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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE GRAY PANTHERS OF SAN FRANCISCO, a nonprofit corporation; MARK BECKWITH; CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTERS, INC., a nonprofit corporation; INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a nonprofit corporation; LIFELONG MEDICAL CARE, a nonprofit corporation; and MARGARET DOWLING,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Governor of State of California; KIM BELSHE, Secretary of Health and Human Services Agency of the State of California; DAVID MAXWELL-JOLLY, Director of Department of Health Care Services of the State of California; JOHN CHIANG, Controller of State of California; BILL LOCKYER, Treasurer of State of California; and MICHAEL E. GENEST, Director of Finance of the State of California,

Defendants.

C 09-02307-PJH

DEFENDANT MAXWELL-JOLLY'S NOTICE OF MOTION AND MOTION TO DISMISS (Fed. R. Civ. P. 12(B)(1) & (6)), AND SUPPORTING MEMORANDUM

Date: August 19, 2009
Time: 9:00 a.m.
Judge The Honorable Phyllis J. Hamilton
Trial Date N/A
Action Filed: May 26, 2009

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on August 19, 2009, at 9 a.m., or as soon thereafter as the matter may be heard in the United States District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco, California, defendant David Maxwell-Jolly, Director, California Department of Health Care Services, will move the court to dismiss the action pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

The complaint, and its four causes of action, fail to state a cause of action upon which relief may be granted because (1) as a matter of law, the challenged statute (Cal. Welf. & Inst. Code § 14131.10(b)(1)) does not conflict with §§ 5000(a), 5001(f)(1), or 5001(f)(3) of the American Recovery and Reinvestment Act (ARRA); and (2) the ARRA provisions at issue are not privately enforceable.

The motion will be and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the pleadings and papers filed herein, and the argument of counsel.

MEMORANDUM OF LAW

STATEMENT OF ISSUES TO BE DECIDED

1. Have plaintiffs stated a claim upon which relief may be granted based on a purported conflict between California Welfare and Institutions Code § 14131.10(b)(1) and §§ 5000(a), 5001(f)(1), or 5001(f)(3) of the American Recovery and Reinvestment Act (ARRA)?

2. May §§ 5000(a), 5001(f)(1), or 5001(f)(3) of ARRA be enforced by private parties?

INTRODUCTION

The court should dismiss the complaint because it fails to state a cause of action upon which relief may be granted. Plaintiffs contend that a state statute, California Welfare and Institutions Code § 14131.10(b)(1), is preempted by §§ 5000(a), 5001(f)(1), and 5001(f)(3) of the American Recovery and Reinvestment Act (ARRA). There is, however, no conflict between ARRA and § 14131.10(b)(1), which eliminated certain Medicaid benefits (or services) in some circumstances, the provision of which are, and remain, optional under the Medicaid Act.

Plaintiffs' claims fail as a matter of law because, although ARRA prohibits states from restricting eligibility for the Medicaid program as a condition for receiving funds, it does not prohibit states from restricting the benefits and services that are available to those who are eligible for Medicaid. Congress made clear that, as a condition for receiving ARRA funds, states may not impose more restrictive "eligibility" criteria on potential Medicaid beneficiaries, and to that end included a "Maintenance of Eligibility" requirement in ARRA. §§ 5000(a), 5001(f)(1). However, Congress did not impose any "Maintenance of Benefits" or "Maintenance of Service" conditions on receipt of funds. Indeed, ARRA's "purpose" clause makes an important distinction between "cuts to . . . benefits or services," which ARRA seeks to "help[] avert," and "constrictions of income eligibility requirements," which ARRA seeks to "prevent." § 5000(a)(2). Although § 14131.10(b)(1) eliminated some optional benefits in certain circumstances, it did not affect eligibility in any way (and plaintiffs do not allege otherwise), and it therefore is not preempted by ARRA. This understanding is confirmed by a recent guidance memorandum issued by the Centers for Medicare & Medicaid Services (CMS), the federal agency charged with implementing ARRA's Medicaid provisions, that explains that states may restrict benefits and services without violating ARRA. In light of the plain text of ARRA, its purpose clause, and CMS's guidance, and its legislative history, this court should hold that plaintiffs' allegations of a conflict between § 14131.10(b)(1) and ARRA fail as a matter of law, and dismiss the complaint without leave to amend.

Plaintiff also contends that § 14131.10(b)(1) conflicts with ARRA's prohibition against depositing ARRA funds into a rainy day or reserve fund. This challenge fails because nothing in § 14131.10(b)(1) addresses the disposition of ARRA funds, let alone directs that they be deposited in a reserve fund. Beyond that, as the court may confirm based on judicially noticeable documents and facts, this claim is frivolous: far from operating with a reserve, the State currently has a negative cash balance (-$11 billion) and has been forced to issue I.O.U.s.

Finally, plaintiffs' claims fail as a matter of law for a separate and independent reason: the ARRA provisions at issue are not enforceable by private parties. *See Gonzaga University v. Doe*, 536 U.S. 273 (2002).

STATEMENT OF RELEVANT FACTS

A. The Lawsuit

Plaintiffs are a membership organization that advocates on behalf of the elderly; several nonprofit organizations that provide services to Medicaid beneficiaries; and two individual Medicaid beneficiaries. They challenge the California legislature's decision, in February 2008, to eliminate nine "optional" Medicaid services effective July 1, 2009. *See* Cal. Welf. & Inst. Code § 14131.10(b)(1). Their first three causes of action allege that § 14131.10(b)(1) is preempted by, respectively, (1) section 5000(a) of ARRA, a "purposes" clause; (2) section 5001(f)(3), which prohibits the State from using ARRA funds to create a "rainy day" fund; and (3) section 5001(f)(1)(A), which prohibits a State from adopting "eligibility standards, methodologies, or procedures under its State Plan" that are "more restrictive" than those that were in effect on July 1, 2008. Defendant Maxwell-Jolly's Request for Judicial Notice (RJN), Ex. A. Plaintiffs' fourth cause of action seeks "declaratory relief" that § 14131.10(b)(1) is preempted by ARRA. Plaintiffs also seek various forms of injunctive relief. (First Amended Complaint (FAC) at 16-18.)

B. The Medicaid Act

Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse certain costs of medical treatment for the poor, elderly, and disabled. 42 U.S.C. § 1396. To qualify for federal matching funds, known as the Federal Medical Assistance Percentage (FMAP), a state must establish and administer its Medicaid program through a state plan approved by the Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396a. The receipt of federal funding is expressly conditioned on compliance with the Medicaid Act, and HHS is authorized to withhold funds for noncompliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. The Centers for Medicare & Medicaid Services (CMS) is the federal agency that administers the Medicaid program on behalf of the Secretary of HHS. *See Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 650 n.3 (2003).

A state that participates in Medicaid must determine which services it will provide. *See* 42 U.S.C. § 1396d(a). To receive federal approval, the Medicaid Act mandates that a state plan

include only seven enumerated medical services. *See id.* §§ 1396a(a)(10), 1396d(a)(1)-(5), (17), (21) (including as mandatory: inpatient hospital, outpatient hospital, laboratory and x-ray, nursing facility, physician, nurse-midwife, and nurse-practitioner services). A state may also elect to provide optional medical services, such as dental services, prosthetics, and prescription drugs. *See id.* §§ 1396a(a)(10)(A), 1396d(a). At issue here is the California legislature's decision in February 2009, as part of its response to the State's fiscal emergency, to eliminate some (but not all) of the optional services previously offered under Medi-Cal in certain circumstances, effective July 1, 2009.

C. Enactment of ABX3 5

On December 19, 2008, the Governor of California declared a fiscal emergency and directed the California legislature into a special session. RJN, Ex. B. The Governor noted that there was an approximately $15 billion General Fund deficit for the 2008-2009 fiscal year that, if unaddressed, would grow to $42 billion with the next 18 months. (*Id.*) Therefore, the Governor stated that "immediate and comprehensive action to reduce current spending must be taken to ensure, to the maximum extent possible, that the essential services of the State are not jeopardized and the public health and safety is preserved." (*Id.)*

The Legislature enacted a series of budget measures in response, including, in February 2009, ABX3 5 as urgency legislation to take effect immediately. RJN, Ex. C, at 3, 13. ABX3 5 made a variety of reductions to various state programs; at issue here is its enactment of Welfare and Institutions Code § 14131.10(b)(1), which "excluded from [Medi-Cal] coverage" the following services: adult dental services, acupuncture services, audiology services and speech therapy services, chiropractic services, optometric and optician services, podiatric services, psychological services, and incontinence creams and washes. However, such services remain covered if they constitute "[m]edical and surgical services provided by a doctor of dental medicine or dental surgery, which, if provided by a physician, would be considered physician services, and which services may be provided by either a physician or a dentist in this state." *Id.*, § 14131.10(b)(2). In addition, these services are covered if they are pregnancy-related; provided to beneficiaries under the Early and Periodic Screening Diagnosis and Treatment Program; or

provided to beneficiaries receiving long term care in certain nursing facilities licensed by the State. *Id.*, § 14131.10(b)(3) & (c). It was anticipated that § 14131.10(b)(1) would result in $129.4 million in savings to General Fund expenditures in the 2009-2010 fiscal year. RJN, Ex. D at 2 (p. 4 of the original document).

Section 14131.10 was to take effect 90 days after ABX3 5 became operative. Welf. & Inst. Code, § 14131.10(f). However, the Legislature provided that § 14131.10 (and certain other program changes) would *not* to take effect if the Treasurer and Director of Finance notified the Joint Legislative Budget Committee by April 1, 2009 that the State would receive at least $10 billion in federal stimulus funds under ARRA that would offset General Fund expenditures, and that the funds would "be available" to the State by June 30, 2010. Cal. Govt. Code § 99030; RJN, Ex. C , at 13 (AB 5, § 12). On or about March 27, 2009, however, the Treasurer and Director of Finance issued findings that insufficient funds would be available under ARRA to avoid implementation of § 14131.10. *See* RJN, Ex. E, Attachment at 1 ("Determination).

D. The American Recovery and Reinvestment Act

Congress enacted ARRA on February 17, 2009. RJN, Ex. A (H.R. 1, 111th Cong., Pub. L. No. 111-5 (1st Sess. 2009)). At issue here is Title V of the Act, which provides "state fiscal relief," including a temporary increase in FMAP payments, for all states through the first quarter of the 2011 fiscal year. *See id.*, § 5000, et seq. In enacting these provisions, Congress expressly intended: (1) to "provide fiscal relief to the States in a period of economic downturn"; and (2) "to protect and maintain State Medicaid programs during a period of economic downturn, including by helping to avert cuts to provider payment rates and benefits or services, and to prevent constrictions of income eligibility requirements for such programs, but not to promote increases in such requirements." *Id.*, § 5000(a)(1)-(2). Under ARRA, qualifying states receives a general 6.2 percent increase in their FMAP, and states with relatively high growth in unemployment rates receive additional increases based on quarterly unemployment statistics. *Id.*, § 5001(b), (c).

In order to receive enhanced FMAP, a state must comply with "MAINTENANCE OF ELIGIBILITY REQUIREMENTS" set forth in § 5001(f)(1) of the act, which provides in relevant part:

(1) MAINTENANCE OF ELIGIBILITY REQUIREMENTS –

> (A) IN GENERAL. – Subject to subparagraphs (B) and (C), a State is not eligible for an increase in its FMAP . . . if eligibility standards, methodologies, or procedures under its [Medicaid] State plan . . . are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008.

H.R. 1, § 5001(f)(1). A state is also ineligible for enhanced FMAP if it merely deposits those funds in a reserve rather than spending them on state programs:

> (3) STATE'S APPLICATION TOWARD RAINY DAY FUND. – A State is not eligible for an increase in its FMAP. . . if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund of the State.

Id., § 5001(f)(3).

E. CMS Guidance to States Regarding Implementation of ARRA

Since February 2009, CMS has issued several letters and fact sheets to assist the States in complying with ARRA's requirements. It has provided guidance concerning both substantive provisions at issue here: §§ 5001(f)(1) and (f)(3).

With respect to § 5001(f)(1), CMS has made clear that ARRA prohibits States from restricting eligibility for Medicaid, as distinct from the medical services provided under the Act. Thus, in a recent communication with the states, CMS explained that a state could eliminate Medicaid services without jeopardizing enhanced FMAP:

> **Question 19:** Can States modify or eliminate services, as opposed to eligibility criteria, and still qualify for the increased FMAP?
>
> **Answer**: If the change in the service has no potential impact on an individual's ability to maintain Medicaid eligibility, such a change would not disqualify a State from the increased FMAP.

RJN, Ex. F at 8; *see also id.* (response to **Question 20:** reduction in optional services provided would not disqualify a State from receiving FMAP because no beneficiaries would lose eligibility). Consistent with this understanding, CMS explained that "procedures," as utilized in § 5001(f)(1), "refers to those actions taken by the State in administration of their Medicaid eligibility or redetermination process," as distinct from medical services. *Id.* at 6.

With respect to § 5001(f)(3), CMS has explained that the availability of enhanced FMAP may free up funds that may be spent either on Medicaid or non-Medicaid purposes: "[t]he availability of increased FMAP funding will free-up State funds, which may be spent on activities

that may or may not be related to the Medicaid program." RJN, Ex. F at 12 ("Answer" to Question 31); *see also id.* ("States may use this freed up State money to fund other programs within the State, such as education, or to maintain aspects of their Medicaid program that may have been previously cut due to budgetary constraints.").

ARGUMENT

Plaintiffs' complaint, and all the causes of action within it, fail as a matter of law as to all defendants because (1) § 14131.10(b)(1) does not conflict with ARRA or stand as an obstacle to its purposes; and (2) plaintiffs cannot privately enforce the ARRA provisions at issue.

I. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE § 14131.10 DOES NOT CONFLICT WITH ARRA

Plaintiffs bear a heavy burden in pursuing their preemption claim that they cannot meet here. The Supreme Court has identified two "cornerstones" of a preemption case. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case."' *Id.* (citation omitted). "Second, '[i]n all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" *Id.* at 1194-95. Plaintiffs here are pursuing an "implied" or "conflict" preemption claim, as ARRA does not contain an "express" preemption clause. Accordingly, plaintiffs must demonstrate either that it is "'impossible for a private party to comply with both state and federal requirements,'" or that state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). Because § 14131.10 is entirely consistent with ARRA and does not conflict with it in any way, plaintiffs' preemption claim fails as a matter of law.

A. Plaintiff's first cause of action fails as a matter of law because § 14131.10(b)(1) does not conflict with ARRA's "purpose" clause

Plaintiffs contend that § 14131.10 conflicts with the "purpose" clause of ARRA. As an initial point, because the purpose clause is advisory or hortatory rather than mandatory, it cannot support a cause of action. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981)

(declining to infer a private cause of action because statute spoke in terms "intended to be hortatory, not mandatory"); *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007) (holding that "precatory" provision did not create "any enforceable law").

Beyond that, there is no conflict. The ARRA purpose clause makes an important distinction between "cuts to . . . benefits or services," which ARRA merely seeks to "help[] avert," and "constrictions of income eligibility requirements," which ARRA seeks to "prevent." § 5000(a)(2). Beyond cavil, the State's receipt of enhanced FMAP will "*help[] to avert cuts*" under Medicaid. However, the State has not received sufficient ARRA funds to *avert all cuts entirely*. *See* RJN, Ex. C , at 13 (AB No. 5, § 12); *id.*, Ex. E, Attachment at 1 ("Determination). Nothing in ARRA precludes the States from cutting "benefits or services," *see* § 5000(a)(2), which is what the State has done here, as distinct from constricting eligibility requirements, which it has not.

B. Plaintiffs' second cause of action fails as a matter of law because § 14131.10(b)(1) does not conflict with ARRA § 5001(f)(3)

Plaintiffs contend that § 14131.10(b)(1) conflicts with ARRA's prohibition against deposit of enhanced FMAP into a reserve or "rainy day" fund, § 5001(f)(3). Plaintiffs' facial challenge to § 14131.10(b)(1) fails as a matter of law: nothing in § 14131.10 requires or authorizes deposit of enhanced FMAP into a rainy day fund, or, for that matter, addresses in any matter the disposition of the funds.

Plaintiffs contend, nonetheless, that "defendant officers have allowed savings resulting to the State from use of enhanced FMAP . . . to sink into the fungible funds of the State of California" rather than to be used directly for Medicaid. (FAC, ¶ 41.) This pleading is entirely conclusory and therefore insufficient to state a claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions"); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*); Fed. R. Civ. P. 8(a)(2). But even were this allegation adequately pled, plaintiffs' claim would fail as a matter of law because nothing in the text of § 5001(f)(3) prohibits the State from applying savings due to enhanced FMAP to offset

non-Medicaid expenditures. CMS has confirmed as much in its guidance materials to the States. RJN, Ex. F at 12-13 ("States may use this freed up State money to fund other programs within the State, such as education, or to maintain aspects of their Medicaid program that may have been previously cut due to budgetary constraints."). The federal agency's interpretation, which is entirely consistent with the language of ARRA, is entitled to substantial deference. *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); *Alaska Dept. of Health & Soc. Servs. v. CMS*, 424 F.3d 931, 939-40 (9th Cir. 2005) (CMS entitled to deference with respect to Medicaid Act).

Plaintiff also alleges, in similarly conclusory fashion, that the State has "s[u]nk" the enhanced FMAP "to be reserved, used as a rainy day fund." Again, this allegation is too conclusory to satisfy federal pleading requirements. *See Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do."); Fed. R. Civ. P. 8(a)(2). Beyond that, it is entirely counterfactual, as this court may confirm by judicially noticing facts that are beyond dispute: far from enjoying any reserves, the State is running out of cash and has issued I.O.Us. because of that fact. RJN, Ex. G; *see also id.*, Ex. H at 4 (reflecting that, as of June 30, 2009, the state had a negative cash balance of - $11 billion).

C. Plaintiffs' third cause of action fails as a matter of law because § 14131.10(b)(1) does not conflict with ARRA § 5001(f)(1)(A)

Finally, plaintiffs suggest that elimination of the optional benefits violates ARRA's "maintenance of eligibility requirements" prohibition, in particular the prohibition against adopting "eligibility standards, methodologies, or procedures under its State Plan" that are "more restrictive" than those in effect on July 1, 2008. ARRA, § 5001(f)(1)(A). Specifically, plaintiffs contend that the word "procedures," as used in ARRA, encompasses "services" such as the optional services described in § 14131.10(b)(1).

Plaintiffs' argument fails as a matter of law under the plain text of the statute and classic canons of statutory construction. It is a "cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn*, 542 U.S. 88,

101 (2004). The ultimate purpose, of course, is to effectuate congressional intent, of which the plain text is the best evidence. Here, the specific provision on which plaintiffs rely occurs in a section entitled "Maintenance of Eligibility Requirements," *not* "Maintenance of Benefits or Services." According to its plain meaning, and within context, § 5001(f)(1)(A) restricts states from constricting "eligibility" standards, methodologies, or procedures. Because § 14131.10 does not restrict the "procedures" by which a Medi-Cal beneficiaries "eligibility" is determined, there is no conflict between § 14131.10 and § 5001(f)(1)(A), and plaintiffs' claims fail as a matter of law. This is consistent with Congress's express purpose in enacting these provisions, and the distinction it made between "cuts to . . . benefits or services," which ARRA was only intended to "help[] to avert," and "constrictions" to "income eligibility requirements," which ARRA was intended to "prevent." § 5000(a)(2).

Given the unambiguous statement of Congressional purpose and the statutory text, there is no need to resort to extrinsic aids. However, defendant notes that this understanding of § 5001(f)(1)(A) is supported by CMS's guidance regarding the statute. *See Satterfield v. Simon & Schuster, Inc.*, --- F.3d ----, 2009 WL 1708081, at *4 (9th Cir. June 19, 2009). As described *supra* in the Statement of Facts, CMS explained that "procedures," as utilized in § 5001(f)(1), "refers to those actions taken by the State in administration of their Medicaid eligibility or redetermination process," as distinct from medical services. RJN, Ex. F at 6. In addition, this understanding is consistent with the legislative history relating to ARRA's enactment. *See, e.g.*, 155 Cong. Rec. S1474, S1513 (Feb. 4, 2009) (statement of Sen. Grassley) ("The bill only prevents States from cutting Medicaid income eligibility. But if Congress is giving States $87 billion and telling them not to cut Medicaid eligibility, I think it is very important we in Congress also tell the States that they can't cut benefits. But this bill doesn't do that."), attached as RJN, Ex. I.[1]

[1] *See also* 155 Cong. Rec. S1992, S2009 (Feb. 9, 2009) (statement of Sen. Grassley) (" Does the bill prevent States from getting Medicaid Programs? It does not. The bill only prevents States from cutting Medicaid on one of three propositions, this one being income eligibility. So that is a good thing. But if Congress is giving States $87 billion and telling them not to cut Medicaid eligibility, shouldn't Congress also tell States they can't cut benefits?"), attached as RJN, Ex. J; *see also id* at 2013 ("The bill only prevents States from cutting Medicaid income (continued…)

In sum, because § 14131.10(b)(1) does not implicate the State's "eligibility" process, it does not conflict with, and therefore is not preempted by, § 5001(f)(1)(A).

D. Plaintiffs' fourth cause of action fails as a matter of law because it is entirely derivative of their first three causes of action

In their fourth cause of action, plaintiffs seek declaratory relief based on the allegations in their first three causes of action. This claim must be dismissed because it is dependent on the substantive claims that precede it, all of which fail as a matter of law.

II. PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW BECAUSE THE ARRA PROVISIONS AT ISSUE ARE NOT PRIVATELY ENFORCEABLE

Plaintiffs' claims fail as a matter of law for a separate and independent reason: the ARRA provisions at issue are not enforceable by private parties. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court explained that, regardless of whether plaintiffs seek to enforce a federal statute under an "implied" rights theory or under § 1983, the court "must first determine whether Congress intended to create a federal right" with its enactment. *Id.* at 283. This is because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

A statute only may be found to create a private right of action where its text is "phrased in terms of the persons benefited," thus reflecting an intention to "confer[s] rights on a particular class of persons." *Gonzaga*, 536 U.S. at 284-85 (internal quotations omitted). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286. And "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" *Id.* at 284 (quoting *Sandoval*).

(…continued)
eligibility."). Senator Grassley filed an amendment to prohibit States "from generally cutting eligibility and benefits and providers," but it was not voted on and therefore not incorporated. *Id.* at S2009-2010; *see also id.* at 2013 ("I had several other amendments that were never allowed to be made pending.")

The ARRA provisions at issue are not privately enforceable because they do not evince any Congressional intent to create either privately enforceable rights or a private remedy. Rather than confer "rights" on private parties, the text of ARRA imposes obligations on the parties to be regulated (i.e., the States). *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"). Further, there is no indication in the text of an intent to create a private remedy; to the contrary, it appears that Congress intended that the obligation to enforce ARRA, and to impose remedies for noncompliance (i.e., forfeiture of FMAP), would lie with CMS. *See* § 5001(g) (providing for reporting by states to Secretary of HHS).

Plaintiffs may contend that, under *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), private parties may state a claim for injunctive relief under the Supremacy Clause any time there is a purported conflict between a federal and state statute. However, *Independent Living* was wrongly decided because it conflicts with numerous Supreme Court precedents, including *Gonzaga*, and because the Supremacy Clause does not itself create any substantive rights. *See Dennis v. Higgins*, 498 U.S. 439, 450 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979). Defendant recognizes, however, that *Independent Living* is arguably controlling here, and therefore raises this argument to preserve it for later appellate proceedings.

CONCLUSION

The court should grant the motion to dismiss without leave to amend. Section 14131.10(b)(1) does not conflict with ARRA in any way. Although ARRA prohibits states, as a condition for receiving funds, from constricting eligibility for the Medicaid program, it does not prohibit states from restricting the benefits and services that are available to those who are eligible for Medicaid. And while ARRA prohibits states from depositing ARRA funds in a reserve fund, there is nothing in § 14131.10(b)(1) that addresses disposition of ARRA funds, let alone that directs their deposit into a reserve fund. Further, the court may confirm, based on

judicially noticeable documents, that far from creating reserve funds, the State has expended all the cash available to it and has a negative cash position.

Dated: July 15, 2009

Respectfully Submitted,

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