

No. 09-17581

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**DAVID OSTER, et al.,**  
*Plaintiffs/Appellees,*

v.

**JOHN WAGNER, Director of the California  
Department of Social Services, et al.,**  
*Defendants/Appellants.*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

---

**BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF THE  
PLAINTIFFS/APPELLEES SEEKING AFFIRMANCE**

---

Barbara A. Jones  
AARP Foundation Litigation  
200 So. Los Robles, Suite 400  
Pasadena, CA 91101  
Telephone: (626) 585-2628  
Fax: (626) 583-8538

Kenneth Zeller  
AARP Foundation Litigation

Michael Schuster  
AARP

601 E Street, NW  
Washington, DC 20049  
(202) 434-2060

Attorneys for *Amicus Curiae* AARP



## TABLE OF CONTENTS

CORPORATE DISCLOSURE FORM.....	i
TABLE OF AUTHORITIES .....	iv
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT	
I.    CUTS IN IHSS ARE CONTRARY TO THE TREND TOWARD MORE COMMUNITY BASED CARE OPTIONS, WHICH IS SUPPORTED BY RESEARCH-BASED POLICY. THE CUTS WILL LIMIT THE ABILITY OF OLDER PEOPLE TO AGE AT HOME AND PLACE MANY AT RISK OF INSTITUTIONAL PLACEMENT.....	2
A.    ABX4 4 Reduces, or Completely Eliminates, IHSS Services for Affected Recipients.....	2
B.    By Reducing Access to IHSS, ABX4 4 Will Increase Institutionalization, which Is Counter to the Current Trend in Long-Term Care in Favor of Community-Based Care .....	4
C.    Older People Strongly Prefer to Age at Home .....	7
D.    Research Shows that Aging at Home Can Benefit Older People .....	8
E.    In-Home Supportive Services Cost Less Than Institutionalized Care and in the Long-Term May Slow the Growth of Medicaid Spending .....	10

II.	SUPREMACY CLAUSE CLAIMS FOR INJUNCTIVE RELIEF REQUIRE NO ASSERTION OF A STATUTORY RIGHT AND IMPLICATE A DRAMATICALLY DIFFERENT ANALYSIS THAN DOES 42 USC 1983.....	12
A.	Supremacy Clause Provides a Basis for Challenging a State Law that Conflicts with a Federal Statute and Regulation .....	13
B.	Standards Applied to § 1983 Claims Are Inapplicable to Supremacy Clause Claims.....	18
	CONCLUSION.....	24
	STATEMENT OF RELATED CASES .....	25
	CERTIFICATE OF COMPLIANCE.....	26
	CERTIFICATE OF SERVICE .....	27

## TABLE OF AUTHORITIES

### Cases

<u>Air Transp. Ass’n of Am., Inc. v. Cuomo,</u> 520 F.3d 218 (2d Cir. 2008) .....	16, 20
<u>Alexander v. Sandoval,</u> 532 U.S. 275 (2001).....	22
<u>AlohaCare v. State of Haw., Dep’t of Human Servs.,</u> 572 F.3d 740 (9th Cir. 2009) .....	19, 21
<u>Barrientos v. 1801-1825 Morton LLC,</u> 583 F.3d 1197 (9th Cir. 2009) .....	13
<u>Bud Antle, Inc. v. Barbosa,</u> 45 F.3d 1261 (9th Cir. 1994) .....	15, 20
<u>Cal. Pharmacists Ass’n v. Maxwell-Jolly,</u> 563 F.3d 847 (9th Cir. 2009) .....	21
<u>Chamber of Commerce of U.S. v. Edmondson,</u> Nos. 08-6127, 2010 WL 354353, at *5 n.13 (10th Cir. Feb. 2, 2010).....	16
<u>Farrar v. Hobby,</u> 506 U.S. 103 (1992).....	20
<u>Geier v. Am. Honda Motor Corp., Inc.,</u> 529 U.S. 861 (2000).....	14
<u>Golden State Transit Corp. v. City of Los Angeles,</u> 493 U.S. 103 (1989).....	13, 22, 23
<u>Gonzaga University v. Doe,</u> 536 U.S. 273 (2002).....	19

<u>Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel,</u> 570 F.3d 520 (3d. Cir. 2009) .....	18
<u>Hayfield N. R. Co., Inc. v. Chicago &amp; N. W. Transp. Co.,</u> 467 U.S. 622 (1984).....	13
<u>Hafer v. Melo,</u> 502 U.S. 21 (1991).....	20
<u>Independent Living Center of Southern California v. Shewry</u> <u>(Independent Living Center),</u> 543 F.3d 1050 (9th Cir. 2009) .....	2, 12, 15, 16, 20, 21, 22
<u>Indep. Living Ctr. of S. Cal., Inc v. Maxwell-Jolly,</u> 572 F.3d 644 (9th Cir. 2009) .....	14, 19, 20, 21
<u>Lankford v. Sherman,</u> 451 F.3d 496 (8th Cir. 2006) .....	17, 22
<u>Mahach-Watkins v. Depee,</u> No. 08-15694, 2010 WL 337328, at *4 (9th Cir. Feb. 1, 2010) .....	20
<u>Olmstead v. L.C. ex rel. Zimring,</u> 527 U.S. 581 (1999).....	5
<u>P.R. Tel. Co. v. Municipality of Guayanilla,</u> 450 F.3d 9 (1st Cir. 2006).....	16
<u>Pharm. Research &amp; Mfrs. of Am. v. Concannon,</u> 249 F.3d 66 (1st Cir. 2001), <u>aff’d sub nom. Walsh</u> , 538 U.S. at 670.....	20
<u>Pharm. Research &amp; Mfrs. of Am. v. Thompson,</u> 362 F.3d 817 (D.C. Cir. 2004).....	16, 18
<u>Pharm. Research &amp; Mfrs. of Am. v. Walsh,</u> 538 U.S. 644 (2003).....	15, 16, 17
<u>Planned Parenthood Affiliates of Michigan v. Engler,</u> 73 F.3d 634 (6th Cir. 1996), .....	18

<u>Planned Parenthood of Houston &amp; Se. Tex. v. Sanchez,</u> 403 F.3d 324 (5th Cir. 2005) .....	16, 18, 22
<u>Sanchez v. Johnson,</u> 416 F.3d 1051 (9th Cir. 2005) .....	18, 22
<u>Save Our Valley v. Sound Transit,</u> 335 F.3d 932 (9th Cir. 2003) .....	22
<u>Shaw v. Delta Air Lines, Inc.,</u> 463 U.S. 85 (1983).....	15
<u>St. Thomas – St. John Hotel &amp; Tourism Ass’n, Inc. v. Gov’t of U.S. Virgin Islands,</u> 218 F.3d 232 (3d Cir. 2000) .....	16
<u>The Wilderness Soc’y v. Kane County, Utah,</u> 581 F.3d 1198 (10th Cir. 2009) .....	16
<u>Ting v. AT&amp;T,</u> 319 F.3d 1126 (9th Cir. 2003) .....	14
<u>Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.,</u> 535 U.S. 635 (2002).....	15
<u>V.L., et al. v. Wagner, et. al,</u> No. C 09-04668, 2009 WL 3486708, at *1 (N.D. Cal. Oct. 23, 2009) .....	3, 4, 12
<u>Watson v. Weeks,</u> 436 F.3d 1152 (9th Cir. 2006) .....	19
<u>Wachovia Bank, N.A. v. Burke,</u> 414 F.3d 305 (2d Cir. 2005) .....	19
<u>Wright Elec. v. Minn. State Bd. of Elec.,</u> 322 F.3d 1025 (8th Cir. 2003) .....	19

**Statutes and Regulations**

28 U.S.C. § 1331 ..... 15

42 U.S.C. § 1396a(a)(17) .....12

42 U.S.C. § 1983 ..... 2, 18-23

42 U.S.C. § 1988 .....20

42 C.F.R. § 440.230(b).....12, 17

Cal. Welf. & Inst. Code § 12300(a) (2009).....3

U.S. Const. Art. VI, cl. 2 ..... 13

**Other Authorities**

Wayne Anderson et al., U.S. Dep’t of Health & Human Servs., Money Follows the Person Initiatives of the Systems Change Grantees 12 (2006). ...6

A. E. Benjamin et al., Age, Consumer Direction, and Outcomes of Supportive Services at Home, 41 *The Gerontologist* 632 (2001).....9

California Dep’t of Social Servs., Manual of Policies & Procedures § 30-761.13 .....3

J. Kevin Eckert et al., Preferences for Receipt of Care Among Community-Dwelling Adults, 16 *J. of Aging & Social Pol’y* 49 (2004).....7

Amanda J. Lehning, Long-Term Care in the United States: Policy Themes and Promising Practices, 53 *J. of Gerontological Social Work* 43 (2009) .....7

H. Stephen Kaye, Mitchell P. LaPlante, & Charlene Harrington, Do Noninstitutional Long-Term Care Services Reduce Medicaid Spending?, *Health Affairs* 262 (2009).....11

Andrew Kochera et al., AARP, A Report to the Nation on Livable Communities: Creating Environments for Successful Aging 48 (2005).....7, 8, 9

Kathryn Lawler, Joint Center for Housing Studies of Harvard University, <u>Aging in Place: Coordinating Housing and Health Care Provision for America’s Growing Elderly Population</u> 15 (2001) .....	9, 10
Jordana L. Maisel et al., AARP, <u>Increasing Home Access: Designing for Visitability</u> 4 (2008).....	8, 9
Robert Mollica et al., AARP, <u>Taking the Long View: Investing in Medicaid Home and Community-Based Services is Cost-Effective</u> 4 (2009).....	11
Larry Polivka, <u>Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System</u> , 10 Marq. Elder’s Advisor 75 (2008).....	7, 10
John Pynoos et al., <u>Aging in Place, Housing, and the Law</u> , 16 Elder L.J. 77 (2008).....	8
Steven P. Wallace et al., UCLA Center for Health Policy Research, <u>Community-Based Long-Term Care: Potential Consequences of California’s 2009 Budget Cuts</u> 13 (2009) .....	4, 6, 10
Steven P. Wallace et al., UCLA Center for Health Policy Research, <u>California Budget Cuts Fray the Long-Term Care Safety Net</u> 3 (2009).....	3, 4, 8, 10
Audra T. Wenzlow et al., Mathematica Policy Research, Inc., <u>The National Evaluation of the Money Follows the Person (MFP) Demonstration Grant Program</u> 1 (2009).....	5

## **STATEMENT OF INTEREST**

AARP is a nonpartisan, nonprofit membership organization dedicated to representing the needs and interests of people 50 and older. AARP supports access to quality long-term care services in the setting of choice and access to a range of financing sources for needed long-term care services. To that end, AARP supports efforts to ensure that individuals on Medicaid in California have access to long-term care services at home.

## **SUMMARY OF ARGUMENT**

California's In-Home Supportive Services ("IHSS") program provides a range of in-home assistance services to low-income older people to aid with the tasks of daily living. California legislation, ABX4 4, reduces access to IHSS and many affected individuals will thereby be placed at imminent risk of institutionalization and unable to age at home which is the choice of most individuals. The clear trend in long term care for older people and persons with disabilities, supported by the overwhelming weight of scholarship and policy, is away from institutional care and toward a community based model that allows persons to choose their living situation and grow old in places that are familiar and supportive of their needs. People derive many benefits from aging in their own home or residence of choice supported by IHSS. Studies demonstrate that

community based care has the added benefit to beneficiaries and the states that it is generally more cost-effective than institutionalized care.

The plaintiffs bring two claims under the Supremacy Clause arguing that ABX4 4 conflicts with federal Medicaid law. In response, the defendants argue that plaintiffs do not have a statutory right of action and attempt to convince this Court that it should conflate the legal standards for a claim brought under 42 U.S.C. § 1983 with Supremacy Clause challenges. The Supremacy Clause is focused on conflicts between state and federal law and does not involve enforcement of an individual statutory right. *Amicus* argues that this Court's analysis in Independent Living Center of Southern California v. Shewry (Independent Living Center), 543 F.3d 1050 (9th Cir. 2009) remains the correct standard to apply, particularly when a court is looking at statutory action by a state that conflicts with federal Medicaid law. Such challenges by beneficiaries of safety net legislation can be brought pursuant to the Supremacy Clause regardless of whether a statutory right of action exists.

## **ARGUMENT**

- I. **CUTS IN IHSS ARE CONTRARY TO THE TREND TOWARD MORE COMMUNITY BASED CARE OPTIONS, WHICH IS SUPPORTED BY RESEARCH-BASED POLICY. THE CUTS WILL LIMIT THE ABILITY OF OLDER PEOPLE TO AGE AT HOME AND PLACE MANY AT RISK OF INSTITUTIONAL PLACEMENT.**
  - A. **ABX4 4 Reduces, or Completely Eliminates, IHSS Services for Affected Recipients**

As part of California's Medicaid program, IHSS provides a range of in-home assistance services to low-income people to aid with the tasks of daily living. Assistance with these personal care and essential household services allow older people to live safely at home. V.L., et al. v. Wagner, et. al, No. C 09-04668, 2009 WL 3486708, at \*1 (N.D. Cal. Oct. 23, 2009). Older people make up approximately 60% of IHSS recipients. Steven P. Wallace et al., UCLA Center for Health Policy Research, California Budget Cuts Fray the Long-Term Care Safety Net 3 (2009). In order to qualify for IHSS, a person must be unable to perform the services themselves and cannot safely remain in the home unless the services are provided. Cal. Welf. & Inst. Code § 12300(a) (2009); see also California Dep't of Social Servs., Manual of Policies & Procedures § 30-761.13-14. ABX4 4, challenged by plaintiffs, makes beneficiaries eligibility dependent on: 1) a numerical rank assigned previously by a social worker in the domestic and related services category in order to receive any services in that category, and 2) a functional index score, which is a weighted average of eleven ranks of functional ability, in order to receive any IHSS services. V.L., 2009 WL 3486708, at \*4. Domestic and related services include assistance with housework, laundry, shopping and errands, meal preparation, and meal cleanup. Under ABX4 4, approximately 8% of IHSS recipients will lose all benefits and an additional 22% will

lose the time allocated for assistance with domestic activities. Wallace et al., California Budget Cuts, *supra*, at 4.

**B. By Reducing Access to IHSS, ABX4 4 Will Increase Institutionalization, which Is Counter to the Current Trend in Long-Term Care in Favor of Community-Based Care**

Recipients affected by ABX4 4 will face health and safety risks and may be subject to unnecessary institutionalization. V.L., 2009 WL 3486708, at \*13 (citing numerous affidavits filed by the plaintiffs showing that loss of IHSS services will harm recipients who require assistance with tasks such as obtaining food, medication, or other necessities, taking medication properly, and traveling to medical appointments). Domestic services have been described as the “‘glue’ that permits older people to stay in their homes. Shopping and meal preparation are especially essential, since they influence how much and how well older people eat.” Steven P. Wallace et al., UCLA Center for Health Policy Research, Community-Based Long-Term Care: Potential Consequences of California’s 2009 Budget Cuts 13 (2009). Because older people with chronic conditions are unlikely to get better and more likely to experience a slow decline, *id.*, reductions in services may lead to increases in “emergency room use, hospitalization, permanent nursing home placement[,] and increased caregiver burden.” Wallace et al., California Budget Cuts, *supra*, at 5 (research shows that “providing assistance to those with functional impairments delays institutionalization”).

Furthermore, the increased burden on caregivers can cause greater mental and physical health problems, and lead to earlier institutionalization for older people. *Id.* at 6.

ABX4 4 is inconsistent with the clear policy trend towards giving individuals the option to receive long-term care services in the community rather than in institutions. “Three factors have contributed to [the current policy] trend: rapidly increasing costs of institutional care, a growing population of elderly and people with disabilities, and evidence that many people in institutional care prefer to live in the community and could potentially do so at a lower cost.” Audra T. Wenzlow et al., Mathematica Policy Research, Inc., The National Evaluation of the Money Follows the Person (MFP) Demonstration Grant Program 1 (2009).<sup>1</sup> The federal government has encouraged states to follow this policy trend in Medicaid programs. For example, the Centers for Medicare and Medicaid Services created the Money Follows the Person (“MFP”) initiative to change the balance of Medicaid spending from institutionalized care to community care. MFP is “a system of flexible financing for long-term services and supports that enables available funds to move with the individual to the most

---

<sup>1</sup> See also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607 (1999) (“[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”).

appropriate and preferred setting as the individual's needs and preferences change.”

Wayne Anderson et al., U.S. Dep't of Health & Human Servs., Money Follows the Person Initiatives of the Systems Change Grantees 12 (2006) (internal quotation marks omitted).

IHSS' consumer-directed approach, which gives low-income people long-term care choices, is consistent with the prevailing policy trend towards community-based care. Wallace et al., Community-Based Long-Term Care, *supra*, at 8 (noting that other states have attempted to emulate IHSS with federal support). IHSS recipients can be

authorized to recruit, hire, train and supervise their own service workers, with direct payment by the state to those workers for certified hours. Recipients are free to hire anyone they choose, meaning that they can hire family members or friends, something older recipients are especially likely to do. . . . Consumer direction allows the recipient the flexibility within program guidelines to schedule and design the package of services they most need to remain independently at home. Studies which have compared the outcomes of services delivered under consumer direction and traditional agency services have consistently shown that recipients have greater satisfaction, more positive health outcomes, and better quality of life under consumer directed approaches like IHSS.

Id. IHSS allows people to obtain the necessary support and remain at home in the community. Aging at home, which is preferred by a majority of older people, can have important health benefits and reduce Medicaid spending in the long-term.

### **C. Older People Strongly Prefer to Age at Home**

Research shows that a majority of older people want to remain at home as they age. Andrew Kochera et al., AARP, A Report to the Nation on Livable Communities: Creating Environments for Successful Aging 48 (2005) (citing survey data showing that 75% of people ages sixty-five to seventy-four and 77% of people age seventy-five and older strongly prefer to remain in their current residence for as long as possible). When long-term care services become necessary, people prefer to receive these services at home or in the community. Amanda J. Lehning, Long-Term Care in the United States: Policy Themes and Promising Practices, 53 J. of Gerontological Social Work 43, 50 (2009); see also J. Kevin Eckert et al., Preferences for Receipt of Care Among Community-Dwelling Adults, 16 J. of Aging & Social Pol’y 49, 60 (2004) (a majority of individuals in the study preferred care in the home or community settings). People believe that living in the home will give them greater independence. Anderson et al., supra, at 15 (“The great majority of individuals of all ages with chronic illnesses and disabilities prefer to receive services in their own homes or other settings that allow them maximum independence and the ability to make choices about their daily activities.”); Larry Polivka, Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System, 10 Marq. Elder’s Advisor 75, 80 (2008) (people prefer to age at home or in other community settings, which have fewer constraints than

institutionalized settings). Older people affected by ABX4 4 would lose the supportive services that allow them to safely remain at home and may need to move into an institutionalized setting. Wallace et al., California Budget Cuts, *supra*, at 2.

**D. Research Shows that Aging at Home Can Benefit Older People**

Through IHSS, the option to age in a familiar community and home environment can benefit older people. An older person's attachment in the community grows over time as he or she becomes more invested economically, socially, and psychologically in the area. Kochera et al., *supra*, at 25.

A source of identity is cultivated from living in one place for an extended period of time, and the home becomes a place to which older adults have deep-seated ties with family members and close friends. Its location is often near familiar shops, restaurants, and health services. Attachment to place is a reflection of the emotional, cultural, and spiritual connection between a person and their environment. The home is more than a physical structure. Among older adults, housing satisfaction is related to the identity of the home as a harbor of family traditions. For some older widows, leaving the home in which they lived with their husbands may be associated with leaving that relationship behind.

John Pynoos et al., Aging in Place, Housing, and the Law, 16 Elder L.J. 77, 79 (2008); see also Jordana L. Maisel et al., AARP, Increasing Home Access: Designing for Visitability 4 (2008) (elderly people “get a sense of familiarity, comfort, and meaning from their own home”). This attachment is fostered by “a range of activities and relationships that link a person with his or her community,” including relationships

with neighbors, membership in organizations, volunteer work, and participation in community affairs. Kochera et al., supra, at 22. Community engagement helps older people live a more meaningful life through social interaction, independence, and personal control. Maisel et al., supra, at 4; Kochera et al., supra, at 22; A. E. Benjamin et al., Age, Consumer Direction, and Outcomes of Supportive Services at Home, 41 The Gerontologist 632, 633 (2001) (noting one study that found that as people age the sense of control becomes more important and that opportunities for control are important to a person's well-being later in life). The maintenance of an individual's social network avoids isolation. When compared to people with five to six social ties, "those who had no social ties were at increased risk for incident cognitive decline after adjusting for a variety of socio-economic and physical factors." Kathryn Lawler, Joint Center for Housing Studies of Harvard University, Aging in Place: Coordinating Housing and Health Care Provision for America's Growing Elderly Population 15 (2001); see also Kochera et al., supra, at 23 (social involvement and mental stimulation can offset cognitive decline, which occurs in approximately 25% of people who are seventy-five years old). Because leaving the community can result in "significant loss in the quality of life, personal control and dignity[,]" "[s]uccessful aging-in-place programs minimize the provision of inappropriate care . . . by offering a range of flexible services and calibrating those services to fit the needs of the individual."

Lawler, supra, at 15. Through IHSS, older people have the option of safely aging at home, which can offer important physical and mental health benefits.

**E. In-Home Supportive Services Cost Less Than Institutionalized Care and in the Long-Term May Slow the Growth of Medicaid Spending**

On a per person served basis, nursing home services cost more than home and community based services (“HCBS”). Medi-Cal pays approximately \$55,000 per recipient for a year of nursing home care, Wallace et al., California Budget Cuts, supra, at 2, while the average annual cost per IHSS recipient is approximately \$13,000. Wallace et al., Community-Based Long-Term Care, supra, at 9; see also Appellant’s Suppl. Excerpts of Record: Volume I, Decl. of Nicholas Kline, Ex. G at SER00149-50 (noting a 2003 study which found that compared to an average daily nursing home cost of \$118 per person, the average daily cost per IHSS recipient was \$24 with the most expensive IHSS recipients costing less than \$100 per day). Effective targeting of HCBS to high-risk recipients can reduce nursing home use and avoid unnecessary institutionalization. Larry Polivka, Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System, 10 Marq. Elder’s Advisor 75, 82 (2008).

A reduction of nursing home services in favor of HCBS can also help slow Medicaid spending growth in the long run. In a study that analyzed the Medicaid long-term care spending in states that offered extensive HCBS versus states that offered

mostly institutionalized services, “states with well established noninstitutional programs actually reduced their overall, inflation adjusted [long-term care] spending, in contrast with growing expenditures among states with minimal noninstitutional services.” H. Stephen Kaye, Mitchell P. LaPlante, & Charlene Harrington, Do Noninstitutional Long-Term Care Services Reduce Medicaid Spending?, *Health Affairs* 262, 270 (2009). “Nursing home spending grew by 3.4 percent in the low-HCBS states over the period, after adjusting for inflation, but declined by 15.3 percent in the high-HCBS states. . . .” Id. at 265. The study showed a delay between the expansion of noninstitutional services and the reduction in institutionalized spending, which can be attributed to the fact that HCBS programs “tend to serve people at risk of needing institutional services, with the goal of deferring or obviating their eventual institutionalization, and not merely people gradually moving out of institutions . . . .” Id. at 270-71. However, overall, “states offering noninstitutional alternatives do not generally suffer any long-term financial penalty as a result. Such states have been able to contain and even reduce costs, largely avoiding the [problem] in which the demand for services was predicted to grow tremendously once HCBS programs became available.” Id. at 271; see also Robert Mollica et al., AARP, Taking the Long View: Investing in Medicaid Home and Community-Based Services is Cost-Effective 4 (2009) (the shift of services from nursing homes to HCBS would allow a state to serve

more people at a lower aggregate cost). In addition to the physical and mental benefits of aging at home, the care received through IHSS is less costly than institutionalized care, could reduce Medicaid spending in the long-term, and would allow the state to provide long-term care services to more people. ABX4 4 is counter to the current policy trend by reducing low income older people's access to IHSS.

## **II. SUPREMACY CLAUSE CLAIMS FOR INJUNCTIVE RELIEF REQUIRE NO ASSERTION OF A STATUTORY RIGHT AND IMPLICATE A DRAMATICALLY DIFFERENT ANALYSIS THAN DOES 42 USC § 1983**

The district court interpreted Independent Living Center to conclude that the plaintiffs could bring claims under the Supremacy Clause asserting that implementation of ABX4 4 conflicts with the reasonableness standards<sup>2</sup> and the sufficiency requirements<sup>3</sup> of federal Medicaid law. V.L., 2009 WL 3486708, at \*9, 10

---

<sup>2</sup> In Count 7, the plaintiffs allege that ABX4 4 conflicts with the reasonable standards requirements because the defendants failed to provide IHSS services for recipients with comparable needs and use a functional evaluation system that does not provide a reasonable measure of need for services. (Second Am. Compl. ¶¶ 218-19); see also 42 U.S.C. § 1396a(a)(17) (stating the requirement to employ a reasonable standard to determine the extent of the medical assistance needed).

<sup>3</sup> In Count 6, the organizational providers and the individual plaintiffs who would or have lost domestic and related services allege that termination or reduction of IHSS domestic and related services result in insufficient services to fulfill the purpose of the IHSS benefit. (Second Am. Compl. ¶¶ 214-15); see also 42 C.F.R. § 440.230(b) ( the requirement to provide a service that is sufficient in amount, duration, and scope to reasonably achieve its purpose).

n.9. The defendants argue that the plaintiffs do not have a statutory right to bring a claim under the Supremacy Clause and attempt to apply the legal standards for a § 1983 claim, which involves enforcement of a private right. Because the district court properly applied Independent Living Center, the Court should affirm the district court's order enjoining the defendants from implementing ABX4 4.

**A. Supremacy Clause Provides a Basis for Challenging a State Law that Conflicts with a Federal Statute and Regulation**

Under the Supremacy Clause, a plaintiff can challenge a state law that is inconsistent with a federal law. In the United States Constitution, the Supremacy Clause states that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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. The Supremacy Clause secures federal rights by preempting any state law that contradicts or interferes with federal law. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 (1989); Hayfield N. R. Co., Inc. v. Chicago & N. W. Transp. Co., 467 U.S. 622, 627 (1984); see also Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1208 (9th Cir. 2009) (noting that “[t]he preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution”). A conflict can arise when the state law makes compliance with

federal law impossible or “prevent[s] or frustrate[s] the accomplishment of a federal objective. . . .” Geier v. Am. Honda Motor Corp., Inc., 529 U.S. 861, 873 (2000); see also Indep. Living Ctr. of S. Cal., Inc v. Maxwell-Jolly, 572 F.3d 644, 653 (9th Cir. 2009). When there is a conflict, the “state rule is preempted to the extent it actually interferes with the ‘methods by which the federal statute was designed to reach [its] goal.’” “Thus, obstruction preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history, and interpretation.” Id. (quoting Ting v. AT&T, 319 F.3d 1126, 1137 (9th Cir. 2003)) (internal citations omitted).

The Ninth Circuit has recognized the Supremacy Clause as a means of challenging a state law that conflicts with a federal law. In Independent Living Center, the plaintiffs sought to enjoin a state official from reducing Medicaid payments to medical service providers, arguing that the state law was preempted by the federal Medicaid Act. Because the Independent Living Center plaintiffs brought their claims under the Supremacy Clause, the Ninth Circuit concluded that “[i]t [was] beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a

federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.” Indep. Living Ctr., 543 F.3d at 1056-57 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983)); see also Verizon Md., Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635, 642-43 (2002) (stating that the court could entertain a claim for injunctive relief, which asserted that a regulation was pre-empted by a federal statute). Independent Living Center rejected the argument that a statutory right was necessary in order to bring a Supremacy Clause challenge, relying on Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003). In Walsh, the Supreme Court reached the merits of the plaintiffs’ claim without addressing the defendants’ argument that the plaintiffs lacked a statutory right to bring a claim under the Supremacy Clause. Walsh “necessarily assumed - albeit implicitly - that a private party seeking to enjoin implementation of a state law allegedly preempted by the federal Medicaid Act may bring suit for injunctive relief directly under the Supremacy Clause.” Indep. Living Ctr., 543 F.3d at 1061. Bud Antle, Inc. v. Barbosa, 45 F.3d 1261 (9th Cir. 1994), also supports Independent Living Center’s conclusion that a right of action is unnecessary. Bud Antle, which involved an attempt to enjoin a state from adjudicating labor practice charges based on preemption by the National Labor Relations Act, concluded that “[e]ven in the absence of an explicit statutory provision establishing a cause of action,

a private party may ordinarily seek declaratory and injunctive relief against state action on the basis of federal preemption.” Id. at 1269.

Like Independent Living Center, several circuits have commented that claims under the Supremacy Clause challenging a state statute can be entertained even absent a statutory right of action.<sup>4</sup> Moreover, courts have considered preemption claims involving federal Medicaid law. For example, in addressing whether there was a

---

<sup>4</sup> See, e.g., Chamber of Commerce of U.S. v. Edmondson, Nos. 08-6127, 08-6128, 2010 WL 354353, at \*5 n.13 (10th Cir. Feb. 2, 2010) (a party may bring a preemption claim under the Supremacy Clause even if the federal law at issue does not create a private right of action); The Wilderness Soc’y v. Kane County, Utah, 581 F.3d 1198, 1216 (10th Cir. 2009) (concluding that consistent with a majority of circuits, including the Ninth Circuit in Independent Living Center, “private litigants may bring suit directly under the Supremacy Clause without establishing an associated statutory right of action”); Air Transp. Ass’n of Am., Inc. v. Cuomo, 520 F.3d 218, 221 (2d Cir. 2008) (the lack of a statutory right of action did not prevent the plaintiff from pursuing its preemption challenge based on the Supremacy Clause); P.R. Tel. Co. v. Municipality of Guayanilla, 450 F.3d 9, 14 (1st Cir. 2006) (a plaintiff can argue under the Supremacy Clause that a local law is preempted even if the federal law at issue creates no private right of action); Planned Parenthood of Houston & Se. Tex. v. Sanchez, 403 F.3d 324, 333 (5th Cir. 2005) (recognizing an “implied cause of action to bring preemption claims seeking injunctive and declaratory relief even absent an explicit statutory claim”); Pharm. Research & Mfrs. of Am. v. Thompson, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004) (finding that the Supreme Court in Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003), implicitly concluded that a claim for injunctive relief could be brought under the Supremacy Clause). St. Thomas – St. John Hotel & Tourism Ass’n, Inc. v. Gov’t of U.S. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000) (“We know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right on the party that argues in favor of preemption. On the contrary, a state .

“probability that [the state’s] program was pre-empted by the mere existence of the federal statute[.]” Walsh concluded that the state’s prescription drug program could provide services consistent with the best interests of Medicaid recipients and that there was insufficient evidence at the preliminary injunction stage to support pre-emption because the program had not been fully implemented. Walsh, 538 U.S. at 661, 668.<sup>5</sup> Likewise, in Lankford v. Sherman, 451 F.3d 496, 509 (8th Cir. 2006), plaintiffs brought suit under the Supremacy Clause alleging that a state regulation was in direct conflict with Medicaid’s reasonable standards requirement under 42 C.F.R. § 440.230(b). Lankford stated that the Supremacy Clause “secures federal rights by according them priority whenever they come in conflict with state law” and concluded that plaintiffs had established a likelihood of success on the merits because the state’s restriction of durable medical equipment appeared unreasonable. Id. at 509, 513

---

. . . law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.”).

<sup>5</sup> In separate concurrences, Justices Scalia and Thomas appear to question whether a preemption claim can be brought to address a state’s failure to comply with federal Medicaid law. See Walsh, 538 U.S. at 675 (Scalia, J., concurring) (rejecting the “petitioner’s statutory claim on the ground that the remedy for the State’s failure to comply with the obligations it has agreed to undertake under the Medicaid Act . . . is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services”); id. at 683 (Thomas, J. concurring) (expressing “serious questions as to whether third parties may sue to enforce Spending Clause legislation-through pre-emption or otherwise”). However, these concurrences are not binding

(internal quotation marks omitted). The court in Planned Parenthood Affiliates of Michigan v. Engler, 73 F.3d 634 (6th Cir. 1996), found that a state law conflicted with federal Medicaid program requirements because the state law impermissibly discriminated in its coverage of a medical procedure based on the patient's condition, and was therefore invalid under the Supremacy Clause. Id. at 637, 639. Under Independent Living Center, the plaintiffs can bring claims under the Supremacy Clause arguing that ABX4 4 conflicts with Medicaid's reasonable standards and sufficiency requirements irrespective of whether a statutory right exists.<sup>6</sup>

**B. Standards Applied to § 1983 Claims Are Inapplicable to Supremacy Clause Claims**

In arguing that a right of action is required to bring a claim under the Supremacy Clause, the defendants rely on case law interpreting claims under §1983. Because § 1983 focuses on enforcement of individual rights and not on conflicts between a

---

precedent on this Court. Planned Parenthood of Houston, 403 F.3d at 332 n.34; Thompson, 362 F.3d at 819 n.3.

<sup>6</sup> The appellants can make legislative changes to the IHSS program. However, when a state accepts federal funds, the state must administer its Medicaid program in compliance with federal law. Sanchez v. Johnson, 416 F.3d 1051, 1054 (9th Cir. 2005); see also Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520, 523 (3d Cir. 2009) ("States are . . . not required to participate in [Medicaid], but those that do accept federal funding must comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services.").

federal and state law, § 1983's requirement of a right of action is inapplicable to a Supremacy Clause claim.

The application of § 1983's legal standards to a preemption claim fails to recognize the difference between the two types of relief. Under § 1983, "persons are liable if they act under color of law to deprive individuals of 'any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Watson v. Weeks, 436 F.3d 1152, 1157 (9th Cir. 2006) (quoting 42 U.S.C. § 1983). The right must be "unambiguously conferred" and the statute must "'be phrased in terms of the persons benefitted . . . with an unmistakable focus on the benefitted class.'" AlohaCare v. State of Haw., Dep't of Human Servs., 572 F.3d 740, 746 (9th Cir. 2009) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002)). Based on the statutory language, § 1983 provides a "remedy for deprivation of any rights . . . secured by the Constitution and laws of the United States." Maxwell-Jolly, 572 F.3d at 652 (internal quotation marks omitted). Comparatively, "[t]he primary function of the Supremacy Clause is to define the relationship between state and federal law" rather than to protect individual rights through enforcement of a federal law. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 321 (2d Cir. 2005) (internal quotation marks omitted); Wright Elec. v. Minn. State Bd. of Elec., 322 F.3d 1025, 1028 (8th Cir. 2003). In a preemption challenge, "it is the interests protected by the Supremacy Clause, not by the preempting statute[ ] that

are at issue.’” Indep. Living Ctr., 543 F.3d at 1060 (quoting Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001), aff’d sub nom. Walsh, 538 U.S. at 670); Air Transp. Ass’n of Am., Inc., 520 F.3d at 221 (the difference between a statutory claim for enforcement of federal law and a preemption claim under the Supremacy Clause “is not a trifling formalism”).

Furthermore, § 1983 and the Supremacy Clause offer different remedies. Under § 1983, a plaintiff can obtain attorney’s fees, Mahach-Watkins v. Depee, No. 08-15694, 2010 WL 337328, at \*4 (9th Cir. Feb. 1, 2010) (under 42 U.S.C. § 1988(b), a court may award reasonable attorney’s fees as part of costs to the prevailing party in a case involving §1983), and damages for injuries against state actors in their individual capacities. Farrar v. Hobby, 506 U.S. 103, 112 (1992) (“[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights” (internal quotation marks omitted)); Hafer v. Melo, 502 U.S. 21, 23, 31 (1991) (state officials sued in their individual capacities under § 1983 could be liable for damages). In comparison, a Supremacy Clause is focused on ceasing application of a state law that conflicts with a federal law through prospective injunctive and declaratory relief. Bud Antle, 45 F.3d at 1269.

Because courts have “consistently rejected attempts to extend [§1983’s rights requirement] analysis to claims for purely prospective injunctive relief under the

Supremacy Clause . . .[,]” Independent Living Center concluded that a Supremacy Clause claim could be considered regardless of whether a statutory right of action existed. Indep. Living Ctr., 543 F.3d at 1055, 1062. Independent Living Center relied on Planned Parenthood of Houston, which declined to apply § 1983’s requirements to a Supremacy Clause claim. Planned Parenthood of Houston noted that the plaintiffs’ claim that a state law imposed conditions on federal funds, which were incompatible with Title X of the Public Health Service Act, was “not based on a claim of right under Title X[,]” but was a preemption claim. 403 F.3d at 335. Since Independent Living Center, the Ninth Circuit has continued to recognize the difference between claims under the Supremacy Clause and § 1983. In AlohaCare, the court noted that § 1983 “‘require[s] a plaintiff to show the deprivation of ‘an unambiguously conferred right’ in order to support a cause of action,’ while the [Supremacy Clause] ‘is presumptively available to remedy a state’s ongoing violation of federal law.’” AlohaCare, 572 F.3d at 745 (quoting Indep. Living Ctr., 543 F.3d at 1062, 1064); see also Cal. Pharmacists Ass’n v. Maxwell-Jolly, 563 F.3d 847, 851 (9th Cir. 2009) (interpreting Indep. Living Ctr. to hold that “a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created ‘right,’ in the sense that term has recently been used in suits brought under § 1983, but need only satisfy traditional standing requirements”). A Supremacy Clause claim can be brought even

when § 1983 is unavailable as a basis for suit. Golden State Transit Corp., 493 U.S. at 119 (Kennedy, J., dissenting) (while a claim under § 1983 did not exist, a preemption claim seeking declaratory and equitable relief could be available); Lankford, 451 F.3d at 509 (plaintiffs could not enforce Medicaid’s reasonable-standards provision under § 1983, but could bring their claim arguing that the state regulation was preempted by Supremacy Clause).

The defendants cite to Gonzaga University and Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005), to support their argument that a private right of action is required.<sup>7</sup> However, Sanchez and Gonzaga University focused on §1983 claims, not the Supremacy Clause. Indep. Living Ctr., 543 F.3d at 1063 (Sanchez involved §1983 only and “had nothing to say about a claim for injunctive relief brought under the Supremacy Clause”); Planned Parenthood of Houston, 403 F.3d at 335 (“Gonzaga, by its terms, applies only to § 1983 claims”). Neither Gonzaga University nor Sanchez should be applied to analyzing a Supremacy Clause claim.

This case clearly involves the Supremacy Clause, not § 1983. The plaintiffs do not bring claims under §1983 requesting damages and enforcement of an individual

---

<sup>7</sup> The appellants also argue that Independent Living Center conflicts with Alexander v. Sandoval, 532 U.S. 275 (2001). However, Sandoval did not involve the Supremacy Clause. See Save Our Valley v. Sound Transit, 335 F.3d 932, 937 (9th Cir. 2003)

right. Rather, the plaintiffs seek to enjoin the defendants from implementing ABX4 4, which impermissibly conflicts with Medicaid’s reasonable standards and the sufficiency requirements. (Second Am. Compl. ¶¶ 215, 219.) The plaintiffs’ claims for injunctive relief are consistent with the purpose of the Supremacy Clause to “secure[] federal rights by according them priority whenever they come in conflict with state law.” Golden State Transit Corp., 493 U.S. at 107 (internal quotation marks omitted). Given the difference between the Supremacy Clause and § 1983, as noted in Independent Living Center and AlohaCare, the requirement of a statutory right for a §1983 claim should not be imposed on a claim under the Supremacy Clause.

---

(Sandoval involved an issue of whether a private right of action existed to enforce a federal regulation).

## CONCLUSION

For the reasons stated above, the Court should affirm the district court's order to preliminarily enjoin the defendants from implementing ABX4 4.

March 2, 2010

Respectfully submitted,

\_\_\_\_\_  
/s/

Barbara A. Jones  
AARP Foundation Litigation  
200 So. Los Robles, Suite 400  
Pasadena, CA 91101  
Telephone: (626) 585-2628  
Facsimile: (626) 583-8538  
E-Mail: [bjones@aarp.org](mailto:bjones@aarp.org)

Kenneth Zeller  
AARP Foundation Litigation

Michael Schuster  
AARP

601 E Street, NW  
Washington, DC 20049  
(202) 434-2060

Attorneys for *Amicus Curiae* AARP

**STATEMENT OF RELATED CASES**

*Amicus Curiae* AARP is not aware of any related cases pending in this Court.

March 2, 2010

\_\_\_\_\_/s/  
Barbara A. Jones

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief Amicus Curiae of AARP in Support of Plaintiffs-Appellees Urging Affirmance is in compliance.

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points Times New Roman and contains 4,4945 words. The word processing system software used to prepare this brief was Microsoft Word 2007.

\_\_\_\_\_  
/s/  
Barbara A. Jones

## CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 2, 2010

/s/ Barbara A. Jones  
Attorney for *Amicus Curiae*