No. 14-525

In the

Supreme Court of the United States

NICK COONS, et al.,

Petitioners,

v.

JACOB J. LEW,
Secretary of the Treasury, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REP. PHIL ROE AND OTHER MEMBERS OF CONGRESS* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The petition presents two questions:

1. Is Plaintiff Coons's lawsuit for prospective injunctive relief to bar irreparable injury—*i.e.*, the unconstitutional condition that the Affordable Care Act (ACA) imposes on his right to privacy—ripe for review now, or must he first surrender that right, or pay a fine for exercising it, before he may seek injunctive relief?

2. A litigant has standing "to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate [his] rights," *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), even before that agency has acted, so long as the person is "directly subject to the governmental authority [he] seek[s] to challenge." *Comm. for Monetary Reform v. Bd. of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985). As a physician performing work for Medicare patients, Plaintiff Dr. Novack is directly subject to the authority of the Independent Payment Advisory Board—an unelected, unaccountable, and purportedly unrepealable agency empowered by the ACA to enact whatever laws it considers "related to the Medicare program," 42 U.S.C. § 1395kkk(c)(1)(A)—when he seeks reimbursements for his practice. Does Dr. Novack have standing to seek prospective relief based on his separation-of-powers claim?

Amici address only the second question presented.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) represents itself and the following Members of Congress as amici curiae in support of the Petition:

Representative Phil Roe
Representative Dan Benishek
Representative Diane Black
Representative Marsha Blackburn
Representative Paul Broun
Senator Tom Coburn
Representative Mike Coffman
Representative John Fleming
Representative Trent Franks
Representative Phil Gingrey
Representative Paul Gosar
Representative H. Morgan Griffith
Representative Tim Huelskamp
Representative Thomas Massie
Representative Tom McClintock
Representative Alan Nunnelee
Representative Pete Olson
Representative Bill Posey
Representative Tom Price

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Representative Todd Rokita
Representative Matt Salmon
Representative David Schweikert
Representative Lee Terry
Representative Rob Woodall
Representative Ted Yoho

These members have consistently opposed IPAB in Congress on constitutional and policy grounds.

PLF is the nation's largest and most experienced non-profit legal foundation devoted to limited government, individual rights, and economic liberty. PLF has litigated and appeared as amicus curiae in many lawsuits involving the Patient Protection and Affordable Care Act (ACA), including *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014) (representing plaintiff); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (amicus); and *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 133 S. Ct. 59 (2012) (amicus). PLF participated as amicus in this case in the District Court and Court of Appeals. PLF attorneys have also published scholarly research on the legal controversies surrounding the ACA. *See* Timothy Sandefur, *So It's A Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 Tex. Rev. L. & Pol. 203 (2013); Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. Fla. J.L. & Pub. Pol'y 311 (2012). PLF believes its public policy experience will assist this Court in its consideration of the petition for certiorari.

SUMMARY OF REASONS FOR GRANTING THE PETITION

This important case is ripe for review because it presents a challenge to the constitutionality of

provisions of the ACA that are already in effect. The ripeness doctrine is concerned with ensuring that federal courts only review actual controversies, rather than speculative disputes. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). There is no ambiguity or speculation involved here: the unconstitutional provisions of the ACA relating to the Independent Payment Advisory Board (IPAB) are now operating. And because the challenge involves the purely legal question of whether IPAB's autonomous lawmaking power is constitutional, no further factual development is necessary to ripen this case.

The Court of Appeals found this case unripe on the theory that Petitioner Novack's only injury is that IPAB might decrease Medicare reimbursement rates as a result of unforeseeable future events. *Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014). But Dr. Novack's injury is not just financial. He is injured by being subjected to a new set of rules for determining his reimbursement rates, rules promulgated by an unconstitutional entity which is immunized from judicial review or Congressional or Presidential control. Those rules are now in effect. This case is not about whether any particular act by IPAB is correct or not. It is about whether IPAB's power to make law without any public accountability offends the Constitution. Dr. Novack need not wait for IPAB to act before challenging its constitutionality. *Buckley v. Valeo*, 424 U.S. 1, 117 (1976).

IPAB's powers are already in effect because, the President having failed to appoint anyone to IPAB, the Secretary of Health and Human Services (HHS) exercises its powers. 42 U.S.C. § 1395kkk(c)(5) and (e)(5). While it is true that IPAB or the Secretary will

begin issuing "recommendations" (actually laws) only after the Chief Actuary makes certain findings, *id.* § 1395kkk(b), the ACA *requires* the Actuary to make those findings pursuant to a specified formula. *Id.* § 1395kkk(c)(6). Thus when regarded as a whole, as they must be, the provisions of the ACA which the Petitioners challenge here are already operating. The IPAB machinery is now moving.

Delaying judicial review further would work serious hardship, without benefitting the Court or the public. IPAB's immunity from judicial or administrative review, *id.* § 1395kkk(e)(5), makes it unlikely that a person could challenge a "recommendation" in some future administrative proceeding. Any such challenge would only duplicate the facial challenge to the IPAB provisions of the ACA presented here. Also, further delay will engender confusion about the future of Medicare throughout the medical profession, needlessly complicate future judicial review, and encourage the creation of other autonomous lawmaking bodies. In light of the ACA's purported anti-repeal provisions, this Court's respect for Congress—including future Congresses—counsels in favor of judicial review now, not later.

REASONS FOR GRANTING THE PETITION

I

IPAB REPRESENTS AN UNPRECEDENTED ABDICATION OF CONGRESS'S ROLE AS LAWMAKER

This case presents a question of exceptional importance for federal law.

IPAB wields authority to make law with no meaningful legislative, executive, or judicial oversight. It is not a mere executive entity; it is an autonomous *lawmaking* body shielded from democratic checks and balances. It was designed, in the words of one of the ACA's most prominent advocates, as a group of "Platonic Guardians." Timothy Stoltzfus Jost, *The Independent Medicare Advisory Board*, 11 Yale J. Health Pol'y, L. & Ethics 21, 21 (2011). But the Constitution is not compatible with any system of Platonic Guardians.[2] On the contrary, the framers rejected the idea of being governed by "a will in the community independent of the majority," because such an independent entity could impose "unjust" legislation without any check by the people. *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961). They chose instead a system in which all branches of government enjoy clear and limited powers, balanced against each other and accountable to the public.

[2] Plato believed that political power should reside "[o]nly in the hands of the select few or of the enlightened individual," *Statesman* 297c, in *Plato: The Collected Dialogues* 1067 (Edith Hamilton & Huntington Cairns eds., 1961), and thus imagined a society overseen by Guardians who would, *inter alia*, govern the "art of medicine" by laws which "will care for the bodies and souls of such of your citizens as are truly wellborn, but those who are not, such as are defective in body, they will suffer to die, and those who are evil-natured and incurable in soul [the Guardians] will themselves put to death." *Republic* 409e-410a, *in id.* at 654. "This," Plato contended, "has been shown to be the best thing for the sufferers themselves and for the state." *Id.* at 410a. Thomas Jefferson and John Adams called Plato's ideas "shock[ing] . . . disgust[ing]" "unintelligible . . . nonsense" produced by a "foggy mind." *Compare* Letter from Jefferson to Adams, July 5, 1814, in *The Adams-Jefferson Letters* 432-33 (Lester J. Cappon, ed., 1987), *with* Letter from Adams to Jefferson, July 16, 1814, in *id.* at 437.

The ACA empowers IPAB—supposedly an executive branch entity—to write law which the President must enforce without alteration, and without legislative or judicial checks. IPAB enjoys more autonomy than any previous independent agency; its "recommendations" cannot be meaningfully altered or blocked by Congress, the President, or the courts, but are enforced automatically. These and other factors, taken together, make it clear that IPAB is not merely a subordinate agency, but a lawmaking authority combining legislative, executive, and judicial powers. As Prof. Jost admits, *supra*, at 31, "the conscious abdication of congressional responsibility to the IPAB is striking."

To understand the exceptional importance of this petition, and the complexity of the ACA's provisions governing IPAB, any consideration of the ripeness of this case must begin with a brief examination of how IPAB operates.

A. How the ACA's IPAB Provisions Work

IPAB is charged with "reduc[ing] the Medicare per capita growth rate." 42 U.S.C. § 1395kkk(b). It does so by drafting "recommendations" in the form of "legislative proposals." Yet these are not mere recommendations or proposals, because the Secretary of HHS is *required* to implement them without their being adopted by any administrative process or legislative action. *See* 42 U.S.C. § 1395kkk(b)(2) and (3).[3] The HHS Secretary must "implement *the*

[3] The fact that IPAB's "proposals" are not mere suggestions is emphasized by the fact that the ACA establishes an *entirely separate* provision allowing IPAB to prepare truly *advisory* proposals. The ACA calls these "advisory reports," Section (continued...)

recommendations contained in a proposal," regardless of whether Congress approves or disapproves of them. Section 1395kkk(e)(1) (emphasis added).

It bears emphasis that IPAB's "recommendation" power is extremely broad. It is empowered to draft "proposals *related to* the Medicare program." Section 1395kkk(c)(1)(A) (emphasis added). And given the lack of judicial, legislative, or executive oversight of IPAB, this provision essentially leaves it up to IPAB itself (or the Secretary, when, as now, she exercises IPAB's powers) to decide what qualifies as "related to."

Thus, for example, although the ACA states that IPAB may not "ration care," Section 1395kkk(c)(2)(A)(ii), the ACA never defines what constitutes "rationing care," and no mechanism is provided to enforce this restriction. IPAB is also immune from judicial or administrative review, *see* Section 1395kkk(e)(5), so that there could be no meaningful recourse against it if it *did* take action that rationed care. In short, IPAB is given a roving commission to "propose" whatever *it considers* to be "related to the Medicare program," and its "proposals" automatically become law.

Congress is given no meaningful opportunity to review or alter IPAB's "recommendations" before they are put into effect. Sections 1395kkk(d)(3)(A) and (B) purport to deprive Congress of such authority, by forbidding either house from considering "any bill, resolution, or amendment . . . that fails to satisfy the

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[3] (...continued)
1395kkk(c)(1)(B), and treats them in a completely different manner than the "proposals" that IPAB prepares under Section 1395kkk(c)(2)(A)(i).

requirements of subparagraphs (A)(i) and (C) of subsection (c)(2)"—that is, the same statutory criteria IPAB itself must comply with when formulating the "proposal." In other words, Congress may only amend the "proposal" by adding to it items IPAB could have included but failed to. Congress may not reverse or alter those recommendations, or diverge from them, or change the policy unless 3/5 of all elected Senators agree to override this rule. *See* Section 1395kkk(d)(3)(D). This prohibition is reinforced by another provision purporting to bar repeal of the statutory sections establishing this prohibition. *See* Section 1395kkk(d)(3)(C).[4] This is akin to Congress letting an administrative agency set tariff rates without review or approval, and then disabling itself from acting except to increase the tariff.

The ACA allows Congress only one way to bar IPAB's "recommendations" from automatically becoming law, and that power—described below, Part III—is rendered defunct if not exercised in a brief period in 2017. Otherwise, once IPAB's "recommendations" are submitted, the President of the Senate and the Speaker of the House must, by the next business day, refer them to the Senate Finance, House Energy And Commerce, and House Ways And Means Committees, respectively. *See* Section 1395kkk(d)(1)(D). But these committees may not change, or recommend for or against passage of, the "recommendations"; they may only amend them in ways that comply with the same instructions IPAB itself must follow when formulating the

[4] This provision is not to be confused with the anti-repeal provision in Section 1395kkk(f). The latter purports to bar Congress from ever repealing IPAB at all.

"recommendations" in the first place. *See* Section 1395kkk(d)(3)(B). With this trivial exception, the committees *must* report out IPAB's "legislative proposal" (which the ACA thereafter refers to as a "bill") on or before April 1—three months after IPAB first issues its "recommendations." *See* Section 1395kkk(d)(2)(A).

The ACA then requires the Senate to consider the bill, and again prohibits amendments, *see* Section 1395kkk(d)(4)(B)(ii), (iv), as well as severely restricting debate on it. *See* Section 1395kkk(d)(4)(D). This prohibition on alterations is reinforced still further by Section 1395kkk(d)(3)(C), which forbids changing the rule against alterations: "It shall not be in order in the Senate or the House of Representatives to consider any bill, resolution, amendment, or conference report that would repeal or otherwise change this subsection." The Senate—and only the Senate—may remove this obstruction, and only by a 3/5 vote of all *elected* Senators. *See* Section 1395kkk(d)(3)(D).[5]

B. The ACA Exempts IPAB from Legislative, Executive, and Judicial Oversight

IPAB operates without meaningful Congressional oversight. Although Congress may deputize a " 'selected instrumentalit[y]" to make "subordinate rules within prescribed limits,'" *Currin v. Wallace*, 306 U.S. 1, 15 (1939), it may not "abdicate, or . . . transfer

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[5] The fact that this Section bars the House from acting at all without Senate approval violates Article I, Section 5 of the Constitution, which makes each House its own rulemaker—and demonstrates that these provisions of the ACA cannot be justified as an exercise of Congress's rulemaking power, as the Court of Appeals claimed. *Coons*, 762 F.3d at 896.

to others, the essential legislative functions with which it is vested." *Id.*

The IPAB provisions of the ACA go far beyond the acceptable limit, and beyond what any previous administrative agency has been given. The "proposal" IPAB prepares is automatically put into effect without legislative approval, and with no practical Congressional control. With one minor exception—*i.e.*, only if, during a 29-day period in 2017, 3/5 of all elected members of Congress approve a joint resolution, *see* Section 1395kkk(f), which the President must also sign—the HHS Secretary must, beginning in 2020, implement the "recommendations," and Congress cannot prevent their enforcement, according to the ACA. It is therefore "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" by IPAB. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

The ACA also deprives the President of control over IPAB. Sections 1395kkk(c)(4) and (5) provide that if the President fails to appoint members to IPAB, and IPAB fails to issue the "recommendations," the HHS Secretary must prepare those "recommendations" on her own. The content of the Secretary's "recommendations" is dictated by the same rules provided to IPAB. *See* Section 1395kkk(d)(3)(A). The President may not alter them, and must then submit them to Congress within two days.

In other words, the statute dictates the content of legislation that the President *must* submit to Congress, while simultaneously depriving him of power to alter those "recommendations." Yet the Constitution gives the President authority to "recommend to [Congress'] Consideration such Measures *as he shall judge*

necessary and expedient." U.S. Const. art. II, § 3 (emphasis added). Congress may not restrict this Recommendations Clause power. *See* J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079, 2121 (1989) ("the recommendation clause obviously contemplates that the President is the sole judge of what measures he will submit to Congress."); *see also* Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 U.S. Op. Off. Legal Counsel 632, 640; 1982 WL 170732, at *8 (Nov. 5, 1982) (Congress cannot "require a subordinate executive official to present legislative recommendations of his own."). Given that administrative agencies "*must be*" arms of the executive branch, *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 n.4 (2013), Congress's attempt to bar presidential control over IPAB is sufficient grounds to find the statute unconstitutional.

Finally, the ACA explicitly bars judicial review of "the implementation by the Secretary under this subsection of the recommendations contained in a proposal." Section 1395kkk(e)(5).

Thus IPAB is given power to write and implement law without meaningful oversight by the legislative, executive, or judicial branches. Even if Congress, the President, and the courts were to disapprove of its "proposals," the HHS Secretary would still enforce them, and Congressional attempts to alter IPAB's "recommendations" before they go into effect are statutorily deemed out of order. *See* Sections 1395kkk(d)(3)(C), (d)(3)(B), (d)(4)(B)(ii), and (d)(4)(B)(iv).

C. IPAB's Autonomy Is Far Beyond That of Any Previous Independent Agency

Congress has previously established entities with varying degrees of autonomy to take charge of politically difficult decisions—for example, the Defense Base Closure and Realignment Commission (BRAC)—or to write codes of rules or regulations that might require expert knowledge, such as the U.S. Sentencing Commission, charged with writing the Sentencing Guidelines. Each of these has given rise to separation of powers concerns, but never has Congress sought to establish an entity as autonomous as IPAB. And all of the factors that led the courts to reject separation of powers challenges to BRAC, the Sentencing Guidelines, *etc*., are absent here.

Courts weighing separation-of-powers challenges must consider the entity in question as a whole, and evaluate "the aggregate effect of the factors" involved. *Synar v. United States*, 626 F. Supp. 1374, 1390 (D.C. Cir.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). Thus the question of whether Congress has legitimately delegated executive functions, or has unconstitutionally yielded the lawmaking power, is "a question of degree," *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting), and "varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001). *See also INS v. Chadha*, 462 U.S. 919, 962-63 (1983) (courts weighing separation-of-powers challenges must be "mindful that the boundaries between each branch should be fixed according to common sense and the inherent necessities of the governmental co-ordination.").

The "aggregate of the factors" is striking here. The ACA

- insulates IPAB's "recommendations" from APA notice and comment requirements,
- prevents Congress from altering or amending the "recommendations" except to add provisions IPAB could itself have written,
- curtails the President's power to recommend such measures as he considers expedient,
- prohibits judicial review,
- forbids Congress from repealing the restriction on alteration or amendment,
- provides that Congress may bar IPAB's "recommendations" from automatically becoming law only if 3/5 of all elected members of Congress pass a joint resolution within a 29-day period in 2017 to disband IPAB, and
- purports to eliminate even this impracticable opportunity of repeal in 2020 if Congress does not exercise it before August 15, 2017, whereupon it
- provides that, regardless of what any amendment or legislation Congress does adopt, the Secretary must still enforce the original "recommendations" that IPAB submits to Congress.

These factors extend far beyond any previous case. The ACA's IPAB provisions differ from the "fast track procedures" which allowed BRAC to recommend the

decommissioning of military bases. Congress still retained power to disband BRAC, but the ACA tries to bar the elimination of IPAB.[6] And although the sentencing commission was immune from judicial review, it was still subject to the Administrative Procedures Act, unlike IPAB. *See* 28 U.S.C. § 994(x).

II

PETITIONER'S PURELY LEGAL CHALLENGE IS RIPE FOR REVIEW WITHOUT ANY NEED FOR FURTHER FACTUAL DEVELOPMENT

The Court of Appeals found this challenge unripe on the grounds that Dr. Novack has not yet been harmed, and may not be harmed, by a reduction in the rates he is paid in reimbursement for his Medicare work, and because IPAB's powers will only be exercised once the Chief Actuary makes the requisite findings. *Coons*, 762 F.3d at 898. But the question is not whether Dr. Novack will be reimbursed at a lower rate in the future, but whether he may challenge the constitutionality of an entity to which he is directly subject, and which will adjudicate his rights and allocate benefits under the program. He can. *See Buckley*, 424 U.S. at 117.

Nor is any ripening necessary to resolve this dispute, which centers around purely legal issues. The IPAB provisions of the ACA—which must be considered *as a whole*, including those provisions governing the Chief Actuary's findings—are already

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[6] Congress was required to enact a joint resolution, by simple majority, to disband BRAC. *See* Pub. L. No. 101-510, § 2904(b). That was modest by comparison to the ACA's anti-repeal provisions. *See* below, Section III.

operating. Thus the alleged injury is not speculative or merely potential, but actual. No further factual development will aid the Court in its consideration of this legal dispute.

A. Plaintiff Novack's Injury Is Being Subjected to an Unconstitutional Mechanism for Determining His Reimbursements

The Ninth Circuit assumed that Dr. Novack's injury was financial. But Dr. Novack is injured by being subjected to a new set of rules for calculating reimbursements and governing the Medicare program which he alleges are unconstitutional. The Complaint specifies that the ACA "alter[s] the procedure by which Dr. Novack and other physicians . . . are reimbursed," which *in addition* to harming him financially, will *also* "otherwise adversely affect[] his practice." *See* Second Amended Complaint ¶ 128.

Being subjected to a new set of rules and a new governing agency is a legal harm. In *Buckley*, 424 U.S. at 117, this Court held that "litigants . . . have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." Thus, even though the Federal Election Commission had not yet acted, the petitioner was allowed to bring suit to challenge its constitutionality. As the D.C. Circuit has explained, a plaintiff need only show that he is "directly subject to the governmental authority [he seeks] to challenge," *Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985), not that the authority has acted in any specific way.

In support of its holding that a plaintiff may challenge the constitutionality of an agency that is empowered to determine the plaintiff's rights, even though that agency has not yet acted, the *Buckley* Court cited three cases—*Palmore v. United States*, 411 U.S. 389 (1973), *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), and *Coleman v. Miller*, 307 U.S. 433 (1939)—none of which involved any *particular* determination by the agencies in question. Instead, the plaintiffs had standing because the statutes in question empowered entities to adjudicate their rights in violation of the separation of powers doctrine.

In *Palmore*, a criminal defendant challenged a statute under which he was tried by a non-Article III judge. 411 U.S. at 396-97. In *Glidden*, the plaintiffs challenged the makeup of federal courts under Article III; the plurality[7] found that their separation of powers claim "ha[d] nothing to do with the manner in which either of these judges conducted himself." 370 U.S. at 533 (plurality op.). Instead, the plaintiffs had standing because "Article III . . . gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment." *Id.* And in *Coleman*, the Court expressly held that the plaintiffs could challenge a state legislature's actions in counting a vote cast by a member who lacked authority to participate. 307 U.S. at 437-47. Again, the dispute centered around an unconstitutional change in the procedures by which rights or privileges were determined or allocated.

[7] Neither the concurring nor dissenting opinions disputed that the plaintiffs could sue.

To emphasize, a plaintiff *need not* establish that an unconstitutional agency has taken some action to harm him before challenging that agency on separation of powers grounds. In *In re. Subpoena of Scarfo*, 783 F.2d 370, 374 (3d Cir. 1986), the Court of Appeals found that the witness could challenge the constitutionality of the Commission on Organized Crime, even though he had "failed to demonstrate a causal relationship between the harm alleged and . . . the [allegedly unconstitutional] presence of Justice Stewart and Judge Kaufman on the Commission." No such showing was required. "It is not the Commission's authority to undertake the specific action that is attacked, but the legality *vel non* of its creation." *Id.* This was sufficient because a plaintiff may challenge the makeup of an agency or court which adjudicates rights or allocates benefits.

As with the litigants in *Buckley, Palmore, Glidden, Coleman*, and *Scarfo,* Dr. Novak is "directly subject to the authority of [IPAB]." *Comm. for Monetary Reform*, 766 F.2d at 543. His rights and privileges under the Medicare program are subject to determination by IPAB or by the Secretary exercising IPAB authority. He therefore may bring the separation of powers claims alleged here, without waiting for IPAB to act.

B. No Further Delay Is Justified Because IPAB's Powers Are Now in Effect

The IPAB provisions of the ACA are now in effect. Although the President has not appointed any members to IPAB, the statute provides that its powers are thereby vested in the HHS Secretary. Section 1395kkk(c)(5). Accordingly, the Chief Actuary is required to make findings and the Secretary must

submit "proposals" in accordance with Section 1395kkk(c)(3)(A)(i).

The purpose of the ripeness doctrine is to avoid ruling on speculative or hypothetical controversies, and ensure that all facts are before the Court that will enable it to resolve the dispute. *Buckley,* 424 U.S. at 680-81; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

Where the dispute is purely legal—as in this facial constitutional challenge—there is less reason to postpone judicial review. *Id*. at 149. And where the case is unlikely to be rendered moot by some future act—an extremely remote possibility here—there is less justification for delay. *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1034, 1040 (1st Cir. 1982).

The Ninth Circuit held the case unripe in part because IPAB's authority will only be invoked when the Chief Actuary finds that Medicare expenditures have risen to the levels described in Section 1395kkk(c)(6). *See Coons*, 762 F.3d at 898. But this is not a "contingency" which deprives Dr. Novack's case of ripeness, because Dr. Novack challenges the *entire* statutory mechanism empowering IPAB, including the provisions which control the Chief Actuary's findings. Making these findings is a mandatory, ministerial act, and the acts of IPAB triggered by those findings are also mandatory and ministerial. *See* Section 1395kkk(c)(2)(A)(i).

Subdividing the statutory provisions misled the court below because it created the illusion that Dr. Novack's injury is contingent on future events. But Dr. Novack's injury is not just his future financial

harm, though that is an important part of it; rather, his injury is being subjected to a regulatory mechanism—including the Chief Actuary's obligations—which violates the separation of powers. That injury is *now* occurring.

C. Delay Will Not Ripen This Case Further, but Will Harm the Parties and the General Public

The final ripeness consideration is the hardship to the parties if review is delayed. *Abbott Labs.*, 387 U.S. at 149. Here, the hardship is considerable.

First, if this Court forces Dr. Novack to await IPAB's reduction of Medicare reimbursement rates before challenging IPAB's constitutionality, Section 1395kkk(e)(5) will likely block judicial review. That section forbids *all* "administrative or judicial review . . . of the implementation by the Secretary . . . of the recommendations contained in a proposal." This provision is extraordinarily broad—much broader than other restrictions on judicial review of the Medicare program, such as Section 1395w-3(b), or Section 1395w-4(i)(1), which itemizes matters which courts are barred from reviewing. Unlike those provisions, which are designed "to prevent judicial 'second-guessing' of a discretionary administrative decision," *Painter v. Shalala*, 97 F.3d 1351, 1359 (10th Cir. 1996), the no-review provision here appears to bar judicial review not of specific, discretionary acts, but of *anything* relating to "implementation" of IPAB's "recommendations." It is unclear whether this extraordinary breadth is itself ambiguous enough to entitle a plaintiff to challenge IPAB's existence in court. *Cf. Cardiosom, L.L.C. v. United States*, 656 F.3d 1322, 1326-29 (Fed. Cir. 2011) (prohibition on judicial

review was so broad on its face as to raise ambiguity and defeat total bar to judicial review). But there is no advantage to forcing Dr. Novack to make such an argument in some future proceeding when the Court could address it in this case. Deciding the case now would conserve judicial resources.

Second, forcing Dr. Novack to wait would require him—and all others subject to IPAB's authority, as well as patients who must rely on IPAB's decisions to make their own plans regarding health care—to modify their behavior in anticipation of IPAB's (or the Secretary's) actions. For example, the Health Care Management Association, the nation's foremost membership organization for health financers, is already counseling its members that "the mandated payment cuts and possible IPAB-imposed spending growth limits" may force "some hospitals [to] go out of business or operate under financial duress," and that doctors should therefore "limit Medicare volume," "lay off employees," and "take advantage of . . . governmental subsidization." Ken Perez, *Preparing for ACA-Driven Medicare Cuts*, HFMA, Jan. 1, 2013.[8] Further delay will only cause more disruption in the nation's health care industry, as doctors prepare for the cuts which IPAB is bound to impose.

Finally, if allowed to stand, the IPAB model is likely to encourage Congress to delegate wider and wider discretionary authority to other administrative agencies. This Court recently expressed considerable concern about the increasing breadth of grants of power to such agencies. *Compare City of Arlington*, 133 S. Ct. at 1873 n.4, *with id.* at 1877 (Roberts, C.J.,

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[8] *Available at* http://www.hfma.org/Content.aspx?id=14873 (last visited Nov. 21, 2014).

dissenting). In *Mistretta*, Justice Scalia warned that the Sentencing Commission would serve as a blueprint for the erection of autonomous lawmaking bodies, and with eerie prescience he wrote,

> I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future . . . . I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission . . . to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research . . . . The only governmental power the Commission possesses is the power to make law; and it is not the Congress.

488 U.S. at 422 (Scalia, J., dissenting). IPAB is just such a Commission.

III

THERE IS NO REASON TO DELAY REVIEW OF A LAW THAT TRIES TO PROHIBIT ITS OWN REPEAL

In *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938), this Court pledged to apply heightened scrutiny to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." The ACA's IPAB provisions go even further, attempting to block Congress from ever

repealing IPAB itself, except under prohibitively stringent circumstances.

Specifically, the ACA asserts that any repeal effort shall be deemed out of order unless:

- a Joint Resolution is introduced during the 29 days between January 3 (when Congress convenes) and February 1, 2017, which
- recites the precise wording specified in 42 U.S.C. § 1395kkk(f)(1)(C) and (D), and
- receives the votes of 3/5 of all *elected* members of Congress, and
- is signed by the President,[9]
- before August 15, 2017.

42 U.S.C. § 1395kkk(f). Note that this means absentees or abstention votes are counted as "no" votes, unlike other supermajority requirements that require a supermajority of all *present*. The IPAB provisions of the ACA therefore establish *the severest supermajority requirement in the history of American law*.

A law that attempts to prohibit its own repeal is subject to the strictest possible scrutiny. As Francis Bacon observed more than four centuries ago, such a law is "void ab initio & ipso facto" simply "by the impertinency of it." *Elements of the Common Lawes of*

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[9] The ACA does not specify that the President must sign any such repeal statute, but with the exception of proposed constitutional amendments, Joint Resolutions are presented to the President for signature. *Bowsher*, 478 U.S. at 755-56.

England 77 (John Moore 1630) (1597).[10] Or, as Thomas Jefferson observed, a legislature has "no power to restrain the acts of succeeding assemblies constituted with powers equal to [its] own," so that "to declare [an] act to be irrevocable would be of no effect in law." Virginia Statute for Religious Freedom, Va. Code Ann. § 57-1 (2011). This Court has reiterated the point in many different contexts. *See*, *e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 881 (1996) ("Government cannot make a binding contract that it will not exercise a sovereign power." (citation and quotation marks omitted); *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) ("the power of governing is a trust committed by the people to the government, no part of which can be granted away."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) ("[O]ne legislature cannot abridge the powers of a succeeding legislature.").

This point has caused some confusion, as it is obvious that Congress could repeal the prohibition on repeal. In its brief before the Ninth Circuit, for example, the Respondents argued in defense of the ACA that "Congress may always override [IPAB] . . . by repealing or suspending the rules that govern Senate or House changes to [IPAB's] recommendations . . . . And, of course, nothing prevents Congress from repealing 42 U.S.C. § 1395kkk—or the Affordable Care Act as whole—via ordinary legislation." Br. of Appelles, *Coons v. Lew* (No. 13-15324) at 21. This is true, but it is not a *defense* to the charge of unconstitutionality: the IPAB provisions are subject to repeal *because Section 1395kkk(f) is unconstitutional.*

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[10] *See also* 4 E. Coke, *Institutes* *43 ("though divers Parliaments have attempted to barre, restrain, suspend, qualifie, or make void subsequent Parliaments, yet could they never effect it.")

Congress is incapable of tying its legislative hands as this Section attempts to do. To argue, as the government has in this case, that the anti-repeal provision should be *upheld* because a future Congress is free to disregard it is incoherent.

As Justice Scalia observed in *Lockhart v. United States*, 546 U.S. 142 (2005), the Court typically defers to Congress out of respect for the democratic process, but to defer to purported anti-repeal provisions would be to *disrespect* the democratic processes of *future* Congresses. While "it might seem more respectful of Congress to refrain from declaring the invalidity" of the entrenchment, "that would depend upon which Congress one has in mind: the prior one that enacted the provision, or the current one whose clearly expressed legislative intent it is designed to frustrate . . . . [I]t does no favor to the Members of Congress . . . to keep secret the fact that such express-reference provisions are ineffective." *Id.* at 149-50 (Scalia, J., concurring). This Court's commitment to ensuring the proper working of the "political processes which can ordinarily be expected to bring about repeal of undesirable legislation," *Carolene Products*, 304 U.S. at 153 n.4, militates against withholding judicial review of laws that seek to prohibit their own repeal.[11]

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[11] This case does not focus on the anti-repeal provisions alone. Rather, those provisions must be considered as part of the "aggregate effect of the factors" when deciding whether IPAB is operating within the bounds of constitutional delegation, or is unconstitutionally acting as an autonomous lawmaking body. *Synar*, 626 F. Supp. at 1390.

CONCLUSION

Ripeness is a matter of legal fitness for review; it bars determination of abstract questions and ensures that all necessary factual developments are final and ready for judicial determination. *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003). These factors are met here. There is no reason to delay review of the constitutionality of IPAB, including the anti-repeal provisions that attempt, however ineffectually, to make IPAB into a permanent, autonomous lawmaker free of all checks and balances. The petition should be *granted*.

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