

Neal Kumar Katyal, Acting Solicitor General
Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: The Supreme Court's invitation to file a brief expressing the views of the United States in *Maxwell-Jolly, Director, California Department of Health Care Services v. Independent Living Center of Southern California, Inc., et al.*, U.S. Supreme Court No. 09-958.

August 6, 2010

Dear Mr. Katyal:

The undersigned national organizations and associations, representing a broad spectrum of health care providers participating in the Medicaid program in states throughout the country, urge the United States to oppose the petition for a *writ of certiorari* in *David Maxwell-Jolly, Director, California Department of Health Care Services v. Independent Living Center of Southern California, Inc., et al.*, No. 09-958 (U.S. 2010). The underlying dispute involves Medicaid providers and recipients challenging Medicaid reimbursement rate reductions imposed by the state of California. The District Court and the Ninth Circuit found in favor of the Medicaid providers and recipients and the state petitioned for Supreme Court review of whether Medicaid recipients and providers may, as they did in this case, bring a lawsuit under the Supremacy Clause of the United States Constitution seeking to enjoin a state law as preempted by the federal Medicaid statute.

The undersigned national organizations and associations do not believe that review by the Supreme Court is appropriate or necessary. The decision of the Ninth Circuit is consistent with decades of Supreme Court precedent and the federal government's own position in recent cases on the use of the Supremacy Clause; there is no conflict among the courts of appeals on this issue. In addition, there have been no developments since the Supreme Court denied the state's request for review on this same issue last year that would warrant a different result here. *See Independent Living Center v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert denied*, 129 S. Ct. 2828 (2009). The court of appeals' decision is, moreover, consistent with the federal government's interest in ensuring the primacy of federal law over inconsistent state laws and regulations.

The Ninth Circuit correctly held that the Supremacy Clause contains an implied cause of action for prospective injunctive relief to prohibit implementation of preempted state laws. Numerous decisions of the Supreme Court reflect the longstanding and consistent understanding that "the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation." *Independent Living Center v. Shewry*, 543 F.3d 1050, 1056 (9th Cir. 2008). As the Ninth Circuit recognized and respondents' brief details, the decisions evidencing that understanding arise from any number of different contexts, reflecting the breadth of federal

regulation and the variety of circumstances in which questions of preemption can arise.¹ Of particular significance for your review, is that the federal government itself just recently relied on the implied cause of action under the Supremacy Clause and cited the court of appeals' decision in this very case as authority for the government's successful challenge to Arizona's immigration law. Complaint, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (D. Ariz.).

As respondents have noted in their brief, there is no division in the lower courts regarding the availability of an action under the Supremacy Clause. In general, the courts have recognized that the Supremacy Clause provides an important mechanism for vindicating the primacy of federal law over inconsistent state laws and regulations. Courts have permitted plaintiffs to bring Supremacy Clause actions to enforce the primacy of a broad range of federal statutes by prohibiting implementation of inconsistent state laws.² Moreover, the federal government has supported private plaintiffs asserting preemption claims against state legislation. *See, e.g.*, Amicus Brief, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2007); Amicus Brief, *Crosby* 530 U.S. 363.

As noted above, this case involves Medicaid providers and recipients challenging state Medicaid reimbursement rate reductions implemented by state statute. Under federal law, state Medicaid programs operate as partnerships between the federal and state governments and, although states have substantial discretion in implementing and administering their programs, these programs must meet minimum federal statutory and regulatory requirements. 42 U.S.C. §§ 1396 et seq. The statutory requirement at issue in this case mandates that each state Medicaid plan:

provide such methods and procedures ... 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). In relevant part, the provision requires that states employ methods and procedures to set provider payments at levels that are adequate to ensure quality care is available to Medicaid recipients, at least to the extent that it is available to the general population. A state reimbursement policy that reduces provider rates without considering whether the reduced rates will adequately provide for such quality and equal access violates federal law.

¹ *See, e.g.*, *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

² *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (Congressional sanctions included in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997); *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (Employee Retirement Income Security Act of 1974); *Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) (Title X of the Public Health Service Act); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258 (10th Cir. 2004) (Federal Telecommunications Act of 1996); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1995) (National Labor Relations Act).

As Medicaid providers, members of the undersigned organizations are acutely aware of the difficulties Medicaid recipients face when seeking primary, secondary, and tertiary care. At a certain point, despite a continued commitment to treating the Medicaid population, increased Medicaid volume at reduced rates threaten providers' long-term financial viability and providers' ability to adequately serve Medicaid recipients.

Provider suits that enforce the Medicaid statute's requirement of procedures to ensure adequate payment rates further the federal government's interest in ensuring that the Medicaid program provides meaningful benefits to Medicaid recipients. Our members' commitment to the Medicaid program ensures that Medicaid coverage does not become an illusory federal coverage program without an adequate network of participating providers. Provider actions that prevent states from violating these requirements of the Medicaid statute assist the federal government in implementing the program.

The federal government monitors state compliance with the Medicaid statute primarily by requiring states to seek federal approval for any changes to their state Medicaid plans. 42 C.F.R. § 430.12. However, this review process alone is not always adequate for ensuring compliance – especially timely compliance. The federal government does not have the resources to analyze or state-specific experience to anticipate the effects of each state proposal, and a state's outlook or expectations often conflict sharply with the reality experienced by Medicaid recipients and providers. Federal administrative enforcement mechanisms are often far too blunt instruments and are frequently only belatedly available to address discrete violations of federal law suffered by providers as states implement their Medicaid programs. Indeed, as occurred in this case, states can slow down the federal review process, delaying or effectively precluding federal enforcement. For all of these reasons, there has been a long history of provider lawsuits against states with respect to the Medicaid program. *See, e.g., Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). Although many of those cases were brought under § 1983, that does not suggest that an action is not also possible under the Supremacy Clause directly. Particularly where delay occurs and providers and recipients suffer the immediate negative consequences of state actions such as rate cuts, suits against states must be available.

To further protect Medicaid recipients' continued access to medical care, the federal government has a strong interest in protecting the ability of providers and other interested parties to ensure that the Medicaid statute's requirements are being met. The *Maxwell-Jolly* litigation serves this purpose, enabling Medicaid recipients and providers to hold states accountable for Medicaid policies in violation of the Medicaid statute. According to the Medicaid statute, states are not permitted to indiscriminately cut Medicaid payments to the point where recipients no longer have meaningful access to medical care. 42 U.S.C. § 1396a(a)(30)(A). Despite the states' protestations to the contrary, the Ninth Circuit decision will not establish an unpredictable funding burden; it merely reinforces the obligation that states already have under federal law to employ methods and procedures that ensure provider reimbursement rates will be high enough to attract an adequate number of Medicaid providers..

If you have any questions or wish to discuss this letter, please feel free to call any of organizations that have signed this letter or the following attorneys at Ropes & Gray LLP, which represents signatory National Association of Public Hospitals and Health Systems: Larry Gage, Doug Hallward-Driemeier, Charles Luband, or David Gross.

Sincerely,

American Hospital Association
National Association of Public Hospitals and Health Systems
American Academy of Pediatrics
American Congress of Obstetricians and Gynecologists
American Health Care Association
Association of American Medical Colleges
Family Planning Councils of America
Federation of American Hospitals
National Association of Community Health Centers
National Community Pharmacists Association
National Family Planning and Reproductive Health Association
Planned Parenthood Federation of America
Premier, Inc.

cc: Mark Childress, Acting General Counsel, Department of Health and Human Services