

SCALIA, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

No. 01–188

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, PETITIONER *v.* PETER E. WALSH, ACTING COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[May 19, 2003]

JUSTICE SCALIA, concurring in the judgment.

I would reject petitioner’s negative-Commerce-Clause claim because the Maine statute under challenge is neither facially discriminatory against interstate commerce nor (as the Court explains, *ante*, at 22–24) similar to other state action that we have hitherto found invalid on negative-Commerce-Clause grounds; and because, as I have explained elsewhere, the negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated. See *West Lynn Creamery, Inc. v. Healy*, 512 U. S. 186, 209–210 (1994) (concurring in judgment).

I would reject petitioner’s statutory claim on the ground that the remedy for the State’s failure to comply with the obligations it has agreed to undertake under the Medicaid Act, see *Blessing v. Freestone*, 520 U. S. 329, 349 (1997) (SCALIA, J., concurring); *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981), is set forth in the Act itself: termination of funding by the Secretary of the Department of Health and Human Services, see 42

U. S. C. §1396c. Petitioner must seek enforcement of the Medicaid conditions by that authority—and may seek and obtain relief in the courts only when the denial of enforcement is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U. S. C. §706(2)(A).