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

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QUESTION PRESENTED

Whether the Supremacy Clause gives Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against state officials when Congress has not created enforceable rights under that statute.

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The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and reproduced in the appendix to the petition for a writ of *certiorari* ("Pet. App.") at 1. The initial opinion of the United States District Court for the District of Idaho is reported at 835 F. Supp. 2d 960 and reproduced at Pet. App. 15. The district court's decision on the petitioners' motion for reconsideration is unreported and reproduced at Pet. App. 7. The judgment of the district court is reproduced at Pet. App. 5.

JURISDICTION

The court of appeals issued its decision on April 4, 2014. Pet. App. 1. The petition for a writ of *certiorari* was filed on July 2, 2014 and granted, limited to question one presented by the petition, on October 2, 2014. The Ninth Circuit's jurisdiction arose from 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution 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.

2. A provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), provides:

> A State Plan for medical assistance 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. . . .

STATEMENT OF THE CASE

Idaho provides home- and community-based care to Medicaid-enrolled participants as an alternative to

institutionalization. It contracts with providers, who provide the service and are then reimbursed by the State. A group of these providers sued Idaho Medicaid officials, claiming the State's provider reimbursement rates were too low and so preempted by a Medicaid reimbursement provision. Under Ninth Circuit law, the providers had no enforceable rights under 42 U.S.C. § 1983 or the statute itself. The Idaho officials resisted the suit, but the district court allowed the case to proceed anyway based on a Ninth Circuit holding that all a plaintiff claiming preemption need show is Article III standing. The district court found Idaho's reimbursement rates to be too low in violation of the Medicaid Act. It ordered Idaho to raise its reimbursement rates and the Ninth Circuit affirmed.

This case presents the question left open in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012). And it involves the same Medicaid reimbursement statute, 42 U.S.C. § 1396a(a)(30)(A), or § 30(A) for short. We begin with the statutory scheme at issue.

Medicaid. Medicaid is a cooperative federal-state program that offers federal funding to states that provide medical assistance to "families with dependent children, . . . [and] aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. To qualify for federal funding, a state must comport with the Medicaid Act and its implementing regulations promulgated by the Secretary of the U.S. Department of Health and Human Services,

otherwise known as HHS. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

One such criterion for reimbursement – and the one underlying the suit in this case – is that states adopt and submit "plan[s] for medical assistance" to the Centers for Medicare and Medicaid Services – called CMS – for approval. 42 U.S.C. § 1396a(a); *see also* 42 C.F.R. § 430.10. Among other things, these plans 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).

States generally enjoy great flexibility in designing and administering their Medicaid programs. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985).[1]

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[1] This Court has said that Congress has given HHS "exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981). The Secretary of HHS has not adopted any

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A state's flexibility is not unchecked, though. Part of the ongoing relationship between participating states and CMS includes periodic program reviews by CMS, 42 C.F.R. § 430.32(a), and periodic audits conducted by the HHS Office of Inspector General, *id.* § 430.33. If these reviews or audits reveal deficiencies, the state has the opportunity to submit facts in aid of its position or accept CMS's determination and correct any deficiencies. *Id.* § 430.33(c).

If CMS believes a state has failed to correct a deficiency, CMS may initiate a process to withhold federal funds, either entirely or limited to the funds associated with the noncompliant service. 42 U.S.C. § 1396c; 42 C.F.R. § 430.35. If, for example, a state's Medicaid expenditures are inconsistent with its state plan, CMS may disallow the expenditure and force the state to repay federal funds. *See* 42 C.F.R. §§ 430.33(c)(3); 430.42(a); 430.35(d). The state may request a hearing if it disagrees with the disallowance, and private parties, including providers, may participate. *Id.* § 430.76. These parties may conduct discovery and offer opinion and expert testimony. *Id.* §§ 430.83, 430.86, 430.88. CMS's decision is

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regulation addressing how States may demonstrate compliance with § 30(A). In 2011, HHS issued a proposed rule setting forth a comprehensive and detailed approach to demonstrating compliance with § 30(A). 76 Fed. Reg. 26,342, 26,343 (May 6, 2011). No final rule has been adopted and movement on it seems to have stalled.

subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. More often, however, problems are resolved through more informal discussions between the state and CMS.

The services at issue in this case. Medicaid includes a basic bundle of services, but states may receive money to fund, in part, additional services through waivers. Congress authorized the Developmentally Disabled Home and Community Based Services Waiver – known as the DD Waiver – to assist states in funding a variety of non-institutional care options for persons who would be eligible for Medicaid benefits in an institution, but who prefer to live at home or in the community. 42 U.S.C. § 1396n(c)(1); *see also Sanchez v. Johnson*, 416 F.3d 1051, 1054 n.1 (9th Cir. 2005). The services at issue in this case are called "residential habilitation" services.[2] Idaho has had a DD Waiver since 1995 and provides these services through contracted providers, including the respondents here. Like the base Medicaid services, waiver programs involve an ongoing dialogue between the states and CMS to avoid problems and address any that may arise.[3]

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[2] Some requirements of the Medicaid Act may be waived; § 30(A) is not one of them. *See* 42 U.S.C. § 1396c.

[3] The 330-page CMS § 1915(c) technical manual describes the ongoing dialogue between CMS and the participating State once a waiver is approved. It explains, among other things, that these discussions may concern how to improve operations and address issues that arise. *See* "Post Approval Activities," Instructions, Technical Guide and Review Criteria, Centers for

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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.

The rates for the residential habilitation services at issue in this case were increased by the Idaho Department of Health and Welfare, which is the State's Medicaid agency, in 2006. Pet. App. 17. The Department does not typically include the reimbursement rates for these services in its State plan or waiver application documents. (Nor is it required to. It simply must maintain documentation of those rates and make them available to CMS on request. 42 C.F.R. § 447.203.) Rather, the State's DD Waiver documents identify the methods and procedures the Department follows to set rates. Once the Department establishes rates, it publishes them in a pricing file, which is made available to Medicaid providers through Information Releases and is published on the Department's web site. Enrolled providers provide the services and then bill the Department, which reimburses them. The Department then draws its allocation of federal Medicaid money quarterly.

Federal and state regulations limit provider participation to those that agree to accept, as payment in full, the amounts that the state pays them. 42 C.F.R.

Medicare and Medicaid Services, pp. 33-35, *available at* http://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/downloads/technical-guidance.pdf.

§ 447.15; Idaho Admin. Code § 16.03.09.210.03. State regulations limit provider reimbursement to the lower of the provider's actual charge or the maximum allowable charge as established by the Department. Idaho Admin. Code § 16.03.10.036.02.

In 2005, the Idaho Legislature adopted a new law directing the Department to compile information relating to the cost of care. *See* Idaho Code § 56-118 (2005) (*amended by* 2011 Idaho Sess. Laws 463). Pet. App. 18. The statute directed the Department to furnish this information to the Legislature annually as part of its budget request. The statute did not, however, require any changes in rates based on the information the Department compiled. Pet. Reply App. 13.

In 2006, the Department hired a firm to conduct surveys to implement § 56-118. The firm produced recommended rates based on varying alternative methodologies for various services each year. Pet. App. 18. The Department did not implement the rates in the firm's reports, but continued to report the information to the Legislature each year. In 2009, the Department proposed rate increases for the services at issue in this case. Pet. App. 19. The Department did not receive an appropriation for the increases from the Idaho Legislature, however, so the Department did not increase the rates.

The proceedings below. The respondents, five residential habilitation services providers, sued petitioner Armstrong, the Director of the Department of

Health and Welfare, and his Medicaid deputy on December 7, 2009. They did not sue the Secretary of HHS or CMS. The providers claimed that based on the new cost information the Department had compiled, the Department's rates were preempted by § 30(A) because they were not consistent with the Ninth Circuit's requirements from *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997). In that case, the court of appeals read § 30(A) to require states to set hospital outpatient reimbursement rates so that they "bear a reasonable relationship" to provider costs, and to "rely on responsible cost studies" before reducing reimbursement rates. *Id.* at 1496. Where rates do not "substantially reimburse providers their costs," a state cannot justify the rates with "purely budgetary reasons." *Id.* at 1499 & n.3.

The providers' case presented another issue. The plaintiffs in *Orthopaedic Hospital* sued under 42 U.S.C. § 1983. 103 F.3d at 1495. But in 2005, in *Sanchez v. Johnson*, the Ninth Circuit held that under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), providers and beneficiaries had no right of action to enforce § 30(A) under § 1983. The court of appeals characterized § 30(A) as having "an aggregate focus, rather than an individual focus that would be evidence of an intent to confer an individually enforceable right." 416 F.3d at 1059. The statute spoke "not of any individual's right but of the State's obligation to develop 'methods and procedures' for providing services generally." *Id.* The court of appeals also concluded that § 30(A) set out "competing policy goals"

and that "[t]he tension between" them "supports a conclusion that § 30(A)" does not "confer[ ] individually enforceable rights on individual Medicaid recipients." *Id.* at 1059-60.

The Ninth Circuit resurrected private enforcement of § 30(A) about three years later, in *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008). California's Medicaid program was again the target of several suits by providers and beneficiaries claiming the state's statutory reimbursement rate reductions violated § 30(A). With no rights enforceable under the Medicaid Act or through § 1983, the plaintiffs in *Independent Living Center v. Shewry* floated a different theory of their claim: the rate reductions were preempted under the Supremacy Clause. The district court had denied the plaintiffs' request for preliminary injunctive relief because, it said, the plaintiffs had no enforceable rights, and could not proceed under the Supremacy Clause as an alternative. *Id.* at 1054. The Ninth Circuit reversed. It wrote that this Court had "repeatedly entertained" preemption claims seeking injunctive relief without requiring the plaintiff to demonstrate any enforceable rights. *Id.* at 1055. In its view, this "Court has consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation." *Id.* at 1055-56. All a plaintiff alleging preemption need show was "traditional standing requirements." *Id.* at 1058.

Under the framework established in *Independent Living Center v. Shewry*, the district court in this case held that the providers could challenge the reimbursement rates directly under the Supremacy Clause. Pet. App. 23. As for the merits, the district court ruled that *Orthopaedic Hospital* controlled. The district court noted that the record "would appear to support" a finding that the then-existing rates were consistent with precisely the things § 30(A) is concerned with: efficiency, economy, and quality of care. Pet. App. 22. And there had been no dispute about access to care, either: The parties agreed that services covered by the DD Waiver were readily available to eligible participants and there was no dispute that there were no waiting lists for any Medicaid services in Idaho. Pet. Reply App. 8-9.

The district court recognized, too, that *Orthopaedic Hospital* and later cases involved rate cuts, not challenges to existing rates. Pet. App. 21. Yet, in light of the more recent cost information, the district court ruled that existing rates failed the requirements of *Orthopaedic Hospital*. Pet. App. 22. "The Court need not wait for evidence of low quality of care or insufficient access to services before intervention is warranted," it said. Pet. App. 22-23. The court granted the providers' motion for summary judgment and issued an injunction requiring that the Department raise its rates to match those proposed in 2009. Pet. App. 24.

The Ninth Circuit affirmed. First, it held that the providers had an implied right of action under the

Supremacy Clause to challenge the state's rates as preempted by § 30(A). Pet. App. 2-3, *quoting Indep. Living Ctr. v. Shewry*, 543 F.3d at 1050 ("Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The court of appeals deemed itself bound by circuit precedent and this Court's precedents that it said "have recognized a private right of action under the Supremacy Clause." Pet. App. 3, *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

On the merits, the court held that, under *Orthopaedic Hospital*, because the state's reimbursement rates did not substantially reimburse providers their costs and remained in place for purely budgetary reasons, the district court correctly granted summary judgment to the providers. Pet. App. 4.

SUMMARY OF THE ARGUMENT

I.A. This Court's cases hold that to enforce a federal statute, a plaintiff must have a federally conferred right and a congressionally intended remedy. Congressional intent is mandatory. Without it, there is no cause of action. This is just as true with Spending Clause statutes like § 30(A). Congress did not create privately enforceable rights in § 30(A).

The statute's references to "methods and procedures," "efficiency," "economy," and a "sufficient" number of providers bear none of the characteristics of the rights-creating language that is necessary to create individually enforceable rights. Indeed, this language demonstrates that Congress intended an agency expert in the statute's subject matter to administer and enforce the statute. The Ninth Circuit ignored the limits this Court has placed on private enforcement of federal statutes.

B. Because Congress has not created enforceable rights, there is no reason to look for alternative sources for a right of action. This Court's cases foreclose such an enterprise. The Court has explained that its prior cases involving the Social Security Act necessarily relied on § 1983 as the basis for the right of action because the Social Security Act did not provide a private right of action. If some alternative source, like the Supremacy Clause, had been available, then the theoretical foundation and understanding of the Court's cases is wrong. It is not wrong, because if it is, then § 1983 is unnecessary since the Supremacy Clause always supplies a private right of action regardless of what Congress has said. The Court has also rejected a plaintiff's third-party beneficiary contract claim to enforce a federal drug-pricing statute that was not directly enforceable. The Court explained that the suit to enforce the contract, which incorporated the statute at issue, was a suit to enforce the statute itself. If the suit could proceed

under the contract, the absence of a private right of action in the statute would be meaningless.

There are two important structural constitutional principles that provide the foundation for this Court's reliance on congressional intent in deciding whether a statute is privately enforceable. The first is the separation of powers. By avoiding judicial intervention when it is not intended, the Court allows Congress to establish a program under its broad spending authority and control the remedial component to fit the substantive scheme it has designed. This permits Congress to leave the often complex details of administering a massive program like Medicaid to an agency expert in the subject matter. This avoids unintended consequences that result from administration by litigation in the federal and state courts around the country.

The other important constitutional interest in play is federalism. The contractual nature of state-federal cooperative programs under the Spending Clause means that the states' participation is dependent on the states voluntarily and knowingly agreeing to the terms of the agreement. Private enforcement under the Supremacy Clause, when it has not been provided for by Congress, changes those terms. One, the Medicaid Act does not contain any statute that would support an implied right of action to enforce § 30(A) or an enforceable right under § 1983. So the States enter into Medicaid with the understanding that their exposure does not include private enforcement lawsuits. Two, the substantive obligations that

inevitably flow from private enforcement of § 30(A) fail the requirement of clear notice. These obligations are not voluntary in any sense when they are unilaterally imposed after the States have joined the program. And the nature of litigation means that States must guess at what will be required of them.

II.A. The Supremacy Clause is no alternative to congressional intent. The text of the Supremacy Clause simply instructs judges and States that the constitution, federal law, and treaties are the supreme law of the land. The Supremacy Clause thus provides a rule of decision. It says nothing at all about authorizing private lawsuits. Unlike some provisions of the Constitution, the Supremacy Clause is not a source of any federal rights.

B. This Court's preemption cases do not support the providers' theory. They reflect a practice of permitting plaintiffs to raise anticipatory defenses to state enforcement proceedings on the grounds that their conduct is immune from state regulation. But this practice is not as open-ended as the Ninth Circuit suggested it was. Rather, preemption cases involve the plaintiff seeking to protect a federal right against state interference. Here, the providers have no federal right to protect, and hence no immunity from state regulation to assert. Their case therefore does not fit the mold established by this Court's preemption cases.

The providers' resort to general equitable principles is not consistent with traditional equity jurisprudence. Equity is not so broad as to provide a remedy where there is not some basis in law for it. With no federal right to protect, the providers cannot invoke this Court's equitable powers to provide a remedy.

III. Finally, even if the Supremacy Clause supports a preemption right of action in some circumstances, it does not provide a right of action for private enforcement of § 30(A). As a cooperative state-federal program, uniformity of administration, flexibility, and cooperation are key features of Medicaid. The program is therefore different than other federal statutes that displace state authority to regulate in a given area. And while some spending statutes impose obligations on states that receive federal funds, § 30(A) simply conditions future payments on state compliance with certain terms. A state retains the choice to accept the federal government's offer or not. The consequence is simply a loss of funding. Section 30(A) is not capable of "preempting" state reimbursement rates. Therefore, the supremacy of federal law is not implicated.

ARGUMENT

MEDICAID PROVIDERS HAVE NO PRIVATE RIGHT OF ACTION UNDER THE SUPREMACY CLAUSE TO ENFORCE § 30(A) AGAINST STATE OFFICIALS

The Ninth Circuit's judgment establishes the Supremacy Clause as implying a private right of action anytime a plaintiff with no more than Article III standing seeks to enforce a federal statute by alleging a state law is preempted by federal law. This expansive view of the Supremacy Clause cannot be squared with this Court's cases in three respects:

First, this Court has consistently held that Congress holds the authority to decide who may enforce federal statutes. *See*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Implying a private right of action to enforce § 30(A) where Congress created no enforceable rights improperly appropriates to the judiciary a function that is reserved for Congress.

Second, the Supremacy Clause does not provide a freestanding private right of action to enforce a federal statute when the plaintiff has no federal right to protect from state interference. It provides a choice-of-law rule, ensuring that federal law applies over conflicting state law. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979). Contrary to the Ninth Circuit's holding and the providers' contentions, this Court's preemption cases are perfectly consistent with that understanding of the Supremacy Clause. The

Ninth Circuit's holding stretches this Court's preemption cases beyond the established boundaries.

Finally, § 30(A) is not capable of preempting a state's Medicaid reimbursement rates in a private enforcement action. The statute does not entitle providers to anything; it merely conditions federal payments on a state's compliance with its terms. Whether the state has satisfied that condition is a determination vested in the Secretary of HHS. This case therefore does not even implicate the supremacy of federal law. The judgment of the court of appeals should be reversed.

I. Implying a Private Right of Action Under the Supremacy Clause to Enforce § 30(A) Improperly Invades Congress's Authority to Provide – or not Provide – Private Remedies for Statutory Violations.

The providers seek to enforce a federal statutory funding condition against State officials to obtain affirmative relief in the form of higher reimbursement rates for their services. They do not contend § 30(A) gives them any rights or that it supplies them with any remedies if a state acts inconsistently with that statute. Indeed, that is the law in the Ninth Circuit, as it is in most every circuit to consider the issue. *Sanchez*, 416 F.3d at 1060-61.[4] In allowing their

[4] *See Long Term Pharmacy Care Alliance v. Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004); *New York Ass'n of Homes & Servs.*

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case to proceed under the Supremacy Clause anyway, the Ninth Circuit disregarded this Court's cases that limit the enforceability of federal statutes to plaintiffs who can demonstrate a congressionally conferred right and congressionally intended remedy. In other words, the court of appeals "effect[ed] a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting).

A. This Court's cases make clear that whether to provide a private remedy for statutory violations is Congress's choice to make, and Congress has not created enforceable rights in § 30(A).

1. Congress writes the law; part of that authority includes the exclusive prerogative to decide whether a particular federal statute is privately enforceable. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. As Justice Brennan explained for the Court in *Davis v. Passman*, 442 U.S. 228, 241 (1979), "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these

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for the Aging v. DeBuono, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 703-04 (5th Cir. 2007); *Westside Mothers v. Olszewski*, 454 F.3d 532, 542-43 (6th Cir. 2006); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-49 (10th Cir. 2006).

rights and obligations, to determine in addition, who may enforce them and in what manner." *See also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011).

Sometimes, though rarely, a statute expressly authorizes private suits. Other times, when the statute does not expressly authorize suit, a court may conclude that a private right of action is nonetheless implied from the statute if Congress intended to create a private right and a remedy for its violation. *Alexander*, 532 U.S. at 286-87; *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) ("recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy."). In some other instances, the remedy for a violation of a federal right (by someone acting under color of state law) is provided by 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. at 284.

The remedial component of a federal statute is therefore not divorced from the substantive component: Congress retains control of each. Congress has not assigned the judiciary the task of creating private remedies anytime the law is violated. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) ("In the absence of congressional intent the Judiciary's recognition of an implied right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.' "),

quoting Am. Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951).

Even if a statute reveals that *a* remedy might be available to *some* plaintiff, a violation of the law is not, by itself, enough. Not only must there be some congressionally intended remedy, but Congress must have intended to create a right, as well. *Sandoval*, 536 U.S. at 286; *Cort*, 422 U.S. at 78 (first factor in deciding whether there is a private right of action asks, "Does the statute create a federal right in favor of the plaintiff?"). The need for a federal *right* extends to cases brought under 42 U.S.C. § 1983, too: In such cases "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *see also Gonzaga Univ.*, 536 U.S. at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.").

Congressional intent is not advisory. It is "dispositive." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Sandoval*, 532 U.S. at 286 (statutory intent to create a remedy is "determinative"). Absent congressional intent to create a private remedy, "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 it might be with the statute." *Sandoval*, 532 U.S. at 287; *see also California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a

remedy on a statute, no matter how salutary, that Congress did not intend to provide."). And when it comes to federal funding conditions, they are not privately enforceable "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous intent to confer individual rights.'" *Gonzaga Univ.*, 536 U.S. at 280, *quoting Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981).

2. Congress did not create privately enforceable rights in § 30(A), as the Ninth Circuit recognized in *Sanchez*. The providers do not contend otherwise. Instead, § 30(A) provides guideposts that leave room for flexibility depending on the specific needs of a state's demographic and geographic factors. State plans must adopt "methods and procedures" to assure CMS that a state's reimbursement payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers" to ensure Medicaid participants have access to care to the same extent the general population in a given area has it. This language is "broad and general," *Independent Living Center*, 132 S. Ct. at 1210, and by its reference to a "sufficient" number of providers the statute demonstrates concern for access to quality care. *Sanchez*, 416 F.3d at 1059. The statute's focus, therefore, is on "'the aggregate services provided by the State,' rather than 'the needs of any particular person.'" *Gonzaga Univ.*, 536 U.S. at 282, *quoting Blessing*, 520 U.S. at 340. There is, accordingly, no "*individual* entitlement" to specific rates or rates based on specific factors. *Blessing*, 520 U.S. at 343.

Section 30(A)'s broad language and competing policy goals also demonstrate that Congress intended agency, rather than private enforcement. *See Gonzaga Univ.*, 536 U.S. at 282 (to establish a right enforceable through § 1983, the statute at issue must "not [be] so vague and amorphous that its enforcement would strain judicial competence") (internal quotations omitted); *Indep. Living Ctr.*, 132 S. Ct. at 1210 (§ 30(A)'s "broad and general" language suggests "that the agency's expertise is relevant in determining its application."). This Court characterized the "reasonable efforts" standard in *Suter v. Artist M.*, 503 U.S. 347 (1992), as evidence that "[h]ow the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.* at 360. The "substantial compliance" provision in *Blessing* was a "yardstick for the Secretary to measure the *systemwide* performance of a State's Title VI-D program." 520 U.S. at 343. Nonspecific "methods and procedures" to assure a "sufficient" number of providers is not different in nature than the similarly broad provisions at issue in *Blessing* or *Suter*.

The upshot of all this is that Congress has defined the terms on which it will grant money to states to provide Medicaid services. It has not included among those terms authorization for private litigants to sue state officials to enforce § 30(A)'s broad and general terms. This Court's cases say that congressional intent to create – or not create – private remedies for statutory violations matters; the Ninth Circuit says it does not. The Ninth Circuit is wrong.

B. Because Congress has not authorized private enforcement of § 30(A), there is no basis for the Court to depart from its cases and look elsewhere for a private remedy.

When the statute at issue reveals no intent to create rights or remedies, that is the end of the matter and there is no basis to look elsewhere for a private suit. This Court has put it succinctly: "[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." *Gonzaga Univ.*, 536 U.S. at 286; *see also Horne v. Flores*, 557 U.S. 433, 456 n.6 (2009) ("Whether or not HB 2064 [a state statute] violates § 7902 [of the No Child Left Behind Act], . . . 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."). The Ninth Circuit ignored those precedents – and Congress's will – when it allowed the providers' action to move forward. There is no reason to exempt the providers from the requirements this Court has established.

1. The Ninth Circuit's judgment is inconsistent with this Court's well-established cases that limit the enforceability of federal statutes. The first of these is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that § 1983 was not limited to constitutional provisions, but was available to enforce federal statutes, including the Social Security Act. The Court

explained that this interpretation of § 1983 was confirmed by earlier Social Security Act cases where "§ 1983 was necessarily the exclusive statutory cause of action because, as this Court held in *Edelman v. Jordan*, [415 U.S. 651, 673-74 (1974)], the SSA affords no private right of action against a State." 448 U.S. at 6. The assumption, then, was that when the Social Security Act fails to authorize a private enforcement action of its terms, the *only* basis for a private suit is § 1983.

But the Ninth Circuit said that § 1983 is not the exclusive basis for a private right of action to enforce § 30(A). If the Ninth Circuit is correct, the Court's theoretical foundation in *Thiboutot* and the cases it cited was wrong. If the Supremacy Clause *also* had been available, there would have been no basis to say that § 1983 was the exclusive enforcement mechanism. Section 1983 would not have been necessary because the Supremacy Clause would have authorized enforcement of Social Security Act statutes irrespective of whether the plaintiffs had any rights. The Ninth Circuit's judgment determines who may enforce a statute based solely on magic words in a complaint rather than the substance of the claim: The preemption plaintiff may proceed; the § 1983 plaintiff may not. If the Ninth Circuit's holding is correct, then the claims in *Suter*, *Blessing*, and *Sandoval* could have simply been recast as preemption cases. Section 1983 thus becomes superfluous. Because the providers have no rights enforceable through § 1983, *Thiboutot* forecloses the providers' claim.

The Ninth Circuit's judgment runs into *Astra USA*, as well. There, this Court rejected the plaintiffs' attempt to enforce a statute (that was not privately enforceable) as a third-party beneficiary to a contract between drug manufacturers and the federal government. The statute at issue had been incorporated into the contract. 131 S. Ct. at 1345. The plaintiff, Santa Clara County, complained that the drug manufacturers were overcharging for their drugs in violation of the pricing agreement between the manufacturers and HHS. *Id.* at 1347. Everybody agreed that the statute at issue contained no private right of action. *Id.* The Court explained that the county's suit was "in essence a suit to enforce the statute itself." *Id.* at 1348. The absence of a private right of action to enforce the statute could not be overcome by the third-party beneficiary theory because if it could, "the absence of a private right of action to enforce the statutory ceiling price obligations would be rendered meaningless." *Id.* Private suits "to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime." *Id.* at 1345.

Just as the Court rejected Santa Clara County's alternative third-party beneficiary right of action theory, so too should the Court reject the providers' alternative Supremacy Clause theory. Their "pre-emption" claim is plainly an attempt to enforce a term of the agreement between CMS and Idaho. In this sense, the providers here are like third parties seeking to enforce the benefit of a contract party's

obligations. But under contract principles, third parties may enforce a contract only if they are the intended, rather than incidental, beneficiaries of the contract and only if enforcement by them "is appropriate to effectuate the intention of the parties." Restatement (Second) of Contracts, § 302(1) (1981). The providers have no rights under the statute and they are plainly not the intended beneficiary of the State's § 30(A) obligations owed to CMS. The statute does not speak of providers individually, it does not express any intent to benefit them, and it does not require any specific rate or methodology to ensure provider costs are covered. When Congress has not made the statute enforceable there is no need to look elsewhere.

2.a. Two important structural constitutional principles are served by the Court's reliance on congressional intent when deciding whether a statute is privately enforceable. First, deference to congressional intent furthers separation-of-powers principles by preventing judicial intrusion into a congressional function. The decision whether a statute is enforceable "has significant consequences for the reach of federal power." *Stoneridge Inv. Partners, LLC*, 552 U.S. at 165. These limitations on court-implied rights of action therefore "reflect[ ] a concern, grounded in the separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990).

The Court's approach serves more than abstract separation-of-powers ideals. It delivers the tangible benefit of averting judicial involvement in federal programs where it may not be intended or appropriate. *Gonzaga Univ.*, 536 U.S. at 282. This, in turn, allows Congress to design the mechanics of the solution to the problem it is attempting to solve without unwanted outside tinkering. The Court's cases reflect an understanding that in some instances, particularly in Spending Clause cases, Congress establishes a program, writes the statutes, and leaves it to the implementing agency, rather than the judicial branch, to work out the details. *See Blessing*, 520 U.S. at 345 (statute requiring "sufficient" staffing levels did not create private rights enforceable through § 1983; "Enforcement of such an undefined standard would 'strain judicial competence.'").

Such is the case with Medicaid. The agency is "comparatively expert in the statute's subject matter." *Indep. Living Ctr.*, 132 S. Ct. at 1210. Medicaid's cooperative nature, complex design, and often broadly worded standards allow the federal and state experts who have to manage the program decide how best to deliver quality services in an efficient and economical way. By not creating privately enforceable rights, Congress intended that a single federal agency expert in the subject matter administer the program and interpret and apply the statute in a uniform manner and in cooperation with the states, rather than leaving the myriad complex details to be determined case by case by the many state and federal courts across

the Nation. *See*, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (when "statute's key language is broad and nonspecific," Congress may have intended agency remedy to be exclusive "both to achieve the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking and to avoid the comparative risk of inconsistent interpretations that can arise out of an occasional inappropriate application of the statute in a private action for damages.").

The practical benefits of agency administration of a program – "expertise, uniformity, wide-spread consultation, and resulting administrative guidance," for example – can be stifled by judicial applications that perhaps unintentionally but inevitably narrow and harden intentionally broad and flexible standards. This is especially so where the agency that administers the program is not a party to the case. Without that input, the courts are left to fill perceived generalities with specific requirements that may not serve Congress's goal and will interfere with CMS's centralized, expert administration of the program.

This case provides an example of the tangible benefits that are lost when private litigants inject the federal courts into the administration of Medicaid in a way that Congress did not intend. The court of appeals affirmed an injunction requiring Idaho to raise its rates based on little more than cost-study information that never withstood any scrutiny. It did this despite the fact that CMS had never found Idaho's rates to be deficient. It did this even on

agreed-upon findings and a concession by the district court that the goals of § 30(A) had been met. Section 30(A)'s text makes plain that it is concerned with a variety of competing interests that must be balanced in establishing payment rates. The end goal is "efficiency" and "economy" and access to quality care, but Congress decided that the agency and the states are better positioned than the federal judiciary to make these calls. Even the Ninth Circuit acknowledged this self-evident truth. *See Sanchez*, 416 F.3d at 1059-60 ("the interpretation and balancing of the statutes and competing goals would involve making policy decisions for which this court has little expertise and even less authority."). The Ninth Circuit has not explained why § 30(A) is not suitable to judicial enforcement under § 1983, but is when the claim is preemption.

The Ninth Circuit's judgment elevates one § 30(A) factor – reimbursement rates – above the other factors that must be balanced to achieve efficiency, economy, and access to quality care. Private enforcement of § 30(A) therefore could have sweeping implications affecting the balancing act that CMS and states must do. For example, waiver programs must comply with cost-neutrality rules, under which states must show that the annual cost of the services is not more than the annual cost of institutional services. 42 U.S.C. § 1396n; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999). Singular concern with provider reimbursement regardless of the other factors may undermine a program's cost neutrality. And a narrow focus on provider cost may perpetuate

inefficiencies that § 30(A) is designed to prevent. These are all complex matters that Congress left to CMS to address with the states. If the Ninth Circuit's decision is correct, and congressional intent is irrelevant, this Court's "careful approach," *Stoneridge Inv. Partners*, 552 U.S. at 164, and its attendant benefits, are rendered meaningless.

b. The Ninth Circuit's intrusion into congressional territory is unwarranted for yet another reason: Private enforcement of funding conditions like § 30(A) imposes on states requirements they did not bargain for. Spending statutes that grant money to states on the condition of their compliance with various requirements have been often characterized as "much in the nature of a contract" between the state and federal government. *Pennhurst*, 451 U.S. at 17; *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).[5] Congress can invoke its spending power to entice states to do things it may not be able to under its enumerated powers. *New York v. United States*, 505 U.S. 144, 166-67 (1992). So "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451

[5] Not all contract rules apply to funding conditions, *see Bennett v. Kentucky Dep't of Ed.*, 470 U.S. 656, 669 (1985), but the Court has used the analogy to support the basic principle that state acceptance of funding conditions must be voluntary and knowing. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

U.S. at 17. The nature of the state-federal relationship established by spending legislation is thus defined by the states' voluntary assent to the terms of the deal.

Private suits to enforce § 30(A), and the resulting judicially imposed requirements, unilaterally change the terms of the deal. The Medicaid Act is an elaborate set of bilateral commitments that states decide whether to make based on their assessment of the relative risks and benefits of participating. Section 30(A) says that to receive funding, states need do no more than to assure CMS in their state plans that they have adopted "methods and procedures" to ensure "sufficient" access to quality care. States know that they have to convince CMS that their methods and procedures will ensure sufficient access to quality care. They know, too, that if they cannot convince CMS that their methods and procedures will ensure sufficient access, or if they administer their plans in a way that fails a term of the Medicaid Act, they will lose federal money. The specific manner in which CMS will enforce the Act's provisions is set forth in the Act and HHS's implementing regulations. And states know Medicaid may be amended (within limits), at which point they can choose whether to continue to seek federal funding for providing care under their Medicaid programs.

But the Medicaid Act hardly puts the states on notice that they can be forced by private parties with nothing more than Article III standing to find money to meet judicially mandated obligations that are not spelled out in the Act and that CMS has not required.

First, where Congress has not unambiguously provided for private enforcement of § 30(A), private suits in contravention of Congress's intent do not meet the Court's clear notice requirement. *See Gonzaga Univ.*, 536 U.S. at 280. A state's calculus in deciding whether and how to participate in Medicaid necessarily includes the ability of third parties to correct perceived deficiencies in the state's performance of its obligations by suing state officials in federal court. The state's obligations in § 30(A) are owed to CMS, not providers, and there is no plausible argument that the providers are the intended beneficiaries of that statute. Under this Court's precedents, parties who do not meet the requirements for an implied right of action or a suit under § 1983 do not have a cause of action to enforce a particular statute, and so the states participate in Medicaid with the understanding that § 30(A) is not privately enforceable.

Second, the states' exposure to the substantive requirements that private enforcement produces materially alter the agreement between the state and CMS. Cooperation and negotiation and flexibility are part of the program. But private suits impose non-negotiable funding conditions that Congress did not intend and the states did not agree to. These post-acceptance judicially created funding conditions leave states little choice because they change the rules in the middle of the game. *See Pennhurst*, 451 U.S. at 25 (Congress's broad spending power "does not include surprising participating States with post-acceptance or 'retroactive' conditions."). When obligations are

imposed on states on an ad-hoc basis through the rigid, unpredictable adversarial forum federal litigation prescribes, states have to guess at what might be required. The resulting obligations cannot be voluntary. *See id.* at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.").

This case illustrates the problem vividly. The Ninth Circuit expanded its obligations from rate cuts to hospitals to *existing* rates for a completely different class of service providers. It imposed minimum reimbursement levels based on nothing appearing in § 30(A). And the court of appeals replaced broad and general statutory terms with ambiguous ones of its own that leave still other questions that can only be resolved through yet more litigation: What is a "responsible cost study"? What does "substantially reimburse" mean? What triggers an obligation to reevaluate rates and adjust them upward? What if meeting the "substantially reimburse" requirement negates efficiency and economy? These are all matters that are ordinarily resolved through the State's discussions with CMS. But in the context of federal litigation by private parties, the State cannot possibly have clear notice of the terms that the Ninth Circuit has imposed and will impose if private parties may continue to enforce § 30(A). Justice Kennedy captured the problem of judicially implied causes of action in spending statutes thusly:

> When the statute at issue is a Spending Clause statute, this element of speculation is

> particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. . . . Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.

Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 656-57 (1999) (Kennedy, J., dissenting). The Court's limitations on private rights of action serve important structural constitutional interests. The lower courts must not be permitted to clear alternative paths. *See Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (in the absence of private remedy to enforce statute, a private right of action under Court's "general equitable powers would raise the most serious questions regarding the separation of powers . . . and federalism.").

II. The Supremacy Clause Does Not Provide an Alternative, Freestanding Private Right of Action to Enforce Federal Statutes When the Plaintiff Has no Right to Protect Against State Interference.

The providers' preemption theory and the Ninth Circuit's judgment suffer the same analytical defect: If the Supremacy Clause always supplies a private

right of action to enforce a federal statute, that means Congress no longer controls when statutes are privately enforceable. Indeed they are all privately enforceable. This Court has never held this to be the case, and it should not now. For good reason: "[I]f Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause itself must provide one." *See Indep. Living Ctr.*, 132 S. Ct. at 1212 (Roberts, C.J., dissenting). By invoking the Supremacy Clause and preemption, the providers have attempted to put the Supremacy Clause to the wrong use.

A. The Supremacy Clause provides a rule of decision, not a right of action.

The general principle that federal law is the supreme law of the land is not in dispute. Before a court concludes, however, that the Supremacy Clause also authorizes private statutory enforcement actions invoking preemption, it should consider what the Supremacy Clause says. It says:

> 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 is a directive to the "Judges in every State" that they are bound to follow the Constitution, federal laws, and treaties, as they are the "supreme Law of the Land," whatever state constitutions or laws might say.[6] Nothing in the text of the Supremacy Clause authorizes private litigants to sue state officials on the mere allegation that a state law conflicts with federal law.

That authorization must come from somewhere else. The providers will no doubt characterize their claim as a "constitutional" claim, seeking to vindicate the supremacy of federal law. They are not seeking to enforce the statute, the theory will go, they are enforcing the structural constitutional principle of federal supremacy that the Supremacy Clause declares. That argument must fail. The Supremacy Clause is not a "source of any federal rights." *Chapman*, 441 U.S. at 613; *Golden State Transit Corp.*, 493 U.S. at 107. Instead, it "'secure[s]' federal rights by according them priority whenever they come into conflict with state law." *Chapman*, 441 U.S. at 613. In this sense, the Supremacy Clause is different than, for example, the Commerce Clause, which "of its own force imposes limitations on state regulation of commerce and

[6] Except for a one-year run in 1801, federal-question jurisdiction did not exist in the lower federal courts until 1875. Thus, state-court judges would have regularly resolved federal law-based questions that are now decided in large measure by the lower federal courts. The Supremacy Clause provided then, as it does now, a choice-of-law rule for them when presented with conflicting state and federal laws.

is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis v. Higgins*, 498 U.S. 439, 450 (1991). It is different than the Takings Clause (U.S. Const. amend. V), the right to habeas corpus (U.S. Const. art. I, § 9, cl. 2), the freedom of speech (U.S. Const. amend. I), and the freedom from illegal searches and seizures (U.S. Const. amend IV). The purpose of the Supremacy Clause, then, is "to ensure that, in a conflict with state law, whatever Congress says goes." *Indep. Living Ctr.*, 132 S. Ct. at 1211 (Roberts, C.J., dissenting). While the Supremacy Clause *resolves* the conflict, it says nothing about *who may present* that conflict in the first place. *See Davis v. Passman*, 442 U.S. at 239 n.18 ("*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court").

It is therefore incorrect to say that the providers' enforcement action is permitted by the Supremacy Clause *even though* Congress did not create enforceable rights under the statute simply because they have cast their claim as "constitutional" under the Supremacy Clause. *See Swift & Co. v. Wickham*, 382 U.S. 111, 121 (1965) ("the Supremacy Clause gives superiority to valid federal acts over conflicting state statutes[,] but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment."). The Court in *Swift* held that the claim that a state regulatory statute violated a federal statute was not

"upon the ground of the unconstitutionality of such statute," which was a requirement for a three-judge court under former 28 U.S.C. § 2281. *Id.* at 126-27. The providers cannot overcome congressional intent by characterizing their claim as something that it is not. The Supremacy Clause simply tells courts (and states) that federal law prevails over conflicting or displaced state law. That rule of decision does not disable Congress from deciding whether a particular statute may be privately enforced. The Ninth Circuit has, however, effectively removed that congressional authority.

B. This Court's preemption cases do not support the providers' cause of action.

In disposing of Idaho's appeal, the Ninth Circuit said that "[u]nder well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law." Pet. App. 3, *quoting Indep. Living Ctr. v. Shewry*, 543 F.3d at 1065. In the lower court's view, this Court's cases "have recognized a private right of action under the Supremacy Clause." Pet. App. 3, *citing Shaw*, 463 U.S. at 96 n.14. The Ninth Circuit has this wrong: In no case has the Court decided if or when a plaintiff lacking enforceable rights nevertheless may bring an equitable claim directly under the Supremacy Clause to enforce a statute. The Ninth Circuit misread what this Court's cases reveal about preemption claims.

1. A conflict between state and federal law – a preemption claim, in other words – may arise in two ways. First, an entity may raise federal preemption as a defense in a proceeding against it under state or local law. *See*, *e.g.*, *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). In that example, federal preemption was raised as a defense in a suit where the federally regulated entity was subject to liability under District of Columbia tort law. The defendant argued that federal law displaced the local tort law, shielding it from liability under the local law. The second way in which a preemption claim arises is when a party files a lawsuit and asserts preemption as an anticipatory defense to state enforcement or regulation of the plaintiff's conduct. *See Shaw*, 463 U.S. at 95-97. The justification for this is to protect people from the Hobson's choice of violating the state law at the risk of potentially tremendous liability or complying with the state law and enduring the injury until (if ever) the state law is invalidated. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

The providers relied on *Ex parte Young*, 209 U.S. 123 (1908) and a series of related cases to justify their argument. *Ex parte Young* provides the well-used example of preemption raised as an anticipatory defense to state enforcement proceedings, but it does not help the providers' cause in this case. In *Young*, which is also known for establishing a limit on state sovereign immunity, a railroad shareholder claimed that Minnesota's limitations on freight-rail charges were unconstitutional and obtained an injunction

against Minnesota's attorney general, prohibiting him from enforcing the state's rate limits. The shareholder's suit was not premised on a Supremacy Clause cause of action. As Justice Kennedy has explained, the shareholder's suit was "nothing more than the pre-emptive assertion in equity of a defense that would have been available in the State's enforcement proceedings at law." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1643 (2011) (Kennedy, J., dissenting); *see also* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997 (2008) (explaining the bill in equity to "restrain proceedings at law").

This assertion in equity of a preemption defense is not as free-ranging and open-ended as the Ninth Circuit would have it. The Court in *Young* carved out a limited exception to a state's sovereign immunity. As such, it removed a bar to an otherwise actionable claim of constitutional impairment – there, an alleged violation of the shareholders' due process and equal protection rights under the Fourteenth Amendment. This limited exception to sovereign immunity does not, however, also authorize *every* lawsuit where the plaintiff alleges the state law is preempted. It is more limited than that. *Young* and the Court's preemption cases spawning from it reveal something in common that is lacking here: They presented state action that interfered with the plaintiffs' conduct or property that was, by federal law, properly free of state regulation. In other words, the plaintiff had a federal right that the state law interfered with. The Ninth Circuit's holding disregards this component.

The Ninth Circuit in this case cited *Shaw*, but *Shaw* does not support the Ninth Circuit's holding. For one thing, the footnote in *Shaw* that the Ninth Circuit cited involved the question of jurisdiction. 463 U.S. at 96 n.14. The question of jurisdiction is a different matter than the question whether a cause of action exists.[7] Still, *Shaw*'s facts fit the *Ex parte Young* mold because the plaintiff was asserting an anticipatory defense to the state's regulation of its conduct. An employer's ERISA-covered employee benefit plan was subjected to New York's laws relating to pregnancy discrimination in employee benefit plans. But under 29 U.S.C. § 1144(a), state laws relating to ERISA-covered employee benefit plans were preempted. The employer's preemption case thus presented an anticipatory defense of preemption by the claim that its benefit plan was, by ERISA, immune from state regulation. *Id.* at 92; *see also id.* at 96 n.14 ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with *federal rights*.") (emphasis added). The federal right at stake there was immunity from the state's pregnancy discrimination laws. The providers here seek no immunity from state regulation; they have no anticipatory defense to assert.

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[7] Jurisdiction is jurisdictional; a cause of action is not, so cases may have proceeded on an arguable but undecided cause of action. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002).

The same holds for the other cases the Ninth Circuit has said show this Court has "consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation." *Indep. Living Ctr. v. Shewry*, 543 F.3d at 1056; *see City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (city ordinance prohibiting aircraft from departing at certain times); *Ray v. Atlantic Ritchfield Co.*, 435 U.S. 151 (1978) (Washington statute regulating substantive aspects of oil tankers in Puget Sound); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (state statutes providing for training, testing, and licensing of hazardous waste site workers); *Pac. Gas & Elec. Co. v. State Energy Resources Comm'n & Dev't Comm'n*, 461 U.S. 190 (1983) (state statutes limiting conditions of when nuclear power plant could be built and imposing moratoriums on construction of new plants until state conditions were met); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state statute prohibiting transportation or sale in California of avocados according to certain oil content). In these cases, state or local law attempted to regulate the activities of a party who alleged it was immune by federal law from that local regulation.

Preemption claims, then, depend on the plaintiff's ability to assert an independent federal right that is impaired by state regulation. *See Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1638; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("the

Young doctrine has been accepted as necessary to permit the federal courts to vindicate *federal rights* and hold state officials responsible to 'the supreme authority of the United States.' "), *citing Young*, 209 U.S. at 160 (emphasis added); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (under the Supremacy Clause, courts determine "validity" of state law that "come[s] into collision with an act of Congress, and deprive[s] a citizen *of a right* to which that act entitles him.") (emphasis added); *id.* at 211-12 ("when a Legislature attaches certain privileges and exemptions to the exercise of a right over which control is absolute, the law must imply a power to exercise the right."); *Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1643 (Kennedy, J., dissenting) ("it must be assumed that VOPA has a federal right to the records it seeks, and so the extension of *Young* would vindicate the Supremacy Clause.").

The providers contended below that the Court has reached the merits in preemption cases without requiring that the standards for § 1983 be met. It is true that preemption cases do not necessarily mention § 1983. But it does not follow that there was not a federal right at issue. In many of this Court's preemption cases, the plaintiffs were plainly asserting anticipatory defenses to state laws that impaired federal rights. *See*, *e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (California political subdivision rules regulating vehicle fleets alleged to be preempted by Clean Air Act); *Verizon Md.*, *supra*, 535 U.S. 635 (suit by telecommunications

provider asserting state commission order requiring payments to competitor preempted by federal Telecommunications Act); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (suit by towing company against city claiming city ordinance regulating tow trucks preempted by federal Interstate Commerce Act); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (mining company alleged state permit requirement for mining development preempted by federal Coastal Zone Management Act, Mining Act, and U.S. Forest Service regulations). These cases are of the same species as those relied on by the Ninth Circuit in that they involved the preemptive assertion of a federal right to be free of state regulation. *See also Golden State Transit*, 493 U.S. at 115 (Kennedy, J., dissenting) (expressing the view that even though § 1983 was unavailable to the employer against the city, NLRA gave the employer "an immunity from the city's interference with the NLRA.").

In another category of cases, the question whether the plaintiff could maintain a cause of action directly under the Supremacy Clause was either not argued or not decided and so it was at most, assumed without examination. *See Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006); *Wos v. E.M.A.*, 133 S. Ct. 1391, 1405 (2013); *PhRMA v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (questioning whether petitioner was entitled to bring preemption suit as third-party beneficiary but that "Respondents have not advanced this argument

in this case."). Since the issue was not decided in these cases, they do not support an argument that the Court has endorsed a Supremacy Clause cause of action absent a federal right. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-631 (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.").

Here, § 30(A) creates in the providers no legal right that the Supremacy Clause protects. The providers are subject to no enforcement action like the plaintiffs in *Shaw* and *Atlantic Ritchfield* and *Florida Lime & Avocado Growers* and *Gade* would have been. Idaho simply does not regulate their activity in a manner that would lead to an immunity defense. *See*, *e.g.*, *Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("the respondents are not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*. They simply seek a private cause of action Congress chose not to provide."). The Ninth Circuit's judgment expands *Ex parte Young* – and with it, the limited exception to sovereign immunity – beyond the boundaries this Court has set.

2. The providers' resort to more general principles of equity is not consistent with this Court's cases, and it is not consistent with traditional equity jurisprudence. It assumes equity will always step in, even in the absence of a basis in law. This is not correct. The Chief Justice explained in his *Independent Living Center* dissent:

> It is a longstanding maxim that "[e]quity follows the law." 1 J. Pomeroy, Treatise on Equity Jurisprudence § 425 (3d ed. 1905). A court of equity may not "create a remedy in violation of law, or even without the authority of law." *Rees v. Watertown*, 19 Wall. 107, 122, 22 L.Ed. 72 (1874).

132 S. Ct. at 1213 (Roberts, C.J., dissenting). Equity jurisdiction is not so broad as to allow the providers' case to proceed where Congress has not authorized it or where they are not protecting a right against State interference. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19 (14th ed. 1918) ("If indeed a Court in Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it . . . it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (court of equity may not "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"); *I.N.S. v. Pangilinan*, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard

constitutional requirements and provisions than can courts of law.'"). Thus, this Court's equitable powers are constrained by principles of separation of powers, congressional intent, and sovereign immunity. *Sandoval*, 532 U.S. 275; *Blessing*, 520 U.S. 329; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1; *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (the "contractual nature" of Spending Clause statutes "has implications for our construction of the scope of available remedies."). The providers' theory ignores these limitations.

Reliance on equity does not absolve the providers of their need to demonstrate interference with a federal right. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); *see also* Pomeroy, at §§ 89-107 (describing "primary rights," the violation of which may give rise to an equitable "remedial right"). The Court's equity cases establish important limiting principles that the Ninth Circuit's holding obliterates. Under its view, every federal statute is enforceable against state officials. But because the providers have no rights to protect against State interference, equity will not deliver the Supremacy Clause to rescue their case from a fate this Court's precedents have prescribed.

III. Even if the Supremacy Clause Authorizes Preemption Claims Against State Officials in Some Circumstances, It Cannot Supply a Private Right of Action to Enforce § 30(A).

There is still another reason why this Court should not recognize a nonstatutory right of action to enforce § 30(A). That reason is the nature of § 30(A) itself. The providers' characterization of their case as being one of "preemption" uses that term "in a rather special sense," because their claim "does not involve arguable federal pre-emption of a wholly independent State program dealing with the same or a similar problem." *New York State Dep't of Social Servs. v. Dublino*, 431 U.S. 405, 411 n.9 (1973). Medicaid as a whole is full of often broadly worded and complicated rules. Uniformity, flexibility, and cooperation are key features of this program. *See*, *e.g.*, *Wos v. E.M.A.*, 133 S. Ct. at 1405 (Roberts, C.J., dissenting) ("where the law and the Secretary are silent on a specific question, it is up to the States – sometimes informally advised by the federal Centers for Medicare and Medicaid Services – to make sense of it all in running their programs."). These features of Medicaid are in contrast with other federal statutes that preempt unwanted state or local law in the interests of achieving federal uniformity. *See*, *e.g.*, *Ray v. Atlantic Ritchfield Co.*, 435 U.S. at 165 ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention

to establish a uniform federal regime controlling the design of oil tankers.").

But § 30(A) is different from federal rules establishing uniform, national standards relating to the design of oil tankers or the fat content of avocados. As § 30(A) simply conditions funding on the performance of certain conditions, it cannot preempt a state's Medicaid reimbursement rates. Some types of federal spending legislation, like Title VI of the Civil Rights Act of 1964 and the Religious Land Use and Institutionalized Persons Act, or RLUIPA, impose binding legal obligations on entities that accept federal funds. These statutes require any "program or activity receiving Federal financial assistance" to accommodate religious liberties and refrain from racial discrimination. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 42 U.S.C. § 2000cc(a)(2)(A) (requiring any "program or activity that receives Federal financial assistance" to accommodate religious liberties). Under these laws, entities must renounce or return federal aid *before* deviating from the specified conditions; otherwise they become federal lawbreakers if they violate the conditions imposed on the receipt of federal funds. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (allowing private individuals to sue for injunctive relief against entities that accept federal money yet fail to comply with Title

IX, which prohibits sex discrimination by universities receiving federal financial assistance).

Other types of federal spending legislation merely offer annual reimbursement to states that comply with certain conditions, or threaten to withhold federal funds from noncompliant states or force the states to return funds once noncompliance is determined. One example is the statute relating to the 21-year-old drinking age. It states that:

> 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.

23 U.S.C. § 158(a)(1)(A). Under this type of spending legislation, a state retains the prerogative to lower its drinking age to 18 even after accepting federal highway money. It may lose some future federal money as a consequence of that decision, but it is not breaking any federal law by deviating from criteria for reimbursement and provoking the Secretary of Transportation to reduce the state's allocation of federal funds. No one would contend that a state is violating federal law by returning to an 18-year-old drinking age – even after accepting federal highway funds – and no

one could maintain a "preemption" lawsuit if a state were to do so.

Section 30(A) falls within this latter category of spending legislation. Idaho's reimbursement rates cannot be "preempted" by the Medicaid Act because this statute does not obligate the State to do *anything*. The Medicaid Act permits states to administer their Medicaid programs as they please; it merely requires the Secretary of HHS to reimburse states whose Medicaid programs satisfy the criteria specified in § 1396a and allows the Secretary to cut off funding or repay money if she determines a state plan or a state's administration of it does not meet a condition of funding. A state retains the lawful prerogative to establish and administer a Medicaid program that deviates from § 1396a at any time, and then wait to see if the Secretary will turn off the spigot or merely reduce the amount of federal funding. There is nothing unlawful about state officials taking actions that might goad the Secretary into halting some or all of the state's Medicaid reimbursement payments. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (holding that states may choose to violate conditions in the Affordable Care Act and accept a reduction in federal Medicaid reimbursement). A state that departs from the Medicaid Act's reimbursement criteria does not even violate federal law, let alone deprive any person of federally protected "rights."

All of this is clear from 42 U.S.C. § 1396c, which provides:

> 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. The Medicaid Act does nothing more than hold a carrot in front of the states: If a state administers a Medicaid program that satisfies the criteria of § 1396a, then the federal government will reward it by reimbursing some of its Medicaid expenditures. If it does not, it will not. Accordingly, the issue in this case is not whether federal law trumps state law – the Supremacy Clause's concern – the issue is whether the State has satisfied a funding

condition. And that is for the Secretary, not private litigants and federal courts, to decide.

So even if the Ninth Circuit were correct to insist that the Supremacy Clause authorizes private litigants to assert "preemption" claims against state officials in some cases, this is not one of those cases. Idaho is no different from a state that risks losing highway funds if it lowers its drinking age below 21. The Supremacy Clause does not prohibit that decision – and neither does any other provision of federal law. The Ninth Circuit deprives Idaho of making that perfectly lawful choice.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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