

March 21, 2010

By U.S. Mail and E-Mail

Neal Kumar Katyal
Acting Solicitor General
Leondra R. Kruger
Acting Principal Deputy Solicitor General
Edwin S. Kneeder
Deputy Solicitor General
Melissa Arbus Sherry
Assistant to the Solicitor General
Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *Douglas (formerly Maxwell-Jolly) v. California Pharmacists Association et al*, No. 09-1158;
Douglas v. Independent Living Center of Southern California, Inc., et al., No. 09-958; and
Douglas v. Santa Rosa Memorial Hospital, no. 10-283.

Dear Mr. Katyal, Ms. Kruger, Mr. Kneeder, & Ms. Sherry:

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 file an amicus brief in support of the plaintiff-respondents in the above-referenced consolidated cases pending before the Supreme Court. The question before the Court is whether Medicaid recipients and providers may bring suit under the Supremacy Clause of the United States Constitution to ensure that states comply with the federal Medicaid statute and to prevent dramatic cuts that would undercut Congress' goals in enacting the program.

The federal government has an interest in assuring that this statute and other federal laws are not undermined by conflicting state laws, and private party suits remain a critical tool for ensuring the supremacy of federal law. As you recognized in your earlier brief to the Supreme Court in this matter, "[a] system that relies solely on agency review may often be less effective in ensuring the supremacy of federal law than a system of agency review supplemented by private enforcement." As described in more detail in this letter, the federal government has relied on the Supremacy Clause to prevent state action that was inconsistent with federal law, and federal courts have upheld this right. The federal government also has benefited from Supremacy Clause actions brought by private parties, and federal courts have upheld these actions as well. The United States should not take a position in this litigation that would undermine the critical role that Supremacy Clause litigation plays in effectuating the primacy of federal law.

1. The Federal Government Alone Cannot Fully Ensure Compliance with the Mandates of the Medicaid Statute

Provider suits to vindicate federal Medicaid requirements further the federal government's interest in ensuring that the Medicaid program provides meaningful benefits to Medicaid recipients. 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. Further, compliance issues may arise even after federal approval as circumstances change. Federal administrative enforcement mechanisms are often far too blunt instruments. As the United States’ amicus brief at the petition stage in this very case acknowledged “...those programs in which the drastic measure of withholding all or a major portion of federal funding is the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions in appropriate circumstances.” And administrative mechanisms 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.

The need for continued scrutiny of state compliance with federal Medicaid law will only expand in upcoming years, as the Medicaid provisions of the recent health reform legislation, including the requirement to expand Medicaid eligibility to all residents below 133 percent of the federal poverty limit, go into effect. Supremacy Clause litigation remains a critical route through which private plaintiffs can vindicate the supremacy of federal Medicaid law and achievement of Congress’ goals.

2. The United States’ Interests are Served by Preserving the Availability of Supremacy Clause Challenges to Vindicate the Primacy of Federal Statutes Over Inconsistent State Law

The federal government has long relied on Supremacy Clause actions brought by itself and private plaintiffs to vindicate the primacy of federal statutes over inconsistent state law, and federal courts have upheld this right. As the Ninth Circuit has noted, numerous decisions of the Supreme Court reflect the longstanding and consistent (albeit implicit) 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). Federal courts have permitted private plaintiffs to bring Supremacy Clause actions to enforce the primacy of a broad range of federal statutes by prohibiting implementation of inconsistent state laws.¹

Of particular significance, the federal government has itself relied on the implied cause of action under the Supremacy Clause and cited one of the decisions under review, the Ninth Circuit’s *California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009), as authority for its ongoing challenge to Arizona’s immigration law. Motion for Preliminary Injunction, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (D. Ariz.). Likewise, on numerous occasions, the

¹ See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (federal statutory sanctions preempted state sanctions against Burmese government); *Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005) (Title X of the Public Health Service Act preempted state limitations on the use of federal family planning funds); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258 (10th Cir. 2004) (Federal Telecommunications Act of 1996 preempted a local ordinance establishing new procedures for telecommunications providers seeking access to city-owned rights-of-way); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1995) (National Labor Relations Act preempted action by the state Agricultural Labor Relations Board).

federal government has supported private plaintiffs seeking declarations that state laws are preempted. *See, e.g.,* Amicus Br. 6-13, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2007) (federal motor carrier statute preempted state law regulating transportation of cigarettes); Amicus Br. 12-21, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (state law regulating Holocaust-era insurance policies conflicted with means chosen by President and Congress); Amicus Br., *Crosby*, 530 U.S. 363. And in its amicus brief urging the Court not to grant certiorari in the present case, the government noted the “important role private parties can and often do play in vindicating federal law.” Amicus Br. 19, *Independent Living Center of Southern California, Inc.*, No. 09-958. The wide variety of contexts in which affirmative Supremacy Clause challenges arise demonstrates the breadth of the federal government’s interest in sustaining this critical avenue for vindicating the supremacy of federal law. Notably, several of the suits discussed above arise in areas with acute federalism and even foreign relations concerns.

The government’s interest would not be served by the narrow view espoused by petitioner that Supremacy Clause challenges be limited to those statutes where the regulated party can raise preemption as a defense against enforcement. This position would drastically limit the ability of private plaintiffs to enforce state compliance with federal law.² Carried to its logical end, this argument could even lead to a conclusion that no party, including the federal government, can bring a Supremacy Clause action unless raising it as a defense to enforcement. Such a holding would eliminate the government’s ability to intervene in situations like the *Arizona* case, where the federal government was not subject to enforcement under the law and at least some provisions of Arizona’s immigration statute directly regulated only state officials.³

The United States’ interest would not be served by endorsing the view that Spending Clause legislation is less entitled than other legislation to vindication against state law that is inconsistent with federal law. To date, the Supreme Court has protected federal interests by recognizing that Spending Clause legislation trumps conflicting state statutes or regulations under the Supremacy Clause. For example, in *Arkansas Dep’t of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006), the Supreme Court invalidated an Arkansas statute that purported to impose a lien on a Medicaid recipient’s tort settlement in violation of a federal anti-lien provision, 42 U.S.C. § 1396p. Similarly, in *Townsend v. Swank*, 404 U.S. 282, 285 (1971), the Supreme Court held that an Illinois statute was “invalid under the Supremacy Clause” because it conflicted with the Aid to Families With Dependent Children (AFDC) program, a provision of the Social Security Act that was adopted as Spending Clause legislation.⁴ A change in this precedent by the Supreme Court would leave vulnerable

² In *Crosby*, for example, the Massachusetts Burma sanctions statute directly regulated only the conduct of governmental actors in Massachusetts, who were forbidden from entering into contracts with companies doing business in Burma. The businesses whose conduct were indirectly regulated and who had an interest in challenging the statute were not subject to enforcement actions in which they might have raised preemption as a defense.

³ For example, A.R.S. § 11-1051(B) requires officers to make a reasonable attempt to determine the immigration status of a person who is stopped.

⁴ Indeed, the Supreme Court has recognized repeatedly the preemptive effect of different provisions of the Social Security Act, adopted pursuant to the Spending Clause, in Supremacy Clause litigation brought by private plaintiffs. *See, e.g.,* *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) (state program discriminating against AFDC beneficiaries preempted by federal regulation); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972) (state rule denying assistance to children of military members preempted by AFDC); *cf. Dalton v. Little Rock Family*

important Spending Clause legislation, such as certain provisions of the Patient Protection and Affordable Care Act, as well as Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, which is responsible for dramatic improvement in the provision of resources to female students. While Spending Clause legislation may permit an express or implied individual right of action for money damages, either directly or through Section 1983,⁵ the fact that Congress chooses not to authorize individual damages claims should not mean there is *no manner* for private parties to vindicate the primacy of the federal statute over inconsistent state law.

Significantly, pursuant to the Supremacy Clause, federal legislation may constrain a state in ways that other actors are not. In *Crosby*, for example, the federal Burma sanctions act did not preclude a private individual or corporation from engaging in a secondary boycott of companies that did business with Burma. By contrast, a state was foreclosed from adopting such a sanctions policy because it undermined the President's capacity for diplomacy, which was central to the federal sanctions legislation. While the state would not be subject to a claim for damages for violating the federal act, an *Ex parte Young* action under the Supremacy Clause provided prospective relief invalidating the preempted state legislation.

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 at (202) 508-4600, 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
Catholic Health Association of the United States
Federation of American Hospitals
National Association of Community Health Centers
National Family Planning and Reproductive Health Association
Planned Parenthood Federation of America
Premier, Inc.

cc: William B. Schultz, Acting General Counsel, Department of Health and Human Services
Ken Choe, Deputy General Counsel, Department of Health and Human Services

Planning Servs., 516 U.S. 474, 476-78 (1996) (per curiam) (leaving in place district court injunction enjoining application of state law prohibiting expenditure of state funds for abortions in the case of incest or rape to the extent it "imposed obligations inconsistent with" the Hyde Amendment to the Medicaid statute, a pending bill).

⁵ Title IX, for example, permits individual suits for money damages. *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).