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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

AMBER WINTERS, et al., Plaintiffs, vs. BANNER HEALTH INC., et al., Defendants.	No. CV2012-007665 **SUPPLEMENT TO DEFENDANTS' MOTION FOR NEW TRIAL**

Defendants hereby supplement their motion for new trial. Under new U.S. Supreme Court authority, Plaintiffs no longer have a viable cause of action for federal preemption under the Supremacy Clause. *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378 (2015).

There are two ramifications: First, the Complaint fails to state a claim upon which relief can be granted within the meaning of Rule 12(b)(6), thus removing the basis for this Court's subject matter jurisdiction, and thus (in turn) this Court's previous judgment is "contrary to law" within the meaning of Rule 59(b). Second, the Supremacy Clause precludes this Court's attempt to adjudicate issues of federal law using a procedure that

conflicts with the procedures and ignores the limitations prescribed by Congress and the Supreme Court.

The Court should grant the motion for new trial, vacate the judgment in Plaintiffs' favor, and enter a judgment dismissing Plaintiffs' preemption claim.

I. Plaintiffs may no longer bring a preemption claim under the Supremacy Clause based on federal Medicaid law.

This lawsuit advances a claim under the Supremacy Clause to enforce a federal statute, 42 U.S.C. § 1396a(a)(25)(C) ("Section 25(C)"), and a federal regulation, 42 C.F.R. § 447.15. Plaintiffs sought declaratory and injunctive relief that these federal laws preempt A.R.S. § 36-2903.01(G)(4), which allows hospitals to enforce health care provider liens after accepting payment from the AHCCCS program. This Court granted judgment in Plaintiffs' favor in November 2014.

In March 2015, however, the law changed dramatically. In a case involving the *very federal statute at issue here*, the U.S. Supreme Court held that the Supremacy Clause does not confer a cause of action to enforce federal statutes. *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378 (2015).

Armstrong is fatal to Plaintiffs' case. Without an underlying cause of action, Plaintiffs are no longer entitled to a declaratory judgment that federal law preempts A.R.S. § 36-2903.01(G)(4) and an injunction barring lien enforcement under that statute.

The below discussion demonstrates why this result is compelled by federal law generally, including the Supremacy Clause, and federal Medicaid law specifically.

a. The U.S. Supreme Court has sharply restricted the ability of private parties to bring lawsuits to enforce federal statutes.

Armstrong follows a long line of U.S. Supreme Court cases that close the courthouse door to private lawsuits to enforce federal statutes. One must understand this

body of law to understand *Armstrong*—and understand why Plaintiffs may no longer use the Supremacy Clause to enforce Section 25(C).

A violation of a statute, in and of itself, does not authorize a court to act—a plaintiff needs a viable cause of action. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979). Rather, a person may sue to enforce a federal statute only if Congress has expressly or impliedly created a private right of action to enforce that statute. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). An implied private right of action to enforce a statute exists only if that statute includes "rights-creating language;" that is, language creating an "individual entitlement" that is phrased "in terms of the persons to be benefited . . . with an unmistakable focus on the benefited class." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283-84 (2002). If a statute lacks rights-creating language, a private party may not bring a lawsuit to enforce that statute. *Id.* at 286.

After *Cannon*, plaintiffs found another open door to the courthouse: they sought to enforce federal statutes under 42 U.S.C. § 1983, even if the statutes did not include a private right of action. The U.S. Supreme Court closed that door in 2002, holding that only "unambiguously conferred right[s]" are enforceable under § 1983. *Id.* at 283. To enforce a statute under § 1983, a plaintiff must show that the statute unambiguously confers a right, rather than a simple benefit or interest. *Id.* A statute, in turn, confers a right only if Congress included the same rights-creating language that is necessary to confer a private right of action. *Id.* Thus, if Congress did not confer a private right of action to enforce a statute, a private litigant could not bring a claim under § 1983 to enforce that statute.

After *Gonzaga*, plaintiffs found yet another open door to the courthouse: they sought to enforce federal statutes under the Supremacy Clause by contending that those

statutes preempted contrary state laws or actions. This door was open for a while. Our own Court of Appeals recognized the existence of a private cause of action under the Supremacy Clause to enforce federal Medicaid law. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 18, n.9, 219 P.3d 216, 228 (App. 2009). The Ninth Circuit also recognized such a cause of action. *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1047, 1048–49 (9th Cir. 2008) ("[A] plaintiff may bring suit under the Supremacy Clause to enjoin implementation of a state law allegedly preempted by federal statute, regardless of whether the federal statute at issue confers an express 'right' or cause of action on the plaintiff.").

In 2012, this door began to close. The U.S. Supreme Court ultimately accepted certiorari in *Shewry*, and four Justices concluded private parties could not enforce the same statute at issue here, 42 U.S.C. § 1396a, under the Supremacy Clause. *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting). Congress did not confer a private right of action to enforce 42 U.S.C. § 1396a, either expressly or by including the sort of rights-creating language necessary to imply a private right of action. *Id.* A litigant "may not overcome the absence of" a private right of action "simply by invoking a right of action under the Supremacy Clause to the exact same effect." *Id.* at 1213. Permitting a claim under the Supremacy Clause to enforce the statute "would effect a complete end-run" around *Cannon* and *Gonzaga*. *Id.*

b. *Armstrong* eliminated Plaintiffs' cause of action under the Supremacy Clause to enforce 42 U.S.C. § 1396a.

In *Armstrong*, the Supreme Court adopted the rule articulated by the *Douglas* dissent: there is no cause of action under the Supremacy Clause to enforce federal statutes that lack a private right of action—including 42 U.S.C. § 1396a, the exact same statute at issue here.

The Supremacy Clause neither confers a cause of action nor specifies "who may enforce federal laws in Court." *Id.* Instead, the Supremacy Clause establishes a rule of decision: federal law trumps state law. *Id.* at 1383. *Congress* is tasked with deciding who may enforce federal statutes and how such enforcement may occur. *Id.* at 1383-84. In designing a statutory scheme, Congress may confer a private right of action, allowing private parties to enforce the law, or vest a federal agency with enforcement authority.

Congress chose the latter with regard to the Medicaid program, leaving enforcement of 42 U.S.C. § 1396a to the Department of Health and Human Services ("HHS"). 42 U.S.C. § 1396a is "phrased as a directive to the federal agency charged with approving state Medicaid plans." *Id.* at 1387 (Scalia, J., plurality). The statute lacks rights-creating language and does not "confer[] . . . the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." *Id.* Indeed, the "sole remedy" provided by Congress for a violation of 42 U.S.C. § 1396a is for HHS to withhold federal funding from a state Medicaid program. *Id.* at 1385 (Scalia, J., majority opinion) (citing 42 U.S.C. § 1396c). Congress chose not to give private parties authority to bring lawsuits to enforce 42 U.S.C. § 1396a, and *Armstrong* barred litigants from circumventing that decision by bringing a claim under the Supremacy Clause.

Armstrong is controlling: Plaintiffs bring the exact same type of claim (a preemption claim under the Supremacy Clause) seeking to enforce the exact same federal statute (42 U.S.C. § 1396a).[1] The U.S. Supreme Court shut the door to private enforcement of 42 U.S.C. § 1396a, of which Section 25(C) is a part, under the Supremacy Clause or otherwise.

[1] *Armstrong* involved a different subsection of 42 U.S.C. § 1396a, referred to as Section (30)(A), but the Supreme Court's analysis is phrased in terms of the entire statute and thus applies with full force to Section (25)(C).

As a result, the Court must vacate its judgment and dismiss Plaintiffs' claim under the Supremacy Clause.

Plaintiffs may not evade *Armstrong* by pointing to 42 C.F.R. § 447.15. Federal agencies may not confer private rights of action to enforce administrative regulations—only Congress may do so when enacting a statute. *Alexander*, 532 U.S. at 291. The question is whether 42 U.S.C. § 1396a confers a private right of action, and the answer is clearly no.

Nor may Plaintiffs evade *Armstrong* by invoking Arizona's Declaratory Judgment Act. State courts must apply federal law in deciding federal claims and are bound by decisions of the U.S. Supreme Court. *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) ("The decisions of the United States Supreme Court are binding with regard to the interpretation of the federal constitution."). Like the Supremacy Clause itself, declaratory judgment statutes create no substantive rights and no causes of action. *Medtronic, Inc. v. Mirowski Family Ventures*, 134 S. Ct. 843, 849 (2014). Rather, a declaratory judgment is merely "a remedy for an underlying cause of action." *Snyder v. HSBC Bank*, 913 F. Supp. 2d 755, 770 (D. Ariz. 2012). Plaintiffs no longer have an underlying cause of action under the Supremacy Clause as a matter of federal law and thus may not obtain a declaratory judgment in state court by asserting such a claim.[2]

Moreover, the Supremacy Clause obligates state courts to administer their own jurisdiction in a way that parallels—and does not evade the limitations of—federal law.

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[2] The same analysis applies to injunctive relief—like a declaratory judgment, an injunction is a remedy for an underlying cause of action. *Diaz-Amador v. Wells Fargo Home Mortgages*, 856 F. Supp. 2d 1074, 1083 (D. Ariz. 2012) (an injunction "is a remedy for an underlying cause of action, not a separate cause of action in and of itself"). Plaintiffs may not obtain an injunction as a remedy to a cause of action under the Supremacy Clause that no longer exists.

Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 58 (1912). This principle is "fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372–73 (1990). Historically, this principle has typically been expressed when state courts *closed* the courthouse door, refusing to hear a federal claim based on some procedural or substantive provision of state law. *See Testa v. Katt*, 330 U.S. 386, 394 (1947). But the reverse is also true. When federal law (as collectively expressed by Congress and the Supreme Court) comprehensively specifies when and how and by whom Medicaid-preemption claims may be adjudicated, state courts cannot upset this balance by freely adjudicating any and all federal claims. Nor could the Arizona Legislature constitutionally enact a statute conferring a private right of action under state law to enforce the federal Medicaid Act. Simply put, the Supremacy Clause does not permit Arizona to supplement the work of Congress by supplying new and additional causes of action or remedies for alleged violations of the Medicaid Act.

In short, *Armstrong* has sounded the death knell for Plaintiffs' case. Without a cause of action, Plaintiffs may not sustain a case and obtain any judicial remedies. *Melancon v. USAA Cas. Ins. Co.*, 174 Ariz. 344, 347, 849 P.2d 1374, 1377 (App. 1992). Plaintiffs no longer have a viable cause of action under the Supremacy Clause to enforce 42 U.S.C. § 1396a. The declaratory and injunctive relief they obtained is no longer permitted by federal law.

c. Congress mandated that Plaintiffs' remedy is in the administrative process.

Douglas and *Armstrong* point plaintiffs towards a different remedy and a different forum—not in superior court—to make their argument. A.R.S. § 36-2904.01(G)(4) is part of the enabling statutes for AHCCCS. If Plaintiffs believe that AHCCCS' enabling statutes violate federal Medicaid law, they may seek relief from HHS and its subsidiary

agency, the Centers for Medicare and Medicaid Services ("CMS"). If the agencies conclude that the statute violates federal law, they may withhold federal funding from AHCCCS. *Id.* at 1387 (Scalia, J., plurality) & 1389 (Breyer, J., concurring) (citing 42 U.S.C. § 1396c). If the agencies disagree with Plaintiffs, Plaintiffs may sue them under the federal Administrative Procedures Act. *Id.* at 1389-90 (Breyer, J., concurring).

Again, this is how Congress intended the Medicaid system to operate. The Medicaid Act is notoriously dense and obscure, and "Medicaid administration is nothing if not complex." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1248 (9th Cir. 2013). For those reasons, Congress made agency oversight the primary check on the Medicaid program. *DeSario v. Thomas*, 139 F.3d 80, 96-97 (2d Cir. 1998). Congress charged HHS and CMS with administering the Medicaid program, ensuring that state Medicaid plans comply with the long list of requirements in 42 U.S.C. § 1396a, and ensuring that participating states comply with federal Medicaid law. *Managed Pharmacy Care*, 716 F.3d at 1248.

Courts recognize that CMS and HHS have developed special expertise and competence in administering the Medicaid program. Although the agencies are not above the law, judicial review of their actions is limited: courts defer to the agencies' interpretations of federal law and will not reverse a decision of the agencies unless it was arbitrary, capricious or an abuse of discretion. *Managed Pharmacy Care*, 716 F.3d at 1244. This deferential standard of review is appropriate because Medicaid is a "'complex and highly technical regulatory program' [that] benefit[s] from expert administration" by HHS and CMS. *W. Va. v. Thompson*, 475 F.3d 204, 212 (4th Cir. 2007) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Compared to generalist judges, the agencies "[are] comparatively expert in the [Medicaid Act's] subject matter." *Douglas*, 132 S. Ct. at 1210.

Private litigation, such as Plaintiffs' lawsuit under the Supremacy Clause, disrupts this administrative machinery and thrusts generalist judges into the minefield of Medicaid law without guidance from the experts at HHS and CMS. Private enforcement of the Medicaid Act undercuts Congress' intent to charge federal bureaucracies with administering Medicaid. *Armstrong* correctly recognized that fact and sensibly shut the door to private enforcement of the Medicaid Act under the Supremacy Clause.

II. Conclusion

Armstrong deprived Plaintiffs of a viable cause of action under the Supremacy Clause. Without a cause of action, Plaintiffs are not entitled to the declaratory and injunctive relief they obtained. The Court should grant a new trial, vacate the judgment in favor of Plaintiffs, and enter judgment dismissing Plaintiffs' preemption claim.

RESPECTFULLY SUBMITTED this 3rd day of October, 2016.

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