No. 08-1223

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, A NONPROFIT CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit held that Medicaid providers and beneficiaries can sue under the Supremacy Clause to enforce 42 U.S.C. § 1396a(a)(30)(A) even though the statute concededly does not create a private right of action; does not create any rights privately enforceable under 42 U.S.C. § 1983; and instead authorizes a federal agency to oversee states' compliance. The decision conflicts with – indeed, provides an end run around – several lines of this Court's precedents. *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). The decision also deepens a pre-existing circuit split with the Eleventh Circuit. *See Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990).

The question presented is both important, implicating core principles of federalism, and recurring. Indeed, in just the two months since the Petition in this case was finalized for printing, courts in three other states (Arizona, Idaho, and Washington) have relied upon the Ninth Circuit's decision to permit private challenges to reductions in Medicaid payments and services to proceed, and one state (Washington) has abandoned efforts at Medicaid payment reform as a result. For these reasons and those that follow, the Petition should be granted.

I. The Ninth Circuit's Decision Undermines This Court's Precedent

The expansive theory of state liability adopted by the Ninth Circuit cannot be reconciled with the limitations on implied private suits against the states applied by this Court in *Cort*, *Pennhurst*, and *Gonzaga*, among numerous others. Perhaps most important among those limitations: no cause of action may be implied or otherwise recognized absent evidence that Congress intended to create a privately enforceable "right." *See Gonzaga*, 536 U.S. at 283; *Cort*, 422 U.S. at 78. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Respondents do not dispute that their lawsuit runs afoul of the traditional limitations on implied causes of action. Thus, they do not argue that Congress intended to allow private enforcement of § 1396a(a)(30)(A) under *Cort v. Ash*. They do not discuss, let alone harmonize, their theory with this Court's repeated statement that, as to preemption claims, Congressional intent must be the "ultimate touchstone," *see, e.g., Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 1194 (2009), a serious problem with their case given the Ninth Circuit's refusal to analyze Congressional intent, the affirmative evidence of contrary intent, and the lack of evidence of positive intent. *See Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 540 n.15 (3d Cir. 2002); H.R. Rep. No. 105-149, at 590 (1997). They also do not dispute

that 42 U.S.C. § 1396a(a)(30)(A) is ill-suited to judicial enforcement because it sets conflicting policy goals rather than imposing a clear mandate, and therefore does not create any rights privately enforceable under § 1983. *See Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005); *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).

Finally, respondents do not dispute the extraordinary breadth of their theory of liability. Under respondents' theory, a private preemption claim may be asserted as to any federal statute based on a purported conflict between that statute and a state statute or policy. But this theory directly conflicts with this Court's holding that Congress "must" create any private claims premised on federal statutes. *Sandoval*, 532 U.S. at 286. Such a requirement means nothing if a private preemption claim *always* may be asserted.

Instead, respondents cite a slew of cases for the proposition that the type of claim they seek to raise is supported by precedent. But, as described below, those cases cannot be considered precedential as to an issue that they did not reach. Tellingly, respondents do not cite a single case in which this Court allowed a preemption claim to proceed based on a federal Spending Clause statute that had previously been held not to confer privately enforceable rights – the situation here – because no such precedent exists.

Thus, respondents rely on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and *Verizon Maryland,*

Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002), as well as a string of other cases cited by the Ninth Circuit. Opp. at 16, 24. Respondents must eventually concede, however, that these cases merely addressed the jurisdictional basis for preemption claims, Opp. at 19, and did not reach the question presented here. As such, they are not authority: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).[1] Further, *Shaw*, on which respondents rely most heavily, involved a federal statute (ERISA) with an express preemption provision, an unambiguous statement of Congressional intent and therefore a significant point of distinction. *See* 463 U.S. at 91-92 (applying 29 U.S.C. § 1144).

Respondents cite *Green v. Mansour*, 474 U.S. 64, 68 (1985), for the proposition that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Opp. at 23. But it has never been the case that every federal law carries a private remedy. *See Livadas v. Bradshaw*,

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[1] Respondents' citation to preemption cases involving Spending Clause legislation suffers from the same defect. *See* Opp. at 20-21 (citing, *inter alia, Arkansas Dep't of Health & Hum. Servs. v. Ahlborn*, 547 U.S. 268 (2006)). Because the states did not challenge the private enforceability of the federal statutes at issue in the cited cases, they cannot be considered precedential. *Webster*, 266 U.S. at 511.

512 U.S. 107, 133 (1994). Any federal interests are adequately protected and advanced by the approaches adopted in *Cort*, *Pennhurst*, and *Gonzaga*, which operate to ensure the supremacy of the law consistent with Congressional intent.

Finally, respondents build a number of straw men. Petitioner does not contend that private suits are precluded whenever a federal statute provides for federal agency review. Opp. at 26-27 (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)). To the contrary, petitioner recognizes that this Court has long held that, where Congress has expressly intended to create a privately enforceable right, the mere existence of an administrative review scheme will not generally preclude private lawsuits. *See, e.g., Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 522 (1990). But, where there is no evidence that Congress intended for private enforcement, and where the federal statute at issue does not lend itself to judicial enforcement, agency review may be not only the most appropriate, but also the exclusive, means of review – subject, of course, to later judicial review of that agency's decision. *See* Pet. at 16-19; *see also Pharm. Res. & Mfrs. of Am. (PhRMA) v. Walsh*, 538 U.S. 644, 672-73, 675, 675-83 (2003) (Breyer, J., Scalia, J., Thomas, J., separately concurring or concurring in judgment). And, contrary to respondents' assertions, petitioner does not contend that the requirements of § 1983, per se, must be imported into the Supremacy Clause context, Opp. at 22, but rather that the traditional limits on implying private claims from federal statutes apply

no less in the preemption context than they do elsewhere. Pet. at 13-21.[2]

II. The Ninth Circuit, Together With Several Other Circuits, Has Misapplied This Court's Precedent and Deepened an Existing Split With the Eleventh Circuit

The need for this Court's review is compelling because several circuits (including the D.C., First, Fifth, and Eighth Circuits) have recently embraced the expansive theory applied by the Ninth Circuit. In so doing, these circuits have largely misconstrued this Court's willingness to reach the merits of petitioner's Medicaid preemption claim in *Walsh* as carrying an implicit holding that petitioner had stated a valid cause of action under the Supremacy Clause. *See* Pet. at 21-28 (citing, *inter alia, Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004)). These cases, together with others cited in the Petition, have deepened an existing split with the Eleventh Circuit. *See Pegues*, 904 F.2d at 643-44.

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[2] Contrary to respondents' suggestion otherwise, petitioner affirmatively disputes that the Supremacy Clause may, of its own force, create a private cause of action. Pet. at 19-20 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979); *Dennis v. Higgins*, 498 U.S. 439, 450 (1991)).

Respondents do not dispute that the Ninth Circuit erred in relying on *Walsh*, an opinion (like *Shaw*) that did not actually address whether there was a private cause of action. *See* Pet. at 24-28, 32-34 (citing, *inter alia, Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*). Accordingly, a main contention in the Petition is unchallenged: that the recent circuit decisions allowing preemption claims to proceed in the absence of a privately enforceable right rest in significant part upon an error of law that only this Court has the power to correct.

Respondents do, however, dispute the existence of a circuit split, contending that the Eleventh Circuit's decision in *Pegues* is consistent, not at odds, with those of other circuits. Opp. at 14-15. Specifically, they contend that *Pegues* was premised on the conclusion that "plaintiff was simply suing the wrong government." Opp. at 15. Respondents' interpretation is insupportably reductionist. *Pegues* expressly refused to permit plaintiffs to imply a cause of action "directly from the Supremacy Clause" where, as here, Congress did not create a federal right privately enforceable under § 1983. 904 F.2d at 643 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981)). As such, it is on point and conflicts irreconcilably with the Ninth Circuit's decision here, as well as decisions from the other circuits.

Respondents contend that the en banc decision in *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270

(11th Cir. 2003), "demonstrates that petitioner has misread *Pegues*." Opp. at 15. However, neither the *BellSouth* majority nor the dissent mentioned *Pegues*, let alone attempted to clarify or overrule it. In *BellSouth*, the question presented was purely jurisdictional: applying *Verizon*, the court held that the district court had jurisdiction, under 28 U.S.C. § 1331, over a challenge to an order issued by a state public service commission. 317 F.3d at 1278-79. The court did not purport to address the issue resolved in *Pegues*, of whether a plaintiff may state a claim under the Supremacy Clause in circumstances analogous to those present here. Nor does the *BellSouth* dissenting opinion, cited by respondents, supply a basis for ignoring the plain meaning of *Pegues*. *See id.* at 1296 (Tjoflat, J., dissenting) (dissenting on the ground that the district court did not have jurisdiction pursuant to 28 U.S.C. § 1331 over claims on appeal, but stating that "abandoned" claim "could have been asserted" either as a § 1983 claim or as a preemption claim under *Shaw*).

III. The Ninth Circuit's Decision Is an Appropriate Vehicle for Reviewing the Question Presented

Respondents contend that the Petition should be denied because the Ninth Circuit's decision is interlocutory, and thus that its importance may be mooted by subsequent events in the case or statutory enactments. Opp. at 11. Beyond dispute, this Court has jurisdiction to grant the Petition, and respondents do

not argue otherwise. 28 U.S.C. § 1254; *see also Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923) ("Our power to grant writs of certiorari extends to interlocutory as well as final decrees. . . .").

The Court should grant the Petition because the issue presented is important and because the Ninth Circuit's decision already has established vitality far beyond the geographic and temporal limits of the present suit.[3] The Ninth Circuit's decision is not an outlier decision as to a nonrecurring issue, but rather the latest in a string of recent circuit court decisions to misread this Court's decision in *Walsh*. Pet. at 21-31. Relying expressly on the Ninth Circuit's decision,

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[3] The case is not moot. After the Ninth Circuit's order on July 11, 2008, the district court enjoined some of the reductions mandated by AB 5. *See Independent Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS, 2008 WL 3891211 (C.D. Cal. Aug. 18, 2008). Petitioner's appeal of the district court's order is pending in the Ninth Circuit. As respondents note, a subsequent enactment (AB 1183) amended California Welfare and Institutions Code § 14105.19 to sunset the reductions on February 28, 2009, and enacted a new set of smaller reductions to take their place, *see id.* § 14105.191. While that makes respondents' claim for injunctive relief moot, the appeal presents a live controversy because the injunction forced the state to pay providers hundreds of millions of dollars more in Medi-Cal reimbursements than the state would have had to pay had AB 5 remained in full force. The Ninth Circuit's decision regarding the preliminary injunction will determine whether the state is entitled to recoup those extra payments. And a decision by this Court that respondents lacked a private cause of action would likewise mean that AB 5 was improperly enjoined, thereby entitling the state to recoup those monies the state was wrongly forced to pay.

courts in at least three other states – Arizona, Idaho, and Washington – have recently enjoined Medicaid reductions. *Affiliates, Inc. v. Armstrong*, No. CV-09-149-BLW, 2009 WL 1197341, at *4 (D. Idaho Apr. 30, 2009) (entering temporary restraining order and holding that plaintiffs had asserted a claim that is "actionable under the Supremacy Clause" even though § 1396a(a)(30)(A) does not confer a "substantive" right on providers); *Washington State Pharmacy Ass'n v. Gregoire*, No. C09 5174-BHS, 2009 WL 1259632 (W.D. Wash. Mar. 31, 2009) (temporarily restraining implementation of a six percent reduction in Medicaid reimbursement rates as preempted under § 1396a(a)(30)(A)); *Arizona Ass'n of Providers for Persons with Disabilities v. State*, No. 1 CA-CV 09-0167, 2009 WL 1156492, at *10 n.9. (Ariz. Ct. App. Apr. 30, 2009) (vacating a trial court injunction after holding, based on the Ninth Circuit's decision, that "[t]here is a private cause of action under the Supremacy Clause of the United States Constitution for a violation of Title XIX's network requirements"). As a direct result of such litigation, the State of Washington abandoned any effort to implement its Medicaid rate adjustments.[4]

Courts in California also have extended the Ninth Circuit's decision, applying it to claims brought

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[4] *See* Letter from Doug Porter, Assistant Secretary, Washington Medicaid Pharmacy Program, Health and Recovery Services Administration, to "Pharmacies" (Apr. 17, 2009), *available at* http://fortress.wa.gov/dshs/maa/pharmacy/Broadcast%20fax%2004%2020%2009%20includes%20memo%2009%2016.doc.

by other types of providers and claims involving different enactments. *See, e.g., California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009) (granting motion to stay AB 1183, which would have reduced Medi-Cal reimbursement rates for certain services effective March 1, 2009, as to hospitals); *Managed Pharmacy Care v. Maxwell-Jolly*, 603 F. Supp. 2d 1230 (C.D. Cal. 2009) (enjoining AB 1183 in suit brought by pharmacists); *see also Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 85 Cal. Rptr. 3d 639, 651 n.6 (Cal. Ct. App. 2008) (citing Ninth Circuit's decision in dicta for the proposition that challenges to Medicaid rates under § 1396a(a)(30)(A) could have been brought under the Supremacy Clause).

Respondents imply, incorrectly, that petitioner should have filed a certiorari petition with respect to an earlier, July 11, 2008 order, which they contend represented the Ninth Circuit's judgment. They are wrong: the September 17, 2008 order, rather than the earlier July order, represented the court's judgment. The July order expressly contemplated issuance of an "opinion, in due course," Order, 9th Cir. Dkt. 16 at 3, n.1; *see also id.* at 5 ("An Opinion will follow."), and the Ninth Circuit did not give notice of entry of a judgment at that time as would be required. Fed. R. App. P. 36(b). Although a mandate issued on July 16, 2008, 9th Cir. Dkt. 20, the Ninth Circuit recalled the mandate on September 17, 2008, 9th Cir. Dkt. 41, and filed the opinion now at issue. 9th Cir. Dkt. 42; Pet. App. at 1a, 36a. This time, the Ninth Circuit did give notice of entry of judgment, which it appended

directly to the opinion. 9th Cir. Dkt. 42 ("This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36."). The Ninth Circuit's mandate, which issued on February 2, 2009, expressly referred to the September 17, 2008 opinion as the "judgment of this Court." 9th Cir. Dkt. 60; *see also* 9th Cir. Dkt. 55 & 58 (same).[5]

IV. The Issue Presented Is Important and Recurring

The issue presented here is both important, as it strikes at core principles of federalism, and recurring, as confirmed by the authorities and developments described in Parts II and III. Respondents contend, nonetheless, that the rule applied by the Ninth Circuit will lead to no "untoward results." Opp. at 28. As applied in this case, the "untoward result" is unmistakable: the court's opinion resuscitated a type of claim that previously was precluded, *Sanchez*, 416 F.3d at 1062, despite Congressional intent to eliminate such claims. That the same analysis adopted by the Ninth Circuit here may be applied to authorize lawsuits premised on virtually any Spending Clause statute, no matter how "vague and amorphous" and "ill-suited" to judicial review and without regard to Congressional intent, makes the result more than

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[5] Following a phone conversation with the Clerk's office on March 18, 2009, petitioner omitted all but the September 17, 2009 decision from the appendix as unnecessary to the Court's understanding of the case. S. Ct. Rule 14.1(i).

"untoward," but potentially devastating to the states and our system of federalism.

CONCLUSION

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

Dated: June 1, 2009

Respectfully submitted,

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