyzed the impact of the rate reductions on the § 1396a(a)(30)(A) factors, and on providers' costs, including cost data where it was available. But this was held insufficient because the Ninth Circuit added yet more requirements to *Orthopaedic*'s already atextual requirements: that any studies occur before the cuts are "implement[ed]," App., *infra*, 4, and that they be prepared "in anticipation" of the rate reduction. App., *infra*, 11-12 & n.9. Then, in September 2008, the California legislature enacted subsequent Medicaid reductions

(the "AB1183 reductions") and delayed their implementation until March 2009, thereby enabling DHCS to analyze their impact prior to their implementation. *See* Cal. Welf. & Inst. Code § 14105.191(b),(h) (West 2009) (eff. Sept. 30, 2008). In an effort to comply with the Ninth Circuit's rulings to date, DHCS prepared studies of the AB1183 reductions in the months before they were to take effect. Nonetheless, the district court enjoined many of the reductions, finding that the pre- *and* post-enactment studies cited by DHCS were unsatisfactory, after engrafting yet more atextual requirements: now, that there must be evidence that any study was conducted (or possibly at least considered) by the Legislature rather than DHCS, and any study must be completed not just pre-implementation but also pre-enactment. *Managed Pharmacy Care v. Maxwell-Jolly,* 603 F. Supp. 2d 1230, 1238 (C.D. Cal. 2009); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 630 F. Supp. 2d 1154, 1161 (C.D. Cal. 2009), *stay granted*, 563 F.3d 847 (9th Cir. 2009); *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 630 F. Supp. 2d 1144, 1151 (C.D. Cal. 2009). In a published decision issued on April 6, 2009, the same panel that decided *Independent Living* accepted this expansion, holding that providers in *California Pharmacists* (challenging the AB 1183 reductions) had "made a strong showing of . . . likelihood" of success, and granted a stay of statutory reductions at issue that the district court had previously denied. 563 F.3d 850.

III. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING

1. The issues presented here are important and recurring. The Ninth Circuit's decisions in *Independent Living I, II*, and *III* have spawned a new, national wave of Medicaid litigation. So far as DHCS can determine, at least 33 additional cases of this type have been filed in the last two years, including 17 in California, and 16 in other states, including Arizona, Connecticut, Delaware, Hawai'i, Idaho, Louisiana, Maine, Minnesota, New York, Pennsylvania, and Washington. App., *infra*, 211-23.[10] While § 1396a(a)(30)(A) has been the primary basis for such claims, the courts have also now permitted the Supremacy Clause to animate claims based on 42 U.S.C. §§ 1396a(a)(17) and the American Recovery and Reinvestment Act of 2009, among others. App., *infra*, at 213, 217, 221, 222. All of these lawsuits are proceeding under statutes as to which Congress charged HHS with reviewing state compliance and did not create any privately enforceable rights.

2. Through its three decisions in this case, and its earlier ruling in *Orthopaedic*, the Ninth Circuit has set out the legal rules that govern this case and that will govern similar pending cases. Further proceedings under the fundamentally flawed legal

---

[10] Two cases were omitted from the Appendix. *See Minn. Pharmacists Ass'n,* No. 09-2723, 2010 U.S. Dist. LEXIS 11620 (D. Minn. Feb. 10, 2010); *Pharmacists Soc'y of the State of N.Y. v. Paterson*, No. 09-CV-1100 (N.D.N.Y.).

framework adopted by the Ninth Circuit will simply perpetuate that court's legal error, while critical time is lost in enabling the states to address Medicaid reform as part of their ongoing budget crises. Given the importance of the issues presented, the now well-developed nature of the case law, and the rapidly expanding impact of the Ninth Circuit's decisions in *Independent Living I*, *II*, and *III*, review is merited now. This Court has used its certiorari jurisdiction to review interlocutory decisions that raise "important legal or constitutional issues," where the circumstances justify an "'earlier interposition.'" Eugene Gressman et al., *Supreme Court Practice* 81 (9th ed. 2007) (quoting *The Conqueror*, 166 U.S. 110, 114 (1897)). That is precisely the case here.

In California, based on the *Independent Living* decisions, the courts have already issued six injunctions of Medicaid reform efforts, with almost a dozen additional challenges still pending. App., *infra*, 211-19. The losses to California from these injunctions are fast approaching $1 billion, consisting of almost $700 million paid or due under existing injunctions as of February 1, 2010, plus an additional $250 million in retroactive damages claimed by providers in the present case. App., *infra*, 211-14. The State will incur an additional $34 million loss each month that the existing injunctions remain in effect, assuming no further injunctions are added. App., *infra*, 211-14.

These losses could not come at a worse time, as California grapples with a financial crisis of unprecedented proportions.[11] The Ninth Circuit's holding that Medicaid payment reductions cannot be motivated by budgetary considerations leaves California in an impossible position, as much of its current legislative effort is being directed to address its crisis, and Medicaid expenditures represent the second largest component in its budget (after K-12 education). Further exacerbating the problem is the uncertainty in the law: specifically the ever-shifting series of atextual requirements that the Ninth Circuit continues to impose, but the State has been unable to anticipate and meet, in contravention of *Pennhurst* and the cooperative federalism that animates the Medicaid program. In practical terms, the Ninth Circuit's holdings have made it difficult-to-impossible for California to project its Medicaid budget shortfalls (and budget for them) or to address its ongoing fiscal crisis through sensible Medicaid reform.

---

[11] California now has an accrued deficit of $24.8 billion and growing: for the first six months of the current fiscal year (through December 31, 2009), general fund receipts were $375 million below budget, and disbursements were $762 million above budget. Controller John Chiang, *Statement of General Fund Cash Receipts and Disbursements: January 2010 Summary Analysis*, http://www.sco.ca.gov/Press-Releases/2010/01-10 summary.pdf; *see also California's General Fund Cash Outlook for the Months of January-December 2010*, http://www.sco.ca.gov/Files-EO/01-22-10cashbalance.jpg.

CONCLUSION

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

Dated: February 16, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
JENNIFER M. KIM
Supervising Deputy
Attorneys General
CARMEN SNUGGS
Deputy Attorney General

**Counsel of Record*

Counsel for Petitioner
David Maxwell-Jolly, Director,
California Department of
Health Care Services

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010