No. 02-1604

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROSIE D., et al.
Plaintiffs-Appellees

v.

JANE M. SWIFT, et al.
Defendants-Appellants

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DENYING A MOTION TO DISMISS ON GROUNDS OF SOVEREIGN IMMUNITY

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August 2, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. MEDICAID BENEFICIARIES CAN SEEK PROSPECTIVE INJUNCTIVE RELIEF AGAINST STATE OFFICIALS UNDER *EX PARTE YOUNG* TO ENFORCE THE PROVISIONS OF THE MEDICAID ACT. 8

A. *The Supreme Court's Decision in Verizon Confirms the Narrowness of the Seminole Tribe Exception to the Ex parte Young Doctrine.* 9

B. *Courts Have Uniformly Held That Claims Under the Medicaid Act Are Proper Ex parte Young Actions and Are Not Barred by the Seminole Tribe Exception.* 13

II. THE DETAILED REMEDIAL SCHEME EXCEPTION TO *EX PARTE YOUNG* IS VIRTUALLY IDENTICAL TO THE COMPREHENSIVE REMEDIAL SCHEME EXCEPTION TO PRIVATE RIGHT OF ACTIONS UNDER 42 U.S.C. § 1983, WHICH THE SUPREME COURT HAS ALREADY DETERMINED DOES NOT PRECLUDE PRIVATE ENFORCEMENT OF THE MEDICAID ACT. 20

III. CONGRESS HAS NEVER INDICATED AN INTENT TO FORECLOSE PRIVATE ENFORCEMENT OF THE MEDICAID ACT, AND, INSTEAD, HAS EXPLICITLY PERMITTED BENEFICIARIES TO ENFORCE WITH THE ACT PURSUANT TO *EX PARTE YOUNG.* 24

A. Seminole Tribe's Detailed Remedial Scheme Exception to the Ex parte Young Doctrine Is Narrow, and Limited to Clear Expressions of Congressional Intent to Preclude Enforcement of Federal Law in Federal Court. 24

B. Congress Did Not Intend That the Administrative Hearing Provision of the Medicaid Act Would Bar Private Enforcement of the Act Against the States. 25

IV. THE ADMINISTRATIVE HEARING PROVISION OF THE MEDICAID ACT DOES NOT CONSTITUTE A DETAILED REMEDIAL SCHEME THAT PRECLUDES THE ENFORCEMENT OF THE ACT UNDER *EX PARTE YOUNG.* 28

A. The Medicaid Act Is Fundamentally Different From the Indian Gaming and Regulatory Act. 30

1. Unlike the Medicaid Act, the IGRA Requires Actions By the State Itself As Sovereign. 31

2. Unlike the Medicaid Act, the IGRA Specifies Intricate and Detailed Enforcement Procedures. 32

3. Unlike the Medicaid Act, the IGRA Explicitly Limits Available Remedies Under the Statutory Scheme. 33

4. Unlike the Medicaid Act, the IGRA Provides Specific and Meaningful Remedies For Its

Beneficiaries. 34

B. The Medicaid Administrative Hearing Process Is Not A Detailed Remedial Scheme. 35

V. CONCLUSION 42

TABLE OF AUTHORITIES

CASES

Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) 14, 16, 17, 22, 33

Blessing v. Freestone, 520 U.S. 329 (1997) 21, 22, 24

Bonnie L. v. Bush, 180 F.Supp.2d 1321 (S.D.Fla. 2001) 15, 16, 35

Boudreau v. Ryan, 2001 WL 840583 (N.D. Ill. May 2, 2001) 15

Boulet v. Celluci, 107 F. Supp.2d 61 (D. Mass. 2000) 15

Bryson v. Shumway, 177 F.Supp.2d 78 (D.N.H. 2001) 15

Cramer v. Chiles, 33 F.Supp.2d 1342 (S.D.Fla. 1999) 16

Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998) 15, 29

Ex parte Young, 209 U.S. 123 (1908) passim

Frazar v. Gilbert, 2002 WL 1652782 (5th Cir. July 24, 2002) 14, 16, 18

Hale v. Belshe, 117 F.3d 1425 (9th Cir. 1997) 15

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 9

Joseph A. v. Ingram, 262 F.3d 1113 (10th Cir. 2001) 14

Joseph A. v. Ingram, 275 F.3d 1253 (10th Cir. 2002) 14, 19, 22

Lewis v. New Mexico Dept. of Health, 261 F.3d 970 (10th Cir. 2001) 9, 15, 31

Maryland Psychiatric Society v. Wasserman, 102 F.3d 717 (4th Cir. 1996) 16, 22

Memisovski v. Patla, 2001 WL 1249615 (N.D. Ill. Oct. 17, 2001) 15

Middlesex County Sewerage Authority v. National Sea Clammers Association, 433 U.S. 1 (1981) 20

Missouri Child Care Association v. Cross, 2002 WL 13965121 (8th Cir. June 26, 2002) 18, 19, 22, 23

Parry v. Crawford, 990 F.Supp. 1250 (D.Nev. 1998) 16

Reynolds v. Giuliani, 118 F. Supp.2d 352 (S.D.N.Y.2000) 16, 34

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) passim

Suter v. Artist M., 503 U.S. 347 (1992) 25

Verizon Maryland v. Public Service Commission of Maryland, 122 S.Ct. 1753 (2002) passim

Westside Mothers v. Havemann, 289 F.3d 852 (6th Cir. 2002) 14-17, 33

Wilder v. Virginia Hospital Ass'n., 496 U.S. 498 (1990) 7, 17, 21

Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S.418 (1987) 21

STATUTES AND REGULATIONS

25 U.S.C. § 2710(d)(7) 10, 32

42 U.S.C. § 1320a-2 26

42 U.S.C. § 1396a *et seq.* 1

42 U.S.C. § 1396a(a)(3) 6, 25, 36, 38

42 U.S.C. § 1396a(a)(8)	1
42 U.S.C. § 1396a(a)(10)	1
42 U.S.C. § 1396a(a)(30)(A)	1
42 U.S.C. § 1396a(a)(43)	1, 41
42 U.S.C. § 1396d(a)(1)-(27)	3
42 U.S.C. § 1396d(a)(4)(B)	1
42 U.S.C. § 1396d(r)(5)	1
42 U.S.C. § 1396u-2(b)	1
42 U.S.C. § 1983	passim
42 U.S.C. § 2710(d)(3)	33
42 U.S.C. § 2710(d)(7)	10
47 U.S.C. § 251(c)(2)	10
47 U.S.C. § 252	6, 10, 30
47 U.S.C. § 252(a)-(b)	10
47 U.S.C. § 252(e)	11
42 C.F.R. § 441.50	1
42 C.F.R. § 441.56(a)	1
42 C.F.R. § 441.61(b)	1
139 Cong. Rec. S3,173 (1993)	26, 27

141 Cong. Rec. H12,668 (1995) 27

1994 U.S.C.C.A.N. 2901 26

Cong. Rec. 17,689 (1992) 26

H.R. 2491, 104th Cong. (1995) 27

H.R. Rep. No. 101-247 (1989) 27

House Conf. Rpt. 103-761 (1994) 26

PUBLICATIONS

Carlos Manuel Vasquez, "What is Eleventh Amendment Immunity?" 106 *Yale Law Review* 1683 (1997) 20

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Is the plaintiff class' claim for prospective injunctive relief to compel state officials to perform their enforceable, statutory duties under the federal Medicaid Act, 42 U.S.C. § 1396a *et seq.*, barred by the State's sovereign immunity because the Act contains a detailed remedial scheme of limited federal court jurisdiction?

STATEMENT OF THE CASE

On October 29, 2001, nine children, acting through their parents or guardians, filed a class action Complaint against various executive officials of the Commonwealth of Massachusetts who are responsible for the Commonwealth's Medicaid program. The Complaint alleges violations of several provisions of the federal Medicaid Act, and particularly the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions of the Act, 42 U.S.C. §§ 1396a(a)(10), 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r)(5), and their implementing regulations, 42 C.F.R. § 441.50, 441.56(a), and 441.61(b).[1] App. 41-42. These provisions require that State officials: (1) inform Medicaid-eligible children and their families about the EPSDT program and the services available; (2) arrange and provide those services which are medically necessary to treat or

[1] The three additional sections of the Act challenged in the Complaint are: Count II (reasonable promptness), 42 U.S.C. § 1396a(a)(8); Count III (methods of administration), 42 U.S.C. § 1396a(a)(30)(A); and Count IV (managed care), 42 U.S.C. § 1396u-2(b). App. 52-54.

ameliorate their physical or mental impairments; and (3) enlist an adequate array of providers and professionals to offer services to eligible children. The children allege that the defendant state officials (hereafter "state officials") have violated federal law by failing to inform, arrange, and provide medically necessary services to thousands of children with psychiatric, behavioral, or emotional conditions, despite their statutory obligation to do so under the joint federal-state Medicaid program. App. 12-13.

On December 18, 2001, the state officials filed a Motion to Dismiss the Complaint, claiming that: (1) the State's sovereign immunity bars this action, even though the Complaint alleges ongoing violations of federal law and seeks only prospective injunctive relief against state officials in their official capacities; (2) there is no private right of action to enforce the cited provisions of the Medicaid Act; and (3) the Complaint fails to state a claim. The children opposed the Motion to Dismiss, and further sought to have this case certified as a class action. After briefing and argument on March 29, 2002, the district court denied the state officials' Motion to Dismiss in its entirety, and allowed the plaintiffs' Motion for Class Certification. The state officials filed a timely Notice of Appeal limited to the Court's denial of its sovereign immunity defense.[2] The children filed, with

[2] The state officials also filed with the district court a Motion to Stay Disclosures and Discovery, which was allowed with two minor exceptions on May

the state officials' assent, a Motion to Expedite the Appeal, which was allowed by this Court on May 23, 2002.

STATEMENT OF THE FACTS

The plaintiffs in this case are nine Medicaid-eligible children, and a class of similarly situated children,[3] who reside throughout Massachusetts. App. 11-16, 16-17. These children have been diagnosed with serious mental illnesses. App. 30-47. As alleged in the Complaint, the mental health treatments which they seek, and which the state officials have failed to provide, are all covered Medicaid services listed in the statute and regulations. 42 U.S.C. § 1396d(a)(1)-(27). App. 20-21, 23-24. All of the children require these services to treat or ameliorate their psychiatric or behavioral conditions. App. 30, 48.[4]

None of these children have received the level, duration, or intensity of

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31, 2002. The state officials subsequently petitioned this Court for a stay of all proceedings, which was denied in part and remanded in part on July 12, 2002.

[3] The class certified by the district court is defined as "all current or future Medicaid-eligible residents of Massachusetts under the age of twenty-one who are or may be eligible for, but are not receiving, intensive home-based services, including professionally acceptable assessments, special therapeutic aides, crisis intervention, and case management services."

[4] The state officials' repeated protestations that the children have not been determined to need requested services, and that these services are not mandated by the Medicaid Act, *see* Brief for Appellants at 4-5, 7 [hereafter App. Br.], are directly contradicted by the allegations in the Complaint. App. 23-24.

home-based services necessary to treat or ameliorate their individual illnesses. App. 47-49. Instead, most have suffered through repeated and unsuccessful hospitalizations; others have been left to fend for themselves, without even knowing what services to ask for because of the state officials' failure to inform them of the EPSDT program and their entitlement to necessary services. App. 26-29, 47-48. Those few children and parents who knew to ask for the necessary home-based services learned that the state officials had not arranged, and did not provide, this treatment with the intensity and duration they needed. App. 24-26, 48. This lack of medically necessary treatment has exacerbated the mental illnesses of these children, making it less likely that they will be able to live and grow in their home communities. App. 30-47. Despite the urgency and medical necessity of their need for intensive home-based mental health services, none of the children have received the treatment to which they are entitled under the EPSDT program. App. 29-30.

State officials have been aware for years of the mental health crisis for children in Massachusetts. App. 26-28. Despite the State's acknowledgment of this crisis and its debilitating effects on children and their families, these state officials have taken no meaningful action to comply with the statutory requirements of the EPSDT program. App. 47-49. Instead, the state officials have denied, and

continue to deny, seriously ill children reasonable access to covered Medicaid services which are necessary for their care and recovery, and which would allow them to remain with their families and in their communities. *Id.* Medicaid-eligible children with psychiatric conditions have been, and continue to be, unable to obtain prompt and adequate mental health services, including case management and intensive home-based services, thus aggravating the daily crisis these children face and causing them ongoing harm and deterioration.[5] App. 30.

SUMMARY OF THE ARGUMENT

Although the Eleventh Amendment generally bars private actions against unconsenting States, the *Ex parte Young* doctrine, 209 U.S. 123 (1908), has long been invoked to permit suits against state officials to enjoin ongoing violations of federal law. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996), the Supreme Court crafted a narrow exception to this doctrine, where Congress specifically restricts the authority of federal courts to enforce a statute and establishes a detailed, intricate remedial scheme intended to preclude the

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[5] Many of the children are confined to hospitals or residential treatment centers far longer than is medically necessary or appropriate because adequate, intensive home-based services are unavailable. App. 27-28. Other children have been repeatedly hospitalized in general pediatric or emergency wards because they have not received the intensive home-based services needed to treat and ameliorate their behavioral, emotional, or psychiatric conditions. App. 28. The State refers to these children as "stuck kids."

application of *Ex parte Young*. Recently, in *Verizon Maryland v. Public Service Commission of Maryland*, __ U.S. __, 122 S.Ct. 1753, 1760-61 (2002), the Court declined to apply this narrow exception to the Telecommunications Act of 1996, 47 U.S.C. § 252, even though it contains a complex administrative procedure, because Congress did not express a clear intention to displace federal court enforcement under *Ex parte Young*.

In this case, the State contends that the one-line requirement in the Medicaid Act, requiring State Medicaid plans to provide for an individual administrative hearing for limited purposes, demonstrates Congress' intent to immunize the State from all individual and class action suits to enforce the States' duties under the Medicaid statute. The Act simply mandates that the State plan must:

> provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or not acted upon with reasonable promptness;

42 U.S.C. § 1396a(a)(3). Neither the narrow exception to the *Ex parte Young* doctrine enunciated in *Seminole Tribe*, nor the recent decision in *Verizon* refusing to apply that exception ,support the State's claim of sovereign immunity under the Medicaid Act. To the contrary, the analysis in these cases demonstrate why Medicaid's brief administrative hearing provision, which is limited to challenging eligibility determinations and delays in providing prompt medical assistance,

plainly was not intended by Congress to preclude *Ex parte Young* actions.

The state officials' argument that the *Seminole Tribe* exception should be extended to claims under the Medicaid Act is flawed for several reasons: (1) it is contrary to the Supreme Court's holdings in *Seminole Tribe* and *Verizon* that the statutory remedy must be "intricate," "detailed," and incompatible with an *Ex parte Young* suit, and erroneously interprets *Seminole Tribe's* exception to encompass *any* statutory remedy which simply offers *less* relief than an *Ex parte Young* action (section I(A), pp. 8-13); (2) it has been directly rejected by every court of appeals and district court that has considered the argument (section I(B), pp. 13-20); (3) it is inconsistent with the Supreme Court's holding in *Wilder v. Virginia Hospital Ass'n.*, 496 U.S. 498, 523 (1990), which applied an almost identical test for determining whether to bar a § 1983 action against a State under the Medicaid Act, and which held that "[T]he availability of state administrative procedures ordinarily does not foreclose resort to § 1983." (section II, pp. 20-24); (4) it makes no claim nor cites any authority that Congress ever intended to foreclose an *Ex parte Young* action under Medicaid or to establish the State's administrative hearing process as the exclusive remedy for a violation of the Medicaid Act (section III, pp. 24-28); (5) it ignores the unique facts and Congressional intent in the Indian Gaming Regulatory Act (IGRA) and the

fundamental differences between the IGRA and the Medicaid Act (section IV(A), pp. 28-35); and (6) it misconstrues the purpose and effect of the Medicaid administrative hearing provision (section IV(B), pp. 35-42).

ARGUMENT

I. MEDICAID BENEFICIARIES CAN SEEK PROSPECTIVE INJUNCTIVE RELIEF AGAINST STATE OFFICIALS UNDER *EX PARTE YOUNG* TO ENFORCE THE PROVISIONS OF THE MEDICAID ACT.

The Eleventh Amendment bars federal court litigation by private parties against unconsenting States. However, the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), creates an exception for a "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe of Florida*, 517 U.S. at 71 n.14 (1996). The *Ex parte Young* doctrine permits suits against state officials where citizens allege ongoing violations of federal law and seek only prospective, declaratory and/or injunctive relief. *Id.* at 73. *Ex parte Young* "ordinarily" applies where there is "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective." *Verizon*, 122 S.Ct. at 1760, *citing Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). Moreover, as the Court has recently noted, *Ex parte Young* requires only "a straightforward inquiry [which] does not include an analysis of the merits of the claim," but simply a determination whether the two part test is met

by the allegations in the complaint. *Id.* at 1761. The children in this case fit precisely within the *Ex parte Young* paradigm, having sued state officials, charged them with violations of federal law, and requested only prospective declaratory and injunctive relief.[6]

A. The Supreme Court's Decision in Verizon Confirms the Narrowness of the Seminole Tribe Exception to the Ex parte Young Doctrine.

Seeking to avoid the routine application of *Ex parte Young* in this case, the state officials argue that the children's claims fall under a narrow exception to the *Ex parte Young* doctrine created by the Supreme Court in *Seminole Tribe*. In that case, the Supreme Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an

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[6] The state officials' cases elucidating the constitutional design and explaining the purpose and scope of the Eleventh Amendment primarily involve actions for money damages -- relief not requested here and beyond the scope of the *Ex parte Young* doctrine. App. Br. at 17-18. Thus, these cases are not relevant to this appeal. Similarly, their lengthy quote from the opinion of Justice Kennedy in *Coeur d'Alene*, 521 U.S. at 269-70, ignores both the unique facts of that case and the concurring opinion of Justice O'Connor for seven members of the Court which broadly reaffirmed the straightforward application of the test for applying *Ex parte Young*. *Id.* at 293-94 (O'Connor, J. concurring). *See Id.* at 297-98 (Opinion of Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, noting that Justice O'Connor's opinion "charts a more limited course that wisely rejects the lead opinion's call for federal jurisdiction contingent on case-by-case balancing."). *See also Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 978 (10th Cir. 2001)(holding that Medicaid program does not implicate special sovereign interests).

action against a state officer based upon *Ex parte Young*." Seminole Tribe, 517 U.S. at 74. To ine whether Congress intended to preclude other remedies, the Court relied upon the "intricate procedures set forth in [§ 2710(d)(7) which] show that Congress intended not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." [7] In particular, the Court found that the Seminole Tribe's claim under the IGRA was not a proper *Ex parte Young* action because that statute provided a carefully crafted remedial scheme that Congress intended to be the Tribe's sole remedy against the State. *Id.* at 74-76.

Applying the same standards enunciated in *Seminole Tribe*, the Supreme Court has recently rejected the argument that the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(2), contains "intricate procedures," constrains "judicial relief," and establishes a "detailed remedial scheme" which would preclude an *Ex parte Young* action to enforce the Act against state officials.[8] *Verizon* 122 S.Ct. at

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[7] 25 U.S.C. § 2710(d)(7) is an exhaustive complaint and negotiation procedure crafted by Congress for the explicit purpose of both mandating an alternative mechanism for resolving disputes between sovereigns and limiting federal court authority. The length and detail of the procedures are a testament to the intricacy of the statutory remedial scheme under the IGRA, which stands in sharp contrast to Medicaid's circumscribed, one-sentence administrative hearing provision. For a fuller discussion of the IGRA and its comparison with the Medicaid provision at issue here, *see* section IV(A), *infra*.

[8] 47 U.S.C. § 252 mandates that all disputes under the Telecommunications Act must first be negotiated in good faith and may be submitted to arbitration. 47 U.S.C. § 252(a)-(b). Parties may then petition the appropriate State utility

1760. The Court reaffirmed, once again, the vitality and breadth of the *Ex parte Young* doctrine. Justice Scalia's majority opinion demonstrates the narrowness of the *Seminole Tribe* exception by rejecting the argument that the Telecommunications Act creates a detailed remedial scheme which is incompatible with federal court enforcement of the Act under *Ex parte Young*, or which reflects a Congressional intention to preclude judicial enforcement of the Act. *Id.* In concluding that *Seminole Tribe* was inapplicable, the Court distinguished the complex, alternative dispute resolution mechanisms and the strict limitation on the federal court's authority of the IGRA from the administrative enforcement process of the Telecommunications Act. *Id.* It emphasized that the IGRA contained "intricate procedures" that mandated negotiations, mediation, and administrative notification between sovereign entities, and only proscribed a "quite modest set of sanctions" that significantly limited any judicially-imposed relief. *Id.*, quoting from *Seminole Tribe*. The Telecommunications Act, on the other hand, simply provides that an aggrieved party can appeal to a court from an administrative

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commission for further review and approval of an agreement. *Id.* at § 252(e). Detailed procedures govern the commission's review, which must be exhausted before seeking a judicial determination of the commission's decision. There is no subsequent limit on federal court authority to enforce the Act. Congress described this process in far more detail than the Medicaid administrative hearing requirement, but the Court, nevertheless, determined that it did not displace *Ex parte Young* and rejected the State's sovereign immunity defense. *Verizon*, 122 S.Ct. at 1760. *See* section IV(A), *infra*.

determination and places "no restriction on the relief a court can award." *Id.* Nor does the Act define "whom the suit is to be brought against." *Id.* The Court concluded that there is nothing in the administrative review process of the Telecommunications Act that is incompatible with a federal court enforcement action under *Ex parte Young*. Significantly, *Verizon*, like *Seminole Tribe*, looked only at the language of the statutory remedy which *Congress* created, and not at any administrative regulations, in determining the applicability of *Ex parte Young*.

In their argument that *Seminole Tribe's* narrow exception applies to the administrative hearing provision of the Medicaid Act, the state officials ignore the Court's fundamental criteria for invoking that exception: intricate procedures, detailed remedies, limited federal court jurisdiction, and evidence of Congressional intent to displace an *Ex parte Young* suit.[9] Instead, the officials reduce the Court's holding to a simplistic test: does a remedy provided by a federal statute offer less relief than is otherwise available under *Ex parte Young* to enforce the

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[9] The Court in *Seminole Tribe* went out of its way to indicate that its decision did not foreclose all actions under *Ex parte Young*: "Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We only find that Congress did not intend that result in the Indian Gaming Regulatory Act." 517 U.S. at 75, n. 17.

State's statutory duties.[10] In so doing, the state officials then disregard both the explicit holding and specific language of *Verizon*, which declines to afford the State sovereign immunity even though the Telecommunications Act's limited administrative hearing mechanism provides less relief than an *Ex parte Young* action. The officials attempt to extract their reductionist test from *Verizon*, and imply that *Verizon* significantly altered the *Seminole Tribe* test, by incorrectly claiming that *Verizon* eliminates all of *Seminole Tribe's* restrictive criteria and substitutes, in its stead, the broad concept of "more limited relief."[11] App. Br. at 1. This distorted reading of *Seminole Tribe* and *Verizon* is patently inconsistent with the Court's holdings and specific directives in those cases.

B. Courts Have Uniformly Held That Claims Under the Medicaid Act Are Proper Ex parte Young Actions and Are Not Barred by the Seminole Tribe Exception.

Every federal court which has considered a sovereign immunity defense in a Medicaid case has consistently held that claims under the Medicaid Act, and specifically those enforcing the EPSDT program, are classic *Ex parte Young*

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[10] Because the answer to the state official's test is invariably yes, their argument here bodes ill for the *Ex parte Young* doctrine with respect to virtually all federal statutes that incorporate an administrative or other similar remedy. In short, their argument proves too much.

[11] The state officials are forced to adopt this extreme contention because the Medicaid case law applying *Seminole Tribe* uniformly rejects their position. *See* section I(B), *infra.*

actions.[12] Seven courts of appeals -- the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits -- and numerous district courts have specifically concluded that Medicaid or Social Security Act beneficiaries can enforce the Acts under *Ex parte Young*, even after *Seminole Tribe*.

Courts uniformly have held that a claim for enforcement of rights under the Medicaid Act is precisely "the traditional *Ex parte Young* action" to which Chief Justice Rehnquist referred in *Seminole Tribe*. *Frazar v. Gilbert*, 2002 WL 1652782 (5th Cir. July 24, 2002)(Medicaid beneficiaries can enforce certain provisions of the Act pursuant to *Ex parte Young*); *Antrican v. Odom*, 290 F.3d 178, 185-91 (4th Cir. 2002)(holding that a suit to enforce the EPSDT provisions of the Medicaid Act is enforceable under *Ex parte Young* because the action seeks prospective relief, plaintiffs allege an ongoing violation of federal law, and the

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[12] Three of the cases upon on which the state officials relied in the district court have subsequently been reversed. In *Westside Mothers v. Havemann*, 289 F.3d 852 (6th Cir. 2002), the Sixth Circuit Court of Appeals overturned a novel interpretation of the Eleventh Amendment which was the primary case cited by the state officials to support their Eleventh Amendment claim below. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 122 S.Ct. 1753, reversed an appellate decision that had applied the *Seminole Tribe* analysis to preclude an *Ex parte Young* action because of the administrative procedures in the Telecommunications Act of 1996. Finally, the Tenth Circuit Court of Appeals withdrew its initial decision in *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), and held that "the statutes at issue in this case [Titles IV and XX of the Social Security Act] do not provide remedial schemes sufficient to foreclose *Ex Parte Young* jurisdiction." *Joseph A. v. Ingram*, 275 F.3d 1253, 1264 (10th Cir. 2002).

statute does not provide a detailed remedial scheme); *Westside Mothers v. Haveman*, 289 F.3d 852, 860-62 (6th Cir. 2002)(suit to enforce the mandatory EPSDT provisions of the Medicaid Act is properly based upon *Ex parte Young*); *Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 975-78 (10th Cir. 2001)(*Ex parte Young* applies to claim for Medicaid services); *Doe v. Chiles*, 136 F.3d 709, 720 (11th Cir. 1998)(Medicaid claim "fits neatly within the *Ex parte Young* exception"); *Hale v. Belshe*, 117 F.3d 1425, **1 (9th Cir. 1997)("we conclude that the exception to Eleventh Amendment immunity set forth in *Ex parte Young* squarely applies" to claims under the EPSDT provisions of the Medicaid Act)(unpublished disposition). *See also Bonnie L. v. Bush*, 180 F.Supp.2d 1321, 1326-31 (S.D.Fla. 2001)(claim against state officials for violating EPSDT is not barred by Eleventh Amendment); *Memisovski v. Patla*, No. 92C1982, 2001 WL 1249615 at *5-6 (N.D. Ill. Oct. 17, 2001)(Eleventh Amendment did not bar claims seeking prospective, injunctive relief for EPSDT violations); *Bryson v. Shumway*, 177 F.Supp.2d 78, 87 (D.N.H. 2001)(suit for prospective relieve under Medicaid not barred by Eleventh Amendment); *Boudreau v. Ryan*, No. 00C 5392, 2001 WL 840583, at *3-5 (N.D. Ill. May 2, 2001)(*Ex parte Young* applicable to claimed Medicaid violations); *Boulet v. Celluci*, 107 F. Supp.2d 61, 73-74 (D. Mass. 2000)(Eleventh Amendment does not bar suit to enforce "reasonable promptness"

provisions of Medicaid); *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1350 (S.D.Fla. 1999)("Plaintiffs' Medicaid claims fall squarely under the doctrine enunciated in the case of *Ex parte Young*....").

Importantly, courts have explicitly rejected the state officials' argument that claims under Medicaid generally, and EPSDT specifically, are barred by the *Seminole Tribe* exception to the *Ex parte Young* doctrine. *Frazar*, 2002 WL 1652782 at *16, n. 109 ("In contrast to the statutory scheme at issue in *Seminole Tribe*, the Medicaid Act does not have an intricate remedial scheme regulating noncompliance by a state."); *Antrican*, 290 F.3d at 190 (State's argument that *Seminole Tribe's* exception to the *Ex parte Young* doctrine applies to the Medicaid Act is meritless); *Westside Mothers*, 289 F.3d at 862 (same); *Maryland Psychiatric Society v. Wasserman*, 102 F.3d 717, 719 (4th Cir. 1996)(rejecting defendants' *Seminole Tribe* argument); *Bonnie L.*, 180 F.Supp.2d at 1328-31 (rejecting *Seminole Tribe* argument and permitting EPSDT claim to proceed); *Reynolds v. Giuliani*, 118 F. Supp.2d 352, 382 (S.D.N.Y.2000)(finding "detailed remedial scheme" of the IGRA "absent in the ... Medicaid Act"), *Parry v. Crawford,* 990 F.Supp. 1250, 1255 (D.Nev. 1998)("Defendants have made no showing of a detailed remedial scheme for the enforcement of rights created under the Medicaid Act sufficient to foreclose a remedy under *Ex parte Young.*").

Contrary to the state officials' misreading of the recent decisions of the Fourth and Sixth Circuit Courts of Appeals, App. Br. at 27-28, these courts specifically addressed and summarily rejected the precise argument proffered here. In *Antrican*, the Fourth Circuit dismissed as meritless that State's *Seminole Tribe* argument and concluded that, in designing an entitlement program in which the State:

> could participate entirely or not at all, such as the Medicaid Act, Congress has not prescribed a detailed remedial scheme for dealing with noncompliance with the Act once a State elects to participate. On the contrary, the Supreme Court has concluded that the Medicaid Act does not provide the type of detailed remedial scheme that would supplant an *Ex parte Young* action. *See Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498, 521-22 (1990).

Antrican, 290 F.3d at 190. In *Westside Mothers*, the Sixth Circuit held that the federal funding cut-off provision of the Medicaid Act simply was not a "*carefully crafted and intricate* remedial scheme ... for the enforcement of a *particular* federal right" similar to that established by Congress under the IGRA. *Westside Mothers*, 289 F.3d at 862 (quoting from *Seminole Tribe*, 517 U.S. at 73-74) (emphasis in the original). The Court of Appeals found it determinative that the Secretary's right to terminate federal funding to states, which includes an administrative process for appealing such decisions under the Medicaid Act, sharply differed from the "timetables, incentives, and 'intricate procedures' to

cajole states and Indian tribes to negotiate agreements on gambling" found in the IGRA. *Id.*

In *Frazar v. Gilbert*, the Fifth Circuit recently followed suit and became the sixth circuit court of appeals to reject a sovereign immunity defense in a Medicaid case and allow the beneficiaries to enforce the Act against the State pursuant to *Ex parte Young*. 2002 WL 1652782. It adopted the reasoning of the Sixth Circuit in rejecting the lower court's novel Eleventh Amendment interpretation and held that there is no sovereign immunity defense to the enforcement of certain EPSDT provisions of the Medicaid Act by beneficiaries against the State. It specifically concluded that the administrative hearing provision of the Act does not create a detailed remedial scheme that is incompatible with *Ex parte Young* suits. *Id.* at 16 n. 109.

The Eighth Circuit recently has followed the other six circuits in applying the same reasoning to another component of the Social Security Act. *Missouri Child Care Association v. Cross*, 2002 WL 13965121 at *3 (8th Cir. June 26, 2002)(administrative provisions of the Adoption Assistance and Child Welfare Act (CWA) do not create a detailed remedial scheme precluding private enforcement of the Act against state officials under *Ex parte Young*). The Eighth Circuit found that the Child Welfare Act was materially different than the IGRA, since it did not

regulate the relationship between sovereigns, it did not severely limit the sanctions available to a federal court for resolving disputes under the statute, and there were no intricate dispute resolution procedures for ensuring compliance with the statute. *Id.* The CWA established an administrative procedure for challenging agency decisions, which the court concluded did not preclude an *Ex parte Young* action:

> Moreover, administratively created schemes are generally not sufficient to foreclose private actions, such as an action under *Ex parte Young* or § 1983, because an administrative act is not sufficiently indicative of Congress's true intent to limit the available remedies.

Id.[13] *See also Joseph A.*, 275 F.3d at 1265 (administrative remedy and state court remedy are particularly inappropriate substitutes for an *Ex parte Young* action to vindicate federal rights; remedies designed to end a continuing violation of federal law, such as *Ex parte Young* actions, "are necessary to vindicate the federal interest in assuring the supremacy of that law.").

This Court should follow the consistent holdings of every court of appeals and district court that has considered an Eleventh Amendment challenge to Medicaid or Social Security claims and reject the state officials' challenge here.

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[13] As more fully discussed below, the court of appeals found further support for its conclusion by turning to the Supreme Court's private right of action jurisprudence, and specifically the analogous concept of a comprehensive remedial scheme that would preclude a private right of action under § 1983. *See* section II, *infra.*

This overwhelming body of case law makes clear that the children's EPSDT claims in this case are precisely the type of claim allowed by *Ex parte Young*.

II. THE DETAILED REMEDIAL SCHEME EXCEPTION TO *EX PARTE YOUNG* IS VIRTUALLY IDENTICAL TO THE COMPREHENSIVE REMEDIAL SCHEME EXCEPTION TO PRIVATE RIGHT OF ACTIONS UNDER 42 U.S.C. § 1983, WHICH THE SUPREME COURT HAS ALREADY DETERMINED DOES NOT PRECLUDE PRIVATE ENFORCEMENT OF THE MEDICAID ACT.

The *Seminole Tribe* criteria for determining whether Congress meant to preclude *Ex parte Young* actions against a State is virtually identical to the standard for rebutting the presumption that a private plaintiff can enforce a federal right under § 1983. *Compare Seminole Tribe*, 517 U.S. at 74 (Congress has provided detailed remedial mechanisms evidencing intent to bar actions under *Ex parte Young*) *with Middlesex County Sewerage Authority v. National Sea Clammers Association*, 433 U.S. 1 (1981)(comprehensive remedial devices may demonstrate an intent to preclude private suits under § 1983).[14] Indeed, in *Seminole Tribe* itself, Chief Justice Rehnquist recognized that the "same general principal applies" to both inquiries. *Seminole Tribe*, 517 U.S. at 74.

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[14] Legal scholars have noted that "[d]octrinally speaking, *Seminole Tribe* was just another application of the *Sea Clammers* principle," David P. Currie, "Response: *Ex Parte Young* after *Seminole Tribe*," 72 *New York University Law Review* 547, 549 (1997); Carlos Manuel Vasquez, "What is Eleventh Amendment Immunity?" 106 *Yale Law Review* 1683, 1806, n.368 (1997) ("Although the Court inexplicably did not cite *Sea Clammers*, it reasoned in a strikingly similar manner").

Accordingly, the Supreme Court already has rejected the argument that the state officials present here. In *Wilder,* 496 U.S. at 521-22, the Supreme Court concluded that neither the Secretary's funding cutoff process nor an individual administrative appeal procedure constituted a comprehensive remedial scheme intended to preclude private suits under § 1983 for violations of the Medicaid Act: "This administrative scheme [including the Secretary's power "to withhold approval of plans" or "to curtail federal funds" and the presence of "an appeals procedure" to obtain "administrative review"] cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." More recently, in *Blessing v. Freestone*, 520 U.S. 329 (1997), a post-*Seminole Tribe* decision, the Supreme Court reaffirmed this holding from *Wilder*:

> We have also stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by the availability of administrative mechanisms to protect the plaintiff's interests.... We reached much the same conclusion in *Wilder*, where the Secretary of Health and Human Services had power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law. Even though ... these oversight powers were accompanied by *limited state grievance procedures for individuals*, we found that § 1983 was still available.

Blessing, 520 U.S. at 347-48 (citations, quotations, and discussion of *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), omitted)(emphasis added).

Three circuit courts of appeals in four separate decisions have relied on the identity of the inquiries under § 1983 and *Seminole Tribe* -- whether a statute contains a comprehensive and detailed remedial scheme -- to reject the application of the *Seminole Tribe* exception in cases where § 1983 remedies already have been found to be appropriate. In *Maryland Psychiatric Society*, 102 F.3d at 719, the Fourth Circuit held:

> Wasserman next contends that under *Seminole Tribe of Florida v. Florida*, this court lacks jurisdiction to hear the Society's claim against him. He argues that because the Medicaid Act has a 'comprehensive and detailed remedial scheme,' Congress must have intended to foreclose suits designed to force state officials to comply with the terms of the Act. The Supreme Court rejected virtually identical arguments in *Wilder v. Va. Hosp. Ass'n*, ruling that the federal Secretary's 'generalized powers' to audit and sanction noncompliant states 'were insufficient to foreclose reliance on § 1983 to vindicate federal rights' in the Medicaid Act [citation omitted].

See also, Antrican, 290 F.3d at 190 (citing *Wilder* and *Maryland Psychiatric*).

The Tenth Circuit also found the parallel inescapable. *Joseph A.* 275 F.3d at 1261 ("One key aspect of the *Seminole Tribe* analysis is the Court's indication that the determination as to whether a statutory scheme precludes other remedies determines whether the scheme forecloses *Ex parte Young* claims" citing the Chief Justice's statement that "the same general principle applies.").

Most recently, in *Missouri Child Care Association*, 2002 WL 1396512, *4, the Eighth Circuit similarly relied upon *Blessing* to conclude that the inquiries

No. 02-1604

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROSIE D., et al.,
Plaintiffs-Appellees

v.

JANE M. SWIFT, et al.,
Defendants-Appellants

CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* NATIONAL HEALTH LAW PROGRAM, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, MASSACHUSETTS LAW REFORM INSTITUTE, WESTERN MASSACHUSETTS LEGAL SERVICES, AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF APPELLEES AND RECOMMENDING AFFIRMANCE

Pursuant to Federal Rules of Appellate Procedure 26.1, the National Health Law Program, the National Alliance for the Mentally Ill, the National Mental Health Association, the National Association of Protection and Advocacy Systems, the Massachusetts Law Reform Institute, Western Massachusetts Legal Services and the Judge David L. Bazelon Center for Mental Health Law hereby submit this Corporate Disclosure Statement.

1. The National Health Law Program, Inc., is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

2. The Massachusetts Law Reform Institute is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

3. The National Mental Health Association is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

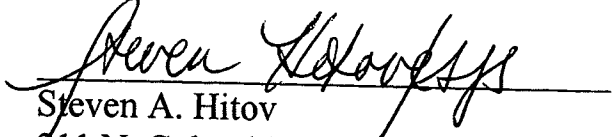
4. The National Association of Protection and Advocacy Projects is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

5. Western Massachusetts Legal Services is is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

6. The Judge David L. Bazelon Center for Mental Health Law is a non-profit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

Respectfully Submitted,

NATIONAL HEALTH LAW PROGRAM



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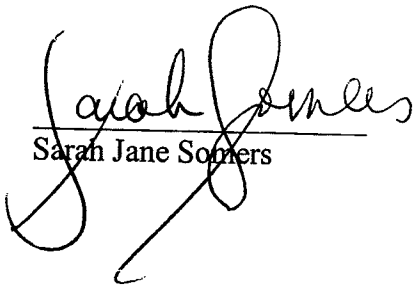
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Corporate Disclosure of *Amici Curiae* was served upon Deirdre Roney, Esq., Assistant Attorney General, One Ashburton Place, Boston, MA 02108, counsel for defendants-appellants, by mail on August 9, 2002.



Sarah Jane Somers

No. 02-1604

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROSIE D., et al.,
Plaintiffs-Appellants

v.

JANE M. SWIFT, et al.,
Defendants-Appellants

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* NATIONAL HEALTH LAW PROGRAM, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, MASSACHUSETTS LAW REFORM INSTITUTE, WESTERN MASSACHUSETTS LEGAL SERVICES AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF PLAINTIFFS-APPELLEES AND RECOMMENDING AFFIRMANCE

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Health Law Program, the National Alliance for the Mentally Ill, the National Mental Health Association, the National Association of Protection and Advocacy Systems, the Massachusetts Law Reform Institute, Western Massachusetts Legal Services and the Judge David L. Bazelon Center for Mental Health Law hereby submit this motion for leave to file a brief of

amici curiae. All Appellees have consented to the filing of this brief. Appellants Jane Swift et al. have not stated whether they consent.

Amici respectfully request the opportunity to present their views on the District Court order that is the subject of this appeal. The undersigned organizations represent families, children, professionals, legal advocates and people with mental illness living in Massachusetts, the First Circuit and all over the United States. *Amici* are grassroots member organizations and advocacy projects that advocate on constituents' behalf in administrative and judicial fora as well as before federal and state legislatures. *Amici* also sponsor and perform research to address the problems that people with mental illness face and educate the public about these problems. The arguments that the defendant state officials urge this court to adopt will directly affect the ability of *amici* and those they serve to obtain Medicaid services. Accordingly, *amici* have an interest in the outcome of that decision.

This *amicus curiae* brief on behalf of these organizations is desirable because it provides a detailed overview of the Medicaid program and the entitlement nature of that program from the perspective of advocates for people with mental illness who need Medicaid services. The history of the Medicaid program and the widespread benefits that program has had provide

additional insight into the destructive nature of the arguments that the defendant state officials are making.

The issues addressed in the brief are relevant to the appeal. *Amici* provide a broad view of the Medicaid program and how essential the right to enforce its guarantees in federal court are to those served by *amici.* From the perspective of these groups who have engaged in advocacy efforts over many years, *amici* describe how crucial it is to be able to stop ongoing violations of federal law guaranteeing access to health and other benefits.

For the foregoing reasons, *amici* respectfully request leave of the Court to file the enclosed brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the Motion for Leave to File Brief of *Amici Curiae* in No. 02-1604, *Rosie D. v. Swift*, was served and filed upon the following:

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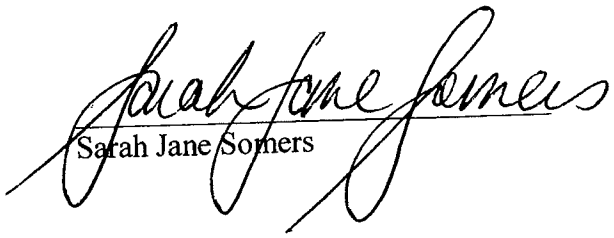

Sarah Jane Somers

No. 02-1604

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROSIE D., et al.,
Plaintiffs-Appellees
v.

JANE M. SWIFT, et al.,
Defendants-Appellants

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DENYING A MOTION TO DISMISS ON THE GROUNDS OF SOVEREIGN IMMUNITY

BRIEF OF *AMICI CURIAE* NATIONAL HEALTH LAW PROGRAM, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, MASSACHUSETTS LAW REFORM INSTITUTE, WESTERN MASSACHUSETTS LEGAL SERVICES AND THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF APPELLEES AND RECOMMENDING AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

BRIEF OF *AMICI CURIAE* 1

STATEMENT OF INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE HISTORY AND PURPOSE OF MEDICAID SUPPORTS THE NEED FOR PRIVATE ENFORCEMENT 2

II. MEDICAID PROVIDES CRUCIAL SERVICES TO MILLIONS OF AMERICANS 10

III. MEDICAID BENEFICIARIES NATIONWIDE HAVE ENFORCED THEIR ENTITLEMENT TO BENEFITS UNDER THE MEDICAID ACT IN FEDERAL COURT 14

IV. MEDICAID'S LIMITED INDIVIDUAL HEARING PROCESS DOES NOT REFLECT A CONGRESSIONAL INTENT TO PRECLUDE ENFORCEMENT OF THE MEDICAID ACT THROUGH THE *EX PARTE YOUNG* EXCEPTION 18

CONCLUSION 22

APPENDIX A 23

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

CASES

Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002) 16

Atkins v. Rivera, 477 U.S. 154 (1986) 5

Boulet v. Cellucci, 197 F. Supp. 2d 61 (D. Mass. 2000) 18

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Rosado v. Wyman, 397 U.S. 397 (1970) 15

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STATUTES

2 U.S.C. § 900 (2002) 4

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42 U.S.C. §§ 1396 – 1396v 2

42 U.S.C. § 1396a(a) 16

42 U.S.C. § 1396a(a)(3) 18, 19, 21

42 U.S.C. § 1396a(a)(10) 13

42 U.S.C. § 1396a(a)(10)(A) 6

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42 U.S.C. § 1396a(*l*)(A)-(D) 13

42 U.S.C. § 1396a(r)(2) 11

42 U.S.C. § 1396d(a) 6

42 U.S.C. § 1396d(b) 5

42 U.S.C. § 1396d(r) 7

42 U.S.C. § 1396u-1(b)(2)(C) 11

Pub. L. No. 89-97 19

Pub. L. No. 81-734, 323, 64 Stat. 477, 551 4

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42 C.F.R. § 431.205(d) 19

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BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the National Health Law Program, the National Alliance for the Mentally Ill, the National Mental Health Association, the National Association of Protection and Advocacy Systems, the Massachusetts Law Reform Institute, Western Massachusetts Legal Services and the Judge David L. Bazelon Center for Mental Health Law respectfully submit this brief *amici curiae* in support of Appellees, recommending affirmance, under cover of the accompanying motion for leave to file.

STATEMENT OF INTEREST OF AMICI

As set forth more fully in Appendix A, *Amici curiae* are national and State-based organizations that advocate for the civil rights of individual with mental health needs. The entitlement to federal Medicaid benefits are crucial to the individuals and organizations that we represent. Among other activities, *Amici* work to promote greater public understanding of the barriers faced by the groups we serve and advocate for the interests and legal rights of people with mental illnesses and disabilities. It is in this final capacity that we submit this Brief, asking this Court to affirm the order of the District Court of Massachusetts below.

SUMMARY OF ARGUMENT

The defendant state officials argue that the *Ex Parte Young* exception to state sovereign immunity does not apply to actions to enforce Medicaid, and that the claims of the children who filed this suit must be dismissed. The basis for their arguments is that a one-line provision of the Medicaid statute comprises a "detailed remedial scheme" that indicates Congressional intent to foreclose federal court jurisdiction. This court should reject the state officials' arguments. The state officials fail to take into account the unique nature of Medicaid as an entitlement for those receiving its benefits. They do not acknowledge the crucial role that Medicaid plays as health insurance for low income people and people with disabilities. They ignore the long history of enforcement of Medicaid in suits just like this case. Finally, they misrepresent the hearing procedure authorized by Medicaid.

ARGUMENT

I. THE HISTORY AND PURPOSE OF MEDICAID SUPPORTS THE NEED FOR PRIVATE ENFORCEMENT.

Medicaid is a medical assistance program that was established in 1965 by Title XIX of the Social Security Act.[1] Cooperatively funded by the federal and state governments, it provides health and long-term care

[1] 42 U.S.C. §§ 1396-1396v (1994).

coverage for individuals who cannot pay for that care.[2] The intent of the program was to provide beneficiaries with insurance that would allow them to "purchase" services in the private health care sector.[3] It works by making payments to qualified health care providers, including hospitals, clinics and nursing homes. One of the fundamental goals of Medicaid is to provide for a uniform and state-wide medical insurance program that adheres to general federal statutory requirements.[4] Congress' "very clear . . . intent [was] that the medical and remedial care and services made available to recipients under Title XIX be of high quality and in no way inferior to that enjoyed by the rest of the population."[5]

Before Medicaid was enacted, low income people received their health services through a patchwork of programs. They obtained services from hospital charity care, from hospitals with federal uncompensated care and community service obligations, free care and state and local programs for the poor.[6] This system provided uneven coverage and inadequate services, particularly for children. The coverage varied dramatically from State to State. The Medicaid Act was intended to change this and to

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[2] *See, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34 (1981).
[3] Rosenblatt et. al., *Law and the American Health Care System* 415 (1997).
[4] *Id.*
[5] *Id.* at 416, *citing* U.S. Dep't of Health, Educ., and Welfare, *Handbook of Public Assistance Administration* § D-5140.
[6] National Health Law Program, *Toward a Healthy Future*, 15 (1995).

provide a consistent and coherent insurance program for the poor, while allowing for some variation between the states.[7]

What is unique and most important about Medicaid is that it is an entitlement program. It creates a legal obligation for the federal and participating state governments to pay for and administer medical assistance. As the Supreme Court has declared, "An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives." *Schweiker v. Gray Panthers,* 453 U.S. 34, 36-37 (1981). Congress has always treated Medicaid as an entitlement program, for example, by applying the budgetary rules that govern entitlement programs.[8] In 1995, a proposal was made to turn Medicaid into a "block grant" and remove all legal requirements and protections. This attempt ultimately failed and Medicaid remains as it was intended – a guarantee of health care to its beneficiaries.[9]

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[7] Medicaid grew out of two precursor federal programs, both of which operated under the same cooperative model under which the federal government provided matching funds to states to make medical assistance available. *See* Social Security Act Amendments of 1950, Pub. L. No. 81-734, 323, 64 Stat. 477, 551; H.R. 12580, 86th Cong., 2d Sess. (1960) (sponsored by Representative Wilbur Mills (Iowa) and Senator Robert Kerr (Oklahoma)), later enacted as Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924.

[8] *See, e.g.*, 2 U.S.C. § 900 (2002).

[9] Rosenblatt et. al., *Law and the American Health Care System* 420 (1997), *citing* H.R. 2921, 104th Cong., 1st Sess. § 7001 (1995).

States are not required to participate in Medicaid, but all do. Once they opt to provide Medicaid services, they, too, have an open-ended entitlement to receive federal matching payments for all spending on covered services.[10] In return for accepting this money, States must adhere to specified federal requirements.[11] For example, the amount, duration and scope of assistance is determined by federal law and regulations and is not limited according to a fixed amount of federally appropriated funding.[12] In addition, States must include certain specified services, including hospital,

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[10] The federal matching payments for Medicaid services can range from 50% to 83% of the state's total expenditures under the program, with poorer per capita income states receiving higher federal payments. *See* 42 U.S.C. § 1396d(b) (providing the federal medical assistance percentage rates); Kaiser Comm'n on Medicaid and the Uninsured, The Henry J. Kaiser Family Found., Pub. No. 2248, *Medicaid: A Primer* 1 (Mar. 2001), *available at* http://www.kff.org/content/2001/2248/2248.pdf.

[11] *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990) ("Although participation in the program is voluntary, participating states must comply with certain requirements imposed by the [Medicaid] Act and regulations . . ."); *Atkins v. Rivera*, 477 U.S. 154, 156-157(1986) ("The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating states are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services").

[12] 42 U.S.C. § 1396a(a)(10)(B). Many programs enacted by Congress pursuant to its spending power are not entitlement programs, but simple grants to states to provide benefits to specified individuals or entities. For example, Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 *et. seq.*, provides federal funding to states for a child support enforcement program. The funding in these programs is fixed and the intended beneficiaries of such programs do not have a right to open-ended assistance unrelated to the amount of funding.

physician and nursing care.[13] Accordingly, once an individual is eligible for Medicaid, he is entitled to a defined minimum set of benefits.[14]

The most important Medicaid service for children is the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program.[15] By creating EPSDT, Congress and the President recognized that low-income children have significantly more illness and disabilities than higher-income children and that children's health and developmental needs differ from those of adults. President Johnson summed up the goal of the EPSDT program when introducing the legislation as a 1967 amendment to the Medicaid Act. Although some of the language is outdated, the goals of the program are clear:

> The problem is to discover, as early as possible, the ills that handicap our children. There must be a continuing follow up and treatment so that handicaps do not go neglected. We must enlarge our efforts to give proper eye care to a needy child. We must provide help to straighten a poor youngster's crippled limb before he becomes permanently disabled. We must stop tuberculosis in the first stages, before it causes serious harm.

113 Cong. Rec. 2883 (Feb. 8, 1967).

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[13] 42 U.S.C. § 1396a(a)(10)(A); 1396d(a).

[14] 42 U.S.C. § 1396a(a)(10)(A). State Medicaid programs can vary in the optional services provided beyond the list of minimum federal benefits, so an individual may be entitled to more than the minimum slate of mandatory services.

[15] 42 U.S.C. § 1396a(a)(43).

Thus, from the time of EPSDT's origin, it was envisioned as a complete treatment program to seek out children's health care needs and address them. In the original legislative history, Congress emphasized that the States would be required to make "vigorous efforts to screen and treat children."[16] Funds expended through EPSDT were intended to reduce the discrepancies in the number of children served from State to State and to help these States with the "early identification of children in need of correction" of disabilities.[17]

EPSDT evolved over the next several decades and, by the late 1980's, EPSDT was similar in form to the current system. Congress made the most significant expansion to EPSDT through the Omnibus Budget Reconciliation Act of 1989 (OBRA 89). OBRA 89 established for the first time the current statutory definition: screening services that are provided at intervals meeting reasonable standards of medical practice, as well as "[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services *whether or not such services are covered under the state plan.*"[18] During the passage of OBRA 89,

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[16] S. Rep. No. 90-744, (1967), *reprinted in* 1967 U.S.C.C.A.N. 2843, 3032.
[17] S. Rep. No. 90-744 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 3032.
[18] 42 U.S.C. § 1396d(r) (emphasis added).

Congress recognized that "[t]he EPSDT benefit is, in effect, the Nation's largest preventive health program for children."[19] Emphasis was placed on eliminating delay in the provision of care. When Senator Bentsen introduced the EPSDT provisions in 1989, he stated, "This bill . . . requires *prompt* treatment once a condition has been diagnosed."[20] EPSDT has remained substantially unchanged to the present time.

In contrast to other Medicaid services, the State must not only cover the needed services but actually "arrange for . . . corrective treatment" that is needed under EPSDT.[21] Thus, while the State generally is required only to pay for most services when medically necessary, "the major exception involves the federal requirement that a State must provide for [EPSDT] for eligible children."[22]

EPSDT services include all forms and types of listed behavioral and mental health Medicaid-covered services which are medically necessary for children. These services must be provided as necessary to "correct or

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[19] H.R. Rep. No. 101-247, at 398 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2124.

[20] H.R. Rep. No. 101-247, at 399, *reprinted in* 1989 U.S.C.C.A.N. 1906, 2125 (emphasis added).

[21] 42 U.S.C. § 1396a(a)(43).

[22] George Annas et. al., *American Health Law* 186-187 (1990). *See also, e.g., Doe v. Pickett*, 480 F. Supp. 1218, 1221 (S.D.W. Va. 1979) (holding that EPSDT "imposes on the states an affirmative obligation to see that minors actually receive necessary treatment and medical services").

ameliorate" mental illnesses, and can include behavioral support services, psychiatric and clinical services, professionally acceptable assessments, crisis services, case management, family counseling, and intensive home-based services. In the context of an individualized plan, these EPSDT services can make all the difference to children whose only alternative is institutionalization.

Over its thirty-five year history, Medicaid has developed into a significant protection for the health of millions of individuals who fit within its eligibility categories – older adults, people with disabilities, pregnant women, and children and their caretakers. It has played a unique role in providing, arranging for and funding services to children mental and physical disabilities, such as mental illness and mental retardation where their need for treatment services is persistent, extensive and critical to the ability to survive and grow. The health care providers who serve Medicaid patients have come to depend on the program's provider payments. States are heavily reliant on the program's open-ended entitlement to federal funding. Parents of children with disabilities are similarly dependant on the program's guarantee of ongoing services necessary to treat chronic, disabling conditions.

The entitlement status brings with it the legal right to enforce the statutory requirements that are placed on the States. However, the entitlement is what makes Medicaid an insurance program – the key factor that allows an individual to know that coverage will be there when health and mental health care is needed and a mental health care provider to know that payments will be made when services are delivered.

II. MEDICAID PROVIDES CRUCIAL SERVICES TO MILLIONS OF AMERICANS.

Medicaid is the primary source of health and mental health care for millions of Americans, particularly children, the elderly and people with disabilities. The program insures more people in this country than any other system, public or private, covering more than 40 million people in 1998.[23] One in five people in the United States qualifies for Medicaid. It is the largest single purchaser of long-term care services for the elderly and non-elderly people with disabilities in the United States.[24] It funds almost half of

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[23] U.S. Census Bureau, *Statistical Abstract of the States: 2000,* at 116 tbl.172 (2001).

[24] Kaiser Comm'n on Medicaid and the Uninsured, The Henry J. Kaiser Family Found., Pub. No. 2172, *Long-Term Care: Medicaid's Role and Challenges* 8 (Nov. 1999), *available at* http://www.kff.org/content/2000/2172/LongTermCare.pdf.

the total nursing home expenditures and nearly 40% of total long term care expenditures in the United States.[25]

Medicaid covers 40.1 % of all children.[26] Its coverage is a mainstay of child health and mental health in the United States. All children under the age of six with family incomes below 133% of the poverty level qualify for Medicaid, and all children between the ages of six and eighteen with family incomes below the federal poverty level qualify.[27] States have the option to extend Medicaid to higher income children, for example, all children with family incomes below 200% of the poverty level.[28] Over 50% of Medicaid beneficiaries were children and youth in 1998 – approximately twenty-one million children.[29] Another 21 % of the program beneficiaries (over eight million people) were adult caretakers with children.[30]

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[25] *Medicaid: A Primer*, *supra* note 10, at 9.
[26] *Id.* at 19.
[27] 42 U.S.C. §§ 1396a(a)(10)(A)(I), (IV), (VI), (VII); 1396a(*l*)(A)- (D); Currently, the poverty level for a family of four in the 48 continental states and D.C. is $18,100; in Hawaii, $20,820 and in Alaska, $22,630. Annual Update of the HHS Poverty Guidelines, 67 Fed. Reg. 6,931, 6,933 (Feb. 14, 2002).
[28] 42 U.S.C. §§ 1396a(a)(10)(B), 1396a(r)(2), 1396u-1(b)(2)(C).
[29] *Medicaid: A Primer*, *supra* note 10, at 1.
[30] *Id.*

Medicaid covers 26.1% of the elderly individuals in the United States[31] and covers 20% of persons with disabilities.[32] Qualified elderly persons and people with a wide range of disabilities qualify for services, including individuals with physical impairments, mental health conditions, cerebral palsy, cystic fibrosis, Down's syndrome, autism and HIV/AIDs. Unlike private health insurance, Medicaid coverage is available without pre-existing condition exclusions or waiting periods on coverage. Medicaid is the single largest insurer, public or private, for people under age 65 with disabilities, including mental disabilities.[33] The program is especially important to the 30% of children with chronic disabling conditions, like the

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[31] Catherine Hoffman & Mary Pohl, The Henry J. Kaiser Family Found., *Health Insurance Coverage in America: 1999 Data Update* 18 tbl.4 (Dec. 2000), *available at* http://www.kff.org/content/2001/2222/2222.pdf; Kaiser Comm'n on Medicaid and the Uninsured, *The Medcaid Program at a Glance,* 1 (Jan. 2001) *available at* www.kff.org/content/2001/2004b/2004b.pdf.

[32] Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid's Role for the Disabled Population under Age 65*, 1 (Apr. 2001), *available at* www.kff.org/content/2001/2171/2171.pdf.

[33] DeWayne Davis et. al., Nat'l Conference of State Legislatures, Item No. 6683, *Deinstitutionalization of Persons with Developmental Disabilities: A Technical Assistance Report for Legislators* (1999), *available at* http://www.ncsl.org/programs/health/Forum/pub6683.htm.

psychiatric, emotional and behavioral conditions of the class members in this case, who qualify for Medicaid.[34]

Over the years, the Medicaid entitlement has resulted in numerous success stories. It has reduced the numbers of uninsured and, thereby, increased access to health care services.[35] Medicaid's positive influences go further than lowering the ranks of the uninsured, however. The program has helped the United States provide near-universal protection against debilitating, communicable childhood diseases. Medicaid has also played a major role in reducing infant mortality rates through a series of expansions during the 1980s to enroll infants and children for ambulatory care services and pregnant women for prenatal care services.[36] Most importantly,

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[34] Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid's Role for the Disabled Population under Age 65*, 1 (Apr. 2001), *available at* www.kff.org/content/2001/2171/2171.pdf.

[35]Catherine Hoffman & Alan Schlobohm, The Henry J. Kaiser Family Found., *Uninsured in America: A Chart Book* 6-7 (2d ed., Mar. 2000), *available at* http://www.kff.org/content/archive/1407/Uninsured%20in%20America.pdf. Children with insurance are more likely to receive routine screening examinations for conditions such as asthma, recurring ear infections and sore throats; uninsured children are 70% more likely not to receive care for such problems. *Id.* at 70.

[36] *See* 42 U.S.C. § 1396a(a)(10). Since 1990, the infant mortality rate has "declined dramatically" from 8.9 deaths per 1000 live births in 1990 to 7.2 deaths per 1000 live births in 1998. Fed. Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being*, at tbl.HEALTH5 (2001), *available at* http://www.childstats.gov/ac2001/ac01.asp.

Medicaid and, specifically, the EPSDT program, has played a central and critical role in ameliorating disabling conditions for children in America, including children with mental illness.

III. MEDICAID BENEFICIARIES NATIONWIDE HAVE ENFORCED THEIR ENTITLEMENT TO BENEFITS UNDER THE MEDICAID ACT IN FEDERAL COURT.

The Medicaid entitlement has been a success in part because it is enforceable by beneficiaries. Since the inception of the program, beneficiaries have been able to go to court to enforce the Medicaid Act when States are refusing or failing to implement it. The state officials' arguments ignore the history, the entitlement character and the substantial successes of the Medicaid program. Most strikingly, however, they ignore settled law. While they acknowledge the Supreme Court's nearly century-old decision in *Ex Parte Young*, 209 U.S. 123 (1908), in which the Court held that suits against state officers for prospective injunctive relief to compel compliance with federal law are not barred by the Eleventh Amendment, they argue that this exception does not apply, because of the existence of state hearing procedures. Brief, p. 17 . Although this novel argument is made in the context of an EPSDT claim for mental health services and alleged to be narrow, Brief p. 1, its logic applies with equal force to all Medicaid suits by beneficiaries, since the hearing procedure on which the argument depends is

equally applicable to all Medicaid services. They can cite no cases in support of this theory because the great weight of authority holds otherwise. The Supreme Court, this Court, and Congress all have addressed this issue, and each has allowed Medicaid beneficiaries to enforce federal requirements and obtain injunctive relief against state officials who are not complying with mandatory federal laws.

This Court has allowed actions to enforce Title XIX of the Social Security Act to proceed against state officials. *See, e.g., Mass. Assn' of Older Americans v. Sharp,* 700 F.2d 749 (1st Cir. 1983) (suit by beneficiaries to enforce Medicaid regulatory requirement that eligibility must be automatically redetermined before terminating Medicaid eligibility based upon cut-off of cash assistance benefits.); *Visiting Nurse Ass'n of North Shore v. Bullen,* 93 F.3d 997 (1st Cir. 1996) (allowing suit by health care providers challenging method of calculating payment rates). This Court's decisions accord with those of the Supreme Court. In *Rosado v. Wyman*, 397 U.S. 397 (1970), the Supreme Court held that "suits in federal court under § 1983 are proper to secure compliance with provisions of the Social Security Act on the part of the participating States." *Maine v. Thiboutot,* 448 U.S. 1, 4 (1980) (quoting *Edelman*, 415 U.S. at 675) (allowing claims against Maine state officials to compel compliance with the

Social Security Act for depriving beneficiaries of cash assistance benefits); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (holding that provisions of Title XIX of the Social Security Act are enforceable against Virginia state health officials despite availability of administrative hearing procedures).

Every circuit court of appeals and many district courts have found that provisions of the Medicaid Act are enforceable against state officials, regardless of the existence of administrative hearing procedures established under 42 U.S.C. § 1396a(a).[37] *See, e.g., Westside Mothers v. Haveman,* 289 F.3d 852 (6th Cir. 2002) (holding that Medicaid-eligible children who were denied EPSDT benefits could sue to enforce EPSDT requirements and specifically rejecting the argument that Medicaid contains a remedial scheme evidencing Congressional intent to foreclose enforcement through *Ex Parte Young*); *Granato v. Bane,* 74 F.3d 406 (2d Cir. 1996) (allowing beneficiaries to challenge the termination of their home care services); *Eder v. Beal,* 609 F.2d 695 (3d Cir. 1979) (allowing enforcement of Medicaid rights to notice and hearing when eyeglasses benefit was terminated for all recipients); *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002) (holding that

[37] In some of these cases, the courts did not make an explicit holding that the *Ex Parte Young* exception applied, however, the cases could not have proceeded unless the courts implicitly accepted that the exception applied.

Medicaid-eligible children had enforceable right to dental care under EPSDT and specifically rejecting the argument that Medicaid contains a remedial scheme evidencing Congressional intent to foreclose enforcement through *Ex Parte Young*); *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 927 (5th Cir. 2000) (allowing enforcement of requirement that services be provided with reasonable promptness); *Mitchell v. Johnston,* 701 F.2d 337, 342 n. 7 (5th Cir. 1983) (holding that Medicaid-eligible children had an enforceable right to dental care under EPSDT); *Wood v. Tompkins,* 33 F.3d 600 (6th Cir. 1994) (holding that Medicaid beneficiaries and their families could sue to challenge Ohio's cap on home care services because the claims were brought pursuant to provisions of the Medicaid Act that were specifically intended for the benefit of home care Medicaid recipients.); *Stanton v. Bond*, 504 F.2d 1246, 1250 (7th Cir. 1974) (allowing enforcement of EPSDT provision requiring States to "aggressively notify, seek out and screen [children]" under EPSDT); *Miller by Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993) (allowing Medicaid-eligible child to enforce EPSDT provisions); *Pediatric Specialty Care v. Ark. Dep't of Human Services*, 293 F.3d 472 (8th Cir. 2002) (allowing enforcement of EPSDT provisions of Medicaid Act); *Hale v. Belshe*, 117 F.3d 1425, No. 97-15177, 1997 U.S. App. LEXIS 16833 (9th Cir. June 9, 1997) (*decision published without*

opinion) (holding that plaintiffs with psychiatric disabilities who sought access to community based mental health services sought prospective relief and that, therefore, the *Ex Parte Young* exception was available); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970 (10th Cir. 2001) (holding that Medicaid beneficiaries who were placed on waiting list for services for years could bring action to enforce reasonable promptness requirement), *aff'g,* 94 F. Supp. 2d 1217 (D.N.M. 2000); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (allowing beneficiaries to enforce reasonable promptness requirement).[38]

Accordingly, this court should reject the appellants invitation to disregard the overwhelming weight of settled precedent.

IV. MEDICAID'S LIMITED INDIVIDUAL HEARING PROCESS DOES NOT REFLECT A CONGRESSIONAL INTENT TO PRECLUDE ENFORCEMENT OF THE MEDICAID ACT THROUGH THE *EX PARTE YOUNG* EXCEPTION.

Defendant state officials claim that 42 U.S.C. § 1396a(a)(3) precludes enforcement of the Act under the *Ex Parte Young* exception, because it is a

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[38] *See also Rancourt v. Concannon*, 175 F. Supp. 2d 60 (D. Me. 2001); *Bryson v. Shumway*, 177 F. Supp. 2d 78 (D.N.H. 2001); *Boulet v. Cellucci,* 107 F. Supp. 2d 61 (D. Mass. 2000); *Rolland v. Cellucci*, 52 F. Supp. 2d 231 (D. Mass. 1999); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 382 (S.D. N.Y. 2000); *Maryland Comm. Health Sys., LLP v. Glendening*, 115 F. Supp. 2d 599, 602 (D.Md. 2000); *Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425, 430 (E.D. N.Y. 2000); *Daniels v. Wadley*, 926 F. Supp. 1305, 1310 (M.D. Tenn. 1996) *vacated in part on other grounds, Daniels v. Menke*, 145 F.3d 1330 (6th Cir. 1998).

detailed remedial scheme indicating Congressional intent to foreclose other remedies. This Court should reject this argument because it is a wholly inaccurate characterization of the beneficiary hearing process Medicaid provides.

In its entirety, § 1396a(a)(3) provides that "[a] state plan for medical assistance must . . . provide for granting a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or it not acted on with reasonable promptness." Nowhere in this sentence, nor anywhere else in the Medicaid Act, is judicial review of administrative hearing decisions addressed. Thus, States are not bound by federal law to grant judicial review of decisions they make in the course of administering the Medicaid program. Accordingly, it defies reason that the single sentence of § 1396a(a)(3) could qualify as a remedial scheme which Congress intended to preclude all federal court enforcement of the Medicaid Act. Courts across the country apparently agree for, as described above, every court which has been presented with such federal court enforcement actions has allowed enforcement despite § 1396a(a)(3).

Further, the hearing right, like many other aspects of the cooperative federal-state Medicaid program, has been implemented differently in different states and administrative processes can thus vary greatly from State

to State. For example, in New Hampshire there is no statutory right of appeal and judicial review is only by writ of certiorari to the state supreme court. *See e.g. Petition of Pelletier*, 125 N.H. 565, 568, 484 A. 2d. 1119 (1984). In contrast, in Texas, the States' Government Code provides that issues related to "the granting, payment, denial or withdrawal of financial or medical assistance or benefits under the Texas Department of Human Services [which administers Medicaid]" cannot be the subject of either a contested case petition or judicial review.[39] Similarly, the authority of the administrative hearing officer varies based on state law. In several states, including Massachusetts, hearing officers are required to follow state Medicaid regulations and policies, regardless of whether parties claim that these very policies violate federal law. *See* Mass. Regs. Code, Tit. 130, § 610.082 (providing that "[t]he hearing officer shall not render a decision regarding the legality of federal or state law including, but not limited to, the Division's regulations.") *See also DeSario v. Thomas*, 139 F.3d 80, 87 (2nd Cir. 1998), *reversed on other grounds in Slekis v. Thomas*, 525 U.S. 1098 (1999) (Noting that the administrative fair hearing officer was required to

[39] Tex. Gov't Code Ann. §§ 2001.223-.226 Under Texas law, a Contested Case petition is a proceeding in which the legal rights, duties or privileges of an individual are determined by a state agency after opportunity before an adjudicated hearing. Tex. Gov't Code Ann. § 2001.03(1). *See also* Tex. Gov't Code Ann. §§ 2001.171, .201.

follow the Connecticut state Medicaid manual and lacked authority to hear challenges to state policies based upon federal law). This lack of uniformity inherent in the processes authorized under § 1396a(a)(3) further undermines any claim that Congress created the hearing right with an intent to foreclose judicial remedies.

The processes established by § 1396a(a)(3) are clearly insufficient mechanisms to enforce the full panoply of federal rights established by Title XIX. The right to a hearing encompasses only disputes that involve benefits that are due under the state plan. It fails to reach situations where, for example, the legality of plan design is challenged under federal law. It would provide no remedy when beneficiaries claim –as the beneficiaries in this case do- that they were not informed of benefits that are available under the EPSDT program. It does not provide the means to force a state Medicaid agency to ensure that there are qualified providers willing to offer EPSDT behavioral and mental health services, as the beneficiaries in this case seek to do.

The state officials' arguments in this case, if adopted, would essentially vitiate beneficiary rights that have been so deliberately and, in some cases, specifically granted by Congress because, of course, if there is

no effective enforcement there is no right.[40] The result would be devastating for the Medicaid program, the low-income families and individuals covered by it, and the health care safety net it supports.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the District Court.

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[40] *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . .).

APPENDIX A

The National Alliance for the Mentally Ill ("NAMI"), with more than 220,000 members and 1,200 state and local affiliates, is a leading grassroots organization dedicated to improving the lives of children, adolescents and adults with severe mental illnesses. NAMI members include mental health consumers, family members, professionals and other advocates from both across this country and abroad.

Increasingly, NAMI members – both children and adults – have come to rely on government benefit programs, like Medicaid, for their health care coverage. Without government benefit programs, many NAMI members would be unable to afford the treatment and services that are critically necessary for them to function in their everyday lives. A ruling that affects the ability of Medicaid beneficiaries to enforce their rights under federal Medicaid law would gravely impact the lives of thousands of NAMI members.

Established in 1909, the National Mental Health Association (NMHA) is the nation's oldest and largest advocacy organization dedicated to all aspects of mental health and mental illness. In partnership with 340 State and local Mental Health Association affiliates nationwide, NMHA works to improve the mental health of all Americans, especially the 54

million individuals with mental disorders, through advocacy, education, research, and service.

In light of the increasing importance of Medicaid as a funding source for public mental health services (accounting for 50 percent of state and local mental health spending, and projected to cover 60 percent by the year 2007), the NMHA is very concerned with judicial or legislative actions that jeopardize the ability of Medicaid beneficiaries to enforce their right to covered health care services. We are especially concerned with improving access to care for children with behavioral disorders or emotional disturbances, particularly in light of research that shows that 20 percent of children in this country have a diagnosable mental disorder and 10 percent face serious emotional disturbances and yet over two-thirds do not receive necessary mental health care.

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a

variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS as the P&A system represents many individuals with disabilities who are trying to enforce their entitlement to Medicaid services.

Massachusetts Law Reform Institute is a statewide legal advocacy and support center that represents very low-income families and individuals on systemic legal issues and provides a wide range of assistance to other legal services programs in Massachusetts that provide legal aid to the same population. Established in 1968, MLRI has long represented groups and classes of persons who are affected by federal laws which govern programs like Medicaid that are operated by the state. In doing so, MLRI and its co-counsel make wide use of the federal civil rights laws as grounds to enforce federal legal requirements which are not followed by state agencies. Most of the systemic violations by state agencies of federal requirements in these programs cannot be addressed by individual fair hearing decisions and court appeals of fair hearing decisions, even if favorable, because the state agencies do not feel obligated to follow individual case decisions as to

others similarly situated. Therefore, the availability of vehicles for bringing litigation to challenge these broader laws and practices are essential for enforcing our clients' rights in a manner that will most efficiently and effectively reach the larger numbers of people adversely affected.

Western Massachusetts Legal Services, Inc. (WMLS) provides civil legal services to the low-income population of western Massachusetts. WMLS provides a mix of individual and systemic change advocacy. It has litigated and is currently litigating numerous individual and class actions against the Division of Medical Assistance and its predecessor agency to enforce the rights guaranteed to recipients under the federal Medicaid statute, 42 U.S.C. § 1396 et seq. If WMLS is no longer able to bring such claims on behalf of low-income families and individuals within its service area, its ability to provide service to those who are denied needed health care will be severely.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center") is a national legal advocacy organization that works to advance the rights and dignity of adults and children with mental disabilities and to ensure their equal access to the services and supports they need for full participation in community life. Through litigation and in the public policy arena, the Bazelon Center strives to ensure that people with mental

disabilities have equal access to health and mental health care, education, housing and employment. The Center dedicates much of its resources to working on behalf of children who are need mental health services and supports to allow them to grow into productive, healthy adults.

The National Health Law Program (NHeLP) is a national public interest law firm working to increase and improve access to quality health care –including mental and behavioral health care- on behalf of limited income people by providing legal and policy analysis, advocacy, information and education. Since its inception over thirty years ago, NHeLP has developed expertise on Medicaid law and has provided legal interpretation and analysis of complex changes in state implementation of Medicaid, federal Medicaid rules and administrative interpretations, waivers of statutory requirements, and federal and state court cases.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

This brief is produced in Times New Roman, 14 point proportionally spaced type and contains 5,838 words (including Appendix A).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Deirdre Roney, Esq., Assistant Attorney General, One Ashburton Place, Boston, MA 02108, counsel for defendants-appellants, by mail on August 8, 2002.

Sarah Jane Somers