No. 12-98

In the Supreme Court of the United States

ALBERT A. DELIA, ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Petitioner

v.

E.M.A. (BY AND THROUGH HER GUARDIAN AD LITEM, DANIEL H. JOHNSON), WILLIAM EARL ARMSTRONG AND SANDRA ARMSTRONG,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF AARP AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*[1]

AARP is a non-partisan, non-profit membership organization for people 50 and over. AARP advocates for health and economic security for everyone and in particular for vulnerable people of all ages, including low-income people and persons with disabilities. AARP supports access to and expansion of quality health care through publicly administered health insurance programs, including Medicaid, an essential safety net program that provides coverage to people who would otherwise be denied health care. To further that end, Medicaid recipients' access to the courts to challenge adverse actions by Medicaid is critical.

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in constitutional federalism and in preserving the federal powers granted by the Constitution. Accordingly, CAC has an interest in the interaction

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

between the Supremacy Clause and the Spending Clause raised in this case. CAC has filed numerous *amicus curiae* briefs in this Court in cases raising significant issues regarding the text and history of the original Constitution and the Bill of Rights, including *Clapper v. Amnesty, International USA,* No. 11-1025; *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB),* 132 S. Ct. 2566 (2012); *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010); and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amici curiae* brief of Texas, *et al.*, urges this Court to apply "federalism-protecting interpretive canons" to reach the conclusion that the federal Medicaid statute is "incapable of 'preempting' state law." Texas Br. 1, 18. Texas contends that Medicaid is "spending legislation" that "does not obligate the States to do *anything*." *Id*. at 20 (emphasis in original). This argument was neither presented below nor raised in the Petition for Certiorari. But if the Court decides to entertain *amici*'s argument, it should reject their contention. Texas's position is contrary to the text and history of our Constitution, more than 200 years of precedent upholding the supremacy of federal law, and the clear language of the Medicaid statute.

The drafters of our Constitution were acutely aware of the dysfunction of the Articles of Confederation, which established a loose confederacy built merely on a "firm league of friendship" among

thirteen independent states. ARTICLES OF CONFEDERATION of 1781, art. III. The "business" of the Constitutional Convention was to correct the "vices" resulting from the lack of "effectual controul in the whole over its parts." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167 (Max Farrand ed., 1911) [hereinafter RECORDS] (statement of James Wilson of Pennsylvania). The Framers viewed a government lacking a supreme federal power as "a monster, in which the head was under the direction of the members." THE FEDERALIST NO. 44 (James Madison).

The delegates considered assigning the task of enforcing the supremacy of federal law to the military and Congress. If that had been the constitutional text, then private parties would have had no role in the invalidation of state statutes that conflict with federal law. But the Founders instead chose to rely upon judicial review of cases brought by injured parties, including private individuals. The Framers wrote into the Supremacy Clause a mandate for the judicial branch to void "any Thing" in state law to the "Contrary" of federal law. U.S. CONST. art. VI, § 2. The Founders did not assign the executive or legislative branches an exclusive role in bringing litigation to uphold federal law. To the contrary, the text of the Supremacy Clause is broadly worded to confer a right to relief upon the people, as well.

There is no reason in the Constitution's text or history to exclude federal law enacted pursuant to Congress's powers under the Spending Clause from the standard preemption jurisprudence of the

Supremacy Clause. Indeed, the history of the Spending Clause shows that the Framers intended to grant power to the federal government to displace state law when the national interest required. The focus of the Founding generation on the need for federal power to supplant inadequate or parochial state laws demonstrates that Spending Clause legislation was clearly intended to have preemptive effect.

For more than 200 years, the judicial branch has permitted suits, including those brought by private parties, to challenge state laws that allegedly violate federal law and requirements. As Chief Justice John Marshall explained, the Framers expected that some state laws would conflict with federal statutes and in "every such case" the law of the state "must yield" to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

It is imperative for constitutional federalism that the Supremacy Clause be applied properly; as Justice Kennedy has observed, "the whole jurisprudence of preemption" is of vital importance to "maintaining the federal balance." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

This Court has upheld the preemptive effect of Spending Clause statutes, including Medicaid, in numerous cases. *See, e.g.*, *Ark. Dept. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 292 (2006). The contention of Texas that the Medicaid Act as a whole has no preemptive effect is contrary to this

Court's determination that states accepting federal Medicaid funds must comply with the mandatory terms of the statute. *See, e.g.*, *Frew v. Hawkins*, 540 U.S. 431, 433 (2004). The Medicaid provisions at issue in this case are, indeed, mandatory, and impose binding obligations on the States. While some of the applicable provisions are contained within a list of State plan requirements, Congress has specified that State plan requirements are privately enforceable. 42 U.S.C. §§ 1320a-2, 1320a-10 (2006).

Texas's argument that the preemptive force of the Medicaid statute is eliminated by the power of the federal government to withhold funds is baseless. Nothing in the text of the Medicaid statute, including the provision authorizing federal sanctions for failure to comply, 42 U.S.C. § 1396c, alters the compulsory nature of Medicaid requirements. This Court has repeatedly permitted private enforcement of Medicaid, ignoring or rejecting arguments that the reduction of federal funding is the exclusive remedy. *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644 (2003) [hereinafter *PhRMA v. Walsh*]; *Blessing v. Freestone*, 520 U.S. 329, 348 (1997).

ARGUMENT

I. The Text and History of the Supremacy Clause and Spending Clause Establish the Preemptive Effect of Mandatory Medicaid Provisions

The Framers wrote the Supremacy Clause to ensure that properly enacted federal law displaces

conflicting state law. The Founders granted specific law-making powers to the federal government in the Constitution, in order to allow Congress to legislate for the country as a whole whenever a national solution is necessary or preferable. The Spending Clause is an integral part of the Founders' vision of federal power, and laws enacted pursuant to Congress's spending power clearly have preemptive force. Texas's assertion that mandatory provisions in the Medicaid statute do not preempt contrary state laws should be rejected, if considered at all.

A. The Framers Drafted the Supremacy Clause to Ensure Judicial Invalidation of All State Laws that Conflict with Federal Law, Permitting Enforcement of Federal Law by Private Parties

At the Constitutional Convention in 1787, James Wilson of Pennsylvania explained that "the business of this convention" is to correct the "vices" of the Articles of Confederation, including "the want of effectual controul in the whole over its parts." 1 RECORDS, at 167. The Framers viewed the failure of the Articles of Confederation to ensure the supremacy of federal law as a "fatal omission." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 167 (1996). The Founding generation extensively debated different possible means for the invalidation of state laws in conflict with federal law. Ultimately, judicial review in suits that could be brought by private parties was

selected as the constitutional mechanism to void contrary state laws.

Governor Edmund Randolph of Virginia proposed an initial mechanism to ensure the supremacy of federal law, recommending that the "National Legislature" be given the power "to negative all laws passed by the several States," as well as the power "to call forth the force of the Union" against a state "failing to fulfill its duties." 1 RECORDS, at 21. While James Madison supported the legislative "negative," he strongly disagreed with reliance upon military force to resolve conflicts between federal and state law. He stated: "The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." *Id*. at 54. Randolph was persuaded to change his position, agreeing that the use of force would be "impracticable, expensive [and] cruel to individuals." *Id*. at 256 (emphasis omitted).

While Madison convinced his colleagues to relinquish the military option, he could not persuade them to embrace the use of congressional power to invalidate state laws. His reasoning in support of the congressional negation of state law met with fierce resistance, precisely because a majority of delegates preferred to rely on judicial review for this important task. 2 RECORDS, at 27-28. During the debate on the "congressional negative," Gouverneur Morris of New York and Roger Sherman of Connecticut insisted that the responsibility to invalidate conflicting state laws

was properly in the province of the judiciary. *Id.* The proposal for Congress to nullify state laws was defeated by a vote of three states in favor to seven states against. *Id.* at 28.

Immediately after the defeat of the "congressional negative," Luther Martin of Maryland proposed a constitutional clause stating "that the Legislative acts of the [United States] . . . shall be the supreme law of the respective States . . . [and] that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding." *Id.* at 28-29. Martin's proposal passed unanimously without debate. *Id.* at 29. John Rutledge of South Carolina recommended adding that the United States Constitution is supreme to state laws, a proposal that likewise passed without dissent. *Id.* at 389. The Committee on Detail changed the phrase "the Judiciaries of the several States" to "the judges in the several states." *Id.* at 183. As modified, the clause required both state and federal courts to uphold the supremacy of federal law.

Significantly, the Committee on Style Revision replaced the words "the supreme law of the states" with the phrase "the supreme law of the land." *Id.* at 603. Professor Amar explains that "the implication was continental: one Constitution, one land, one People." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1458 (1987). The Founding generation believed that federal laws "would embody the judgment of America as a whole,

as distinct from the more parochial view of any particular local part," and therefore federal statutes have "priority over any inconsistent state-law norm." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 300 (2005). The Supremacy Clause establishes federal law as embodying the will of the nation's people, who are empowered to turn to the judiciary for enforcement.

The words of the Supremacy Clause, as finalized, provide:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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, § 2. Thus, all constitutional federal laws are the supreme law of the land, with no exceptions envisioned in the text. The Supremacy Clause does not restrict enforcement of federal law to suits brought by Congress or the executive branch, allowing private individuals to invoke judicial review to invalidate conflicting state laws.

During ratification, the Framers devoted considerable attention to the importance of the Supremacy Clause as a justification for the people to

vote in favor of the Constitution. In the *Federalist Papers*, James Madison and Alexander Hamilton jointly wrote essays criticizing historical examples in which the national government had no means of enforcing its will over independent and sovereign states. THE FEDERALIST NOS. 18, 19, 20 (Alexander Hamilton & James Madison). They mocked governments lacking federal supremacy as prone to anarchy, imbecility, and discord. *Id.* They jointly concluded that a government established as "a sovereignty over sovereigns" is in practice "subversive of the order and ends of civil polity." THE FEDERALIST NO. 20 (Alexander Hamilton & James Madison). Writing separately, Hamilton asserted that if the "laws of the Union" are not "the SUPREME LAW of the land," then "they would amount to nothing." THE FEDERALIST NO. 33 (Alexander Hamilton). Madison similarly declared that without the Supremacy Clause, the Constitution "would have been evidently and radically defective." THE FEDERALIST NO. 44 (James Madison). He likened a government that did not enforce the supremacy of federal law to "a monster, in which the head was under the direction of the members." *Id.*

The Framers viewed the supremacy of federal law as a critically important facet of the new government. They explicitly rejected exclusive assignment of this task to the executive and legislative branches. Instead, they opened the courthouse doors to suits by private parties, as well as governmental parties, with no exception for claims brought under Spending Clause statutes.

B. The Framers Intended Federal Statutes Enacted Pursuant to The Spending Clause to Have Preemptive Force

The failure of the Articles of Confederation to establish federal supremacy had been especially damaging with regard to the federal government's inability to tax and spend for the defense and general interests of the nation. Under the Articles of Confederation, Congress could raise money only by making requests to the States, but the States failed to provide the requested funds "on a massive scale." Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 89 (2012). This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War, and he lamented the dire situation in which the soldiers had been placed as a result of Congress's inability to levy taxes to support the Army. *See* 18 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SCOURES 1745-1799 453 (John C. Fitzpatrick ed., 1931) (Letter to Joseph Jones, May 31, 1780). The need "to provide adequate fiscal powers for the national government" motivated the Framers to write a new Constitution. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6 (1999).

The Constitutional Convention sought to remedy this problem by authorizing Congress to raise and spend national funds for broad national goals. The initial proposal set forth by Governor Randolph began with the resolution "that the articles of

Confederation ought to be so corrected [and] enlarged as to accomplish the objects proposed by their institution; namely 'common defence, security of liberty, and general welfare.'" 1 RECORDS, at 20. Randolph suggested that Congress be assigned the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." *Id.* at 21. This assignment of broad legislative powers passed overwhelmingly. *Id.* at 47, 53-54. The Framers later added the power "to legislate in all cases for the general interests of the Union." 2 RECORDS, at 26-27.

The delegates gave directions for drafting the powers of the national legislative branch to the Committee of Detail, "which took upon itself the task of translating these instructions into the specific enumerations of Article I." AMAR, AMERICA'S CONSTITUTION, at 108 n.*. The delegates' instructions described the "legislative Rights vested in Congress" as including the authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." RECORDS, Vol. 2, at 131-32. The Framers tied the broad legislative powers of Congress to the need to supplant individual state legislation.

The ultimate text of the Spending Clause in Article I was drafted by the Convention's Third Committee of Eleven. *Id.* at 481. The Committee of

Eleven added to Article I that Congress shall have the power to "provide for the common defence and general welfare of the United States." *Id*. at 493, 497. *Cf*. 1 RECORDS, at 20 (Randolph's first resolution seeking "common defence" and "general welfare").

As finalized, the text of the Spending Clause provides in pertinent part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1. The Spending Clause is the first power, and one of the most sweeping powers, that the Constitution confers upon Congress. The Framers noted in their instructions to the Committee of Detail that laws for the general interests of the nation were needed to supersede more insular or ineffective state laws. 2 RECORDS, at 131-32. Thus, laws enacted pursuant to the Spending Clause's "general welfare" provision were clearly intended to have preemptive force.

Hamilton explained in the Federalist Papers that the power to tax and spend is "an indispensable ingredient in every constitution." THE FEDERALIST NO. 30 (Alexander Hamilton). He noted that it was essential for the Constitution to "embrace a provision for the support of the national civic list; for the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury." *Id.*

The text and history of the Spending Clause demonstrate the Framers' intent to provide Congress with broad spending powers in order to displace inadequate or parochial state legislation related to national issues. In early drafts, the Convention delegates described Congress's power as encompassing the "general Interests of the Union" and the "Harmony of the United States." The final text utilized the equally expansive term: "general Welfare of the United States." In all these iterations, the Founders conferred far-reaching powers on Congress to spend federal revenues for the benefit of the nation's people, supplanting contrary state laws.

Texas effectively seeks to relegate the Spending Clause to the status of a "poor relation" when it comes to the application of the Supremacy Clause to Spending Clause legislation, *c.f. Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994), but the Spending Clause is as much a part of Article 1, Section 8 as the other enumerated powers, and this Court should reject this invitation.

II. More Than 200 Years of Precedent Support Judicial Review of the Conflict Between Federal and State Law In This Case

Texas contends that even if "North Carolina's statute fails to comport with provisions in the federal Medicaid Act," the conflicting state law is not preempted by federal law. Texas Br. 22. This argument is contrary to the balance of powers

established by the Constitution and enforced by the judicial branch for centuries.

Chief Justice Marshall eloquently explained the importance of the supremacy of federal law in our system of government:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.

McCulloch v. Maryland, 17 U.S. 316, 405 (1819). Writing for this Court, Marshall noted that the "framers of our constitution foresaw" that states would pass laws conflicting with federal laws, and "[i]n every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824). Marshall acknowledged the argument that the dignity of the state could be wounded by the "humiliation" of submitting to a judicial tribunal, but

the Chief Justice noted the "still superior dignity of the people of the United States." *Craig v. Missouri*, 29 U.S. 410, 437 (1830). He wrote for this Court that a state law "repugnant" to a federal statute will "furnish no authority" to those who relied upon the state statute. *Osborn v. Bank of US*, 22 U.S. 738, 859 (1824).

In the first century of this country's history, suits to enforce the supremacy of federal law were not limited to actions by government actors. Individuals bringing private suits readily obtained judicial review to determine whether a state law contravened federal law. *See, e.g.*, *Gillman v. City of Phila.*, 70 U.S. 713, 722-24 (1866); *Dodge v. Woolsey*, 59 U.S. 331, 341 (1855); *New Jersey v. Wilson*, 11 U.S. 164, 166-67 (1812).

In 1908, in *Ex parte Young*, 209 U.S. 123 (1908), this Court firmly cemented the right of individuals to seek the protection of the judicial branch to obtain injunctive relief to invalidate a state law conflicting with federal law. As then–Associate Justice Rehnquist explained, *Ex parte Young* was a "watershed case" providing prospective relief that is "analogous" to the modern day injunction enjoining state officials from failing to comply with federal regulations. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Justice Rehnquist reiterated a decade later that "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the

supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Justice Kennedy has similarly observed that "the whole jurisprudence of preemption" is of vital importance to "maintaining the federal balance." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). As a result, even when there is no statutory right of action, private individuals may bring "pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State Transit Corp. v. City of L.A.,* 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting). In recent years, this Court has "expanded the *Young* exception far beyond its original office" and "defined important limits on *Young* in order to respect state sovereignty while still adhering to principles necessary to implement the Supremacy Clause." *Va. Office of Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642-43 (2011), (Kennedy, J., concurring). As Justice Kennedy wrote for the unanimous Court in a case involving the enforcement of Medicaid, private individuals may bring "suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

Throughout our nation's history, the judicial branch has fulfilled its constitutional duty to invalidate state statutes that conflict with federal law. This Court has continually emphasized the importance of its role in upholding the supremacy of federal law. More than 200 years of precedent

establish that a state law in direct conflict with federal statutory requirements cannot evade the force of the Supremacy Clause. Texas's argument to the contrary is novel—indeed, novel even within the confines of this litigation—and utterly without merit.

III. Medicaid's Lien Provisions Preempt Contrary State Laws and are Enforceable by Beneficiaries

Texas argues that the Medicaid statute "permits States to administer their Medicaid programs as they please . . . and then wait to see if the Secretary will turn off the spigot or merely reduce the amount of funding." Texas Br. 18. Texas's contention that the Medicaid statute permits states to ignore Medicaid's provisions regarding liens is contrary to the clear language of the statute and this Court's jurisprudence enforcing Medicaid.

Petitioner's Statement lists the relevant provisions in this case as 42 U.S.C. §§ 1396a(a)(25)(A), 1396a(a)(25)(B), 1396k(b), and 1396p(a)(1) (2006). Pet'r Br. 4-5. Texas contends that none of these provisions contains language similar to Title VI's mandatory statement: "No person in the United States shall . . . ." Texas Br. 18, citing 42 U.S.C. § 2000d (2006). But, simply reading the Medicaid statute shows otherwise.

To begin with, 42 U.S.C. § 1396p(a)(1) contains mandatory language prohibiting specific conduct. It provides: "No lien may be imposed against the property of any individual prior to his death on

account of medical assistance paid or to be paid on his behalf under the State plan." The words "No lien may be imposed" have the same proscribing effect as Title VI's command "No person . . . shall." The interpretation urged by Texas that a state may impose a lien in contravention of § 1396p(a)(1) if the state is willing to accept fewer federal dollars cannot be squared with the compulsory language of the statute.

The provisions of Medicaid addressing third-party liability, 42 U.S.C. §§ 1396a(a)(25)(A) and (B), are contained in an extensive list of Medicaid State plan requirements. The section begins with the phrase: "A State plan for Medical Assistance must . . . (a)(25) provide . . . ." 42 U.S.C. § 1396a(a)(25) (2006). Like the language of Title VI, this language is obligatory. Moreover, Congress has clarified that in a private "action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §§ 1320a-2, 1320a-10 (2006). Congress has clearly expressed its intention that State plan requirements impose enforceable obligations on States.

The fourth applicable provision, 42 U.S.C. § 1396k (2006), similarly contains in section (a) the words, "a State plan for medical assistance shall . . . ." Then in section (b), the statute provides that part of the funds collected by the state "shall be retained by the State," and utilized for "appropriate reimbursement" of the federal government, but "the

remainder of such amount collected shall be paid to such individual." *Id.* The word "shall" is of course mandatory, and the phrases "shall be retained" and "shall be paid to such individual" are binding directives.

Texas is urging the Court to treat these mandatory Medicaid provisions as if they were optional. But that would be contrary to the express language of the statute and the clear intent of Congress as set out in the text.

Some provisions of Medicaid are indeed optional. For example, dental care for adults is not a mandatory Medicaid service but rather "*may* be furnished under the State plan *at the State's option*." 42 C.F.R. § 440.225 (2012) (emphasis added). *See* 42 U.S.C. § 1396d(a)(10) (2006). If a State declines to include optional services, such as dental care for adults, in its State plan, the State will not be violating federal law, but will simply receive less federal reimbursement. The Medicaid statute also permits the federal government to waive certain requirements for "demonstration projects" in which "the state expands its coverage in an experimental plan." *Spry v. Thompson*, 487 F.3d 1272, 1273-74 (9th Cir. 2007).

Neither Petitioner nor its *amici* claim that the federal government has waived the applicable provisions of the Medicaid statute in this case. Similarly, they do not deny, nor can they, that the relevant provisions are couched in mandatory terms.

Instead, Texas contends that the Medicaid provision regarding federal government oversight, 42 U.S.C. § 1396c, gives states total discretion whether or not to comply with the requirements of the Medicaid program. Texas Br. 21-22. Texas suggests that this provision renders all the mandatory language in Medicaid merely precatory and not preemptive. But there is nothing in the text of § 1396c that modifies the binding obligations imposed throughout the Medicaid statute.

This Court has repeatedly held that States choosing to participate in the federal Medicaid program must comply with the mandatory provisions of Medicaid. For instance, this Court instructed that "State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew v. Hawkins*, 540 U.S. 431, 433 (2004). *Accord Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986); *Alexander v. Choate,* 469 U.S. 287, 289 n.1, (1985); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

The argument that the federal power to terminate funds precludes private enforcement of Medicaid has been made before in this Court but has never held sway. *See, e.g.*, *PhRMA v. Walsh,* 538 U.S. 644, 675 (2003) (Scalia, J., concurring). In fact, in the *Ahlborn* case brought by a Medicaid beneficiary, this Court unanimously held that an Arkansas law was "unenforceable," because the state statute permitted a lien in contravention of the same Medicaid provisions at issue in the instant case. 547

U.S. 268, 292 (2006). The unanimous Court noted that in return for federal Medicaid funds, States must "compl[y] with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program." *Id*. at 275. In *Ahlborn*, this Court held that the mandatory lien provisions applicable in this case have preemptive effect.

Similarly, in the context of private suits under 42 U.S.C. § 1983, this Court has rejected the argument that the federal government's power to reduce funding precludes private enforcement. The Court explained that "the Secretary's oversight powers are not comprehensive enough to close the door on § 1983 liability." *Blessing v. Freestone*, 520 U.S. 329, 348 (1997). The ability of the federal government to withhold approval of Medicaid State plans and "to curtail federal funds to States whose plans are not in compliance with the Act" does not "withdraw the private remedy under § 1983." *Wilder,* 496 U.S. at 521-22. *Accord Golden State Transit Corp. v. City of L.A.,* 493 U.S. 103, 106 (1989); *Wright v. City of Roanoake Redevelopment and Housing Authority*, 479 U.S. 418, 428 (1987).

Texas's reliance on *NFIB* is misplaced. Texas argues that *NFIB* held that "States may choose to violate conditions in the Affordable Care Act and accept a reduction in federal Medicaid reimbursement." Texas Br. 20. This interpretation is baseless. In *NFIB*, the plurality opinion by Chief Justice Roberts stated:

> Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and *requiring that States accepting such funds comply with the conditions on their use*. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 132 S. Ct. 2566, 2607 (2012) (emphasis added). The plurality indicated that States accepting Medicaid funds must follow federal directives when spending those funds, directly contradicting the interpretation urged by Texas.

Regarding the new program of expanded eligibility for adults established in the Affordable Care Act, Chief Justice Roberts's opinion crafted a remedy that prohibited the federal government from taking away existing Medicaid funds from states choosing not to implement the expansion. *Id.; see also id.* at 2642 (Ginsburg, J., concurring in part and dissenting in part) (agreeing with plurality regarding the "appropriate remedy"). Under this remedy, the expansion of Medicaid eligibility for higher income adults became optional, similar to dental benefits for adults. *NFIB* limited this remedy to the expanded eligibility for adults in the Affordable Care Act and did not render any other provision of Medicaid optional. And *NFIB* confirmed that if funds are accepted for an optional component, applicable

statutory requirements are mandatory and enforceable.

NFIB reinforces and does not in any way undermine the extensive precedent that treats provisions in all federal laws, including Medicaid, as preempting contrary state laws. The argument urged by Texas has no basis in any precedent of this Court and is contrary to the text and history of the Constitution and the clear language of the Medicaid statute.

CONCLUSION

The decision of the U.S. Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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