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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The individual-coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, requires most individuals to pay a tax penalty if they fail to maintain health coverage. 26 U.S.C. 5000A. Another provision of the Act establishes the Independent Payment Advisory Board (IPAB), which will be responsible for making proposals to reduce the growth of Medicare spending if specified preconditions are satisfied in future years. 42 U.S.C. 1395kkk. The questions presented are as follows:

1. Whether petitioner Coons's claim that the individual-coverage provision violates a constitutional right to informational privacy is prudentially unripe, where Coons has not alleged that he would be required to disclose any particular information in order to obtain health insurance.

2. Whether petitioner Novack's non-delegation challenge to IPAB is constitutionally unripe, where IPAB has not taken, and may never take, any action affecting Novack.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported as amended at 762 F.3d 891. The orders of the district court (Pet. App. 22-33, 34-40) are not published in the *Federal Supplement* but are available at 2012 WL 6674394 and 2012 WL 3778219.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2014. The petition for a writ of certiorari was filed on November 5, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Coons is an individual who does not wish to purchase health insurance. Pet. App. 6. Petitioner Novack is an orthopedic surgeon whose patients include Medicare beneficiaries. *Id.* at 10. They

filed this action in the United States District Court for the District of Arizona seeking to raise a variety of constitutional challenges to the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119.[1] Two of those challenges are relevant here.

First, Coons contended that the Act's individual-coverage provision violates a constitutionally protected right to informational privacy. The individual-coverage provision generally requires individuals to pay a tax penalty if they do not maintain health coverage. 26 U.S.C. 5000A; see *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580, 2600 & n.11 (2012). Coons alleged that this provision burdens his right to informational privacy because insurance companies would require him to disclose unspecified medical information in order to obtain coverage. Pet. App. 29.

Second, Novack contended that Congress impermissibly delegated legislative power to an administrative agency by creating the Independent Payment Advisory Board (IPAB or Board), a body charged with making proposals to reduce the growth of Medicare spending. 42 U.S.C. 1395kkk. The Board currently has no voting members, but once constituted it will have 15 voting members nominated by the President and confirmed by the Senate. 42 U.S.C. 1395kkk(g)(1)(A). During years in which the rate of growth of Medicare spending is expected to exceed specified targets, the Board will be required to submit proposals to "reduce the per capita rate of growth in Medicare spending." 42 U.S.C. 1395kkk(b)(2) and (c).

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Any proposals by the Board must satisfy detailed statutory requirements, and may not "ration health care," raise premiums, or "otherwise restrict benefits or modify eligibility criteria." 42 U.S.C. 1395kkk(c)(2)(A)(ii); see 42 U.S.C. 1395kkk(c)(2)(A), (B) and (C). If the Board fails to make a proposal in a year in which one is required, the Secretary of Health and Human Services (HHS) is required to make the proposal instead. 42 U.S.C. 1395kkk(c)(5). The Board's proposals must be implemented by HHS unless they are superseded by Congress under a fast-track process, see 42 U.S.C. 1395kkk(e), or through ordinary legislative procedures.[2]

2. The district court dismissed petitioners' claims. Pet. App. 22-40.

a. The district court held that Coons's informational-privacy claim was unripe and, in the alternative, that it failed on the merits. Pet. App. 29-32. The court noted that Coons "ha[d] not alleged a specific disclosure requested by an insurance company" as a precondition for obtaining health coverage. *Id.* at 30. The court explained that without allegations identifying the particular information—if any—that Coons would have to disclose, the court could not evaluate his

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[2] Petitioners state (*e.g.*, Pet. 9) that the special legislative procedures created by the Act are the sole means for Congress to supersede the Board's proposals or discontinue the Board. See 42 U.S.C. 1395kkk(e) and (f). In fact, Congress may override a Board proposal by repealing or suspending the rules governing Senate or House consideration of Board proposals and then voting on superseding legislation. See 42 U.S.C. 1395kkk(d)(3). And nothing prevents Congress from abolishing the Board altogether by repealing 42 U.S.C. 1395kkk—as a number of bills have proposed to do. See, *e.g.*, H.R. 351, 113th Cong., 1st Sess. (2013); H.R. 5, § 202, 112th Cong., 2d Sess. (2012) (as passed by House).

claim that the disclosure violated an asserted constitutional right to informational privacy. *Id.* at 30-31. The court also held that Coons's claim failed on the merits because he "has the lawful option of paying the tax penalty rather than obtaining health insurance and submitting personal information to third parties." *Id.* at 32.

b. The district court dismissed Novack's non-delegation challenge on the merits. Pet. App. 37-38. The court explained that Congress may delegate authority to an administrative body so long as it "clearly delineate[s] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 37 (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989)). The court held that Congress "met that test" in establishing IPAB. *Ibid.*

3. The court of appeals affirmed in part and vacated in part, holding that both of the relevant claims should be dismissed as unripe. Pet. App. 1-21.

a. The court of appeals held that Coons's informational-privacy claim was "prudentially unripe" because it "would require evaluating a speculative intrusion" on his privacy. Pet. App. 16. The court explained that "prudential ripeness depends on two factors: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* at 16-17 (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967)). The court held that Coons's claim was not fit for judicial decision because he had "not alleged that he has applied for medical insurance or that any third party has requested that he disclose his medical information as a condition precedent to obtaining the minimum required coverage." *Id.* at 16. Coons's failure to identify any information he would

be required to disclose to obtain insurance "frustrate[d] [the court's] ability" to assess his claim that the unspecified disclosure would violate a constitutionally protected right to privacy. *Ibid.* The court further held that Coons would suffer no hardship from the denial of immediate judicial review because he "does not contend that he is currently at risk of being forced to disclose" any private information. *Id.* at 17.[3]

b. The court of appeals held that Novack's nondelegation challenge to IPAB was constitutionally unripe because his claims of injury were "highly speculative." Pet. App. 10-11. As relevant here, Novack alleged that his patients include Medicare beneficiaries and that he would suffer financial harm if the Board in the future proposed reductions in Medicare reimbursements for the services he provides. *Id.* at 10. But the court explained that the Board will propose spending reductions only if growth in Medicare spending exceeds statutory targets. *Ibid.*; see 42 U.S.C. 1395kkk(c)(2)(A)(i), (6) and (7). And even if the Board is required to make a proposal, it is prohibited from recommending reductions in reimbursements to providers like Novack until 2019. Pet. App. 10-11 (citing 42 U.S.C. 1395kkk(c)(2)(A)(iii) and (iv)). The court therefore concluded that Novack's claimed injury was too speculative to satisfy Article III because it

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[3] The court held that Coons's claim that the individual-coverage provision imposes an unconstitutional condition on his right to informational privacy was prudentially unripe for the same reason: It rested on the premise that he would be required to disclose private medical information in order to obtain insurance, but Coons had not identified the information (if any) he would be required to disclose. Pet. App. 16 n.6.

was "wholly contingent upon the occurrence of unforeseeable events." *Id.* at 11 (citation omitted).

The court of appeals also rejected Novack's contention that he suffered an Article III injury "by virtue of being subject to the jurisdiction of the IPAB." Pet. App. 12 n.4. The court stated that "in certain circumstances, merely being subject to the jurisdiction of a governmental entity established in violation of the Constitution" may confer Article III standing. *Ibid.* (citing *Buckley* v. *Valeo*, 424 U.S. 1, 117-118 (1976) (per curiam)). But the court reasoned that "IPAB has no jurisdiction over Novack or his practice of medicine" and that Novack's "allegations that his financial interests will be affected indirectly by IPAB's future regulatory actions do not suffice" to establish an Article III injury on this theory. *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioners' claims are unripe, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Petitioners first contend (Pet. 14-23) that the court of appeals erred in holding that Coons's informational-privacy claim is prudentially unripe. That argument rests on a mischaracterization of the court's decision.

Petitioners assert (Pet. 14) that the court of appeals held that Coons cannot bring his informational-privacy challenge "until he relinquishes the personal information that he objects to disclosing." That premise underlies all of petitioners' arguments on this

issue.[4] But the decision below imposed no such requirement. Rather, the court of appeals held that Coons's claim is unripe because he has not alleged that "any third party has *requested* that he disclose his medical information as a condition precedent to obtaining the minimum required coverage." Pet. App. 16 (emphasis added). To have a ripe claim, therefore, Coons need not disclose anything to anyone. He need only identify the specific information that he would be required to disclose in order to obtain insurance. *Ibid.*; see *id.* at 17 (further factual development is required because the court had "no way to know who might seek what kind of information" from petitioner).

In fact, there is reason to doubt Coons would be required to disclose *any* personal medical information to obtain insurance coverage. The Affordable Care Act imposes no such requirement. To the contrary, the Act provides that insurers offering coverage in the individual market in a State generally "must accept every * * * individual in the State that applies for such coverage." 42 U.S.C. 300gg-1(a). Insurers are also prohibited from varying their premiums based on an individual's medical condition or history—or on any factor except age, geography, tobacco use, and the number of people covered by the policy. 42 U.S.C. 300gg(a)(1); see 42 U.S.C. 300gg-3, 300gg-4.

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[4] See, *e.g.*, Pet. 15 (the decision below held "that a plaintiff must give up his privacy—and suffer irreparable injury—before he can challenge" the individual-coverage provision); Pet. 18 ("The decision below requires a plaintiff to relinquish his privacy rights before he can challenge an unconstitutional burden on his decision to exercise those rights."); Pet. 23 (the decision below "[r]equir[es] Mr. Coons to relinquish his personal information before he can challenge the unconstitutional burden on his privacy rights").

In any event, even if one or more insurance companies would require Coons to disclose *some* medical information in order to obtain insurance, the court of appeals correctly held that his failure to identify the specific information at issue renders his claim unripe. This Court has not recognized a constitutional right to informational privacy. See *NASA* v. *Nelson*, 131 S. Ct. 746, 751, 756-757 & n.10 (2011) (reserving the question). But the courts that have done so have held that the contours of a right to informational privacy depend on factors such as "the type of information requested," "the potential for harm in any subsequent nonconsensual disclosure," "the adequacy of safeguards to prevent unauthorized disclosure," and the "public interest" at issue. Pet. App. 15-16 (quoting *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551 (9th Cir. 2004)); see also *Nelson*, 131 S. Ct. at 757-763 (considering similar factors). Coons's failure to identify the information he would be required to disclose prevented the lower courts from weighing those factors or otherwise assessing the merits of his claim. Pet. App. 16; see *id.* at 30-31. As the Sixth Circuit explained in rejecting a similar informational-privacy challenge to the individual-coverage provision, Coons's claimed injury is "highly speculative" and he has not "allege[d] any specific facts" to support it. *U.S. Citizens Ass'n* v. *Sebelius*, 705 F.3d 588, 603 (2013).

The court of appeals thus correctly held that Coons's claim is unripe because "further factual development would significantly advance [the court's] ability to deal with the legal issues presented" and because Coons will not suffer any hardship if he is required to identify with particularity the information

an insurance company would require him to disclose to obtain insurance. Pet. App. 17 (citation and internal quotation marks omitted). Petitioners do not challenge the court of appeals' formulation of the prudential ripeness test, and the court's application of that test to the particular circumstances of this case does not implicate any broader legal question warranting this Court's review.[5]

2. Petitioners also contend (Pet. 24-34) that the court of appeals erred in concluding that Novack's non-delegation challenge to IPAB is constitutionally unripe. The court of appeals correctly rejected their argument, and its decision does not conflict with any decision by this Court or another court of appeals.

a. Novack alleges that approximately 12.5% of his patients are Medicare beneficiaries and that he will suffer a financial injury if IPAB's proposals lead to a reduction in Medicare reimbursements for the services he provides. 5/10/11 Second Am. Compl. 3, 32. But that injury will come to pass only if, among other things, (1) Medicare spending increases at a rate sufficient to trigger the Board's authority to make a proposal, and (2) the Board proposes to reduce reimbursements for the specific services Novack provides. That combination of events cannot occur until at least 2019, and may never occur at all.

First, the Board will not make any proposals unless the Chief Actuary for the Centers for Medicare & Medicaid Services (CMS) determines that the rate of growth rate in Medicare expenditures exceeds a statu-

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[5] Petitioners do not ask this Court to consider "the continuing vitality of the prudential ripeness doctrine." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2347 (2014).

tory target. 42 U.S.C. 1395kkk(c)(3)(A)(i)-(ii).[6] That criterion will not be satisfied until at least 2017. See CMS, *IPAB Determination* (July 28, 2014), https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/IPAB-2014-07-28.pdf (CMS determination that the growth rate is not expected to exceed the target in 2016). And the Congressional Budget Office (CBO) has projected that "growth in Medicare spending will remain below the IPAB's target growth rate *during the next decade*." CBO, *The 2014 Long-Term Budget Outlook* 29 (July 2014), http://www.cbo.gov/sites/default/files/45471-Long-TermBudgetOutlook_7-29.pdf (emphasis added).

Second, even if IPAB is required to make a proposal in some future year, it is prohibited from proposing to reduce payments to providers like Novack until 2019. 42 U.S.C. 1395kkk(c)(2)(A)(iii). And even after that date, it is a matter of sheer speculation whether the Board would issue any proposal that would alter Medicare's physician fee schedule, let alone one that would reduce payments for the particular services Novack provides.

As the court of appeals explained, therefore, Novack's "allegations with respect to a potential future reduction in Medicare reimbursement rates" are "'wholly contingent upon the occurrence of unforeseeable events.'" Pet. App. 11 (citation omitted). Such speculative claims of contingent injury do not satisfy Article III. Indeed, this Court has "repeatedly reiter-

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[6] The Board may issue advisory reports on matters related to the Medicare program even if growth in Medicare spending does not exceed the statutory targets, but those reports do not implicate Novack's non-delegation challenge because they are nonbinding. 42 U.S.C. 1395kkk(c)(1)(B).

ated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets in original).[7]

b. Petitioners contend (Pet. 25-26) that the decision below is inconsistent with *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (*MWAA*). Petitioners appear to argue that those decisions establish that any person *potentially* affected by a regulatory body's future actions may raise an immediate separation-of-powers challenge to the body's composition or authority. But *Buckley* and *MWAA* provide no support for that departure from established Article III principles.

In *Buckley*, the Court held that a group of plaintiffs including political parties, candidates, and donors could bring a separation-of-powers challenge to the Federal Election Commission. 424 U.S. at 7-8, 114-118. As petitioners observe (Pet. 25), the Court allowed the case to go forward even though some of the Commission's challenged functions "remain[ed] as yet unexercised." 424 U.S. at 116. But the Court emphasized that the exercise of those functions was "all but

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[7] *Clapper* addressed standing rather than ripeness, but the court of appeals was properly guided by this Court's precedents on Article III standing. Where, as here, the issue is "the sufficiency of a showing of injury-in-fact grounded in potential future harms," the standing and ripeness inquiries "often 'boil down to the same question.'" Pet. App. 9 (quoting *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5).

certain" and that the plaintiffs would be affected by "impending future rulings and determinations by the Commission." *Id.* at 116-117.

Buckley thus did not hold that separation-of-powers cases are subject to a relaxed version of Article III's injury-in-fact requirement. To the contrary, the Court explained that parties "*may* have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights," but only if they have "sufficient concrete interests at stake." 424 U.S. at 117 (emphasis added). Here, Novack lacks the required concrete interest because IPAB cannot take any action affecting his interests until at least 2019, and may never take such actions at all.

MWAA also provides no support for petitioners. In that case, the Court held that a citizen group could challenge a board granted veto power over the actions of the Washington Metropolitan Airport Authority. 501 U.S. at 264-265. The Court explained that the existence of the challenged veto power had *already* influenced the approval of a plan for airport operations that resulted in "'personal injury'" to the plaintiffs in the form of "increased noise, pollution, and danger of accidents." *Ibid.* (citation omitted). Here, in contrast, IPAB's existence has not caused, and may never cause, any injury to Novack.

c. Petitioners contend (Pet. 27-30) that the courts of appeals are divided over the proper application of the standing and ripeness requirements in separation-of-powers cases. But the differing results reached by the decisions petitioners cite reflect different facts, not any legal disagreement about the requirements of Article III. More importantly, petitioners do not

identify any decision allowing a suit to go forward based on the sort of highly speculative injury alleged here.

Consistent with *Buckley*, the cases petitioners cite uniformly recognize that "parties have to demonstrate a sufficient 'personal stake' in the outcome of a controversy before they will be granted access to a federal court's remedial powers." *Reuss* v. *Balles*, 584 F.2d 461, 470 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978) (citation omitted). Thus, under those decisions, an individual could challenge the composition of a commission that subpoenaed him, *In re President's Comm'n on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 374 (3d Cir. 1986), and military employees could challenge a commission that would cause the closure of military bases at which they worked, *National Fed'n of Fed. Emps.* v. *United States*, 905 F.2d 400, 403 (D.C. Cir. 1990).[8] But a plaintiff could not challenge the makeup of an administrative body whose actions had only a "speculative" connection to the plaintiff's injuries, *Committee for Monetary Reform* v. *Board of Governors of the Fed. Reserve Sys.*, 766 F.2d

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[8] Amici Pacific Legal Foundation *et al.* err in asserting (Br. 17) that *Scarfo* held that "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." The challenger in *Scarfo* contended that a presidential commission violated the separation of powers because it included Article III judges. 783 F.2d at 372. The court specifically held that the challenger suffered a concrete injury when the commission subpoenaed him to testify. *Id.* at 373-374. The portion of the opinion on which amici rely held only that the challenger's standing was not "defeated by his inability to demonstrate that [the] injury would not have occurred if the judges had not been members of the Commission." *Id.* at 374.

538, 542 (D.C. Cir. 1985), or where the plaintiff otherwise lacked a "concrete interest[]" in the dispute, see *KG Urban Enters., LLC* v. *Patrick*, 693 F.3d 1, 15 (1st Cir. 2012).

d. Finally, petitioners contend (Pet. 30-34) that the court of appeals split with the First, Eleventh, and D.C. Circuits by holding "that an agency must take an action before a plaintiff may sue" to challenge its authority to act. But the court of appeals did not hold that a plaintiff may *never* raise a separation-of-powers challenge based on an injury attributable to future agency action—only that Novack's particular claim of injury in this case is insufficient because it is "wholly contingent upon the occurrence of unforeseeable events" that cannot occur until at least 2019 and may never occur at all. Pet. App. 11 (citation omitted). That holding was entirely consistent with this Court's precedents, which establish that "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore*, 495 U.S. at 158); see also, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury must be "actual or imminent, not conjectural or hypothetical") (citation and internal quotation marks omitted).

Nor does the decision below conflict with the First, Eleventh, and D.C. Circuit decisions on which petitioners rely. In *Riva* v. *Massachusetts*, 61 F.3d 1003 (1st Cir. 1995), the court allowed a plaintiff to challenge a statute that reduced his future retirement benefits. *Id.* at 1006-1007. The court acknowledged a "theoretical possibility" that the reduction could be averted, but it emphasized the "relative certainty" of the future injury and noted that the threatened loss of benefits was already "imposing a present hardship" on

the plaintiff. *Id.* at 1011-1012. In *Whitney* v. *Heckler*, 780 F.2d 963 (11th Cir.), cert. denied, 479 U.S. 813 (1986), the court held that doctors could challenge a statute that was already in effect and that barred them from raising their fees. *Id.* at 968 n.6. And in *National Federation of Federal Employees*, the D.C. Circuit held that a union representing military employees had standing to challenge a statute providing for the closure of military bases identified by a commission because the union's members "will lose their jobs if the base closings are carried out." 905 F.2d at 403. Each of those cases thus involved either a present injury or a future injury that was far more certain to occur than Novack's speculative claim of financial injury attributable to IPAB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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