No. 14-15

In the Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Supremacy Clause give Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a State when Congress chose not to create enforceable rights under that statute?

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INTEREST OF AMICI

Several courts of appeals have held that the Supremacy Clause authorizes private lawsuits to enforce *every* federal statute against state officials—even when Congress has refused to provide a private right of action to

enforce that federal statute, and even when the statute does not create federal "rights" enforceable under 42 U.S.C. § 1983. *See, e.g.*, *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1058 (9th Cir. 2008); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). The amici curiae States have an interest in this case because they have been subjected to unwarranted lawsuits on account of this misguided interpretation of the Supremacy Clause.

SUMMARY OF ARGUMENT

The Ninth Circuit's "preemption" holding should be reversed for three independent reasons.

First, the Ninth Circuit erred by interpreting the Supremacy Clause to establish a constitutionally created private right of action to sue state officials. The Ninth Circuit's holding allows any private plaintiff with Article III standing to sue to enjoin any state law or regulation alleged to conflict with *any* federal statute—even when the federal statute fails to provide a private right of action for its enforcement. That approach to the private-right-of-action issue is incompatible with numerous decisions of this Court, and represents a radical departure from the notion that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Second, even if the Ninth Circuit were correct to recognize an implied right of action in this case, its holding should still be reversed because 42 U.S.C. § 1396a(a)(30)(A) is incapable of "preempting" state law. *See* Pet. Br. 49–54. The Medicaid Act does nothing more than establish criteria for federal reimbursement. It

does not obligate States to comply with the 42 U.S.C. § 1396a(a)(30)(A) once they accept federal Medicaid funds, and it affirmatively permits States to establish partially compliant Medicaid programs and risk a partial reduction (or total elimination) of federal reimbursement in the future. *See* 42 U.S.C. § 1396c; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012). The Medicaid Act is no different from the statute that promises to reduce federal highway funding for States that fail to maintain a 21-year-old drinking age. *See* 23 U.S.C. § 158(a)(1)(A). It is perfectly lawful for a State to depart from 42 U.S.C. § 1396a(a)(30)(A) and risk a reduction or cut-off of federal funds. The State may lose federal funds on account of that choice, but its choice is not (and cannot be) "preempted."

Third, even if the Medicaid Act were capable of preempting state law, and even if there were a cause of action to bring "preemption" claims against state officials, the Court should *still* reverse the Ninth Circuit's preemption holding under the doctrine of primary jurisdiction. Rather than engage in its own de novo interpretation of 42 U.S.C. § 1396a(a)(30)(A), which is rife with vague and ambiguous language, the Ninth Circuit should have abstained and waited for the Centers for Medicare & Medicaid Services (CMS) to opine on the legality of the State's policy. *Cf. Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1210 (2012) (holding that CMS's interpretations of the Medicaid Act "carr[y] weight").

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY HOLDING THAT THE SUPREMACY CLAUSE AUTHORIZES PRIVATE LITIGANTS TO SUE STATE OFFICIALS WHO VIOLATE FEDERAL LAW

The Ninth Circuit's understanding of the Supremacy Clause is untenable for many reasons—not least of which is that it renders 42 U.S.C. § 1983 superfluous and allows private litigants to make an end-run around the decisions from this Court that purport to limit state-official liability. *See Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence."); *see also* NGA Amicus Br. at 32–34. This Court has long held that state officials may be sued under section 1983 only when they violate federally protected *right*s—not whenever they violate some provision of federal *law*. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."); *see also Gonzaga Univ. v. Doe*, 536 U. S. 273, 286 (2002) ("[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."). Yet the Ninth Circuit declared that officials who act under color of state law may be sued for injunctive relief whenever

they violate *any* provision of federal law—so long as a litigant can establish Article III standing. *See Indep. Living Ctr.*, 543 F.3d at 1058 (endorsing "the right of private parties to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly preemptive statute confers any federal 'right' or cause of action."); Pet. App. 2–3. This means that Congress's decision to enact section 1983 was a meaningless gesture, and that Congress's decision to limit state-official liability to violations of federally protected "rights" has no legal effect.

All of this is well explained in Chief Justice Roberts's dissenting opinion in *Douglas*—and in other scholarly opinions that reject the Ninth Circuit's approach. *See Planned Parenthood of Kan. and Mid-Mo. v. Moser*, 747 F.3d 814, 822–36 (10th Cir. 2014); *The Wilderness Society v. Kane Cty.*, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting). Yet there are even more reasons why the Ninth Circuit's interpretation of the Supremacy Clause should be repudiated.

A. Nothing In The Language Of The Supremacy Clause Purports To Authorize Private Litigants To Sue State Officials For Violating Federal Law

Any analysis of whether the Supremacy Clause authorizes private lawsuits should begin with the text of that constitutional provision. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008). Yet the Ninth Circuit's opinion in *Independent Living Center* never deigns to analyze the constitutional text that it purports to interpret. Neither do the other federal appellate decisions

that claim to have discovered a private right of action in the Supremacy Clause. *See, e.g.*, *P.R. Tel. Co., Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997); *Lewis v. Alexander*, 685 F.3d 325, 345–46 (3d Cir. 2012); *United States v. South Carolina*, 720 F.3d 518, 526 (4th Cir. 2013); *Sanchez*, 403 F.3d at 333; *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012).

There is nothing in the language of the Supremacy Clause that could possibly establish a private right of action to sue state officials. The Supremacy Clause provides:

> 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.

This language merely provides a choice-of-law rule directed to the "Judges in every State." Those judges must regard the Constitution, federal statutes, and treaties as "supreme," while subordinating all other forms of law (such as state law, international law, and judicial precedents) to the "supreme Law of the Land." Nothing in the text of the Supremacy Clause purports to establish subject-matter jurisdiction for federal courts to adjudicate alleged conflicts between "supreme" and "non-

supreme" laws, and it assuredly does not provide a cause of action authorizing private litigants to sue state officers (or anyone else) who violate a provision of supreme federal law. The power of federal courts to adjudicate these disputes, and the right of private litigants to bring these claims, must come from some other source.

The Supremacy Clause says nothing about the crucial issues that define this cause of action that the Ninth Circuit claims to have found in the Constitution. Who can be sued under this cause of action? Anyone who violates a federal law or treaty? Only state officials? The State itself? And what relief may be obtained from these alleged federal lawbreakers? Money damages or only injunctive relief? Would there be a right to jury trial?[1] If the Supremacy Clause had been understood to authorize private lawsuits by persons seeking to vindicate federal law, one would expect the Supremacy Clause to say *something* about these questions. Its silence on these matters indicates that it does not authorize lawsuits by private citizens against state officials.

Indeed, it hard to imagine that the Constitution would have been ratified if the Supremacy Clause had been understood to establish a private right of action to sue state officials. The swift response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), shows that the notion of subjecting States to suit in federal court was unac-

[1] The Seventh Amendment secured the jury right only in cases at common law; most cases alleging a violation of a federal statute by state officials would fall outside the scope of the Amendment.

ceptable at the time of the founding,[2] and a construction of the Supremacy Clause that would permanently entrench a cause of action for private citizens to bring "preemption" lawsuits against States or state officials would likely have triggered an equally fierce reaction. The extent to which individual citizens may sue state officials for violating federal statutes is an issue that the Constitution leaves to congressional legislation; it is not entrenched or resolved in the Constitution itself. *See Alexander*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ("[T]he power of taking cognizance of any question between individuals, or between the government and individuals … must be given by written law.").

B. The Ninth Circuit's Interpretation Of The Supremacy Clause Is Irreconcilable With This Court's Rulings In *Alexander v. Sandoval*, *Horne v. Flores*, And *Maine v. Thibotout*

The Ninth Circuit's interpretation of the Supremacy Clause contradicts no fewer than three decisions of this Court.

The first is *Alexander v. Sandoval*, 532 U.S. 275 (2001), which explicitly and emphatically holds that pri-

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[2] *See Alden v. Maine*, 527 U.S. 706, 719–24 (1999); 1 Charles Warren, *The Supreme Court in United States History* 91–102 (rev. ed. 1926).

vate rights of action to enforce federal statutes must be created by Congress:

> Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*. 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. Statutory intent on this latter point is determinative. *Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander, 532 U.S. at 286–87 (emphases added) (citations and internal quotation marks omitted). The Ninth Circuit's decision defies *Alexander* by recognizing a private right of action to enforce a federal statute that was *not* "created by Congress." Worse, the Ninth Circuit turns *Alexander* on its head by authorizing private litigants to sue directly under the Supremacy Clause whenever Congress declines to create a cause of action to enforce a federal statute—a regime diametrically opposed to the holding of *Alexander*.

The second is *Horne v. Flores*, 557 U.S. 433 (2009). *Horne* holds that there is no private cause of action to advance a preemption claim under the No Child Left

Behind Act (NCLB), because Congress did not provide for a cause of action to enforce that federal statute:

> *Whether or not HB 2064 violates § 7902*, see Brief for United States as Amicus Curiae 31–32, and n. 8 (suggesting it does), *neither court below was empowered to decide the issue*. As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F.3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Horne, 557 U.S. at 456 n.6 (emphasis added).

The Ninth Circuit's interpretation of the Supremacy Clause is incompatible with this discussion in *Horne*. According to the Ninth Circuit's opinion in *Independent Living Center*, any litigant should be allowed to bring an NCLB "preemption" claim directly under the Constitution—regardless of whether the NCLB establishes a cause of action—even though *Horne* declares that federal courts are not "empowered to decide" these preemption claims. *See id.* And there is no possible basis on which a court can distinguish "preemption" claims brought under the NCLB from "preemption" claims brought under the Medicaid Act; both statutes were enacted as spending legislation.

The third is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that litigants may use 42 U.S.C. § 1983 to enforce federal statutes (and not merely constitutional

provisions) that create individual "rights," and defended this conclusion by noting that previous cases had allowed litigants to sue to enforce statutory provisions in the Social Security Act (SSA). Writing for the Court, Justice Brennan insisted that these earlier cases necessarily relied on section 1983 because that was the *only possible source* for a cause of action to enforce the SSA:

> [O]ur analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. . . . In each of the following cases *§ 1983 was necessarily the exclusive statutory cause of action* because, as the Court held in *Edelman v. Jordan*, 415 U.S. [651], at 673–674 [(1974)], *id.*, at 690 (Marshall, J., dissenting), the SSA affords no private right of action against a State.

Thiboutot, 448 U.S. at 5–6 (emphasis added). This passage makes clear that when the Social Security Act (or any other federal statute) fails to authorize private lawsuits against state officials, the *only* basis on which a private litigant may sue to enforce that statute is section 1983.

If the Ninth Circuit is correct, then *Thiboutot* is wrong. The Ninth Circuit held that section 1983 is *not* the exclusive cause of action for enforcing the SSA (even though *Thibotout* says that it *is*) because on the Ninth Circuit's view private litigants may sue directly under the Supremacy Clause regardless of whether section 1983 could authorize the suit. That means that *Thiboutot* was wrong to state that previous lawsuits brought

against state officials for allegedly violating the SSA necessarily relied on section 1983. Under the Ninth Circuit's reasoning, those pre-*Thibotout* cases could have relied on the Supremacy Clause to supply a cause of action, which means they do not have any implications for whether section 1983 is available to enforce statutory (as opposed to constitutional) rights.

C. The Ninth Circuit's Interpretation Of The Supremacy Clause Disables Congress From Precluding The Private Enforcement Of Federal Statutes And Treaties Against State Officials

The notion that the Supremacy Clause empowers private litigants to bring "preemption" claims against state officials who violate "supreme" federal law has radical and far-reaching implications. The Supremacy Clause gives treaties the same "supreme" status as federal statutes. *See* U.S. Const. art. VI, cl. 2 ("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 …"). So under the Ninth Circuit's reasoning, every treaty obligation that conflicts with state law should be enforceable through private lawsuits brought directly under the Supremacy Clause. Even when a treaty is non-self-executing or fails to provide a private right of action, a litigant could rely on the Supremacy Clause to supply the cause of action—just as the plaintiffs were permitted to do here. That would require this Court to repudiate its observation in *Medellin v. Texas*, 552 U.S. 491 (2008),

that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment *a*, p. 395 (1986)).

The Ninth Circuit's holding would also leave Congress powerless to preclude "preemption" lawsuits brought to enforce federal statutes, because the Supremacy Clause is part of the Constitution and cannot be altered through ordinary legislation. At oral argument in *Douglas*, counsel for the respondents acknowledged that a statute explicitly prohibiting private rights of action to enforce the Medicaid Act would be unable to prevent a "preemption" lawsuit, because the cause of action is derived directly from the Constitution and therefore immune from congressional revision. *See* Oral Argument Transcript at 34, *Douglas*, 132 S. Ct. 1204. Although counsel later denied that this claim was "necessary" to his position, *see id.* at 34–35, it logically follows from the Ninth Circuit's interpretation of the Supremacy Clause. If a constitutional provision gives private litigants a right to seek judicial redress against state laws that conflict with federal statutes, then Congress is powerless to revoke or limit that constitutionally conferred right.

Once it is acknowledged that Congress may alter or abolish the cause of action on which the plaintiffs rely, then this case is no longer about the meaning of the Supremacy Clause, but about the meaning that should be attributed to congressional silence. When a federal stat-

ute—such as the Medicaid Act—neither explicitly authorizes nor explicitly precludes private lawsuits to enjoin conflicting state laws, should that statute be interpreted as permitting or foreclosing private lawsuits?

Although there once was a time when this Court readily inferred private rights of actions from statutes that were silent on the question, *see, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), those days have long since passed. The Court today insists on affirmative evidence of "statutory intent" to authorize private lawsuits. *See, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. … The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."); *Alexander*, 532 U.S. at 286–87. It makes no sense to apply a general statutory presumption *against* private rights of action, while simultaneously applying the opposite statutory presumption when it comes to private rights of action to enforce federal statutes against state officials acting under color of a preempted state law or policy.

D. *Ex Parte Young* Offers No Support For The Ninth Circuit's Holding

Some courts and commentators have argued that *Ex parte Young*, 209 U.S. 123 (1908), supports the Ninth Circuit's interpretation of the Supremacy Clause. But *Ex parte Young* does not establish that private litigants may sue to enjoin the enforcement of any state law that conflicts with a federal statute.

Ex parte Young allows litigants to bring preemptive lawsuits to enjoin state enforcement proceedings against them. This cause of action does not rest on the Supremacy Clause but on principles of equity that allow potential defendants at law to assert their defenses preemptively by seeking the equitable remedy of an anti-suit injunction. *See* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008); NGA Amicus Br. at 26–30. Five members of the Court have endorsed this understanding of *Ex parte Young*—as have the Seventh and Tenth Circuits. *See Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) ("[*Ex parte Young*'s] negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *Douglas*, 132 S. Ct. at 1213 (Roberts, C. J., dissenting) (endorsing Justice Kennedy's explanation of *Ex parte Young*); *Planned Parenthood of Ind., Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012) (same); *Planned Parenthood of Kan. and Mid-Mo.*, 747 F.3d at 829–30 (same).

This view of *Ex parte Young* is far more sound than Professors Wright, Miller, and Cooper's claim that *Ex parte Young* authorizes private lawsuits for injunctive relief whenever a state official is accused of violating any provision of federal law. *See* 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3566, at 102 (1984) ("The 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 officers who are threatening

to violate the federal Constitution or laws."); *see also Burgio & Campofelice, Inc.*, 107 F.3d at 1006 (relying on Wright, Miller, and Cooper's treatise to support an implied right of action under the Supremacy Clause); *Chase Bank USA, N.A.*, 695 F.3d at 554 (same). If Professors Wright, Miller and Cooper's view of *Ex parte Young* were correct, then *Horne v. Flores* should have permitted the litigants in that case to challenge Arizona's statute as "preempted" by the No Child Left Behind Act, rather than declaring that the federal courts were not "empowered to decide the issue." 557 U.S. at 456 n.6; *see also supra* at 9–10. And it hard to see how the Wright-Miller-Cooper understanding of *Ex parte Young* can be squared with *Medellin*'s holding that treaties "generally do not create private rights or provide for a private cause of action in domestic courts." 552 U.S. at 506 n.3; *see also supra* at 12–13.

E. None Of The Arguments Offered By The Ninth Circuit Or The Respondents In *Douglas* Are Persuasive

The Ninth Circuit's opinion in *Independent Living Center* did not provide any independent analysis of the implied-right-of-action question. *See* 543 F.3d at 1055–64. Instead, the Ninth Circuit acted as if this Court had long ago resolved the issue. *Id.* at 1065 ("Under well-established law of the Supreme Court … a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The cases on which the Ninth Circuit relied, however, merely *assumed* the existence of a cause of action because the litigants did not contest the issue.

See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Pharm. Research & Mfg. of Am v. Walsh*, 538 U.S. 644 (2003). When a cause of action is assumed because the parties waived or failed to lock horns over the issue, the case does not establish that a cause of action exists. *See Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). A State that forfeits a no-cause-of-action defense by failing to argue the issue does not preclude future States from raising that defense—and it does not allow a court of appeals to pretend that the binding precedent of this Court forecloses judicial consideration of that defense.

Some of the respondents in *Douglas* tried to characterize federal *statutory* violations as *constitutional* violations. *See* Br. of Resp. Santa Rosa Memorial Hospital at 1–2, 9–10, *Douglas*, 132 S. Ct. 1204 (Nos. 09-958, 09-1158, 10-283), 2011 WL 3288334. Their argument proceeded as follows: (1) The Constitution establishes an implied right of action to seek injunctive relief to remedy all constitutional violations. *Id.* at 9–10, 22–26. (2) The Supremacy Clause makes any violation of the Medicaid Act by state officials into a constitutional violation. *Id.* at 10–11, 30–

31. (3) Therefore, the Constitution provides an implied right of action to enforce the Medicaid Act against state officials.

The syllogism is unsound because the major premise (1) is wrong. Not all constitutional violations authorize private litigants to seek injunctive relief under an implied right of action. The Full Faith and Credit Clause, for example, does not establish an implied cause of action for injunctive relief—and neither does 28 U.S.C. § 1738, the statute that implements that constitutional command. *See Thompson v. Thompson*, 484 U.S. 174, 182–83 (1988) ("[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action. Rather, the Clause only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.") (citations and internal quotation marks omitted); *see also Minnesota v. N. Sec. Co.,* 194 U.S. 48, 72 (1904). The Supremacy Clause may be characterized in much the same way. It "prescribes a rule by which courts … are to be guided" in cases of conflict between federal and state laws. *Thompson*, 484 U.S. at 182. There is no basis for asserting that every "constitutional" violation must give rise to a private judicial remedy for injunctive relief.

The minor premise of the syllogism (2) is also mistaken. State officials do not violate the federal Constitution whenever they violate a federal statute or treaty. If they did, then every violation of a federal statutory right

would *per se* violate a right "secured by the Constitution." 42 U.S.C. § 1983. And then there would have been no need for the Court to resolve in *Thiboutot*, whether violations of federal statutory rights are actionable under section 1983, which provides a cause of action for those deprived of rights "secured by the Constitution *and laws*." 42 U.S.C. § 1983 (emphasis added). Yet the Court did not even consider it a possibility that it could bootstrap violations of federal statutory rights into constitutional violations, and instead spent five pages of its opinion analyzing whether the phrase "and laws" should extend to federal statutes. *See* 448 U.S. at 4–8; *see also Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (noting that "a certificate of appealability may be granted only where there is 'a substantial showing of the denial of a *constitutional* right.' [28 U.S.C.] § 2253(c)(2) (emphasis added). To obtain the necessary certificate of appealability to proceed in the Court of Appeals, Medellín must demonstrate that his allegation of a *treaty* violation could satisfy this standard."); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 644 (11th Cir. 1990) ("To imply from the Supremacy Clause a cause of action against a state official for review of the Administrator's interpretation of the federal statute or, as here, to dispute the Administrator's interpretation of the regulations the Agency has promulgated, would be to bootstrap a statutory claim that should be asserted against the Administrator into a constitutional issue. Applying [*Ex parte*] *Young* in these circumstances would ignore the important distinction between remedies implied to redress constitutional violations and remedies, whether implied or express, for violations of statutory rights."); *Andrews v. Maher*, 525

F.2d 113, 118–19 (2d Cir. 1975) ("Plaintiffs also argue that a claim that state welfare regulations violate the Social Security Act is in fact a claim … of deprivation of rights "secured by the Constitution," because such a claim cannot succeed without ultimate resort to the Supremacy Clause. … We reject the contention because it transforms statutory claims into constitutional claims by verbal legerdemain.").

The argument also proves too much. If state officials violate Article VI of the Constitution whenever they fail to comply with "supreme" federal law, then do so private actors. The supremacy of federal law declared in Article VI is as binding on private citizens as it is on state officials. Yet no one contends that the Supremacy Clause provides a cause of action against private individuals who violate federal statutes or treaties. *See, e.g.*, *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 330 (5th Cir. 2008) (refusing to interpret the Supremacy Clause to establish a right of action "against private parties").

II. EVEN IF THE SUPREMACY CLAUSE ESTABLISHES A "PREEMPTION" CAUSE OF ACTION, THE PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE 42 U.S.C. § 1396a(a)(30)(A) IS INCAPABLE OF PREEMPTING STATE LAW

Even if one accepted the Ninth Circuit's dubious construction of the Supremacy Clause, there is a more fundamental problem with the plaintiffs' lawsuit: A state law or policy cannot be "preempted" by a federal statute that does nothing more than specify criteria for federal reim-

bursement. As the petitioners' brief convincingly demonstrates, the Medicaid Act is no different from the statute withholding federal highway money from States with a sub-21 drinking age. *See* 23 U.S.C. § 158(a)(1)(A).[3] It merely promises federal reimbursement to States that comply with the criteria in the Medicaid Act, and threatens to withhold part or all of that money from noncompliant States. That a State may be docked federal money for its policy decisions does not make those policy decisions unlawful.[4]

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[3] 23 U.S.C. § 158(a)(1)(A) provides: "The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."

[4] Neither the petitioners nor the amici States are arguing that spending legislation can *never* preempt state law. Some spending legislation, such as Title VI of the Civil Rights Act of 1964 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), imposes binding legal obligations on entities that accept federal funds. These statutes require any "program or activity receiving Federal financial assistance" to refrain from racial discrimination and accommodate religious liberties. *See* 42 U.S.C. § 2000d; 2000cc(a)(2)(A). Under these laws, entities must renounce or return federal aid before deviating from the specified conditions; otherwise they become federal lawbreakers by violating conditions imposed on the receipt of federal funds. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); Pet. Br. 50–51. The Medicaid Act does not use the language of Title VI or RLUIPA; nowhere does the Medicaid Act say anything akin to: "No State that receives federal Medicaid funds shall …" The Medicaid Act does nothing more than *promise* federal (continued…)

The idea that a State becomes legally bound to comply with 42 U.S.C. § 1396a(a)(30)(A) once it accepts federal Medicaid money is wrong. A State is not legally required to maintain a 21-year-old drinking age once it accepts federal highway money. Idaho could lower its drinking age tomorrow, wait for the Secretary of Transportation to respond by reducing federal highway funds on the first day of the next fiscal year, and proceed with business as usual. If anyone tried to sue Idaho officials on the ground that 23 U.S.C. § 158(a)(1)(A) "preempts" their efforts to lower the State's drinking age, the lawsuit would be dismissed on the ground that State officials have not violated any federal law—even though the State is acting in a manner that may cause it to lose federal money.

The Medicaid Act works the same way. If Idaho offers rates for residential rehabilitation services that depart from the criteria in 42 U.S.C. § 1396a(a)(30)(A), then Idaho may lose some or all of its federal Medicaid reimbursement. But Idaho does not violate federal law by provoking the Secretary of Health and Human Services to reduce or eliminate its federal funding. It is *perfectly lawful* to operate a non-compliant Medicaid program; nothing in federal law compels the States to permanently establish a fully compliant Medicaid program once they accept federal Medicaid money. And 42 U.S.C. § 1396c removes any doubt on this score by allowing the Secre-

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reimbursement to States whose Medicaid programs satisfy the criteria of 42 U.S.C. § 1396a. It is not possible for a State to "violate" such a statute.

tary to *continue funding* partially compliant States, by withholding only a portion of their federal Medicaid allotment:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C. § 1396c. This statute clearly and unequivocally gives States the lawful option of accepting a reduction (or even elimination) of federal payments and continuing with their non-compliant Medicaid programs. Yet on the

Ninth Circuit's view, no State could ever opt out of Medicaid or choose to accept a partial reduction in federal reimbursement—because a private litigant will be able to sue and enjoin the State's officials as soon as they deviate from *any* provision in the Medicaid Act. Only a belief that Medicaid is forever can support such an approach.[5]

It has become common for courts to say that States are legally bound to follow the provisions in the Medicaid Act once they decide to participate in the program. *See, e.g.*, *Sanchez*, 403 F.3d at 337 ("[O]nce a state has accepted federal funds, it is bound by the strings that accompany them."). That is not a defensible construction of the Medicaid Act, and in all events that proposition cannot be sustained after *NFIB v. Sebelius*. As this Court recognized in *NFIB*, the Medicaid Act explicitly permits the Secretary to continue funding a non-compliant State, and withhold funding only from the "categories" or "parts" of the State's program that fail to comply with the federal reimbursement criteria. *See* 42 U.S.C. § 1396c; *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J.); *id.* at 2642 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Partially compliant Medicaid programs are not on-

[5] Under the Ninth Circuit's reasoning, it is not clear how a State could ever opt out of this supposedly "voluntary" Medicaid program. Is the State required to return every dollar of federal reimbursement that it has received since the inception of Medicaid? *But see NFIB*, 132 S. Ct. at 2603–04 (prohibiting federal officials from imposing "coercive" penalties on States that choose not to comply with Medicaid's reimbursement criteria).

ly acceptable and lawful, they may even continue to receive federal money if the Secretary chooses to fund the compliant aspects of the State's program. Just as every State may decline to implement the Medicaid-related provisions in the Affordable Care Act and accept a reduced allotment of federal money, so too may a State establish a partially compliant Medicaid program and wait to see if the Secretary will defund part or all of the State's Medicaid program. A State does not violate *any* provision of federal law by acting in this manner.[6]

Finally, this Court has never rejected the argument that the Medicaid Act is incapable of "preempting" state law. Some decisions have *assumed* that the Medicaid Act may preempt state law—but only because the state's attorneys in those cases failed to argue (and therefore forfeited) the contention that the Medicaid Act does nothing more than establish criteria for federal reimbursement. *See* Br. for the Petitioners, *Ark. DHHS v. Ahlborn*, No. 04-1506, 2005 WL 3156905 (2005); Br. for

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[6] Neither the petitioners nor the state amici are arguing that withholding federal funds represents the exclusive means of "enforcing" the Medicaid Act against state officials. *See, e.g.*, *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 28 n.11 (1981); *Blessing v. Freestone*, 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring). The claim is that the Medicaid Act *does not impose any legal obligations* on participating States. Like the federal highway statute and the 21-year-old drinking age, the Medicaid Act merely offers federal reimbursement to state Medicaid programs that satisfy certain criteria. There simply are no federal obligations to "enforce," because a State *acts legally* when it deviates from provisions in the federal Medicaid Act.

the Petitioner, *Delia v. E.M.A.*, No. 12-98, 2012 WL 5532211 (2012). These cases do not and cannot establish a precedential holding that the Medicaid Act is capable of preempting state law—any more than the cases that assumed a private right of action because the issue went uncontested by the litigants can establish a precedential holding that a cause of action exists. *See supra* at 16–17; *see also Brecht*, 507 U.S. at 630–31 ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters*, 511 U.S. at 678 (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp.*, 531 U.S. at 557 (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). Neither Idaho nor the amici States can be precluded from making this argument simply because lawyers from other States omitted this claim in past Medicaid disputes.[7]

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[7] Nothing in this argument precludes Medicaid providers or beneficiaries from asserting federally protected "rights" under 42 U.S.C. § 1983. Title VI's prohibition on race discrimination imposes binding legal obligations on all entities that receive federal funds, which includes state Medicaid agencies. And there may be provisions in the Social Security Act that establish federal "rights" under the test in *Gonzaga*. But the statutory provision at issue in this case is nothing more than a condition for receiving continued federal reimbursement, and it neither imposes legal obligations on participating States nor creates federal rights. *See* 42 U.S.C. §§ 1396a(a)(30)(A), 1396c.

III. THE DOCTRINE OF PRIMARY JURISDICTION REQUIRED THE LOWER COURTS TO ABSTAIN AND REFER THIS MATTER TO CMS BEFORE ENJOINING THE STATE'S OFFICIALS

Even if this Court believes that the plaintiffs have a cause of action, and even if this Court further believes that the Medicaid Act is capable of "preempting" state law, the court of appeals' judgment should *still* be reversed under the doctrine of primary jurisdiction. "Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency." *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988); *see also Pharm. Research & Mfg. of Am.*, 538 U.S. at 673–74 (Breyer, J., concurring in part and concurring in the judgment) (noting that "the legal doctrine of 'primary jurisdiction' permits a court itself to 'refer' a question to the Secretary" and that "courts may raise the doctrine on their own motion"); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.4, at 946 (4th ed. 2002) ("[C]ourts frequently hold that an issue of federalism—an arguable conflict between the goals of a statute administered by a federal agency and the effects of a state action—should be referred to the federal agency for initial resolution under the primary jurisdiction doctrine."). The language of 42 U.S.C. § 1396a(a)(30)(A) is couched in vague and general terms that cry out for agency elaboration. *See, e.g.*, 42 U.S.C. § 1396a(a)(30)(A) (requiring a State's Medicaid plan to provide reimbursement "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"). The court of appeals should have abstained and referred this matter to CMS before enjoining the State's officials.

CMS has never disapproved or complained of Idaho's reimbursement rates for residential habilitation services. *See* Pet. Br. 7 ("At no time relevant to this case has CMS ever initiated any compliance action or otherwise complained about the State's rates or its compliance with the DD Waiver."). Nor has CMS opined on whether Idaho's policy comports with 42 U.S.C. § 1396a(a)(30)(A). In these situations, a federal court should give CMS an opportunity to express its views and defer to those views before embarking on a de novo interpretation of the Medicaid Act.

Douglas holds that CMS's interpretations of the Medicaid Act—and its judgments whether a State plan complies with the Medicaid Act—"carr[y] weight." The Court explained:

> The Medicaid Act commits to the federal agency the power to administer a federal program. And here the agency has acted under this grant of authority. That decision carries weight. After all, the agency is comparatively expert in the statute's subject matter. And the language of the particular provision at issue here is broad and general, suggesting that the agency's expertise is relevant in determining its application.

132 S. Ct. at 1210. *Douglas* did not resolve whether private litigants could ever challenge a CMS-approved state Medicaid plan by suing the State's officials (as opposed to suing the Secretary in an APA lawsuit), and left this issue for the Ninth Circuit to resolve on remand. *Id.* at 1211. But *Douglas* unequivocally holds that CMS's views are relevant in determining whether a lawsuit brought against state Medicaid officials can proceed, and in determining whether a State's policies comply with the reimbursement criteria in the Medicaid Act.

The court of appeals' approach permits private litigants to push aside CMS's interpretive role by filing a lawsuit before the agency has an opportunity to address the legality of the State's policy. That is incompatible with the role that *Douglas* establishes for CMS in interpreting the Medicaid Act. *See generally* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 395 (1982) (noting that when a statute "has imposed duties on the states, but has delegated to a federal agency the authority to enforce those duties against the relevant state officials … [the] recognition of a private cause of action … could disrupt the statutory enforcement scheme and undermine the agency's ability to make law and policy.")

When litigants challenge a Medicaid policy that CMS has neither approved nor disapproved, the federal court should stay its hand and solicit the agency's views before plowing ahead with its de novo views of what the Medicaid Act requires. *See, e.g.*, *Dartmouth-Hitchcock Clinic v. Toumpas*, No. 11-cv-358-SM, 2012 WL 4482857, at *1 (D.N.H. Sept. 27, 2012) (relying in part on *Douglas*); *Miller ex rel. v. Olszewski*, No. 09-13683, 2009 WL

5201792, at *8–*9 (E.D. Mich. Dec. 21, 2009); *Affiliates, Inc. v. Armstrong*, Nos. 1:09-cv-00149-BLW, 1:11-cv-00307-BLW, 2011 WL 3421407, at *7 (D. Idaho Aug. 4, 2011). This is especially true when interpreting a provision as ambiguous as 42 U.S.C. § 1396a(a)(30)(A).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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