No. 14-15

In The
Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

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

AMICUS CURIAE BRIEF FOR MEDICAID DEFENSE FUND IN SUPPORT OF RESPONDENTS

LYNN S. CARMAN
203A Picnic Ave.
San Rafael, CA 94901
lynnscarman@hotmail.com
Telephone: 415-927-4023

Counsel for Amicus Curiae Medicaid Defense Fund

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE[1]

Amicus, the Medicaid Defense Fund (MDF), is a nonprofit public interest law foundation, located in San Rafael, California, which is organized to secure, for charitable purposes, civil and economic rights of health care consumers, especially but not limited to their rights under the federal Medicaid Act.

To that end, MDF has freed up at least $400 million in funding for Medicaid programs in litigation sponsored and supported by MDF during 2004 through the present, in California to pay:

– pharmacies in the case of *Clayworth v. Bonta,* 295 F.Supp.2d 1110 (E.D. Cal. 2003), (preliminary injunction enjoining 5% cut to pharmacies in the Medicaid program in California);

– physicians, dentists, pharmacies, optometrists, adult health care centers, non-emergency medical transporters (NEMT), and home health agencies in *Independent Living Center v. Shewry,* 543 F.3d 1047 (9th Cir. 2008); *Independent Living Center v. Maxwell-Jolly,* 572 F.3d 644 (9th Cir. 2009);

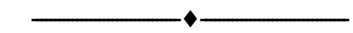
[1] This amicus curiae brief is filed pursuant to Consent to the filing of amicus curiae briefs in support of either party or of neither party, filed by counsel for Petitioners on November 17, 2014, and by Respondents on November 19, 2014. (Docket, Case No. 14-15). No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

(preliminary injunction enjoining 10% cut to these Medicaid providers); vacated without prejudice in *Douglas v. Independent Living Center,* 132 S.Ct. 1204 (2012); appeal vol. dismissed, August 2014; settlement approved by District Court (2014), pending CMS approval; (with providers retaining all payments received under the preliminary injunction);

– pharmacies, in *Managed Pharmacy Care v. Maxwell-Jolly,* 603 F.Supp.2d 1230 (2009); (preliminary injunction enjoining 5% cut to Medicaid pharmacies); vacated without prejudice in *Douglas v. Independent Living Center,* 132 S.Ct. 1204 (2012); appeal vol. dismissed, August 2014; settlement approved by District Court (2014), pending CMS approval; (with providers retaining all payments received under the preliminary injunction);

– pharmacies, in *California Pharmacists Assn. v. Douglas* 2:09-CV-08200 (C.D. Cal. 2010); (preliminary injunctions restraining Maximum Allowable Cost pharmacy payment reduction, and restraining Upper Billing Limit on Medi-Cal pharmacy payments); appeal pending.

A victory in this case by the Petitioners on the Question Presented would be ruinous to thousands of pharmacies and other providers in California, and worse, compromise if not destroy access to quality health care for millions of Medicaid beneficiaries in California, for whom the Medicaid Defense Fund is pledged to protect in the courts to the extent possible.



FACTUAL AND LEGAL BACKGROUND

The facts and the legal background of this case are set forth in the respective briefs filed by the Petitioners and the Respondents in this case.

SUMMARY OF ARGUMENT

Important principles compel the conclusion that the Medicaid provider Respondents have a cause of action under the Supremacy Clause to prevent injury from continuing action of the defendant state official, contrary to federal law.

The first principle is that law is not limited to just that part which deals with the withholding of rights, but, also includes the part of law which relates to remedies to prevent injury to cognizable interests of persons.

See Marbury v. Madison, 5 U.S. 137, 163 (1803),[2] and *Western Pacific, Cal. R. v. Southern Pacific Co.*, 284 U.S. 47, 51-52 (1931),[3] for the general proposition

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

(Emphasis supplied).

[3] A person is a "party in interest":

. . . if the bill discloses that some *definite legal right* possessed by the complainant *is seriously threatened or* that the unauthorized and therefore *unlawful*

(Continued on following page)

that relief may be had for injury to a cognizable interest of the plaintiff, not merely, only for the withholding of a right. So that a plaintiff is not out of court if he or she has no "right" created by Congress, if the plaintiffs sue – as in case at bar – to prevent injury under the injury branch of law, in which relief is granted under the equity jurisdiction of the courts.

See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 119 (1989) (Kennedy, J., dissent), and two circuit cases – *Western Air Lines, Inc. v. Port Auth. of NY and NJ,* 817 F.2d 222 (2d Cir. 1987), and *Burgio and Camofelice, Inc. v. NYS Dept. of Labor,* 107 F.3d 1000, 1006 (2d Cir. 1997) – as typical opinions which rule that injunctive relief is available to prevent injury from a State officer's action contrary to federal law, despite absence of any Congressionally-created right.

Thus Kennedy, J., asserted that:

> By concluding that Golden State may not obtain relief under § 1983, we would not leave the company without a remedy. . . . § 1983 does not provide the exclusive relief that the federal courts have to offer. . . . [P]laintiffs may vindicate . . . pre-emption claims by seeking . . . equitable relief in the district court through their powers under the federal

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

(Emphasis supplied).

> jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.).

(*Golden State,* 493 U.S. at 119).

> *Western Air Lines* explained, 817 F.2d at 225:
>
> A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.

(817 F.2d at 225), and:

> The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments. . . . A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority. . . . In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law. . . .

(817 F.2d at 225-226), and:

> The question whether the Supremacy Clause . . . may be used as a sword in bringing a § 1983 action is, of course, different from that decided in the affirmative by the Supreme Court in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980*)* – whether the Supremacy Clause may be

> invoked as a shield against the imposition of state taxes . . .

(817 F.2d at 226).

Essentially, the Question Presented and Petitioners' Opening Brief are strawmen which, by confining themselves to the irrelevant issue of whether Medicaid providers have any Congressionally-created "right," ignore the established law of remedies to prevent injury: namely, that no Congressionally-created "right" is required of a plaintiff, to obtain injunctive relief under equity jurisdiction of the courts, to prevent injury from continuing action, contrary to law, of any public official (be the official a federal officer or a State officer).

Second, the historical precedent is that the king – (here, a State) – must obey the law of the land and his officers may not injure any person except under the law of the land. (Magna Carta, 39 (nor will we go upon him nor send against him, except by . . . the law of the land); Hamburger, *Law and Judicial Duty,* 194-208, 216-217, 609 (2008).

Logically, without need of the Supremacy Clause, this fundamental principle embodied in federal law applies, by adoption of the Constitution by the people of each of the States, to both federal officers and State officers alike. (As to States, *see* The Federalist, No. 33, p. 205 (C. Rossiter ed. 1961) (A. Hamilton) (the Supremacy *C*lause "only declares a truth which flows

immediately and necessarily from the institution of a federal government); *Law and Judicial Duty,* 595.[4]

Under this common law principle, a State officer (the Petitioner Armstrong), who violates the law of the land (here, 42 U.S.C. § 1396a(a)(30)(A) – "Section 30(A)" – and the State plan, by not paying the rates specified by the State plan, in violation of Section 30(A), is stripped by the *ultra vires* character of the act of all powers to so act; so that persons injured thereby – i.e., Medicaid providers who are paid less than the federally imposed legal rate for their services – have a historically grounded cause of action under the equity jurisdiction of the courts to prevent, by injunctive relief, the irreparable injury of having to repeatedly sue the State to obtain the federally imposed legal rates as well as the irreparable injury of being prevented, by insufficient payments, from furnishing quality services to beneficiaries as required by Section 30(A).

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[4] As Hamilton put it, the new constitution extended "the authority of the union to the persons of the citizens," and thus rather than have to act "by military force" against the states, the government could exert itself "by the agency of the Courts" on individuals. This was the "COERCION of the magistry" instead of the "COERCION of arms." (*Id.* at 595).

Hamburger's thesis is that the Supremacy Clause merely made explicit what was already implicit in the Constitution, and was only added to ensure there was no dispute that by the Constitution, the law of the land – i.e., federal law was supreme throughout the country, any state law to the contrary. (*Id.* at 595-596).

See Pennhurst School and Hospital v. Halderman, 465 U.S. 89, 104-105 (1984):

> . . . [A]n official who acts unconstitutionally is stripped of his official or representative character, *[Ex parte] Young*, 209 U.S. 123, 160 (1908)[5] . . .
>
> [T]he *Young* doctrine has been accepted as necessary to . . . hold state officials responsible to the supreme authority of the United States. *Young, supra,* at 160.

Hence the fact, if it be a fact, that there is no Congressionally-created "right" in case at bar, is irrelevant in this case, which goes off on principles entirely unrelated to whether the plaintiff provider has a Congressionally-created "right" or not.

Third, the system of federalism implicitly created by the structure of the Constitution (*New York v. United States,* 505 U.S. 144 (1992); *Prinz v. United States,* 521 U.S. 898 (1997); and *Bond v. United States,* 131 S.Ct. 2355, 564 U.S. ___ (2011), was created for the benefit of the citizens of this country to preserve their liberty, by preventing any actor in the system – let alone sets of actors – from gaming the system to their advantage, contrary to the applicable laws enacted by Congress, to the oppression or injury of citizens.

See New York, 505 U.S. at 182-183.

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[5] 209 U.S. 123, 160 (1908).

Also see Bond, 131 S.Ct. at 2363-2364:

> Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.

and:

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.

Note: that reimbursement at less than the federally mandated amount, calculated as required by Section 30(A) and as required by the State Plan approved by CMS, is ongoing injury to Medicaid providers in case at bar.

And, to require the providers to repeatedly sue, each time that they are reimbursed less than the rates mandated by Section 30(A) and/or by the State Plan, is deemed, in equity, to be irreparable injury in and of itself.

Indeed, in view of the fact that milk producers had standing in *Stark v. Wickard,* 321 U.S. 288, 304-305 (1944) to be paid at rates mandated by Congress, so also do the Medicaid providers in case at bar have a similar injury, with right to sue to prevent being

injured by payments at less than the federally mandated rates:

> It is only when a complainant possesses something more than the general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. . . . We deem it clear that . . . these producers have such a personal claim as justifies judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations, which this Court upheld in *Columbia Broadcasting System v. United States,* 316 U.S. 407. In the present case a reexamination of . . . the facts and . . . the statute and Order will show that delivering producers are assured minimum prices [by the milk payment statute in question] for their milk. . . . The Order directs the handler to pay [the milk producer] that minimum.

Hence, Medicaid providers (for themselves and for the benefit of their beneficiary patients), have a cause of action, to vindicate and preserve the federalism system, for injunctive relief to prevent injury from continued action of the defendant officials which is contrary to both the requirements of Section 30(A) and the Act's requirement that a State operate its federally-funded Medicaid program in compliance with the State plan approved by CMS.

Summary and observation

The claim of the Petitioner's Brief – *that under the continued failure of CMS* to cut off all federal funding for the continuing violation of the Medicaid Act sued upon, that the State has a perfect right to deliberately continually flout federal law, and injure Medicaid providers – as well as injure beneficiaries in need of the services which Congress enacted them to receive – simply because Congress deigned not to enact any "rights" in providers – is judicially intolerable.

It might well be called the Marie Antoinette defense.

I.e., the position of the defendants is, that when the enforcement agency (here, CMS) fails to enforce the Medicaid Act, that we are free to violate and violate the Act, and injure and injure both Medicaid providers and their beneficiary patients by deliberately paying less than we have determined is the minimum payable under Section 30(A) and which minimum, to boot, has been approved by CMS.

This is especially contumacious where – as in case at bar – the case does not turn on whether Congress created any "enforceable rights," but, instead, turns on whether the traditional equity cause of action to prevent irreparable injury threatened by officials' violation of law, should continue to be so recognized and so sustained by the judiciary.

I.e., this extraordinary claim of Petitioners to be able to injure providers and beneficiaries with impunity, in violation of federal law – simply because another actor in the federalism system (CMS) chooses to continuously fail to enforce the Act – is flatly contrary to the bedrock principles above mentioned.

But even more troubling is that *both the State and CMS* are visibly gaming the federalism system, by acting in parallel, to their mutual monetary advantage, by the State violating the Act on the one hand, and CMS not cutting off federal funds to enforce the Act, on the other hand.

If the State of Idaho and CMS can thereby, by parallel action, willfully shred the federalism system in respect to Medicaid providers, to their monetary advantage, in continued violation of the Act – on the basis that providers may not sue to prevent injury to themselves or their beneficiary patients for whom they sue *jus tertii* – then all the other States and CMS can do the same in respect to all the remaining Social Security Act programs for the aged, infirm, and permanently injured of this country.

That is the grisly view from the promenade of the case at bar. This honorable Court should and must not permit the destruction of the federalism system, which the State and the Obama Administration, through CMS and the Solicitor General, propose to the Court, which will greatly injure millions of aged, disabled poor throughout the country.

ARGUMENT

I. The principle, that the king must obey his own laws, and that an officer who proposes to disobey the law of the land is thereby stripped, in equity, of all powers to so act to the injury of persons, has already been embedded *sub silencio* into federal jurisprudence in respect to federal officers. This principle should likewise, for the same reasons, be articulated and applied in State officer cases, such as the case at bar.

See injunctions to prevent injury from violation of federal law by a federal officer, in none of which the Respondents possessed any rights enacted by the statute being violated:

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

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

– *Abbott Laboratories v. Gardner,* 387 U.S. 136, 142-43 (1967): There is jurisdiction in equity for a suit to restrain the F.D.A., to prevent injury to a plaintiff, from implementing a regulation adopted contrary to the Federal Food, Drug, and Cosmetic Act of 1938. (387 U.S. at 142-43).

Essentially, the Administrative Procedure Act (A.P.A.), as initially enacted, was merely declaratory of existing case law. As stated in *Abbott Laboratories,* 387 U.S. at 142-143, the Department of Justice advised Congress in 1938 during the legislative process which resulted in the A.P.A., that:

> [E]ven without any express provision in the [A.P.A.] any citizen aggrieved by any order of the Secretary, who contends [an] order is invalid, may test the legality of the order by bringing an injunction suit against the Secretary, the head of the Bureau, under the general equity powers of the court. 83 Cong. Rec. 7892 (1938).

By parity of reasoning, these basic principles apply *ipso facto* to cases such as the case at bar, where it is State officers, not a federal officer, who are violating federal law.

In essence, the test is not whether the plaintiff has a Congressionally-created *right,* but rather, will the plaintiff be *adversely affected* by the officer's *ultra vires* action.

Cases of violation of a federal law by a State officer:

The following are cases in which injunctions issued to prevent injury from State officials' acts contrary to federal law, which threatened to injure the plaintiffs:

– In the *Golden State* case, 493 U.S. at 119, Justice Kennedy (dissenting) concluded that although the plaintiff union had no *rights* under the federal law in question, that nevertheless, the plaintiff had a cause of action for injunctive relief under the equitable powers of the courts.

– In *King v. Smith,* 392 U.S. 309 (1968), (Social Security Act, Title IV),[6] injunction issued to prevent injury to AFDC recipients, from implementing a State law contrary to the Act.

– In *Rosado v. Wyman,* 397 U.S. 397 (1970), (Social Security Act, Title IV), injunction issued to prevent injury to AFDC recipients from implementing a State law contrary to the Act.[7]

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[6] Because *King* was pleaded as an Equal Protection claim under the jurisdiction afforded by § 1983, the Court ruled instead on the pendent Supremacy Clause claims first (which was called a "statutory claim") so as to avoid if possible having to address and rule upon the pleaded Bill of Rights claim.

But a "statutory claim," where the plaintiff alleges injury from State violation of a federal statute, is, by any name, a preemptive Supremacy Clause cause of action.

[7] The Court exercised pendent jurisdiction to adjudicate the *Rosado* case the same as the Court adjudicated *King*: i.e., by deciding the underlying "statutory claim," – i.e., for injunction from State action in violation of federal law, which threatened to injure the plaintiffs: which by any other name is a preemptive Supremacy Clause cause of action.

See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. at 281 (1997) (An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to seek injunctive relief).

– *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. 356, 259 n.6.

– *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 485 (1983).

– *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

– *Ray v. Atlantic Richfield Co.,* 436 U.S. 151 (1978).

– *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992).

– *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.,* 461 U.S. 190 (1983).

– *Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963).

II. *Bond v. United States,* 131 S.Ct. 2355 (2011), resolves many issues in favor of the Respondents.

First. The theory of the Directors and the Government that a plaintiff must plead a "right" in order to maintain Article III standing and a cause of action under the Supremacy Clause, is completely trashed by the *Bond* decision. The Court held that Bond seeks to vindicate her own constitutional interests, and that an individual, in a proper case, can assert injury from

governmental action taken in excess of the authority that federalism defines. (*Id.,* 131 S.Ct. at 2363-2364).

Second. *Tennessee Elec. Power Co. v. TVA,* 306 U.S. 118 (1939), in particular – so heavily relied on by the defendants – is rejected out of hand. (*Id.,* 131 S.Ct. at 2361-2364).

Third. *Bond* holds that an adverse effect from a State or federal agency's action in violation of the federalism system, as in case at bar, is injury which is sufficient for Article III standing and cause of action purposes if the injury meets Article III prudential requirements. (*Id.,* 131 S.Ct. 2366-2367).

Fourth. An individual has a direct interest in objecting to State laws that upset the constitutional balance between the Union and the States when the enforcement of these State laws, is contrary to supreme federal law, and causes injury to the individual that is concrete, particular, and redressable. (131 S.Ct. 2366-2367). In case at bar, the plaintiff Medicaid providers meet this test.

Fifth. The theory of the Director and the Government that because generally a plaintiff "cannot rest his claim on the legal rights or interests of others," that *ergo,* only the Government may assert a claim for the within State violations of Section 30(A), is irrelevant in case at bar.

This is because here the Medicaid providers are asserting their own injury from State government

action taken in excess of the limits on a State that federalism defines. (131 S.Ct. at 2363-64).

I.e., here the plaintiffs assert their own injuries (and the injuries of beneficiaries who are their patients, clients, or members for whom they are *jus tertii* virtual representatives), from State action which is in excess of a limitation on State authority that federalism defines).

NOTE:

The federalism defense was raised by Bond as a defense in proceedings commenced against Bond; whereas, in case at bar, the plaintiffs allege their Supremacy Clause defense in a preemptive suit in equity to prevent irreparable harm to themselves (as well as their beneficiary patients). Such preemptive suits in equity are commonplace, where the injury stems from the State's violation of a restriction placed upon it by federal law (constitutional or statutory).

Such preemptive suits to prevent irreparable injury are well established, under the equity jurisdiction afforded to the federal courts by Congress, and by jurisdiction afforded to the federal courts by 28 U.S.C. § 1331. *See, Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281 (1997), (an allegation of an ongoing violation of federal law with request for prospective injunctive relief is ordinarily sufficient under *Ex parte Young,* 209 U.S. 123); *Golden State,* 493 U.S. at 119 (Kennedy, J., dissent); *Board of Liquidation v. McComb,* 92 U.S. 531, 540-541 (1876)

(Contracts Clause violation); *Allen v. Baltimore & Ohio R. Co.,* 114 U.S. 311 (Contracts Clause violation); John Harrison, *Ex parte Young,* 60 Stan. L. Rev. 989, 997-999 (2008).

Conclusion

For the above reasons, the plaintiffs have Article III standing and a cause of action to obtain injunctive relief to prevent being injured from the Directors' preempted acts to implement Idaho law contrary to, hence preempted under the Supremacy Clause, by Section 30(A) and the Medicaid requirement of 42 U.S.C. § 1396a(a) that the Petitioner conform to the State Plan approved by CMS.

III. The Respondents also have a federalism cause of action, to prevent injury from the acts of the Directors contrary to, hence preempted under the Supremacy Clause by the supreme federal law, Section 30(A), and the State Plan conformance requirement of 42 U.S.C. § 1396a(a).

A

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

Federalism is, simply, the allocation in the Constitution of powers to the national government, the

reservation of all other powers to the states, and the provisions, which include the Supremacy Clause, which allocate federal/state powers by limiting State powers, which created the boundaries between, and the spheres of power of the national Government, the States, and the three branches of the Government.

Central to federalism is the principle, which the Court has recognized since the beginning, that a State law must yield to a contrary federal law.

Also, the doctrine of federalism is based on the premise that the Constitution is not a compact between and for the benefit of sovereign governments, but, rather, was stated to be and was adopted by the People, for *their* protection. *New York,* 505 U.S. at 181:

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

(Boldface emphasis supplied).

B

de Tocqueville is informative on this subject

In *Democracy in America* (1839) de Tocqueville analyzed the allocations and the conflicts between federal and State powers.

He reported that a chief concern of the Framers was "to arm the Federal government with sufficient power to enable to resist, within its sphere, the encroachments of the several states," but, at the same time, to avoid confrontation of the Union directly against a State, wherever possible.[8]

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

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

(Boldface emphasis supplied).

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[8] *See,* Alexander Hamilton, prior cited on this point at Footnote 4.

Amicus comments that the true function of the Court, to preserve the federalism system when, as in case at bar, two of the primary actors are gaming the system to their mutual financial advantage (consisting of savings from less expenditures for Medicaid services), is to accept these providers – who are injured by *ultra vires* State and Government action – who come into the Court to seek preventive relief.

For, without such injured victims of federalism violations who sue to obtain injunctive relief to prevent prospective injury, the federalism system could not be maintained.

As per de Tocqueville, it is the private interests of these injured providers which alone is the means of assailing the measures at bar which are prejudicial to the Union, (namely, continual violation by defendants of Section 30(A) and the 42 U.S.C. § 1396a(a) requirement that the State comply with the State Plan approved by CMS).

Inclusion, rather than rejection of the Medicaid provider plaintiffs should therefore be the preferred goal of the Court, so as, by deeming that providers have standing and a cause of action, the Court can fulfill its constitutional mission of preserving the federalism system, despite the obvious gaming of the system, by (1) the payments below the standard approved by CMS, in violation of Section 30(A), and (2) the complicity failure of CMS to enforce the Medicaid Act by cutting off funding to Idaho's Medicaid program.

Conclusion as to the federalism cause of action

For the above reasons, the within federalism cause of action should be affirmed by the Court.

IV. The objections of the Petitioners that the State's acceptance of federal funding subject to the conditions of the Medicaid Act, constitutes a mere "contract," in which Medicaid beneficiaries are mere "incidental beneficiaries of a contract," is irrelevant to the case made by the Respondents.

Again the Petitioners misperceive the nature of an implied Supremacy Clause cause of action.

First

In a Supremacy Clause action, the preempting federal statute strips the officer of all authority and power to do the preempted acts complained of. The essence of the decree is the absence of all power in the defendant to adversely affect (i.e., injure) the plaintiff by the lawless acts complained of, not, whether the plaintiff was intended by the preempting statute or some putative "contract" to be benefitted.

Second

In *Golden State,* 493 U.S. at 118, Kennedy, J., dissenting, stated that the immunity afforded the taxi company by the stripping of the city, by the NLRA, of all authority and power to interfere in the labor

dispute between the company and the union, "**does not benefit the company as an individual**, but, instead results from the Supremacy Clause's separate protection of the federal structure and from the division of power in the constitutional system."

Thus, it makes no difference whatsoever in the Supremacy Clause claim of the plaintiffs, whether Congress in Section 30(A), or the "parties" to the "contract" intended to benefit Medicaid providers: because the **source of the immunity** afforded the plaintiffs is not the existence of any "right" created in them by Section 30(A) or the putative "contract," but, rather, the Supremacy Clause's protection of the federal structure by striking down and rendering void the preempted State action in question: which in turn renders the Directors powerless to implement the preempted State action of paying less than required by Section 30(A), including, paying less than the rates specified in the State Plan approved by CMS.

Conclusion on this point

For the above reasons it is irrelevant, in an implied Supremacy Clause cause of action, whether or not the plaintiffs were intended beneficiaries of the preempting federal law (here, Section 30(A)), or of some "contract" between the Government and the State.

V. The all-inclusive wording of the Supremacy Clause repels the construction proposed: that only "pre-enforcement" causes of action exist under the Supremacy Clause.

The words of the Supremacy Clause are clear: they include all preemption suits to prevent injury to a person from a State's violation of a supreme federal law, such as Section 30(A), not, just "pre-enforcement" suits in those limited cases in which the plaintiff's conduct is regulated by a State government.

Thus the Supremacy Clause 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. (Emphasis supplied).

There being no words of limitation or exception from this clear sentence, it follows that the Clause applies to **all** preemption suits in equity which seek a remedy to prevent being injured from a State's violation of a federal law, **not, just to some** preemption suits – i.e., to only so-called "pre-enforcement suits."

Because this defense is contradictory to the plain meaning of the words of the Supremacy Clause, it should be rejected on this basis alone.

Also, the fundamental rule is that the judicial power extends to all cases arising under the constitution. *Marbury v. Madison,* 5 U.S. at 178.

Hence the judicial power of the Court cannot be withdrawn in respect to any class of Supremacy Clause preemptive suits – which is what the Director and the United States are asking the Court to do.

VI. The Court has ruled directly opposite of this unsupported new theory of the Petitioners and the Government: that only "pre-enforcement" causes of action exist under the Supremacy Clause.

Kennedy, J., dissenting, approved a preemption suit in *Golden State*, 475 U.S. at 119, in which the preempting statute, the NLRA, regulated the defendant's conduct, not, the plaintiff's conduct.

The Court in *Rosado,* 397 U.S. at 421, issued equitable relief in respect to a preemptive Supremacy Clause cause of action, which regulated defendant's conduct, not, the plaintiff's conduct.

In that case the preempting law was a provision of the Social Security Act, Title IV (AFDC) which regulated the conduct of the State of New York, not the plaintiff.[9]

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[9] See, *Rosado*, 397 U.S. at 399; 414-15; 421. Concurrence: Douglas J.:

(Continued on following page)

The Court in the Contract Clause Cases, issued equitable relief in preemptive Supremacy Clause actions in which the State, not the plaintiff, was regulated. *Board of Liquidation,* 92 U.S. 531*; Allen,* 114 U.S. 311. I.e., the Contract Clause *prohibited the State* from interfering with contracts, and did not regulate the successful plaintiffs at all.

These decisions and the view of Kennedy, J., refute the erroneous assertion that there is no preemptive Supremacy Clause cause of action in the universe except where the plaintiff sues to enjoin State regulatory action which regulated the plaintiff's conduct.

VII. The claim that the Medicaid Act foreclosed Supremacy Clause suits has already been rejected by the Court, several times.

There is no evidence in the text or structure of the Medicaid that Congress intended to specifically foreclose any ability of beneficiaries or providers to

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The claims below included the "statutory claim" that "the State's reduction in the overall level of payments . . . violated § 402(a)(23) of the Social Security Act," so that the district court had pendent jurisdiction to decide the federal law claim. (397 U.S.C. at 423-425).

Thus *Rosado* was a suit to enjoin State action in violation of federal law, in respect to which the preempted State action had nothing to do with regulating the conduct of the plaintiffs in that case.

sue to obtain a remedy under any provision of the Act. *See Blessing v. Freestone,* 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 521 (1990), that federal government's power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, accompanied by limited state grievance procedures for individuals, was insufficient to preclude reliance on a cause of action for preemption.

Also, *see,* the seminal case of *Rosado,* 379 U.S. at 420:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, (1967); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). We adhere to *King v. Smith*, 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief.

CONCLUSION

First: This amicus brief addresses only the most important issues in this case. We do not purport to analyze all the other issues raised in this important case.

Second: For the reasons given, the Court should affirm the Ninth Circuit decision in this case in every respect.

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Respectfully submitted,

LYNN S. CARMAN
203A Picnic Ave.
San Rafael, CA 94901
lynnscarman@hotmail.com
Telephone: 415-927-4023

Counsel for Amicus Curiae
Medicaid Defense Fund