No. 081223

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

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
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
JENNIFER M. KIM
Supervising Deputy Attorneys General
**Counsel of Record*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1382
Fax: (415) 703-5480

Counsel for Petitioners

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

Of counsel:

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

QUESTION 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." Virtually all of the Circuits to have considered the issue, including the Ninth Circuit, have concluded that this provision may not be enforced by private parties under 42 U.S.C. § 1983, and respondents do not contend otherwise.

The question presented is whether Medicaid recipients and providers may nonetheless maintain a private 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.

LIST OF PARTIES

Petitioner is David Maxwell-Jolly, Director of the Department of Health Care Services, State of California, a position that he assumed effective January 1, 2009.

Respondents are Independent Living Center of Southern California, Gray Panthers of Sacramento, Gray Panthers of San Francisco, Gerald Shapiro, Pharm.D (d/b/a Uptown Pharmacy and Gift Shop), Sharon Steen (d/b/a Central Pharmacy), Mark Beckwith, Margaret Dowling, Tran Pharmacy, Inc. (d/b/a Tran Pharmacy), and Jason Young.

Respondent-Intervenors are Sacramento Family Medical Clinics, Inc., Theordore Mazer, M.D., Ronald B. Mead, D.D.S., and Acacia Adult Day Services.[1]

---

[1] Respondent-Intervenors did not participate in the briefing in the Ninth Circuit, but first sought to appear in that court on October 1, 2008, approximately two weeks after the Ninth Circuit issued the opinion at issue here. On February 2, 2009, the Ninth Circuit recalled its mandate, entered the appearances of Respondent-Intervenors, and issued a new mandate providing that "[t]he judgment of this Court, entered 9/17/08, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure."

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES – Continued

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 the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 543 F.3d 1050. The opinion of the district court, App., *infra*, 37a, is unreported.

STATEMENT OF JURISDICTION

The decision under review was issued on September 17, 2008. App., *infra*, 2a. Petitioner filed a Petition for Panel Rehearing and Petition for Rehearing En Banc, which the court of appeals denied on November 3, 2008. App., *infra*, 52a. On January 16, 2009, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including April 2, 2009. 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.

Title 42, section 1396a(a)(30)(A) of the Medicaid Act 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

A. The State Statutes at Issue (AB 5)

On January 10, 2008, the Governor of California declared a fiscal emergency and directed the California legislature into a special session. App., *infra*, 59a. In response, on February 15, 2008, the legislature enacted Assembly Bill No. 5 (AB 5). App., *infra*, 54a, 66a. The legislature found "that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California." App., *infra*, 64a. AB 5 enacted spending reductions to a variety of benefits programs, including Medi-Cal, the state's implementation of Medicaid. App., *infra*, 60a-66a.

Newly enacted California Welfare and Institutions Code § 14105.19(b)(1) reduced by 10 percent payments under Medi-Cal's fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers. Section 14105.19(b)(3) reduced payments to managed care plans by the actuarial equivalent of 10 percent. Finally, section 14166.245(b) reduced payments to acute care hospitals not under contract with the Department of Health Care Services (DHCS) for

inpatient services by 10 percent. Some services were exempted from the cuts, including services provided by certain acute care hospitals, federally qualified health centers, rural health clinics, hospices, public hospitals, and hospitals under contract with the state. Cal. Welf. & Inst. Code §§ 14105.19(c), 14166.245(d).

The legislature directed DHCS to "promptly seek any necessary federal approvals for the implementation of" the rate reductions. Cal. Welf. & Inst. Code § 14105.19(g); *see also id.*, § 14166.245(f). On September 30, 2008, DHCS submitted a state plan amendment to the Centers for Medicare and Medicaid Services, which remains pending. App., *infra*, 67a-79a.

Respondents and intervenors are Medicaid beneficiaries, service providers, and advocacy groups that seek to enjoin DHCS's implementation of the payment reductions on the ground that they violate 42 U.S.C. § 1396a(a)(30)(A).

B. The Medicaid Act

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 establish and administer its Medicaid program through a state plan approved by HHS. 42 U.S.C. § 1396a. The receipt of federal funding is expressly conditioned on compliance with the Medicaid Act, and HHS is authorized to withhold funds for noncompliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35.

At issue here is a provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), that establishes some general principles regarding the utilization of, and the payment for, Medicaid care and services. A state plan must

> 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. . . .

42 U.S.C. § 1396a(a)(30)(A).

This Court has not previously considered whether § 1396a(a)(30)(A) is privately enforceable. However, in *Wilder*, this Court considered whether a different (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 created an individual "right," enforceable by providers 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 any provider challenges to rates under the Medicaid Act. 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. Courts have therefore concluded that "[o]ne of Congress's main objectives – perhaps its dominant objective – in repealing the Boren Amendment was to take away the right to sue under § 1983." *Pa. Pharmacists*, 283 F.3d at 540 n.15 (Alito, J.).

Since the Boren Amendment's repeal, seven courts of appeals have considered whether § 1396a(a)(30)(A) may be enforced by Medicaid providers or beneficiaries under 42 U.S.C. § 1983. The First, Third, Fifth, Sixth, Ninth, and Tenth Circuits have concluded that it does 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); *Pa. Pharmacists*, 283 F.3d at 541-42 (not enforceable by providers); *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 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, 127 S. Ct. 3000 (2007) (mem.).

C. District Court Proceedings

Respondents filed their lawsuit on April 22, 2008, in Los Angeles superior court. App., *infra*, 37a. DHCS removed the case to federal court. App., *infra*, 39a. In May 2008, respondents filed the operative first amended complaint and a motion for preliminary injunction. App., *infra*, 39a. They contended that the 10 percent payment reductions violate § 1396a(a)(30)(A) because, they claimed, the California legislature failed to consider the factors set forth within the federal statute when it enacted the payment reductions, and because the cuts could result in insufficient providers to provide care to Medi-Cal recipients. App., *infra*, 42a.

The district court denied respondents' motion for preliminary injunction. App., *infra*, 51a. The court observed that, in *Sanchez v. Johnson*, the Ninth Circuit held that § 1396a(a)(30)(A) did not confer individually enforceable rights. App., *infra*, 43a-46a. It concluded that respondents could not use a preemption claim under the Supremacy Clause to effectuate an end run around *Sanchez*. App., *infra*, 46a, 50a-51a. Accordingly, the court found that respondents had no likelihood of success on the merits and denied their motion. App., *infra*, 50a.

D. Ninth Circuit's Decision

The Ninth Circuit reversed the district court. As framed by the Ninth Circuit, the question presented on appeal was "whether the Supremacy Clause provides a valid cause of action to seek injunctive relief on the basis of federal preemption." App., *infra*, 16a. Ultimately, the Ninth Circuit held in the affirmative: that private parties "maintain[ ] a valid cause of action under the Supremacy Clause to assert . . . a claim for injunctive relief" where they claim that state legislation allegedly is preempted by federal law. App., *infra*, 36a.

The Ninth Circuit relied on a number of cases from this Court, including *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which this Court permitted preemption claims to proceed without analyzing whether the federal statutes at issue created privately enforceable rights. App., *infra*, 11a-15a. The Ninth Circuit characterized *Shaw* as "reaffirm[ing] the general rule that a plaintiff seeking to enjoin state law based on federal preemption maintains a valid federal cause of action." App., *infra*, 14a. In support, the Ninth Circuit quoted language from a footnote in *Shaw* that only addressed the jurisdictional basis for such suits. App., *infra*, 14a (quoting *Shaw*, 463 U.S. at 96 n.14) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.").

The Ninth Circuit considered and rejected DHCS's suggestion that the analysis might be different as to

federal Spending Clause statutes because it believed that this Court already had rejected such an argument in *Pharmaceutical Research and Manufacturers of America (PhRMA) v. Walsh*, 538 U.S. 644 (2003):

> The Director provides little, if any, justification for treating a claim of preemption under a federal statute passed pursuant to Congress's spending power differently from a claim of preemption under any of the federal statutes discussed above. But even if she had, this argument has also been flatly rejected by the Supreme Court and other circuits that have addressed the question.

App., *infra*, 20a. According to the Ninth Circuit, in *Walsh*, this Court "implicitly" assumed that "a private party seeking to enjoin implementation of a state law allegedly preempted by the federal Medicaid Act may bring suit for injunctive relief directly under the Supremacy Clause." App., *infra*, 24a. The court cited in support the fact that seven justices of this Court reached the merits of PhRMA's claim without addressing whether plaintiff had stated a valid claim for relief. App., *infra*, 23a. The Ninth Circuit also found "persuasive" recent decisions from the D.C. and Fifth Circuits that similarly construed *Walsh* as authorizing preemption challenges based on Spending Clause statutes that do not themselves create privately enforceable rights. App., *infra*, 24a-26a (citing *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004) and *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005)).

REASONS FOR GRANTING THE PETITION

If it remains unreviewed, the Ninth Circuit's decision will negate 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 "valid cause of action" exists to enforce a federal statute and enjoin state conduct *any time* a private party alleges a conflict between state and federal law. Thus, the Ninth Circuit concluded that the private parties here could state a claim under the Supremacy Clause based solely on their allegation of a federal-state conflict, even though § 1396a(a)(30)(A) is not privately enforceable under § 1983; even though the Ninth Circuit and other appellate courts have found § 1396a(a)(30)(A) to be "ill-suited" to judicial enforcement; even though HHS has not yet determined if there really is a conflict; and despite evidence that Congress does not want any provision of § 1396a to be privately enforced. *See Sanchez*, 416 F.3d at 1060; *Pa. Pharmacists*, 283 F.3d at 540 & n.15. If it stands, the Ninth Circuit's decision will result in a massive expansion in the states' liability under the Medicaid Act and potentially other Spending Clause statutes, and will render a nullity entire lines of cases that previously limited the circumstances in which private parties may sue a state.

The need for Court review is compelling because several courts of appeals – including the D.C., First, Second, Fifth, Eighth, Ninth, Tenth, and Federal Circuits – have now erroneously concluded that this Court already has resolved the question presented here. In permitting preemption claims to proceed based on Spending Clause legislation that is otherwise unenforceable under § 1983, several of these courts have relied on this Court's decision in *PhRMA v. Walsh*, which they believed (incorrectly) foreclosed arguments to the contrary. *Walsh* did not, however, address whether petitioner there 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 *implicitly* reached the validity of plaintiff's cause of action, which they saw as "jurisdictional," was clear error under this Court's precedent – error that only this Court may correct. *See Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002).

The issues in this lawsuit are important and recurring. The federalism concerns are especially substantial because of the Spending Clause context. A state's voluntary participation in Medicaid effectuates a contractual relationship between that state and the federal government. Congress itself has specified the remedy that applies when a state breaches the agreement and then fails to cure its breach on proper notice: HHS may withhold federal money. To allow private parties to sue to compel, in

effect, a different contract remedy – a state's specific performance – is to disrespect the voluntary nature of the state's continuing participation in a "cooperative" program. Because so many state decisions are premised on funds received under exactly this type of arrangement with the federal government, the states' liability under the type of lawsuit sanctioned here would be virtually unlimited.

I.

THE NINTH CIRCUIT'S DECISION UNDERMINES THIS COURT'S DECISIONS LIMITING WHEN FEDERAL STATUTES MAY BE ENFORCED IN § 1983 ACTIONS OR THROUGH IMPLIED CAUSES OF ACTION

The Ninth Circuit adopted an expansive theory of state liability that, if unaddressed, will nullify over 30 years of decisions from this Court establishing limitations on private suits against the states. Under the Ninth Circuit's theory, to state a valid cause of action for injunctive relief, all a plaintiff need do is allege the existence of a conflict between a state statute (here, AB 5) 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 cases: *Cort v. Ash* and its progeny; and *Pennhurst State School and Hospital v. Halderman* and its progeny, including *Gonzaga University v. Doe*.

1. In the *Cort* and *Pennhurst-Gonzaga* lines of cases, this Court has repeatedly addressed and effectively resolved a difficult problem: when to permit private enforcement of a federal statute enacted by Congress when Congress itself has declined expressly to authorize private lawsuits. Although there are analytical differences, in *both* contexts 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 Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008).

Thus, in *Cort v. Ash*, this Court recognized four 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 US. 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 681-82 (Thomas, J., concurring in judgment).

2. 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 previously considered so important by this Court. The potential impact of such

a theory is dramatically demonstrated by its application in the present case, where it was utilized by the Ninth Circuit to revive a type of claim that heretofore was precluded by this Court's and the Ninth Circuit's own precedents.

Respondents do not dispute that the provision at issue here, § 1396a(a)(30)(A), may not be privately enforced under any of the traditional theories of state liability previously recognized by this Court. That is, respondents may not sue directly under § 1396a(a)(30)(A) because no implied right of action exists under the Social Security Act, of which Medicaid is a part. *Maine v. Thiboutot*, 448 U.S. 1, 6 (1980); *Edelman v. Jordan*, 415 U.S. 651, 674 (1974).

In addition, private enforcement of § 1396a(a)(30)(A) is unavailable under § 1983 because, as the Ninth and five other circuits have held (and respondents do not dispute), § 1396a(a)(30)(A) does not create any privately enforceable rights. *See, e.g., Sanchez*, 416 F.3d at 1059 ("[T]he flexible, administrative standards embodied in the statute do not reflect a Congressional intent to provide a private remedy for their violation."); *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"). To the contrary, through its repeal of the Boren Amendment, Congress indicated its intention to preclude private suits under § 1396a. *Pa. Pharmacists*, 283 F.3d at 540 n.15; H.R. Rep. No. 105-149, *supra*, at 590. Moreover, as the Ninth

Circuit itself explained in *Sanchez*: "[t]he language of § 30(A) is . . . ill-suited to judicial remedy; the interpretation and balancing of the statute's indeterminate and competing goals would involve making policy decisions for which this court has little expertise and even less authority." 416 F.3d at 1060. In this respect, § 1396a(a)(30)(A) contrasts significantly from the Boren Amendment that this Court considered in *Wilder*. *See Pa. Pharmacists*, 283 F.3d at 538 (Alito, J.) (contrasting § 1396a(a)(30)(A) and the Boren Amendment).

Dressing the lawsuit up as a preemption challenge should not change the conclusion that the statute is not privately enforceable. This Court's preemption cases make clear that, here too, congressional intent is relevant and potentially dispositive. *See Wyeth v. Levine*, No. 06-1249, ___ U.S. ___, 2009 WL 529172, at *5 (March 04, 2009) (congressional intent is the "ultimate touchstone in every preemption 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 "valid cause of action" despite evidence that Congress intended to preclude private suits. Further, adopting a theory under which private preemption claims may proceed under the Supremacy Clause as to purported conflicts 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.

In addition, the same concerns about judicial enforcement that the courts have identified with respect to § 1396a(a)(30)(A) in the § 1983 cases also apply here. State compliance with such policy-laden objectives is appropriately reviewed by HHS, the federal agency charged with enforcing the Medicaid Act, rather than the courts acting at the request of private parties. Indeed, implying a private cause of action in this case would effectuate a judicial usurpation of HHS's obligation to review California's pending state plan amendment. *See Walsh*, 538 U.S. at 661 (Secretary of HHS's determinations with respect to proposed state plan amendments under the Medicaid Act are "presumptively valid"). The principle of deference to agency decisions is substantially undermined if a court can determine on its own, in a private suit brought preemptively before HHS has acted, whether a state's proposed plan amendment complies with the Medicaid Act. The Court can avoid separation-of-powers problems by limiting judicial involvement to that expressly contemplated by the Medicaid Act itself – i.e., review of the Secretary's decision. *See Walsh*, 538 U.S. at 675 (Scalia, J., concurring in judgment).

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"); *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"). 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.").

This Court should act to ensure that its decisions in cases such as *Cort*, *Pennhurst*, *Blessing*, *Sandoval*, and *Gonzaga*, and the plethora of lower court decisions issued in reliance on this Court's precedent, are not effectively nullified.[2] This Court has developed a

---

[2] The courts have held that various spending statutes do not create "rights" and therefore are not privately enforceable under § 1983. *See, e.g., Gonzaga*, 536 U.S. 273 (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g); *Blessing,* 520 U.S. 329 (Child Support Enforcement Act, 42 U.S.C. §§ 651-669b); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199 (3d Cir. 2008) (No Child Left Behind Act, 20 U.S.C. §§ 6311(h)(6), 6316(b)(6)); *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006) (Temporary Assistance to Needy Families Act, 42 U.S.C. § 657(a)); *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) (Adoption Assistance and Child Welfare Act, 42 U.S.C. § 675(5)(D), (E)); *Grammar v. John J. Kane Reg'l*

(Continued on following page)

sensible and workable scheme for determining when a private cause of action may be implied in the absence of express congressional authorization. That scheme will be rendered meaningless if, as the Ninth Circuit has held (along with the D.C., First, Fifth, and Eighth Circuits, *see infra* Part II), a cause of action for injunctive relief lies any time there is an alleged conflict between a state and a federal statute.

II.

RECENT CIRCUIT COURT DECISIONS HAVE MISREAD THIS COURT'S PRECEDENT AND CREATED A SPLIT WITH THE ELEVENTH CIRCUIT REGARDING THE AVAILABILITY OF PRIVATE PREEMPTION LAWSUITS BASED ON FEDERAL STATUTES THAT ARE NOT OTHERWISE PRIVATELY ENFORCEABLE

There is a compelling need for this Court's review because of confusion and conflict among the courts of appeal regarding the viability of private suits like the present one, which only this Court can resolve. In addition to the Ninth Circuit, the D.C., First, Fifth, and Eighth Circuits also have recently authorized

---

Ctrs.-Glen Hazel, No. 06-781, 2007 WL 1087751 (W.D. Pa., Apr. 6, 2007) (Federal Nursing Home Reform Act, 42 U.S.C. §§ 1395i-3 & 1396r); *Williams v. U.S. Dep't of Hous. & Urban Dev.*, No. 04-CV-3488, 2006 WL 2546536 (E.D.N.Y. Sept. 1, 2006) (Housing & Urban Development Act, 12 U.S.C. § 1701u); *Almendares v. Palmer*, No. 3:00-CV-7524, 2002 WL 31730963 (N.D. Ohio Dec. 3, 2002) (Food Stamp Act, 7 U.S.C. § 2020(e)(1)(B)).

such lawsuits, based largely on a misperception that this Court already resolved the issue presented here in *PhRMA v. Walsh*. Further, the Ninth Circuit's decision has deepened a circuit split with the Eleventh Circuit, which has rejected precisely the implied cause of action theory adopted here. *See Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643-44 (11th Cir. 1990).

1. The Ninth Circuit's decision is the latest in a series of court of appeals decisions to permit preemption suits to go forward based on spending legislation that is not privately enforceable under § 1983. These decisions stem in large part from confusion over the scope of this Court's decision in *Walsh*.

On review in *Walsh* was the First Circuit's decision in *PhRMA v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003). In *Concannon*, the First Circuit rejected, on the merits, a Medicaid Act-based preemption challenge to Maine's Act to Establish Fairer Pricing for Prescription Drugs. Under the Act, drug manufacturers were required to enter into agreements with the state, similar to those used in the state's Medicaid program, to provide rebates for non-Medicaid customers, or else have their drugs subject to a prior-authorization requirement in Medicaid. *Id.* at 71-72. Plaintiff contended that the program conflicted with the Medicaid Act, specifically 42 U.S.C. §§ 1396a, 1396a(a)(19), 1396r-8(d)(1)(A), and 1396r-8(d)(5)(A), (B). *See id.* at 76-79. The First Circuit reached the merits of the case only after explaining 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.'" 249 F.3d at 73 (emphasis added, quoting *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000)). Accordingly, the court rejected Maine's argument that plaintiff lacked "prudential standing" to bring its challenge, and proceeded to an analysis of the merits of plaintiff's lawsuit.

This Court affirmed the First Circuit's decision in *Walsh*. However, the plurality opinion did so without considering whether the underlying Medicaid statutes created any privately enforceable rights or whether Congress intended to create a private remedy in the federal courts for violations of the statutes at issue. Instead, this Court held, as had the First Circuit, that on the merits, Maine's Act did not conflict with the Medicaid Act. 538 U.S. at 662-68. As alluded to earlier, two justices of this Court wrote separately to suggest that plaintiff may not have stated a valid cause of action, and a third to suggest that the district court should have respected the primary jurisdiction of HHS. *Id.* at 675 (Scalia, J., concurring in judgment); *id.* at 675-83 (Thomas, J., concurring in judgment); *id.* at 672-73 (Breyer, J., concurring in part, and concurring in judgment).

The D.C. Circuit subsequently interpreted *Walsh* as having implicitly held that plaintiff had stated a valid preemption cause of action under the Medicaid Act. In *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir.

2004), the court rejected a preemption challenge to a different state's drug rebate program, the Michigan Best Practices Initiative, again on the merits. Significantly, the court rejected the state's argument that there could be no preemption lawsuit because the Medicaid provisions at issue did not support a private right of action. 362 F.3d at 819 n.3 (explaining that defendant argued that there was "no private right of action for injunctive relief against the state based on Justices Scalia's and Thomas's separate opinions in *PhRMA v. Walsh*."). The court held that, "[b]y addressing the merits of the parties' arguments without mention of any jurisdictional flaw, the remaining seven Justices [in *PhRMA v. Walsh*] appear to have *sub silentio* found no flaw." *Id.*

The D.C. Circuit erred to the extent that it interpreted this Court's willingness to review the merits of the preemption challenge in *Walsh* as containing an implicit holding that a valid cause of action existed. This Court has repeatedly emphasized that the absence of a valid cause of action is not a jurisdictional flaw. *See, e.g., Verizon*, 535 U.S. at 642-43 ("'[T]he 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.'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998))); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Accordingly, this Court has often been willing to assume – without deciding – that a valid cause of

action existed in order to proceed to an analysis of the merits of plaintiffs' claims.

Thus, in *Owasso Independent School District v. Falvo*, 534 U.S. 426, 431 (2002), this Court "assume[d], but without so deciding or expressing an opinion on the question, that private parties may sue an educational agency under § 1983 to enforce" the Family Educational Rights and Privacy Act (FERPA), in order to proceed to the merits of the case. Yet, in a separate case decided that very same term, the Court held that no such right exists under FERPA. *Gonzaga,* 536 U.S. 273; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (assuming for the purpose of the case, based on parties' concessions, that Telecommunications Act created rights enforceable under 42 U.S.C. § 1983).[3]

---

[3] There are two additional reasons why this Court did not implicitly rule that petitioner had stated a valid cause of action in *Walsh*. First, Maine did not specifically argue that petitioner lacked a private right of action, but only that it lacked prudential standing. Indeed, Justice Thomas, in his opinion concurring in judgment, stated that "careful consideration" should be given "to whether Spending Clause legislation can be enforced by third parties in the absence of a private right of action" through a preemption lawsuit, but that the Court could not reach the issue because "Respondents have not advanced this argument in this case." *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment). Second, as petitioner argued in its reply brief on the merits in this Court, Maine was foreclosed from pressing its contention in this Court because the state did not file a cross-petition on that issue. Reply Brief of Petitioner at 1 n.1, *PhRMA v. Walsh*, 538 U.S. 644 (2002) (No. 01-88).

The Fifth Circuit also (mis)relied on this Court's decision in *Walsh* to authorize a preemption challenge based on a federal spending statute that did not create any "rights" enforceable by plaintiffs. In *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), family planning and abortion services providers challenged a Texas funding restriction on the ground that it "violate[d] the Supremacy Clause . . . by imposing additional eligibility requirements on Appellees' receipt of federal funds that are inconsistent with the federal funding statutes," including Title X of the Public Health Service Act and Title XX of the Social Security Act. 403 F.3d at 328 (footnote omitted). Citing this Court's decision in *Shaw v. Delta Air Lines, Inc.*, the court of appeals held that the district court had "jurisdiction," under 28 U.S.C. § 1331, over a "preemption claim seeking injunctive and declaratory relief." *Id.* at 331. The court then rejected 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." *Id.* Citing this Court's decision in *Walsh*, the court asserted that "seven Justices [there] assumed both that the federal courts have jurisdiction and that a claim was stated for Spending Clause preemption, tacitly rejecting the suggestion advanced by two concurring Justices – and today espoused by [defendant] – that no claim was stated." *Id.* at 332. The court also cited, with approval, authorities suggesting that the Supremacy Clause may be the source of an

implied right of action to enjoin state or local regulations that are federally preempted. *Id.* at 334 n.47.

Based on similar reasoning, the Eighth Circuit has also recently held that a preemption claim may proceed under the Medicaid Act even if the provision at issue does not create any privately enforceable rights. In *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), disabled Medicaid recipients sought to challenge a Missouri Medicaid regulation that curtailed provision of durable medical equipment to most categorically-needy Medicaid recipients on the ground that it conflicted with, *inter alia*, the "reasonable-standards" requirement of federal Medicaid Act, 42 U.S.C. § 1396a(a)(17). The court of appeals held that § 1396a(a)(17) does not create an "individual right," and that its language is "'too vague and amorphous for judicial enforcement.'" 451 F.3d at 509. And, the court recognized that the Supremacy Clause "is not the direct source of any federal right, but 'secures federal rights by according them priority whenever they come in conflict with state law.'" *Id.* (quoting *Golden State Transit*, 496 U.S. at 107). Nonetheless, the court allowed plaintiff's claim to proceed because "[p]reemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when a state law conflicts with a federal statute or regulation." *Id.*

The remaining circuits have not 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, the Federal,[4] Second,[5] and Tenth[6] Circuits appear to accept that, at least with respect to other sorts of federal claims, the Supremacy Clause may create a preemption cause of action independently of whether the underlying federal statute creates privately enforceable rights.

---

[4] *See Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362, 1368 (Fed. Cir. 2007) (holding that court had jurisdiction over preemption challenge to District of Columbia's Prescription Drug Excessive Pricing Act; "though the plaintiffs' claim is created by principles of supremacy law, its resolution necessarily requires us to construe the patent statutes").

[5] *See W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222 (2d Cir. 1987) (holding that airline could bring Supremacy Clause challenge to local aviation regulation as preempted by federal statute, 49 U.S.C. § 1305(a)(1), even though no private right of action could be implied directly under the statute); *Burgio & Campofelice, Inc. v. N.Y.S. Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) (citing 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3566, at 102 (1984)).

[6] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action."); *Joseph A. ex rel. Corrine Wolf v. Ingram*, 275 F.3d 1253, 1265 (10th Cir. 2002) (explaining, in rejecting Eleventh Amendment defense, that plaintiffs "are not trying to create a private right of action against the Department under the Social Security Act," but rather were pursuing "an implied cause of action" under *Ex parte Young*, 209 U.S. 123 (1908) and the Supremacy Clause); *see also Day v. Bond*, 511 F.3d 1030, 1033-34 (10th Cir. 2007) (citing *Qwest*, 380 F.3d 1258, with approval and harmonizing decision with *Planned Parenthood*, 403 F.3d 324), *cert. denied*, 128 S. Ct. 2987 (2008).

2. The Ninth Circuit's decision, together with those from the D.C., First, Second, Fifth, Eighth, Tenth, and Federal Circuits, conflicts with the Eleventh Circuit's decision in *Legal Environmental Assistance Foundation v. Pegues*. In *Pegues*, the Eleventh Circuit rejected the contention 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.

In *Pegues*, an environmental group sued a state entity that issued national pollution discharge elimination system permits that purportedly did not comply with the Federal Water Pollution Control Act. Although the Act at issue expressly authorized certain private party suits (e.g., a citizen suit against an alleged polluter for violating the Act), it did not expressly authorize the type of suit at issue. The court of appeals observed that this Court had previously concluded that no additional private causes of action could be implied directly under the Act:

> In *Middlesex County Sewerage Authority v. National Sea Clammers Association* [453 U.S. 1 (1981)], the Supreme Court reviewed the "unusually elaborate" enforcement and review provisions of the Act, and held that "both the structure of the Act[ ] and [its] legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied."

904 F.2d at 643 (footnotes omitted). Consequently, the court said that plaintiff was "[s]eeking to sidestep the holding of *Sea Clammers*" by arguing that "a constitutional cause of action should be implied directly from the Supremacy Clause." *Id.*

The court refused to permit plaintiff to "sidestep" *Sea Clammers*, and affirmed dismissal of plaintiff's case because "the Supremacy Clause does not grant an implied cause of action for the relief sought." 904 F.2d at 641. The court recognized that some authorities, including Wright and Miller's *Federal Practice and Procedure*, have suggested that the Supremacy Clause creates an implied right of action for injunctive relief:

> A leading treatise has concluded that "[t]he best explanation of *Ex Parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officials who are threatening to violate the federal Constitution or laws." . . . In addition, [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 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).[7] The court's reasoning and holding flatly contradicts that of the D.C., First, Second, Fifth, Eighth, Ninth, Tenth, and Federal Circuits.

III.

THE NINTH CIRCUIT WRONGLY DECIDED A RECURRING AND IMPORTANT ISSUE

The question presented in this lawsuit is both important and recurring. The rule adopted by the Ninth Circuit implicates important principles of federalism, and could, if left unaddressed, radically change the means by which alleged conflicts between state and federal laws are resolved when they arise, by shifting some of the burden of resolving such issues from federal agencies to federal courts. The federalism concerns are especially sensitive in this case because of its Spending Clause context. The Medicaid Act creates, in effect, a contractual relationship between the states and the federal government

---

[7] The Eleventh Circuit has continued to insist that plaintiffs demonstrate congressional intent to create a private right of action before a preemption claim may proceed. *See, e.g., Bellsouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169, 1189-92 (11th Cir. 2001) (holding that telecommunications companies could bring preemption claim only after determining, based on analysis of Congressional intent, that the "Act creates a private right of action" for private parties seeking preemption of a state or local statute, ordinance, or regulation).

in which the agreement itself provides the remedies for noncompliance (i.e., potential loss of federal funding). *See* 42 U.S.C. § 1396c; *Gonzaga*, 536 U.S. at 280; *Pennhurst*, 451 U.S. at 11-12, 28; *see also Wilder*, 496 U.S. at 527 (Rehnquist, C.J., O'Connor, J., Scalia, J. & Kennedy, J., dissenting). To allow private parties to sue to, in effect, compel a state's specific performance – a contract remedy that Congress did not itself provide – is to eviscerate the voluntary nature of the underlying agreement in derogation of the state's sovereign right to choose not to comply.

As discussed in Part I, this Court's precedents make clear that Congress's intent is key in determining whether and how a federal statute may be privately enforced. Consistent with this precedent, a private preemption claim should not be authorized where there is no evidence that Congress intended such private enforcement and instead only provided an administrative remedy.

Here, the Ninth Circuit erred by ignoring these principles, and by instead relying on other decisions from this Court for propositions that this Court did not actually reach. The Ninth Circuit – like the D.C. Circuit and Fifth before it – misread this Court's decision in *PhRMA v. Walsh*. It erred when it concluded that this Court's willingness to reach the merits of petitioners' preemption claim carried an implicit determination that petitioner had stated a valid, as opposed to merely arguable, cause of action upon which relief may be granted. *See supra* Part II(1) (citing *Verizon*, 535 U.S. at 642, and other

authorities); *cf. Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

The Ninth Circuit also misread the scope of this Court's decision in *Shaw v. Delta Air Lines* and its progeny. In *Shaw*, this Court stated that the courts have "jurisdiction" over lawsuits to "enjoin state officials from interfering with federal rights," and did not reach the separate issue of whether such claims always state a "valid cause of action." *See* 463 U.S. at 96 n.14. This Court explained:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 (1908). 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, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. This Court has reiterated the limited, purely jurisdictional nature of this language in subsequent cases. *Verizon*, 535 U.S. at 642 (citing and quoting *Shaw* for proposition that claim that local regulation is preempted "'presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve'"); *Lawrence County v. Lead-Deadwood*

School Dist. No. 40-1, 469 U.S. 256, 259 n.6 (1985) (similar); *see also Pegues*, 904 F.2d at 643.[8]

The Ninth Circuit appears to have recognized the limited jurisdictional nature of this language from *Shaw*, but again assumed that this Court must have implicitly determined that there always is a valid cause of action to enjoin state action from the Court's willingness to reach the merits of plaintiffs' preemption claims in *Shaw* and its progeny. App., *infra*, 11a, 13a. In this respect, the court made the same error that it made with respect to this Court's decision in *Walsh*.

Nor could the Ninth Circuit properly rely upon *Ex parte Young* for the expansive theory of state liability that it adopted. This Court did not purport to create, in *Ex parte Young*, a new, stand-alone private cause of action to enforce federal statutes, but only eliminated a jurisdictional defense: it described an "exception" to the states' immunity under the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 102. Thus, a section 1983 action against a state official in his or her official capacity that seeks purely injunctive relief may be brought under the *Ex parte Young* exception. But to go further, and construe *Ex parte*

---

[8] Thus, the Ninth Circuit's belief that *Verizon* and *Lawrence* "reaffirmed" that a plaintiff asserting preemption under the Supremacy Clause necessarily states a valid cause of action, *see* App., *infra*, 15a, also was incorrect as the cited portions of the decisions only referenced jurisdiction. *Verizon*, 535 U.S. at 642; *Lawrence*, 469 U.S. at 259 n.6.

Young as the source of a private right of action to enforce federal statutes against state officials, would vitiate any and all limitations on private rights of action under federal statutes.

The issues presented here are likely to recur. Hundreds of billions of dollars are distributed to the states each year for cooperative federal-state programs such as Medicaid, the Temporary Assistance to Needy Families Act, No Child Left Behind Act, Food Stamp Act, FERPA, and Adoption Assistance and Child Welfare Act. *See* Office of Mgmt. & Budget, *A New Era of Responsibility: Renewing America's Promise*, Table S-4 (2009) (proposed budget would provide, *inter alia*, $695 billion for Social Security, $453 billion for Medicare, $290 billion for Medicaid, and $571 billion for other programs in FY 2010) *available at* http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf); *see also supra* n.2. These funds become the basis for an uncountable number of program decisions at the state level. If any program decision that allegedly is inconsistent with a federal statute may be the basis for a federal lawsuit – regardless of Congressional intent, and regardless of whether a federal "right" is involved – then the states' liability under such programs will be completely unbounded.

CONCLUSION

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

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

RICHARD T. WALDOW
KARIN S. SCHWARTZ*
JENNIFER M. KIM
Supervising Deputy Attorneys General

**Counsel of Record*

Counsel for Petitioners

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

Dated: April 1, 2009