

1 EDMUND G. BROWN JR.  
 Attorney General of California  
 2 KARIN S. SCHWARTZ  
 Supervising Deputy Attorney General  
 3 JOSHUA N. SONDHEIMER  
 Deputy Attorney General  
 4 State Bar No. 152000  
 455 Golden Gate Avenue, Suite 11000  
 5 San Francisco, CA 94102-7004  
 Telephone: (415) 703-5615  
 6 Fax: (415) 703-5480  
 E-mail: Joshua.Sondheimer@doj.ca.gov  
 7 *Attorneys for Defendants Arnold Schwarzenegger,*  
*Kim Belshé, Bill Lockyer, and Michael E. Genest, in*  
 8 *their official capacities*

9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12  
 13 **THE GRAY PANTHERS OF SAN**  
**FRANCISCO, a nonprofit corporation; et**  
 14 **al.,**  
 15 Plaintiffs,

16 v.

17  
 18 **ARNOLD SCHWARZENEGGER,**  
**Governor of State of California; KIM**  
**BELSHE, Secretary of Health and Human**  
 19 **Services Agency of the State of California;**  
**DAVID MAXWELL-JOLLY, Director of**  
 20 **Department of Health Care Services of the**  
**State of California; JOHN CHIANG,**  
 21 **Controller of State of California; BILL**  
**LOCKYER, Treasurer of State of**  
 22 **California; and MICHAEL E. GENEST,**  
**Director of Finance of the State of**  
 23 **California,**

24 Defendants.  
 25

C 09-02307-PJH

**CERTAIN DEFENDANTS' MOTION TO DISMISS (Fed. R. Civ. P. 12(B)(1) & (6)), AND SUPPORTING MEMORANDUM**

Date: September 2, 2009  
 Time: 9:00 a.m.  
 Courtroom: 17th floor, Courtroom 5  
 Judge: Hon. Phyllis J. Hamilton  
 Trial Date: N/A  
 Action Filed: May 26, 2009



## INTRODUCTION

1  
2 Plaintiffs' complaint, which seeks to enjoin certain cuts to California's Medi-Cal program  
3 and the alleged misuse of certain federal Medicaid funds, aims in scattershot fashion at not only  
4 the director of the state agency responsible for the Medi-Cal program, but also at the California  
5 Governor, the state Secretary of Health and Human Services, the state Treasurer, and the director  
6 of the state Department of Finance. Even as alleged by plaintiffs, these officials have at best  
7 general supervisory power over persons responsible for the challenged acts or with enforcing the  
8 statute at issue, and at worst, no pertinent authority at all.

9 Plaintiffs seeking prospective injunctive or declaratory relief in federal court against state  
10 officials must demonstrate that the officials have a "fairly direct" connection to the allegedly  
11 wrongful acts or enforcement of the statute in question in order to meet the jurisdictional  
12 limitations of the Eleventh Amendment and Article III. Plaintiffs cannot allege facts sufficient to  
13 demonstrate that moving defendants have the requisite connection to avoid the Eleventh  
14 Amendment's bar to action against the State, or that the alleged injury is traceable to and capable  
15 of redress by them so as to support the "case or controversy" requirement of Article III.  
16 Accordingly, the actions against moving defendants should be dismissed.

## STATEMENT OF RELEVANT FACTS

### A. Medicaid and Medi-Cal

17  
18  
19 Medicaid is a cooperative federal-state program that provides federal financial assistance to  
20 participating states to reimburse certain costs of medical treatment for the poor, elderly, and  
21 disabled. 42 U.S.C. § 1396. To qualify for federal matching funds, known as the Federal  
22 Medical Assistance Percentage (FMAP), a state must establish and administer its Medicaid  
23 program through a state plan approved by the Secretary of the United States Department of  
24 Health and Human Services. 42 U.S.C. § 1396a. The state must designate a "single state  
25 agency" to be responsible for administration and supervision of the state plan. 42 U.S.C.  
26 § 1396a(a)(5). Once designated as the single state agency for Medicaid, this agency may not  
27 delegate the administration of the program or any activities related to rule-making and policy  
28 development to any entity other than its own officials. 42 C.F.R. § 431.10(e).

1 California participates in Medicaid through the Medi-Cal program, and has designated the  
2 Department of Health Care Services (DHCS) as the single state agency responsible for its  
3 administration. Cal. Welf. & Inst. Code §§ 10740, 14000 *et seq.*

4 A state that participates in Medicaid must determine which services it will provide. *See* 42  
5 U.S.C. § 1396d(a). To receive federal approval, the Medicaid Act mandates that a state plan  
6 include only seven enumerated medical services. *See id.* §§ 1396a(a)(10), 1396d(a)(1)-(5), (17),  
7 (21) (including as mandatory: inpatient hospital, outpatient hospital, laboratory and x-ray, nursing  
8 facility, physician, nurse-midwife, and nurse-practitioner services). A state may also elect to  
9 provide optional medical services, such as dental services, prosthetics, and prescription drugs.  
10 *See id.* §§ 1396a(a)(10)(A), 1396d(a).

#### 11 **B. Enactment of ABX3 5**

12 Acting in response to a fiscal emergency declared by the Governor of California in  
13 December 2008, the state Legislature enacted a series of spending reductions, including, in  
14 February 2009, Assembly Bill (AB) X3 5. Stats. 2009-2010, 3rd Exec. Sess., c. 20 (AB 5).  
15 ABX3 5 made a variety of reductions to various state programs, including the enactment of  
16 Welfare and Institutions Code section 14131.10 (“section 14131.10”), which provides that,  
17 beginning July 1, 2009, certain optional MediCal services are “excluded from coverage under the  
18 Medi-Cal program” unless certain exceptions apply. Cal. Welf. & Inst. Code § 14131.10(a)-(f).

#### 19 **C. The American Recovery and Reinvestment Act**

20 Congress enacted the American Recovery and Reinvestment Act (ARRA) also in February  
21 2009. H.R. 1, 111th Cong., Pub. L. No. 111-5 (1st Sess. 2009). Title V of the Act provides “state  
22 fiscal relief,” including a temporary increase in Medicaid payments, for all states through the first  
23 quarter of the 2011 fiscal year provided certain requirements are met. *See id.*, § 5000, *et seq.*  
24 Specifically, qualifying states receive a general 6.2 percent increase in their FMAP, and states  
25 with relatively high growth in unemployment rates receive additional increases based on quarterly  
26 unemployment statistics. *Id.*, § 5001(b), (c). In order to receive enhanced FMAP, a state may not  
27 restrict eligibility “standards, methodologies, or procedures,” beyond those in effect on July 1,  
28

1 2008. A state is also ineligible for enhanced FMAP if it deposits or credits amounts attributable  
2 to those funds into a reserve or “rainy day” fund. *Id.*, § 5001(f)(3).

### 3 **C. Plaintiffs’ Allegations Against the Governor and Other State Officials**

4 Plaintiffs challenge the California legislature’s decision in ABX3 5 to eliminate certain  
5 optional Medicaid services. Their first and third causes of action seek to enjoin implementation  
6 of the cuts mandated by section 14131.10 on the grounds that the cuts violate the “purposes”  
7 clause of ARRA and its limitations on restricting “eligibility standards, methodologies, or  
8 procedures.” (First Amended Complaint (FAC) ¶¶ 31-36, 44-49 and Prayer for Relief ¶ 3.) In  
9 their second cause of action, plaintiffs also seek to enjoin alleged violations of ARRA’s  
10 prohibition on deposit or credit of amounts attributable to enhanced FMAP into any state reserve  
11 or “rainy day” fund. (FAC ¶¶ 37-43 and Prayer for Relief ¶ 3.) Plaintiffs’ fourth cause of action  
12 seeks, in the event injunctive relief is denied, a declaration that section 14131.10 is contrary to  
13 and preempted by ARRA. (FAC ¶¶ 54-56 and Prayer for Relief ¶ 5.)

14 Plaintiffs have named and seek relief on each of their causes of action against not only the  
15 director of DHCS and the state Controller, but also against the following state officials:

- 16 • Governor Arnold Schwarzenegger;
- 17 • The Secretary of the state Health and Human Resources Agency, Kim Belshé;
- 18 • The state Treasurer, Bill Lockyer; and
- 19 • The state Director of Finance, Michael E. Genest.

20 (FAC ¶¶ 9-14, Prayer for Relief ¶¶ 2-5.) The complaint’s only specific allegations as to moving  
21 defendants’ relation to the action are set out under the heading “parties,” and state:

22 1) That Governor Schwarzenegger has duties under California Government Code  
23 sections 12010 and 12011 to “supervise all executive and administrative officers of the State of  
24 California and see that their official duties are performed.” (FAC ¶ 9);

25 2) That the state Health and Human Resources Agency (HHR), directed by HHR  
26 Secretary Belshé, “is under the supervision of the Secretary, and the Department of Health Care  
27 Services is within and subordinate to the Agency.” (FAC ¶ 10);

28

1           3) That Treasurer Lockyer, pursuant to California Government Code sections 12320 and  
2 12324, “receives and keeps all moneys of the State of California, and may only pay out State  
3 monies upon warrants drawn by the Controller” (FAC ¶13); and that

4           4) Finance Director Genest is authorized under California Government Code section  
5 13300 to “supervise the accounts of each department of the State, and may, by certain statutes  
6 made and provided therefore, veto certain expenditures of the State.” (FAC ¶ 14).<sup>1</sup>

7           The complaint also generally asserts the responsibility of each of the six named defendants  
8 for the allegedly wrongful acts of eliminating the discontinued optional services pursuant to  
9 section 14131.10 (FAC ¶¶ 34, 47) and allowing “savings resulting to the State from use of  
10 enhanced FMAP funds” to be used as a rainy day fund. (FAC ¶ 41).

11  
12 **I. PLAINTIFFS’ CLAIMS AGAINST MOVING DEFENDANTS ARE BARRED BY THE ELEVENTH AMENDMENT**

13           A suit against a state official for prospective injunctive or declaratory relief is barred by the  
14 Eleventh Amendment’s guarantee of state immunity from suit in federal court unless the official  
15 has “some connection with the enforcement of the act.” *Ex parte Young*, 209 U.S. 123 (1908);  
16 *see National Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (finding action for  
17 injunctive and declaratory relief against California Governor and Secretary of Resources barred  
18 by Eleventh Amendment “as there is no showing that they have the requisite enforcement  
19 connection” to challenged ballot proposition).<sup>2</sup> Absent the officials’ connection with the  
20 allegedly wrongful act, the suit “is merely making him a party as a representative of the State, and  
21 thereby attempting to make the State a party.” *Id.* at 157. Thus, “when a state officer is sued to

22  
23 <sup>1</sup> California Government Code section 13300 does not support plaintiffs’ allegations  
24 regarding the authority of the Director of Finance. That section merely calls for the Department  
of Finance to establish and maintain a “modern and complete” accounting system and policies  
applicable to all state agencies, and to work with certain other state offices and agencies to  
design, develop, and implement a financial information system.

25  
26 <sup>2</sup> Like the case or controversy requirement, the Eleventh Amendment operates as a limit to  
27 the court’s subject matter jurisdiction. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64  
28 (1996) (“[T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign  
immunity limit[s] the federal courts’ jurisdiction under Article III. The text of the Amendment  
itself is clear enough on this point: ‘The Judicial power of the United States shall not be construed  
to extend to any suit . . . .’”)

1 enjoin enforcement of state law, he must have ‘some connection’ with enforcement or suit against  
2 him would be equivalent to suit against the state and would violate the Eleventh Amendment.” *S.*  
3 *Pacific Transp. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980).

4 The official’s connection required to overcome Eleventh Amendment immunity “must be  
5 fairly direct; a generalized duty to enforce state law or general supervisory power over the  
6 persons responsible for enforcing the challenged provision will not subject an official to suit.”  
7 *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Los Angeles County Bar Ass’n v.*  
8 *Eu*, 979 F.2d 697, 704 (9th Cir. 1992).)

9 **A. Plaintiffs’ Complaint Fails to Allege that Moving Defendants Have a**  
10 **Sufficient Connection with Enforcement to Overcome Their**  
11 **Eleventh Amendment Immunity**

12 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
13 as true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550  
14 U.S. 544, 570, 127 (2007). A claim has facial plausibility “when the plaintiff pleads factual  
15 content that allows the court to draw the reasonable inference” that the defendant may be liable.  
16 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). Plaintiffs’  
17 complaint fails to allege facts demonstrating *any* direct connection between moving defendants  
18 and enforcement of section 14131.10 or the disposition of funds attributable to ARRA’s enhanced  
19 FMAP.

20 The complaint’s allegations against Governor Schwarzenegger, that he has duties “to  
21 supervise all executive and administrative officers of the State of California and see that their  
22 official duties are performed,” assert merely general supervisory power over the persons  
23 responsible for enforcing provisions of the Medi-Cal program. The complaint’s allegations of  
24 HHS Secretary Belshé’s supervision of the Agency within which DHCS operates likewise merely  
25 alleges general supervisory power over DHCS. These allegations are insufficient to support  
26 federal jurisdiction over these defendants. *Snoeck*, 153 F.3d at 984.

27 As to the remaining moving defendants, Treasurer Lockyer and Finance Director Genest,  
28 the complaint merely recites each of these officials’ general areas of responsibility with respect to  
state finances and payments. These allegations state no facts that would establish those officials’

1 connection with enforcement of section 14131.10, nor do they support any “reasonable inference”  
2 that defendants have any form of direct responsibility regarding the disposition of amounts  
3 attributable to the enhanced FMAP reimbursements made available through ARRA.

4 Plaintiffs’ conclusory and indiscriminate allegations that each and every defendant is  
5 responsible for each of the wrongful acts alleged need not be accepted as true, and are insufficient  
6 to meet plaintiffs’ burden to plead “factual content” that would allow the court to draw a  
7 reasonable inference of defendants’ connection to the alleged acts. *See Iqbal*, 129 S.Ct. at  
8 1949-50 (respondents’ bare allegations of officials’ knowledge of, condoning, and agreement to  
9 alleged wrongful conduct were “conclusory and not entitled to be assumed true”).

10 Plaintiffs’ complaint thus fails to state a plausible claim that any of moving defendants have  
11 the requisite “fairly direct” connection with enforcement of section 14131.10 or disposition of  
12 amounts attributable to enhanced FMAP. *Snoeck*, 153 F.3d at 986; *see, e.g., Doe v. Wal-Mart*  
13 *Stores*, --- F.3d ---, 2009 WL 1978730 (9th Cir. 2009) (plaintiffs’ allegations failed to establish  
14 defendant’s “day-to-day” authority over foreign supplier’s employment decisions).

15 **B. Plaintiffs Cannot Establish that Moving Defendants Have a**  
16 **Sufficient Connection with Enforcement to Overcome Their**  
17 **Eleventh Amendment Immunity**

18 The Ninth Circuit has recognized that the Eleventh Amendment bars suit against governors  
19 and other state agencies and officials for prospective relief where plaintiffs could not demonstrate  
20 a sufficient connection to enforcement of the challenged law. *National Audubon*, 307 F.3d at 847  
21 (governor and agency secretary lacked connection to challenged ballot proposition); *Snoeck*, 153  
22 F.3d at 987 (Nevada state judicial discipline commission “has no enforcement power, and  
23 therefore, it has no connection to the enforcement of the challenged law as required under *Ex*  
24 *parte Young*); *S. Pacific*, 651 F.2d at 615 (attorney general’s power to direct and advise local  
25 prosecutors did not “establish sufficient connection with enforcement to satisfy *Ex parte Young*”).  
26 Plaintiffs cannot establish the requisite connection between moving defendants and the  
27 challenged statute or conduct here.

28 Governor Schwarzenegger’s general responsibility over state agencies and general duty to  
enforce state law is insufficient to establish any direct connection to enforcement of section



1 14131.10 or the alleged misallocation of amounts attributable to enhanced FMAP. If such  
2 general responsibilities were sufficient, state governors would be subject to suit in every case in  
3 which a plaintiff seeks prospective declaratory or injunctive relief against the state. The Ninth  
4 Circuit has recognized that absent any showing of specific responsibilities, the Eleventh  
5 Amendment bars suit against California's Governor for such relief. *National Audubon*, 307 F.3d  
6 at 847; *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 714 F.2d 946, 953 (9th  
7 Cir. 1983).

8 Other circuit courts have held likewise. *See, e.g., Waste Mgmt. Holdings v. Gilmore*, 252  
9 F.3d 316, 331 (4th Cir. 2001) (Virginia governor, although under a general duty to enforce state  
10 laws, dismissed from action where he lacked a specific duty to enforce the challenged statutes);  
11 *Okpalobi v. Foster*, 244 F.3d 405, 426-27, 430 (5th Cir. 2001) (en banc) (reversing panel's  
12 holding that Louisiana governor's general duties established sufficient connection with  
13 enforcement of statute to overcome Eleventh Amendment immunity); *Shell Oil Co., Inc. v. Noel*,  
14 608 F.2d 208, 211 (1st Cir.1979) ("The mere fact that a governor is under a general duty to  
15 enforce state laws does not make him a proper defendant in every action attacking the  
16 constitutionality of a state statute.").

17 The remaining moving defendants, each head of a state office or agency, are barred by the  
18 "single state agency" requirements from having any discretionary authority over enforcement of  
19 section 14131.10 or the disposition of funds attributable to enhanced FMAP under ARRA.  
20 DHCS, as California's "single state agency" under the Medicaid program, possesses exclusive  
21 administrative discretion over the enforcement of section 14131.10 and the disposition of federal  
22 Medicaid reimbursement. 42 C.F.R. § 431.10(e); *see San Lazaro Ass'n, Inc. v. Connell*, 286 F.3d  
23 1088, 1092-93 & 1100 (9th Cir. 2002) (noting that single state agency under Medicaid is barred  
24 from delegating administrative discretion in administration or supervision of state Medicaid plan).  
25 Moving defendants, therefore, necessarily lack the connection required under *Ex parte Young*.

26 Although HHS Secretary Belshé's has general supervisory authority over DHCS, like the  
27 governor's authority over all state agencies, such general supervisory power is insufficient to  
28 establish the "fairly direct" connection to enforcement required by *Ex parte Young*. *See National*

1 *Audubon*, 307 F.3d at 847 (Eleventh Amendment immunity barred suit against state Secretary of  
2 Resources, but not over director of subordinate Department of Fish & Game which had “direct  
3 authority and principal responsibility for enforcing” challenged ballot proposition).

4 Irrespective of the single state agency requirement, moving defendants have no statutory  
5 authority relevant to enforcing section 14131.10 or determining the disposition of funds  
6 attributable to enhanced FMAP. Treasurer Lockyer’s responsibilities to “receive and keep” State  
7 funds and to pay out funds on warrants issued by the Controller have nothing to do with enforcing  
8 reductions to optional Medi-Cal benefits or determining whether to place state funds into a  
9 reserve. Cal. Gov’t Code §§ 12320, 12324. Finance Director Genest’s “general powers of  
10 supervision” over state financial and business policies likewise have no direct connection with the  
11 actions challenged by plaintiffs. *Id.*, § 13070. The Governor and Secretary Belshé, as already  
12 noted, hold merely general supervisory authority, respectively, over state agencies and DHCS.

13 As none of the moving defendants have any direct connection to the challenged acts or  
14 enforcement of section 14131.10, the court lacks jurisdiction pursuant to the Eleventh  
15 Amendment over the actions against moving defendants, and the actions against each of them  
16 must be dismissed with prejudice.

17  
18 **II. PLAINTIFFS FAIL TO ALLEGE JUSTICIABLE CLAIMS AGAINST MOVING  
DEFENDANTS**

19 The “case or controversy” requirement of Article III of the federal Constitution precludes  
20 the exercise of jurisdiction by a federal court unless plaintiffs’ alleged injury is “fairly traceable to  
21 the action challenged and is likely to be redressed by a favorable decision.” *Culinary Workers  
22 Union, Local 226 v. Del Papa*, 200 F.3d 614, 617 (9th Cir. 1999) (citing *Valley Forge Christian  
23 College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).  
24 Whether plaintiffs’ injury in a claim for injunctive or declaratory relief against a state official may  
25 properly be traced to actual or threatened action by that official depends upon whether the official  
26 has any connection with enforcement of the statute or allegedly wrongful acts at issue. *Culinary  
27 Workers*, 200 F.3d at 617-19; *S. Pacific*, 651 F.2d at 615. Thus, the inquiry is substantially  
28 similar to the court’s inquiry regarding the applicability of Eleventh Amendment to the claim

1 against the official, discussed above. *See Culinary Workers*, 200 F.3d at 619 (finding requisite  
2 connection under Eleventh Amendment in suit against Nevada attorney general “for the same  
3 reasons” that a case and controversy exists); *S. Pacific*, 651 F.2d at 615 (finding no justiciable  
4 controversy where Oregon attorney general’s power to direct and advise local prosecutors “does  
5 not make the alleged injury fairly traceable to his action, nor does it establish sufficient  
6 connection with enforcement to satisfy Ex parte Young”); *Okpalobi*, 244 F.3d at 429 (finding no  
7 case or controversy due to governor and attorney general’s lack of relevant enforcement  
8 authority, and in the alternative, that suit barred by Eleventh Amendment).

9 For the same reasons discussed in the preceding section, plaintiffs have failed to and cannot  
10 allege facts demonstrating that moving defendants have any sufficiently direct connection to the  
11 challenged acts or statute. Accordingly, no case or controversy exists as to each moving  
12 defendant, and the actions against each must be dismissed.

### 13 CONCLUSION

14 For the foregoing reasons, moving defendants respectfully request that the action be  
15 dismissed, with prejudice, for lack of subject matter jurisdiction and for failure to state a claim on  
16 which relief may be granted.

17  
18 Dated: July 27, 2009

Respectfully submitted,

19 EDMUND G. BROWN JR.  
20 Attorney General of California  
21 KARIN S. SCHWARTZ  
Supervising Deputy Attorney General

22  
23 /s/ Joshua Sondheimer  
24 JOSHUA N. SONDEIMER  
Deputy Attorney General  
Attorneys for Defendants

25  
26 SF2009404122  
40357747.docx