**Nos. 09-958, 09-1158, and 10-283**

# In the Supreme Court of the United States

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a Nonprofit Corporation, *et al.*

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

CALIFORNIA PHARMACISTS ASS'N, *et al.*

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.,*

**On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit**

## BRIEF FOR APA WATCH AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Under the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of ... [Medicaid] services and ... 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 ... at least to the extent that such care and services are available to the general population." 42 U.S.C. §1396a(a)(30)(A). The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), concluded that this provision is not privately enforceable by providers or beneficiaries under 42 U.S.C. §1983, *inter alia,* because it does not confer any "rights" on providers or beneficiaries, and because it requires balancing of indeterminate and potentially conflicting policy objectives that are "ill-suited" for judicial enforcement. Nonetheless, the Ninth Circuit held that such considerations were irrelevant in the present cases, where respondents are proceeding under the Supremacy Clause rather than under §1983.

The question presented is:

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce §30(A) by asserting that the provision preempts a state law that may reduce payments to providers?

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* APA Watch is a nonprofit membership corporation headquartered in McLean, Virginia. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on third-party enforcement and justiciability issues. *See, e.g., Stormans Inc. v. Seleky,* No. 07-36039 (9th Cir.) (third-party justiciability); *Envtl. Defense v. Duke Energy Corp.,* No. 05-848 (U.S.) (third-party enforcement), *Astra USA, Inc. v. Santa Clara County, Cal.,* No. 09-1273 (U.S.) (third-party federal common-law cause of action). Although the third-party enforcement here does not directly affect APA Watch members, the premature second-guessing of agency enforcement and disrupting the contracting parties' expectations present an issue of fairness on which APA Watch seeks to comment. Moreover, because the litigants have not fully briefed the plaintiffs' standing, APA Watch's perspective on third-party justiciability could aid the Court on a jurisdictional issue antecedent to the parties' merits

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[1] This *amicus* brief is filed with written consent of all parties; the written letters of consent from petitioner and respondents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than the *amicus* and its counsel make a monetary contribution to the preparation or submission of this brief.

arguments. For these reasons, APA Watch respectfully files this *amicus* brief.

## FACTUAL AND LEGAL BACKGROUND

In these three consolidated cases, a variety of plaintiffs (respondents here and, collectively, "Providers") sought and obtained a preliminary injunction against California's implementation and planned implementation of the Medicaid statute, 42 U.S.C. 1396 *et seq*. *Amicus* APA Watch adopts the facts as set forth in petitioner California's brief, and sets out the following legal background relevant to APA Watch's argument that the Providers lack standing.

### Enforcement of Spending-Clause Legislation

Courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the affected public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.,* 603 F.3d 365, 386 (7th Cir. 2010); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. With the required notice, recipients may face enforcement for violations. *Id.* at 187-89. Without the required notice, they do not.

### Medicaid Statute

Established in 1965, Medicaid is a cooperative federal-state program that provides medical care to needy individuals. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 502 (1990). State participation in Medicaid is voluntary under the Spending Clause,

but participating States agree to comply with requirements imposed by the Medicaid statute and the implementing regulations of the Department of Health & Human Services ("HHS").

To qualify for federal funds, participating States must submit to HHS and receive approval of "a plan for medical assistance" on the nature and scope of that State's Medicaid program. 42 U.S.C. §1396a(a); 42 C.F.R. §430.10. In addition, after the initial approval, States may submit a "State plan amendment" or "SPA" to revise the State plan. 42 C.F.R. §430.12, as California has done here. If HHS denies the SPA (as HHS has done here), the State may request reconsideration of that disapproval (as California has done here), which initiates an administrative process including a formal hearing – including the opportunity for public participation – and the eventual opportunity for judicial review directly in the Court of Appeals for the appropriate Circuit. 42 C.F.R. 430.18, 430.60, 430.76, 430.102(c); 42 U.S.C. 1316(a)(3). These required processes have not run their course.

**Federal Common Law**

"This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 726 (1979). Thus, "[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract." *Boyle v. United Tech. Corp.,* 487 U.S. 500, 519 (1988); *cf. Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 691 (2006) ("Court has made clear that uniform federal law need not be applied to all questions in federal government litigation, even in

cases involving government contracts") (internal quotations omitted). For *private enforcement* of a federal contract or program, however, a uniform federal rule of decision is not required if the claim "will have *no direct effect upon the United States or its Treasury*." *Boyle,* 487 U.S. at 520 (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). While this Court typically applies federal common law to litigation involving the federal government, it does not necessarily do so for private enforcement of the same federal provisions.

"Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods,* 440 U.S. at 727-28. This Court could adopt a federal rule of decision that looks to state law: "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Kimbell Foods,* 440 U.S. at 728. Indeed, "[t]he prudent course … is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *McVeigh,* 547 U.S. at 691-92 (internal quotation omitted). In other words, notwithstanding that federal law applies, the federal rule of decision nonetheless could be "*See the state rule.*"

Finally, "federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." *Kimbell Foods,* 440 U.S. at 728 (*citing United States v. Yazell,* 382 U.S. 341, 354 (1966)) (interior quotations omitted). "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such

narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641 (1981) (footnotes omitted). Generally, therefore, this Court has discretion "[w]hether to adopt state law or to fashion a nationwide federal rule," *Kimbell Foods,* 440 U.S. at 728, based on "a variety of considerations … relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *U.S. v. Standard Oil Co.,* 332 U.S. 301, 310 (1947). In sum, this Court makes a case-by-case determination on the need for uniform federal rules, based on the totality of the circumstances.

In light of the highly technical nature of both the Medicaid statute and its implementing regulations and of the potentially national – albeit piecemeal – scope of this litigation through similarly situated entities in other States, *amicus* APA Watch respectfully submits that this Court should adopt uniform federal rules of decision. As it happens, however, the rules would be the same under California or federal law.

## SUMMARY OF ARGUMENT

As signaled by the preceding subsection, *amicus* APA Watch submits that this case calls upon this Court to adopt a rule of decision under the federal common law. While the parties focus on the availability of a third-party cause of action to enforce a provision of Medicaid's reimbursement regime, *amicus* APA Watch respectfully submits that this Court first must adopt a federal rule of decision for third-party beneficiaries' standing to enforce the

contractual aspects of a recipient's obligations to the United States under the Spending Clause. Because it is antecedent to the merits question presented here, the standing inquiry assumes *arguendo* the plaintiffs' merits views (*i.e.,* that the Providers may maintain suit under the Supremacy Clause to enforce their particular provision of the Medicaid puzzle) and then asks whether those plaintiffs meet the constitutional and prudential tests for standing. Because it is integral to federal jurisdiction, the standing inquiry comes first. If the Providers lack standing, the case must be dismissed for lack of jurisdiction under FED. R. CIV. P. 12(b)(1).

Section I argues that this Court – like all federal courts – has an independent duty to consider standing, whether or not the parties have raised it. Concurring with California (Opening Br. at 49-53), Section II argues that the Providers do not have third-party standing to enforce the rights of HHS or the United States, both because they lack the required close relationship and because nothing hinders the federal government's enforcing its own rights. Finally, and notwithstanding that this Court must assume the Providers' non-frivolous merits views to evaluate jurisdiction, Section III argues that the Providers lack standing for the relief that they seek because *even the United States* could not obtain the relief that the Providers seek at this juncture, before the required administrative process unfolds. What the promisee lacks a vested right to enforce directly, a third-party beneficiary lacks a cognizable right to enforce indirectly, regardless of whether that third party could enforce the contract after the right vests for the promisee.

## ARGUMENT

Although this Court's "normal role is to interpret law created by others and not to prescribe what [the law] shall be," *Danforth v. Minnesota,* 552 U.S. 264, 290 (2008) (internal quotation omitted), "this Court has ultimate authority to determine and declare" the federal common law. *Taylor v. Sturgell,* 553 U.S. 880, 891 (2008). Here, federal law obviously applies – under Article III for jurisdiction and under Medicaid's express terms for the merits – but "[t]he more difficult task … is giving content to this federal rule." *Kimbell Foods,* 440 U.S. at 727. Although it presents no position on the merits, *amicus* APA Watch respectfully submits that this litigation must be dismissed: the Providers have no cognizable right, much less a right of action, under Medicaid.

### I. CALIFORNIA CANNOT WAIVE THE PROVIDERS' LACK OF STANDING

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, §2, which requires an actual or imminent "injury in fact" to a cognizable interest. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Specifically, constitutional standing presents a tripartite test: "an invasion of a *legally protected interest*" of the plaintiff, caused by the defendants, and redressable by a court. *Defenders of Wildlife,* 504 U.S. at 560-62 (emphasis added).

Moreover, even if California had not contested standing, litigants cannot confer federal jurisdiction by consent or waiver: "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982);

*FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 95 (1998). To the contrary, because it goes to the Article III "power of the court to entertain the suit," standing "is *the threshold question* in every federal case." *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (emphasis added). "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.,* 523 U.S. at 94 (*quoting Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)). Consequently, the Provider's standing is antecedent to the cause-of-action question on which the parties join. *Steel Co.,* 523 U.S. at 89-90:

> *It is firmly established in our cases that the absence of a valid … cause of action does not implicate subject-matter jurisdiction,* i.e., *the courts' statutory or constitutional* power *to adjudicate the case.*

*Id.* at 89 (emphasis in original); *Northwest Airlines, Inc. v. County of Kent,* 510 U.S. 355, 365 (1994) ("[t]he question whether a federal statute creates a claim for relief is not jurisdictional"). Under its precedents – and its constitutional jurisdiction – this Court must evaluate standing before the cause-of-action issue in the Question Presented. If the Providers lack standing, that ends the inquiry, without answering the question.

## II. PROVIDERS CANNOT LITIGATE THE INJURIES OF HHS

It is, of course, "axiomatic" that a "litigant first must clearly demonstrate that [it] has suffered

an injury in fact in order to assert Article III standing to sue." *Wyoming v. Oklahoma,* 502 U.S. 437, 465 (1992) (interior quotations omitted). Because plaintiffs bear the burden of establishing their standing, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). As explained in the next section, the Providers lack standing under Medicaid.

Significantly, the Providers lack standing to litigate the United States' injuries. A plaintiff can assert the rights of absent third parties only if the plaintiff itself has constitutional standing, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the absent third party from protecting its own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Even assuming *arguendo* that the Providers could establish constitutional standing on their own, they would fail the second and third prongs of the test for litigating the United States' injuries: (a) they lack the requisite close relationship with the federal government, and (b) nothing hinders HHS from eventually proceeding against California if the Providers are correct on the merits.

## III. THIRD-PARTY BENEFICIARIES LACK STANDING TO ENFORCE RIGHTS THAT HAVE NOT VESTED IN THE PROMISEE

At the outset, only *intended* beneficiaries have standing to enforce an agreement. *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 821-22 (9th Cir. 1985); *Garcia v. Truck Insurance Exchange,* 36 Cal.3d 426, 436-37 (1984). Those who are not intended beneficiaries are mere interlopers who lack

standing to sue to enforce other parties' contract. *U.S. v. Andreas,* 216 F.3d 645, 664 (7th Cir. 2000) (those "not parties or third-party beneficiaries … do not have standing to enforce the terms of [an] agreement); *More v. Churchill,* 155 Cal. 368, 369-70 (1909); *cf. Gart v. Cole,* 263 F.2d 244, 250-51 (2d Cir. 1959) (individual landowners and tenants lack standing to enforce sponsorship agreements under the Housing Act, which are designed to benefit the public at large). Significantly, even intended beneficiaries need not have the intended right to enforce the bargain, particularly for government promisees like HHS:

> *The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.*

*Astra USA, Inc. v. Santa Clara County, Cal.,* __ U.S. __, 2011 WL 1119021, 5 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Federal agencies, of course, are bound by their own statutes and regulations, which can pose conditions precedent to enforcement in court. Foregoing that process, the Providers here propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* __ U.S. __, 2011 WL 1119021, at 5. California – and the other States – never agreed to that, and federal law does not sanction it.

Significantly, even *intended* third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990); *Holbrook v. Pitt,* 643 F.2d 1261, 1273 n.24

(7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"); *BAII Banking Corp. v. UPG, Inc.,* 985 F.2d 685, 697 (2d Cir. 1993) ("third-party beneficiary … possessed no greater right to enforce a contract than the actual parties to the contract"), which links the third-party beneficiaries' rights to the same conditions as the promisee's rights. RESTATEMENT (SECOND) OF CONTRACTS §304 comment b. To the extent that the Providers depend on California's Medicaid obligations to HHS, the Providers' rights are subject to the same conditions precedent as HHS's rights. *What HHS could not do directly as the promisee, the Providers cannot do indirectly as a third-party beneficiary.*

Under *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977), federal courts can look to state law for third-party beneficiaries' standing to enforce federal obligations. California follows the RESTATEMENT (SECOND) OF CONTRACTS, *Martinez v. Socoma Companies, Inc.,* 11 Cal.3d 394, 401-02, 404-05 (1974) (citing RESTATEMENT OF CONTRACTS and then-tentative drafts of the RESTATEMENT (SECOND) OF CONTRACTS); *Outdoor Services, Inc. v. Pabagold, Inc.,* 185 Cal.App.3d 676, 683-84 (Cal. App. 1986) (citing RESTATEMENT (SECOND) OF CONTRACTS), as do most other states. *See, e.g., Guy v. Leiderbach,* 501 Pa. 47, 459 A.2d 744, 750-52 (Pa. 1983); *Joseph v. Hospital Service Dist. No. 2,* 939 So.2d 1206, 1213 (La. 2006).

An intended beneficiary must assert a vested right, *Karo,* 762 F.2d at 822 ("he must be seeking to

enforce a right that is personal to him and vested in him at the time of the suit"), without which "[h]e does not have standing to sue as a third party beneficiary because he had no vested rights." *Karo,* at 824; *Peabody v. Weider Publications, Inc.,* 260 Fed.Appx. 380, 383 (2d Cir. 2008) ("[b]ecause the condition precedent never came to fruition, Peabody's rights … never vested") (non-precedential summary order). A "vested right" is one "not subject to a condition precedent." *In re Marriage of Bouquet,* 16 Cal.3d 583, 591 n.7 (1976); *Skookum Oil Co. v. Thomas,* 162 Cal. 539, 545 (1912) ("[n]either will equity relieve such [party] who … has not fulfilled conditions precedent to the vesting of his right of action"); *Knudson v. City of Ellensburg,* 832 F.2d 1142, 1147 (9th Cir. 1987). Given that HHS could not have brought this action *under Medicaid* without completing the administrative prerequisites, neither HHS nor California intended third-party beneficiaries to enforce Medicaid – or, really, to *short-circuit* Medicaid – without satisfying those prerequisites.[2] Under the circumstances, the Providers lack standing to sue.

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[2] *See, e.g., Glock v. Howard & Wilson Colony Co.,* 123 Cal. 1, 16-17 (1898) (when a "contract is made to depend upon a condition precedent" and "[b]y its terms no right is to vest … until certain acts … have been done by [a party]," "a court of equity no more than a court at law will relieve [the party], under such circumstances … in the absence of an equitable showing to excuse his default"); *Chen v. Chen,* 586 Pa. 297, 311-13, 893 A.2d 87, 96 (Pa. 2006); *OEC-*

*(Footnote cont'd on next page)*

Unmet conditions precedent can affect both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). For example, Louisiana law for stipulations *pour autrui* (*i.e.,* third-party beneficiary contracts) suggests that failure to meet the promisee's conditions precedent renders third-party beneficiaries unable to state a claim. *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane Enter. v. MacGregor (USA) Inc.,* 322 F.3d 371, 375 (5th Cir. 2003). Even if unmet conditions precedent implicated only Rule 12(b)(6) *for promisees,*[3] they nonetheless would

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*Diasonics, Inc. v. Major,* 674 N.E.2d 1312, 1314-15 (Ind. 1996); *Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc.,* 272 Conn. 469, 476-78, 863 A.2d 645, 649-50 (Conn. 2005).

[3] Numerous statutory regimes set conditions precedent to private enforcement to notify the putative defendant of alleged violations and to provide an opportunity to resolve them. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982); *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 174-75 (2000); *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989). Regardless of "whether the notice provision is jurisdictional or procedural," private enforcement is "barred" and "must be dismissed" if it commenced prior to the required notice. *Hallstrom,* 493 U.S. at 32-33. Even if not jurisdictional under constitutional standing, that is fatal under statutory standing,

*(Footnote cont'd on next page)*

implicate jurisdiction for third-party beneficiaries, who lack standing to enforce non-vested rights. *Conoco, Inc. v. Republic Ins. Co.,* 819 F.2d 120, 123-24 (5th Cir. 1987); *Palma v. Verex Assur., Inc.,* 79 F.3d 1453, 1458 (5th Cir. 1996). Without the conditions precedent to Medicaid enforcement, the Providers have no legally protected interest in Medicaid reimbursement and thus no standing here.

Whether this Court adopts a federal rule of decision or relies on California law under *Miree,* third-party beneficiaries plainly lack standing to enforce contractual provisions that even the promisee could not enforce without having met the conditions precedent to contractual enforcement.

## CONCLUSION

For the foregoing reasons, this Court should hold that the Providers lack standing to bring their third-party claim to enforce Medicaid.

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*(Footnote cont'd from previous page.)*

which this Court also can address at this stage. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999).

May 26, 2011 Respectfully submitted,

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