Case No. 13-15324

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK COONS and ERIC NOVACK;
Plaintiffs-Appellants,

vs.

TIMOTHY GEITHNER (in his official capacity as Secretary of the United States Department of the Treasury); KATHLEEN SEBELIUS (in her official capacity as Secretary of the United States Department of Health and Human Services); ERIC HOLDER, JR. (in his official capacity as Attorney General of the United States); and BARACK HUSSEIN OBAMA (in his official capacity as President of the United States);
Defendants-Appellees.

APPELLANTS' BRIEF

Appeal from the United States District Court for the State of Arizona
Case No. 2:10-CV-1714-GMS, Hon. Murray Snow, presiding

Clint Bolick
Kurt Altman
Nicholas C. Dranias
Christina Sandefur
GOLDWATER INSTITUTE
Scharf-Norton Ctr. for Const. Lit.
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462-5000/F: (602) 256-7045
cbolick@goldwaterinstitute.org
kaltman@goldwaterinstitute.org

ndranias@goldwaterinstitute.org
csandefur@goldwaterinstitute.org
Attorneys for Appellants

CORPORATE DISCLOSURE STATEMENT

The Goldwater Institute is a nonpartisan, tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation. It has not issued any stock. It certifies that it has no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

JURISDICTION

The district court entered judgment on December 20, 2012, dismissing Plaintiffs' Complaint in full, ER1, and this appeal was timely filed on February 19, 2013. ER16-18; *see* Fed. R. Civ. App. P. 4(1)(B). This Court has jurisdiction over this appeal because it arises from a final decision of a district court order dismissing Plaintiffs' Complaint in full. The basis of this Court's appellate jurisdiction is 28 U.S.C. § 1291, as implemented by 9th Cir. Rule 3, which authorizes an appeal of final decisions of district courts. The basis of the district court's subject matter jurisdiction is 28 U.S.C. §§ 1331, 1340, and 1346(a)(2).

STATEMENT OF ISSUES PRESENTED FOR APPEAL

This lawsuit is a multi-faceted challenge to portions of the Patient Protection and Affordable Care Act ("PPACA"). The central issue is whether the district court erred as a matter of law in dismissing Plaintiffs' action, denying Plaintiffs Nick Coons and Dr. Eric Novack the opportunity to prove their claims set forth in counts IV (medical autonomy), V (privacy), VII (separation of powers), and VIII (non-preemption). This question involves the following sub-issues:

1) Did the District Court err as a matter of law in dismissing Count IV, ruling that Plaintiff Coons has no constitutional right to medical autonomy consisting of the freedom to spend his health care dollars on creating direct payment relationships with doctors of his own choice rather than being

forced to participate in health insurance-procured doctor-patient relationships?

2) Did the District Court err as a matter of law in dismissing Count V, ruling that (a) Plaintiff Coons' claim that PPACA violates his right to informational privacy is unripe despite the fact that it is certain PPACA will force him to divulge personal medical information to third parties; and (b) PPACA does not violate Plaintiff's right to informational privacy despite the fact that he must pay a tax penalty to avoid submitting personal medical information to third parties?

3) Did the District Court err as a matter of law in dismissing Count VII, ruling that (a) PPACA's establishment of the Independent Payment Advisory Board ("IPAB") does not violate the Separation-of-Powers doctrine even though PPACA combines unreviewable and nearly unrepealable legislative and presidential power in the hands of an executive agency; and (b) the delegation of power to IPAB is guided by an "intelligible principle" consisting of vague blandishments about cost containment despite the fact that IPAB holds vast and unaccountable power?

4) Did the District Court err as a matter of law in dismissing Count VIII, ruling that, to the extent it conflicts with Arizona law, PPACA preempts the Arizona Constitution's Health Care Freedom Act even though PPACA

invades a core area of the reserved power of the states and expressly states that it does not require anyone to participate in any health care plan?

APPLICABLE LAW

The pertinent constitutional provisions, statutes, regulations, and rules applicable to this appeal are included in the Appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

On March 23, 2010, President Barack Obama signed into law PPACA,[1] the greatest expansion of federal involvement in health care since the creation of Medicaid and Medicare in 1965. The Act introduces sweeping intrusions into personal liberty and "rewrite[s] the relationship between federal and state government." John Schwartz, *Health Measure's Opponents Plan Legal Challenges*, N.Y. Times, Mar. 22, 2010, at A20. The "individual mandate" forces virtually every American to purchase government-approved health insurance, or pay a tax for refusing to do so. ER53-54 ¶ 16; ER 55-6 ¶¶ 19-26; 26 U.S.C. § 5000A(b).

Last summer, the Supreme Court held that "[t]he Federal Government does not have the power [under the Commerce Clause] to order people to buy health insurance," but characterized the "individual mandate" as a tax for not purchasing

[1] PPACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("HCERA"). All citations herein to PPACA are to PPACA as amended by HCERA.

government-approved health insurance. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600-601 (2012) ("*NFIB*").

One consequence of purchasing a health insurance plan, especially one that provides the "minimum essential coverage" required by PPACA, is that the buyer must disclose private medical information to third parties – both the insurance company and, potentially, the government. ER70-71 ¶¶ 88-92. Another is that it diverts resources the individual would otherwise use to purchase the health care he finds necessary or desirable to buying insurance he judges unnecessary or inefficient. ER53-54 ¶¶ 16; ER69 ¶¶ 83-85. Thus, a person like Plaintiff Nick Coons, who if left free to decide would not choose to purchase one of these plans or to disclose this personal information to a privately-owned insurance corporation, is forced either to relinquish his medical autonomy and personal privacy or pay a tax penalty to the government. ER69 ¶ 83; ER70 ¶ 90. The *NFIB* Court was not asked and did not answer how the tax penalty affects an individual's rights to medical autonomy and privacy.

PPACA's most egregious feature also has not yet been reviewed on the merits by any court. IPAB is a board of unelected, unaccountable officials who exercise an unprecedented amount of unchecked authority over the health care industry. IPAB is an executive-branch agency of fifteen members appointed by the President with the advice and consent of the Senate, ER71-72 ¶ 94; 42 U.S.C. §

1395kkk(g)(1)-(4), who are charged with "reduc[ing] the per capita rate of growth in Medicare spending." ER72 ¶¶ 95-6; § 1395kkk(b). But PPACA's vague directives and lack of constraints give IPAB indefinite and apparently unlimited authority over health care in America. ER72 ¶ 98; ER78-79 ¶¶ 119-22. In fact, one of the few things that is *not* left entirely to IPAB's discretion is that every year it is required to make law unilaterally, without presidential, congressional, or judicial supervision. Whenever its proposal power is triggered,[2] IPAB must make "detailed and specific" "*legislative* proposals" that are "*related to* the Medicare program." ER72 ¶ 95; § 1395kkk(b)(1)(3); (c)(1)(A) and (c)(2)(A)(vi); (d)(1)(A)-(D); (e)(1), (3) (emphasis added). These "proposals" then automatically become law, without any vote by Congress nor signature of the President. ER80 ¶ 128. Unless Congress undertakes a prohibitively complex procedure to supersede a "proposal," the Secretary of Health and Human Services (the "Secretary") is legally required to implement it. ER72 ¶ 97; § 1395kkk(e)(1).[3]

Whether or not IPAB issues its annual legislative proposal, it may take other actions. IPAB's power extends beyond legislating for Medicare and into other

[2] IPAB's legislative proposal power is activated when in his annual report, the Chief Actuary predicts that Medicare spending will exceed a set target rate. § 1395kkk(c)(5)(C). Through 2017, the target rate is the average of medical care inflation and overall inflation (using the Consumer Price Index), and for 2018 and beyond, it is the growth of the economy per capita (using gross domestic product) plus one percent. *Id.*

[3] If the President does not appoint any Board members or the Board fails to act, the Secretary exercises IPAB's powers unilaterally. § 1395kkk(c)(5).

government and private health care markets. ER72 ¶¶ 95-6; ER72-73 ¶¶ 98-9; ER78-9 ¶¶ 119-22. *See, e.g.*, § 1395kkk(c)(1)(B) (IPAB must submit advisory reports when it does not submit legislative proposals); § (n)(1) (must submit annual public report, taking into account system-wide health care information used in drafting legislative proposals); § (o) (must submit biennial advisements to slow growth in non-federal health care expenditures); § (n)(1)(E) (may take into account "[a]ny other areas that the Board determines affect overall spending and quality of care in the private sector"); § (c)(2)(B)(vii) (must "develop proposals that can most effectively promote the delivery of efficient, high quality care to Medicare beneficiaries," taking into account markets beyond Medicare); § (o)(1)(A)-(E) (may create recommendations that require legislation to be implemented). In other words, IPAB has broad powers to regulate private health care and insurance markets, so long as its actions are, in its own unreviewable opinion, "related to the Medicare program." ER72 ¶¶ 95 and 98; ER78-79 ¶¶ 119-22. *See* § 1395kkk(c)(2)(B)(i-vii). This extensive legislative authority is not constrained in any meaningful way. *See* §§ 1395kkk(d)(3)(A)-(E) and (d)(4)(A)-(F) (limiting Congress's power to supersede or amend IPAB's proposals); § (e)(2)(B) (IPAB is exempt from administrative rulemaking); § (e)(5) (expressly prohibiting administrative and judicial review); §§ (f), (f)(1), (f)(3) (entrenching IPAB from repeal).

Alarmed at this unprecedented federal intrusion into personal health care choices, in November 2010, a majority of Arizona voters constitutionalized the Health Care Freedom Act ("HCFA"), which provides that a "law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system." ER55 ¶ 18; Ariz. Const. art. XXVII, § 2(A)(1). This provision of the state Constitution reflects the will of Arizonans to protect an individual's right to participate – or refrain from participating – in any health care system, and prohibits the government from imposing fines (including taxes) on that decision. § 2(D)(5). It also protects the rights of individuals to purchase and doctors to provide lawful medical services without penalty. ER55 ¶ 18; § 2(A)(2). In other words, HCFA preserves Arizonans' right to choose. *See generally* ER80-82 ¶¶ 130-36.

On May 10, 2011, Plaintiffs Coons and Dr. Novack filed a Second Amended Complaint ("Complaint") seeking injunctive and declaratory relief against enforcement of PPACA. ER49-85. Plaintiff Coons is an Arizona resident who does not have health insurance and objects to being compelled to purchase it and to share his private medical history with third parties. ER51 ¶ 6; ER53 ¶ 14; ER53-54 ¶ 16; ER55-56 ¶¶ 19-26; ER69 ¶¶ 83-85; ER70-71 ¶¶ 88-91. Novack is an orthopaedic surgeon who serves as a managing partner of his Arizona surgery

practice. ER51 ¶ 7. Approximately 12.5% of his patients are Medicare patients. ER51 ¶ 7.

In their Complaint, Plaintiffs sought a declaration that PPACA's individual mandate and penalty exceed Congress's constitutional authority under the Commerce Clause (Count I, ER56-62 ¶¶ 27-53) and Necessary and Proper Clause (Count II, ER62-66 ¶¶ 54-66) and are not authorized by Congress's taxing power (Count III, ER66-67 ¶¶ 67-78); that the mandate and penalty violate Plaintiffs' rights to medical autonomy (Count IV, ER68-69 ¶¶ 79-86) and privacy (Count V, ER70-71 ¶¶ 87-92) protected by the Fourth, Fifth and Ninth Amendments; that in the alternative, the individual mandate and penalty, even if constitutional, do not preempt protections afforded by the Arizona HCFA (Count VIII, ER80-82 ¶¶ 129-136); and that PPACA's provisions governing IPAB violate the constitutional Separation-of-Powers doctrine (Count VII, ER77-80 ¶¶ 115-128).[4]

On May 31, 2011, Defendants filed a Rule 12(b)(1) and (b)(6) Motion to Dismiss Plaintiffs' claims. On June 20, 2011, Plaintiffs moved to treat that Motion as a Rule 56 Motion for Summary Judgment because it presented matters outside the pleadings. Plaintiffs also filed their own Motion for Partial Summary Judgment. On August 10, 2011, Defendants also filed a Motion for Summary

[4] Plaintiffs also alleged that the anti-repeal provisions burden legislators' voting rights, ER71-77 ¶¶ 93-114, but they voluntarily dismissed this claim due to the Supreme Court's decision in *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), and do not assert it here.

Judgment while their Motion to Dismiss was pending. All motions were fully briefed. On January 17, 2012, the District Court stayed proceedings pending the United States Supreme Court's decision in *NFIB v. Sebelius*.

On June 29, 2012, the Court ruled that although Congress has no power under the Commerce or Necessary and Proper clauses to compel individuals to buy insurance, the financial penalty that PPACA imposes on individuals who do not buy insurance can be construed as an exercise of Congress's tax power. *NFIB*, 132 S. Ct. at 2608.

In light of that decision, on August 31, 2012, the District Court dismissed Counts I and II as moot and Count III on the merits. ER10-14. It also dismissed Count VII and invited the parties to submit supplemental briefing addressing whether Counts IV, V, and VIII remain viable after *NFIB*. ER10-14. In their supplemental brief filed on September 13, 2012, Plaintiffs argued that PPACA violates Coons' rights to medical autonomy, privacy, and health care freedom regardless of whether the financial penalty is construed as a mandate or a tax. ER41-48. On December 20, 2012, the district court dismissed the remaining counts (IV, V, and VIII) and entered judgment for Defendants, dismissing Plaintiffs' Complaint in full. ER2-9. It made no factual findings. *See* ER2-9. On February 19, 2013, Plaintiffs filed this timely appeal with regard to Counts IV (medical autonomy), V (privacy), VII (separation of powers), and VIII (non-preemption).

ER16-18.

SUMMARY OF ARGUMENT

The district court erred in dismissing Plaintiffs' medical autonomy, privacy, separation-of-powers, and non-preemption claims. A complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (citations and quotations omitted). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citations omitted).

In Count IV, Coons asserts a due process challenge to PPACA's tax penalty because it burdens his right to medical autonomy by forcing him to buy government-approved health insurance he does not want or pay the penalty for refusing to do so, thereby displacing and reducing the health care treatments and patient-doctor relationships he can afford. ER53-54 ¶ 16; ER69 ¶¶ 83-85. The district court erred in refusing to recognize this right, which derives from a line of Supreme Court cases acknowledging rights of this nature. *See, e.g., Cruzan v. Dir., Missouri Dept. of Health*, 497 U.S. 261 (1990); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Count V, Coons' privacy claim, likewise should not have been dismissed. That claim is ripe because it is not contingent upon particular disclosure requests

made by a third party, but rather challenges the very fact that PPACA forces Coons either to disclose personal information to third parties or pay a penalty. ER70-71 ¶¶ 88-91. Coons argues that forcing him to make this choice burdens his right to informational privacy – a right recognized by this Circuit and supported by the Supreme Court. *See NASA v. Nelson*, 131 S. Ct. 746, 751 (2011).

The district court also erred in dismissing Plaintiffs' separation-of-powers claim regarding IPAB (Count VII), because the court did not consider the claim in its entirety, nor did it apply the proper standard to its non-delegation analysis. Agency authority must be bounded by an "intelligible principle" or it is an impermissible delegation of legislative power. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 474 (2001). The greater the scope of an agency's power, the greater and more precise the constraints required. *Id.* at 475. In holding, without explanation, that an intelligible principle guides IPAB's exercise of power, the district court failed to measure the Act's constraints against the vast scope of IPAB's power, and failed to identify the intelligible principle at stake. *See* ER12 (noting only its assessment that PPACA "has met that test here"). The court also erred in only considering the *delegation* aspect of Plaintiffs' separation-of-powers claim, *see* ER12-13 ("Anti-Delegation"), when it should have considered "the aggregate effect of the factors," as discussed in Part IV(B), *infra*. *See Synar v. United States*, 626 F. Supp. 1374, 1390 (D.C. Cir. 1986), *aff'd sub nom. Bowsher*

v. Synar, 478 U.S. 714 (1986).

Finally, the district court erred in dismissing Plaintiffs' non-preemption claim (Count VIII). PPACA's penalty for not purchasing government-approved insurance, whether construed as a mandate or tax, directly conflicts with protections enshrined in the Arizona Constitution. ER54 ¶ 17; ER55 ¶ 18; ER80-82 ¶¶ 130-36. In considering whether a federal law preempts a state law, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," and a "high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Wyeth v. Levine,* 129 S. Ct. 1187, 1194-95 (2009). Plaintiffs have shown that this "high threshold" is not met here, as health care has historically been "a subject of traditional state regulation." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002). Therefore, Plaintiffs stated a viable claim.

ARGUMENT

I. Standard of review

A district court's dismissal under either Rule 12(b)(1) or 12(b)(6) is reviewed de novo, meaning that the facts alleged in the complaint are presumed true, and all inferences drawn in the light most favorable to the plaintiff. *Bates v. Mortgage Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012). Facts

are well pleaded "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (citations omitted). As discussed below, the district court's decisions dismissing Plaintiffs' claims are premised on errors of law and should be reversed.

II. The district court should not have dismissed Count IV because Plaintiff Coons has a constitutional right to medical autonomy.

In Count IV, Coons asserts a due process challenge to PPACA's tax penalty because it imposes an undue burden on his right to medical autonomy by forcing him to buy government-approved health insurance he does not want or to pay the penalty for refusing to do so, thereby penalizing his exercise of a constitutional right and displacing and reducing the health care treatments and patient-doctor relationships he can afford. ER53-54 ¶ 16; ER68-69 ¶¶ 80-86. The money Coons must use to purchase PPACA's government-prescribed health insurance – or to pay the penalty for choosing not to do so – is money that he could have used to purchase care directly from doctors he prefers, in a fee-for-service relationship. Forcing Coons to spend that money on insurance, which will not allow him to form a doctor-patient relationship as freely as fee-for-service does, reduces the resources available for creating a patient-doctor relationship of his own choice and pressures

him to form doctor-patient relationships that insurance companies allow. ER69 ¶¶ 83-85.

The district court dismissed Count IV for failure to state a claim, failing to recognize "a substantive due process right to choose medical providers and treatment." ER6. But this Court has acknowledged a right to medical autonomy, and such a right is consistent with abundant Supreme Court precedent. Dismissal of this claim was therefore error.

A. Courts recognize the right to medical autonomy.

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Coons alleges that PPACA burdens his right to medical autonomy, a liberty interest guaranteed by the Fifth and Ninth Amendments. ER68-69 ¶¶ 79-86. *See e.g., Griswold*, 381 U.S. at 484-85 (an individual's right to privacy, including right to obtain one's chosen medical treatment from a physician of one's choice, is protected by the Constitution).

The district court's dismissal effectively capped the liberty interests protected by the Constitution, excluding medical autonomy. *See* ER6. The district court's narrow list of constitutional protections – which included "personal

decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" but little else, *id.*, misconstrues Supreme Court precedent in a manner that seriously curtails individual privacy rights. For this reason alone, the dismissal should be reversed and Plaintiffs should be allowed to prove their claim.

The Supreme Court recognizes liberty interests in medical autonomy that are inherent in substantive due process. These include the right to refuse unwanted medical treatment, *Washington v. Glucksberg*, 521 U.S. 702 724 (1997); rights preserving "the special relationship between patient and physician," *Cruzan*, 497 U.S. at 281, 340 n.12; and the "right to care for one's health and person and to seek out a physician of one's own choice." *Doe v. Bolton*, 410 U.S. 179, 218 (1973) (Douglas, J. concurring). These "fundamental rights and liberties . . . are, objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (citation and quotations omitted). In short, the Supreme Court has acknowledged the right to medical autonomy in two significant lines of cases: one that bars the government from compelling individuals to undergo medical procedures, such as in *Cruzan*, 497 U.S. 261; and one that bars government from interfering with an individual's choice to obtain care, such as in *Roe*, 410 U.S. 113; *Griswold*, 381 U.S. 479; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The Court has "long recognized that the liberty to make the decisions and

choices constitutive of private life is so fundamental to our 'concept of ordered liberty,' that those choices must occasionally be afforded more direct protection." *Cruzan*, 497 U.S. at 342 (citation omitted); *see also Roe*, 410 U.S. at 163. Coons' medical autonomy claim is consistent with the Supreme Court's protection of the right to make one's own private medical decisions. Construing this right narrowly to exclude Plaintiffs' claim clashes with that framework and jeopardizes other personal rights.

B. This Court does not permit regulations that unduly burden the right to medical autonomy.

Because Coons has identified a protected liberty interest, ER70-71 ¶¶ 87-92, he should be afforded the opportunity to prove that PPACA unduly burdens his right to medical autonomy. Where, as here, fundamental rights are involved, regulation limiting these rights must be narrowly tailored to achieve a compelling state interest. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Griswold*, 381 U.S. at 485.

In the context of the right to medical autonomy, this Court has held that increased costs in obtaining medical procedures could present a substantial obstacle to exercising rights. In *Tucson Woman's Clinic v. Eden*, this Court noted that whether the government has impermissibly burdened a right is "record-dependent" and that factors such as the "usurping of providers' ability to exercise medical judgment" are relevant to that inquiry. 379 F.3d at 542 ("there is no

indication in [*Planned Parenthood v.*] *Casey* or any other case that such burdens are somehow irrelevant to the analysis of whether a law imposes a substantial obstacle"). This Court has also long recognized that penalizing a person for exercising his constitutional rights can constitute a deprivation of those rights. *See, e.g., United States v. Chavez*, 627 F.2d 953, 955-57 (9th Cir. 1980); *see also United States v. Frierson*, 945 F.2d 650, 658-59 (3d Cir. 1991). Coons has alleged that he will have to pay the penalty tax because he does not wish to purchase government-approved insurance. ER53-54 ¶¶ 14-16. He should be allowed to present proof of his claim that this impermissibly burdens his rights.

For the purpose of Plaintiffs' medical autonomy claim, it does not matter that the Supreme Court has construed PPACA's mandate as an exercise of Congress's tax power. Mandate or tax, PPACA places a substantial burden on Coons' ability to exercise this right. Congress's enumerated powers are constrained by the Constitution's protections for individual freedom of choice. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [a court's] delicate and difficult task to determine whether the resulting restriction on freedom can be tolerated." *United States v. Robel*, 389 U.S. 258, 264 (1967) (citations omitted) (striking down law banning member of communist organization from working in defense facility as inconsistent with freedom of association).

Even construed as a tax, PPACA "seeks to shape [individual] decisions about whether to buy health insurance." *NFIB*, 132 S. Ct. at 2596. As such, Plaintiffs submit that it imposes an undue burden on the right to exercise medical autonomy. *See Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality) (regulation may not "impose[] an undue burden on [the] ability to make [a] decision . . . [at] the heart of the liberty protected by the Due Process Clause"). The *NFIB* Court itself acknowledged that "Congress's ability to use its taxing power to influence conduct is not without limits," and that "exactions obviously designed to regulate behavior" or that were so burdensome as to constitute a "penalty with the characteristics of regulation and punishment," would be unconstitutional. 132 S. Ct. at 2599-2600 (citations omitted). But such questions were not raised or resolved in that case and are appropriate for consideration here.

Coons has alleged that the tax penalty forces him to divert his limited financial resources to obtaining a health care plan he does not desire. Otherwise, he must cut other expenses to pay the exaction. ER53-54 ¶¶ 14-16; ER69 ¶¶ 83-85. Either he must pay a penalty, thereby reducing his ability to choose the health care treatments and doctor-patient relationships he would prefer, or he must yield his decision-making on this matter of fundamental personal importance to a private insurance company. This unduly burdens Coons' right to medical autonomy. *Id.* This is sufficient to state a claim and all that is required at the motion to dismiss

stage.

III. The district court improperly dismissed Count V because the claim is ripe, and the burden on Plaintiff Coons' right to informational privacy is not assuaged by characterizing the penalty as a tax.

The district court erred in dismissing Coons' privacy claim on the grounds that it is unripe and failed to state a claim. *See* ER7-9. In Count V, Coons has asserted that the tax forces him either to disclose personal information to a third party insurance company – to which the government also has access – or pay an exaction for refusing to do so, in violation of his right to personal privacy under the federal Constitution and his right not to participate in a health care program against his will as guaranteed by the State Constitution (see *infra* Section V). ER70-71 ¶¶ 88-92. As the district court recognized, "Coons [is] arguing that the PPACA violates his constitutional rights because it requires him to disclose personal information to third parties . . . or to pay the tax penalty." ER8. That claim is not contingent upon "disclosure request[s] made by a third party," *id.*, and is therefore ripe. Because Coons has asserted a viable claim, he should be afforded the opportunity to prove that PPACA unduly burdens his constitutional rights.

A. Plaintiff's privacy claim is ripe.

Although the district court found Plaintiff's privacy claim to be unripe because "Plaintiffs have not alleged a specific disclosure requested by an insurance company," it later recognized that "Coons may be arguing that the PPACA violates

his constitutional rights because it requires him to disclose personal information to third parties *at all* or to pay the tax penalty." ER8. This latter assessment is accurate. Coons' claim is not contingent upon future events. *See* ER70-71 ¶¶ 89-91; ER47 ("PPACA unduly burdens [Plaintiffs'] ability to exercise that right by forcing him choose between entering into relationships that require him to relinquish such information, or paying a penalty").

To establish standing, a plaintiff need only "demonstrat[e] that, if unchecked by the litigation, the defendant's allegedly wrong behavior will likely occur or continue, and that the threatened injury [is] certainly impending." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000) (citations and quotations omitted). Ripeness is a "question of timing. . . . Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citations omitted). Ripeness is determined by considering (1) the "fitness of the issues for judicial decision," and (2) the "hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). As with general standing, where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974).

PPACA sets a certain deadline – January 2014 – by which Coons must

obtain "minimum essential coverage," which in turn requires him to disclose sensitive personal information to third parties or pay the tax penalty. ER55-56 ¶¶ 19-26; 26 U.S.C. § 5000A. The courts will be in no better position later than they are now to address Coons' privacy claim. Likewise, the government loses nothing by litigating this claim now rather than later.

But Coons may suffer irreversible harm from delay. His claim is simple: unless he pays the tax penalty, PPACA forces him to disclose personal information to insurance corporations and the federal government. ER70 ¶¶ 88-89; *see* § 42 U.S.C. § 18081(g)(1); 26 U.S.C. § 5000A(f); ER8-9 (PPACA requires Plaintiff to disclose information to "an insurance company or to the Government" to "determine eligibility" and to "obtain 'minimum essential coverage'"). Additionally, concern that the government will abuse this information upon possession has intensified in recent weeks, given the revelation that the very same IRS official who supervised the targeting of politically conservative groups seeking tax-exempt status now oversees the IRS' enforcement of PPACA. *See* John Parkinson and Steven Portnoy, *IRS Official in Charge During Tea Party Targeting Now Runs Health Care Office*, ABC News, May 16, 2013, *available at* http://abcnews.go.com/blogs/politics/2013/05/irs-official-in-charge-during-tea-party-targeting-now-runs-health-care-office/.

To the extent that the district court dismissed Coons' privacy challenge as

unripe, that decision was improper.

B. The burden on Plaintiff's privacy is not assuaged by construing the penalty as a tax.

Construing the mandate as a tax may have altered the label by which that burden is identified, *compare* ER70 ¶ 88 (PPACA "*forces . . . Plaintiff Coons to disclose* or authorize to be disclosed [personal information and medical records] to health plans and health insurance issuers") (emphasis added) *with* ER47 (PPACA is "*forcing him choose between* entering into relationships that require him to relinquish such information, or paying a penalty") (emphasis added), but it does not eliminate or diminish the burden on Coons' privacy rights.

The Constitution bars violations of informational privacy by means other than a constitutionally authorized search. *See York v. Story*, 324 F.2d 450, 456 (9th Cir. 1963) (distribution of photos by police department was not a search under the Fourth Amendment but was nevertheless an "intrusion upon the security of [plaintiff's] privacy"). Acknowledging the threat of such intrusions to personal security, this Court has consistently recognized the right to informational privacy. *See, e.g.*, *Marsh v. Cnty of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012) (parents have the right to control deceased children's information due to "substantive due process right to family integrity"); *Tucson Woman's Clinic*, 379 F.3d at 551 ("Individuals have a constitutionally protected interest in avoiding 'disclosure of personal matters,' including medical information"); *Planned*

Parenthood of S. Ariz. v. Lawall, 307 F.3d 783, 789-90 (9th Cir. 2002) (a minor has a privacy interest in avoiding disclosure of her pregnancy status in a judicial bypass proceeding used in lieu of parental consent); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality" because "[o]ne can think of few subject areas more personal and more likely to indicate privacy interests than that of one's health").

Substantiating this Court's respect for informational privacy, the Supreme Court recently assumed, without deciding, that "the Constitution protects a privacy right of the sort mentioned in *Whalen* [*v. Roe*, 429 U.S. 589 (1977)] and *Nixon* [*v. Administrator of General Services*, 433 U.S. 425 (1977)]," that is, "an interest in avoiding disclosure of personal matters" or the "right to informational privacy." *Nelson*, 131 S. Ct. at 751, 754 (citations omitted) (information relating to medical treatment falls within the domain protected by the right to privacy).

Coons' claim is that the federal government is forcing him to disclose to third parties sensitive medical and private information he would otherwise keep private, or to pay a penalty to preserve that privacy. The compelled disclosure does not stop at insurance companies. Once disclosed to an insurer, this information is subject to transfer to the government, ER70-71 ¶¶ 88-92, because the Supreme

Court has held that individuals lack a reasonable expectation of privacy in information they "voluntarily" share by contracting with private companies. *United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. Jacobson*, 466 U.S. 109, 117 (1984). *See also* "Health Insurance Portability and Accountability Act of 1996, Pub. L. No.104-191, 110 Stat. 1936; 42 U.S.C. §§1320a-3a, 1395cc (permitting the federal government to collect personal information from insurers). And federal law authorizes insurance companies to disclose personal medical information, history, and records to government agencies for law enforcement and regulatory purposes without that person's consent. *See generally* 45 C.F.R. § 164.512 ("uses and disclosures for which an authorization or opportunity to agree or object is not required"). Thus by penalizing Coons for withholding information from insurance corporations, PPACA also compels him to make that information available for government appropriation.

In dismissing Coons' privacy claim, the district court held that "the fact that the PPACA may make it 'more difficult' to exercise [a privacy] right does not invalidate the Act." ER9 (citing *Casey*, 505 U.S. at 874). But Coons contends that this "difficulty" is actually compulsion because the penalty impermissibly burdens his exercise of the right to privacy. That is a fact-driven inquiry subject to fact-

finding in the district court.[5]

This Court has held that a number of factors must be considered when determining whether government has burdened the right to informational privacy, including: (1) the type of information demanded; (2) the potential for harm from subsequent non-consensual disclosure; (3) the adequacy of safeguards to prevent unauthorized disclosure; (4) the degree of need for access; and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. *Tucson Woman's Clinic*, 379 F.3d at 551. These factors are not exhaustive, but are "to be considered among others to decide 'whether the governmental interest in obtaining information outweighs the individual's privacy interest.'" *Seaton v. Mayberg*, 610 F.3d 530, 538 (9th Cir. 2010). Other circuits recognizing the right to informational privacy employ similar balancing tests. *See, e.g., Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (collecting cases and recognizing that "[m]ost courts . . . appear to agree that privacy of personal matters is a protected interest . . . and that some form of

[5] Recent testimony by the I.R.S. Deputy Commissioner reveals that *all* taxpayers will be required to "report[] their health insurance coverage" on income tax returns, regardless of whether or not they opt to obtain government-approved insurance. Written Testimony of Steven T. Miller, Deputy Commissioner for Services and Enforcement, Internal Revenue Service, Before the House Committee on Ways and Means, Subcommittee on Oversight, Hearing on Implementation of Tax Law Changes in the Affordable Care Act, September 11, 2012, *available at* http://waysandmeans.house.gov/uploadedfiles/miller_testimony_os911.pdf. Coons should be afforded the opportunity to introduce evidence regarding these requirements.

intermediate scrutiny or balancing approach is appropriate as a standard of review"); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993) (striking down statute conditioning the right to vote on disclosure of social security number because "[t]he statutes at issue compel a would-be voter in Virginia to consent to the possibility of a profound invasion of privacy when exercising the fundamental right to vote" and thus the plaintiff's fundamental right to vote is "substantially burdened"). Here, the district court conducted no such analysis, but summarily dismissed Plaintiffs' claim. ER6-8. That was reversible error.

PPACA forces Coons to make the difficult choice of yielding private health information to third parties, thus surrendering his Fourth Amendment expectation of privacy in that information, or pay a penalty. The fact that he "has the option" to pay the tax penalty, ER9, does not eliminate or diminish Plaintiff's claim. The issue is whether being forced to choose between those options rises to the level of an impermissible burden. Essentially, Coons must pay to preserve his constitutional rights, which he asserts is unconstitutional. *Cf. Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (the law put plaintiff "between the Scylla of intentionally flouting [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid [being] penal[ized]"). The decision below made no finding as to this issue.

As discussed in Section II, *supra*, even construed as a tax, PPACA unduly

burdens Plaintiff Coons' ability to exercise his privacy right by penalizing him for refusing to relinquish sensitive information. The Constitution prohibits "obstacles [that] . . . impact[] upon the . . . freedom to make a constitutionally protected decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977). Through discovery, Coons will establish that despite PPACA's "guaranteed issue" requirements barring insurers from refusing coverage on the basis of pre-existing conditions, *see* 42 U.S.C. § 300gg *et seq.*, insurance companies nevertheless routinely request information about an insured's pre-existing medical conditions. This seems all too reasonable given that insurance companies, like any responsible business, must consider such factors when planning their budgets. Likewise, discovery will show that choosing either option – purchasing government-approved insurance or paying the tax penalty – displaces and reduces the health care treatments and patient-doctor relationships Coons can choose.

The district court afforded Plaintiff no opportunity to present evidence to prove his privacy claim, nor did it address any of the relevant factors discussed above. Its dismissal is inconsistent with Supreme Court precedent and contrary to this Court's acknowledgement of the right to informational privacy, a burden upon which may only be sustained "upon a showing of proper governmental interest." *Tucson Woman's Clinic*, 379 F.3d at 551 (citations omitted). Plaintiff has stated a plausible claim for relief. The dismissal should be reversed.

IV. The district court improperly dismissed Count VII because Plaintiff Novack has stated a claim that IPAB violates the separation-of-powers doctrine.

PPACA creates an autonomous lawmaking entity called IPAB and gives it the power to make laws without Congressional approval or the signature of the President. ER80 ¶ 128. The public cannot shape its edicts, as its members are not elected, ER71-72 ¶ 94, nor are they required to engage in notice-and-comment rulemaking. 42 U.S.C. § 1395kkk(e)(2)(B). Its actions are immune from both administrative and judicial review. § 1395kkk(e)(5). Its powers are vast – it can set price controls, levy taxes, and even – notwithstanding PPACA's unenforceable claim to the contrary – ration care, so long as its actions are "related to the Medicare program." ER72 ¶¶ 95, 98; ER78-79 ¶¶ 119-22. *See* § 1395kkk(c)(2)(B)(i-vii). In short, it combines the powers of every branch of government but is accountable to none.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citations omitted). "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011).

To safeguard liberty from the specter of tyranny that accompanies consolidated power, the Constitution's Framers established a federal government of limited powers. *See* The Federalist No. 45 at 289 (James Madison) (C. Rossiter ed., 1961) ("The powers delegated by the . . . Constitution to the federal government are few and defined"). These powers are separated into three branches, each circumscribed by function and curbed by the checks and balances of the other branches. *Id.*, Nos. 47-8 at 297-310 (James Madison). The legislative power is vested in Congress because it is the branch most accountable to the people. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); The Federalist No. 57, *supra*, at 348-53 (James Madison). To protect the people from unaccountable decisionmakers, Congress may not delegate its lawmaking power to an independent body. *See* John Locke, *Second Treatise of Civil Government* 408-09 (Peter Laslett, ed., Oxford Univ. Press, rev. ed. 1963) (1690) ("The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, . . . the Legislative can have no power to transfer their Authority of making laws, and place it in other hands").

But the separation-of-powers principle prohibits more than just broad delegations of *legislative* authority – it also prohibits consolidating the powers of the other branches of government. The Supreme Court has "reaffirmed[] the central judgment of the Framers of the Constitution that, within our political

scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Constitution does not allow the whole power of one department to be exercised "by the same hands which possess the whole power of another department." *Id.* "[T]his system . . . was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

IPAB is perhaps the most egregious consolidation of power in American history. Because the district court did not consider Plaintiffs' separation-of-powers claim in full and erred as a matter of law in determining that PPACA's delegation of legislative power to IPAB is governed by an intelligible principle, the dismissal of Count VII should be reversed.

A. PPACA impermissibly delegates legislative authority to IPAB.

Congress answers to the people, who exert a vital check on the legislative power. Recognizing that it is sometimes "impracticable for the legislature to deal directly" with administrative "details," the Supreme Court has acknowledged that Congress may create a "selected instrumentalit[y]" to generate "subordinate rules within prescribed limits" of the laws it has created. *Currin v. Wallace*, 306 U.S. 1, 15 (1939). But such an agency may not supplant Congress's lawmaking role by

making a "determination of the legislative policy." *Yakus v. United States*, 321 U.S. 414, 424 (1944). Congress must always retain its legislative function, while an agency may discharge nondiscretionary functions within that legislative framework. *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) ("a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details"). In short, Congress cannot delegate the "power to make the law," but can only "confer[] authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Loving*, 517 U.S. at 758-59.

The unprecedented consolidation of power in IPAB violates separation-of-powers in multiple ways. First, Congress must devise an "intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform"; otherwise, "such legislative action is . . . a forbidden delegation of legislative power." *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928). "[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it" to another entity. *Id.* at 406. To survive a delegation challenge, Congress "must clearly delineat[e] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73. Determining whether Congress has permissibly created an agency to administer the law or impermissibly delegated its own authority to legislate is "a

question of degree." *Id.* at 415 (1989) (Scalia, J., dissenting). Courts examine an agency's guiding "standards, definitions, context, and reference to past administrative practice" when determining whether a law contains intelligible principles to "guide and confine administrative decision-making." *Bowsher*, 478 U.S. at 720.

In dismissing Plaintiffs' separation-of-powers claim, the district court's delegation analysis was truncated, declaring without explanation that the government "has met that test" of "clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." ER12. But what "intelligible principle" has Congress set forth to constrain IPAB? The district court did not identify any. PPACA empowers IPAB to create "proposals," both advisory (42 U.S.C. §§ 1395kkk(c)(1)(B); (n); (o)) and legally binding (*see, e.g.*, §§ (c)(2); (e)(1)), "on matters related to the Medicare program" (§§ (c)(1)(B); (c)(2)(A)(vi)), to "reduce the per capita rate of growth in Medicare spending." § (b). This is an extremely broad commission – for instance, what does it mean to be "related to" Medicare? – Yet the district court did not identify the "intelligible principle" here, or identify any constraints on IPAB's powers.[6] IPAB

[6] It is telling that IPAB was originally deemed the Independent *Medicare* Advisory Board, but was later changed to the Independent *Payment* Advisory Board, *see* Pub. L. No. 111-148, 124 Stat. 952 (2010), indicating that IPAB's vast regulatory exceeding the field of Medicare was intentional. As one of PPACA's steadfast enthusiasts conceded, "[T]he conscious abdication of congressional responsibility

is authorized to make policy "recommendations" for the nation's *entire* health insurance market – public *or* private – if it deems such policy "related to the Medicare program." *See* §§ 1395kkk(c)(2)(B) (i-vii) and (n). For instance, IPAB must issue a report on "system-wide health care costs, patient access to care, utilization, and quality-of-care that allows for comparison by region, types of services, types of providers, and both *private* payers and the program under this title," § 1395kkk(n)(1) (emphasis added), with attention to "other areas that *the Board determines* affect overall spending and quality of care in the *private sector*." § (n)(2)(E) (emphasis added). That language demonstrates that IPAB defines its own authority and that it is not limited to Medicare. These reports in turn serve as the basis of IPAB's "proposals," which automatically become law. *See* §1395kkk (c)(2)(B)(vii). IPAB must also promulgate cost-cutting recommendations for "Non-Federal Health Care Programs." § 1395kkk(o)(1).

The court's dismissal was premature because the sufficiency of an intelligible principle turns upon its *proportionality* to the scope of the delegated power. The greater the scope of an agency's power, the greater and more precise the constraints required to restrain that power. *See, e.g., Whitman*, 531 U.S. at 475 (degree of oversight necessary "varies according to the scope of the power

---

to the IPAB is striking." Timothy Stoltzfus Jost, *Focus on Health Care Reform: The Independent Medicare Advisory Board*, 11 Yale J. Health Pol'y L. & Ethics 21, 21 (2011).

congressionally conferred"); *Synar*, 626 F. Supp. at 1386 (constitutionality of delegation must be judged "not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions . . . the standards must be correspondingly more precise"). If the scope of an agency's authority is very broad, as it is here, its actions necessarily involve a great deal of discretion. Left unconstrained, "[t]he very choice of which portion of power to exercise" is "an exercise of the forbidden legislative authority." *Whitman*, 531 U.S. at 473.

In dismissing Plaintiffs' claim, the court may have supposed that IPAB is sufficiently constrained because PPACA prohibits it from issuing regulations that "ration health care, raise revenues or Medicare beneficiary premiums under [Medicare A and B], increase Medicare beneficiary cost-sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility requirements." §1395kkk(c)(2)(A)(ii). But these broad generalities hardly constrain IPAB's authority. PPACA defines none of these terms. One would be hard-pressed to determine how, short of rationing care, IPAB could possibly meet its mandate of reducing Medicare spending if it cannot increase beneficiary contributions or alter eligibility for the program. Its remaining option – decreasing reimbursement rates for medical supplies and services – could easily diminish the

availability of supplies and services to Medicare patients.[7] And if IPAB *does* ration care – whether directly or indirectly – *PPACA explicitly makes IPAB its own judge of whether it is acting lawfully*. *See* § 1395kkk(e)(5) (insulating IPAB from judicial and administrative review). Section 1395kkk(c)(2)(A)(ii) provides only the pretense of restraint. The breadth of the general discretion vested in IPAB stands "in stark contrast to the detail and specificity with which Congress has written Medicare payment statutes for the past quarter century, and these provisions grant breathtaking discretion . . . to the IPAB." Timothy Stoltzfus Jost, *The Real Constitutional Problem with the Affordable Care Act*, 36 J. Health Pol. Pol'y & L. 501, 504 (2011).

Weighed against IPAB's expansive scope, the only candidates for "intelligible principles" are hollow. *See, e.g., Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 746 (D.D.C.

---

[7] For example, *see* Jost, *The Real Constitutional Problem*, *supra* at 505:

> To give one example, a complex body of laws regulates Medicare payment for chemotherapy. The IPAB could propose a new payment system that would waive these requirements, dramatically reducing payments for the chemotherapy drugs or to doctors who administer them. This proposal might arguably violate the clause that enjoins the IPAB from establishing systems that ration care or restrict benefits, but these vague limitations certainly do not expressly prohibit such a proposal. Moreover, if HHS implemented the proposal, this decision would be immune from judicial review. Thus HHS could dramatically reduce access to chemotherapy, ignoring existing law and avoiding judicial review.

1971) (a guiding standard "establishes a principle of accountability" for purposes of the non-delegation doctrine if "compatibility with the legislative design may be ascertained not only by Congress *but by the courts and the public*"). *See also Arizona v. California*, 373 U.S. 546, 583-85 (1963) (upholding delegation to Secretary of Interior where Secretary's power to apportion Colorado River water could be reined in by congressional oversight or judicial review); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532-34 (1935) (noting importance to non-delegation challenge of "administrative procedure" and "judicial review to give assurance that the action of the commission is taken within its statutory authority" when agency authority has "broader range"). The necessary judicial inquiry requires far more than the perfunctory and conclusory analysis the court applied. The district court should not have dismissed Plaintiffs' separation-of-powers claim on the basis that there is an intelligible principle guiding IPAB.

B. IPAB also consolidates power in violation of constitutional separation of powers.

The district court also erred in completely failing to consider the grander aspect of Plaintiffs' separation-of-powers claim: the excessive consolidation of power in IPAB. *See* ER12-13; ER77-80 ¶¶ 115-128. The non-delegation doctrine is only one subset of separation of powers. IPAB, however, violates the principles of separation of powers by consolidating the powers of *every* branch of government while being accountable to *none*.

In dismissing Plaintiffs' claim, the district court failed to take into account the multiple factors that courts consider when judging separation-of-powers claims. When analyzing a separation-of-powers claim, "the first step is to identify the applicable test. There is no universal test for separation of powers cases. The landscape is littered with a multitude of tests, each of which has its own area of application." Jonathan R. Siegel, *Finding Sigtarp in the Separation of Powers Labyrinth*, 68 Was. & Lee L. Rev. 447, 449 (2011). Which test – or combination of tests – is applicable depends on the circumstances. Courts have "decline[d] to adopt formalistic and unbending rules" and instead "weigh[] a number of factors," *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986), considering "the aggregate effect of the factors," *Synar*, 626 F. Supp. at 1390. Beyond considering whether an agency is guided by an intelligible principle (an inquiry relevant to the non-delegation doctrine), courts consider the presence of other safeguards, such as whether the agency is subject to judicial review and rulemaking requirements. *See, e.g. J. W. Hampton*, 276 U.S. at 405 (upholding delegation to the Tariff Commission in part because the agency engaged in notice-and-comment rulemaking before making recommendations); *Mistretta*, 488 U.S. at 393–94 (upholding the Sentencing Commission in part because it was subject to the Administrative Procedures Act and subject to Congress's power to "revoke or amend any or all of [its] Guidelines as it sees fit either within the 180-day waiting

period . . . or at any time").

The intelligible principle test is specific to a non-delegation claim, when legislative power has been delegated to an executive agency. *See, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529-42. But where, as here, a law bestows upon an executive agency *other* powers, courts must also consider how the other branches are affected. For example, when the legislature expands its scope of authority to the detriment of the other branches, the test is "the nonaggrandizement principle." Siegel, *supra*, at 450; *Synar*, 478 U.S. at 734-36. When Congress precludes *itself* from acting, "it runs into the principle that 'one legislature may not bind the legislative authority of its successors.'" Siegel, *supra*, at 450; *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996). When the legislative power curbs the executive power, "the test is whether Congress is impeding the President's ability to perform his constitutional duty." Siegel, *supra*, at 451 n.19; *Morrison v. Olson*, 487 U.S. 654, 691 (1988). And when a law confers power on an executive agency at the expense of the judiciary, "the Court applie[s] a more stringent test," which is a "multi-factor balancing test." Siegel, *supra*, at 451 and n.19; *Schor*, 478 U.S. at 851. Because IPAB combines the power and infringes upon the authority of each branch, a court must consider all of these factors.

Taking into account the "aggregate effect of the factors," IPAB violates the

separation-of-powers doctrine by blurring the boundaries between the three branches, usurping power from each, and forsaking the corresponding constraints. PPACA is a super-legislature with full lawmaking powers that evade notice-and-comment rulemaking and trump Congress's ability to alter or amend its proposals. 42 U.S.C. §§ 1395kkk(d)(2)(D); (d)(3); (d)(4)(B); (d)(4)(D); (e)(1)(f); (e)(3)(B). It is an agency that sidesteps the president's constitutional authority to recommend to Congress only such measures as he considers expedient. § 1395kkk(c)(4) (requiring the president to pass the proposals directly to Congress); U.S. Const. art. II, § 3. And it is the final arbiter of its own actions, whose judgment transcends judicial and administrative review. § 1395kkk(e)(5). PPACA removes Congress – the branch closest to the people – from its historical role as architect of Medicare policy, and cedes this authority to fifteen unaccountable administrators, who may all be from one political party. § 1395kkk(g).[8] As icing on the cake, PPACA

[8] In fact, PPACA may very well cede this authority to just one individual – the Secretary of Health and Human Services. The Act empowers the Secretary unilaterally to create and implement IPAB proposals when members fail to do so, including when Board positions have not been filled. § 1395kkk(c)(5). *See also* Congressional Research Service to Honorable Tom Coburn, from Christopher M. Davis, *Independent Payment Advisory Board: Contingent Development by the Secretary of Health and Human Services of a Legislative Proposal Relating to Medicare*, May 9, 2013, at 2, *available at* http://www.coburn.senate.gov/public//index.cfm?a=Files.Serve&File_id=7ff759a3-255c-4a3c-abb1-32ea78cd82fa (PPACA "appear[s] to create a requirement that the Secretary of Health and Human Services develop and submit such a proposal for reducing the per capita growth in Medicare spending in the absence of a required IPAB recommendation, regardless of the reason that the IPAB has not

attempts to forbid Congress from even repealing the provisions relating to IPAB. § 1395kkk(f).

Outside of a vanishingly small window in 2017, PPACA completely insulates IPAB from repeal. *See* §§ 1395kkk(f); (f)(1); (f)(3). In order to repeal IPAB, Congress is *required* to enact a "Joint Resolution," § 1395kkk(f)(1)(C)-(D), but is prohibited from even introducing such a resolution until 2017 *and* no later than February 1, 2017, and the Resolution must be enacted no later than August 15, 2017, or Congress is forever foreclosed from abolishing IPAB. *See* § 1395kkk(f)(3). If such a resolution is introduced, the Act requires an unprecedented super-majority vote requirement for passage of the resolution: three-fifths of all *elected* members of Congress. § 1395kkk(f)(2)(F). Even in the event such a resolution could clear these hurdles, the dissolution would not become effective until 2020. § 1395kkk(e)(3)(A). And if Congress fails to repeal IPAB during this short period, it forever loses the ability to replace IPAB proposals, § 1395kkk(e)(3)(A)(ii), meaning IPAB will have completely displaced congressional authority in this area.

However, one Congress has no power to tie the hands of future Congresses, which is precisely what IPAB's anti-repeal provision does. The Constitution gives "All legislative Powers herein granted" to "a Congress of the United States." U.S.

---

submitted a proposal"). The President has yet to appoint any members to serve on IPAB. Thus, the Secretary currently wields the Board's power.

Const. art. I, § 1. That Congress may not supersede the Constitution by statute was recognized by Justice John Marshall as being "one of the fundamental principles of our society." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). William Blackstone stated that "Acts of parliament derogatory from the power of subsequent parliaments bind not." 1 William Blackstone, *Commentaries* *90. Thomas Jefferson noted that if a present legislature were to "pass any act, and declare it shall be irrevocable by subsequent assemblies, the declaration is merely void, and the act repealable, as other acts are." Thomas Jefferson, *Notes on the State of Virginia* 126 (Wells and Lilly 1829); *see also* Virginia Act for Establishing Religious Freedom in *Jefferson: Writings* 346, 348 (Merrill Peterson, ed. 1984) ("[W]e well know this Assembly, elected by the people for the ordinary purposes of legislation only, have no powers equal to our own and that therefore to declare this act irrevocable would be of no effect in law").

IPAB's anti-repeal provision removes these basic legislative powers from future congresses, thereby diminishing Congress' constitutional powers via statute. This is true even if Congress tries to entrench an agency through its internal rulemaking powers, because Congress may not use its rulemaking authority to surmount constitutional restraints. *See United States v. Smith*, 286 U.S. 6, 33 (1932). *See also* Akhil Reed Amar, *America's Unwritten Constitution* 367 (2012) ("Each house can make rules for itself. But neither house can entrench rules in a

way that prevents a later house from governing itself. Only the Constitution can create entrenched rules. . . . And on this issue, the rule that the Constitution has entrenched for each house is majority rule").

PPACA also infringes upon the President's power to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II § 3. Presidents, including President Obama, have routinely asserted their authority under the Recommendations Clause. *See* Statement on H.R. 1105, Omnibus Appropriations Act, March 11, 2009 ("Several provisions of the Act . . . effectively purport to require me . . . to submit budget requests to Congress in particular forms. Because the Constitution gives the President the discretion to recommend only 'such Measures as he shall judge necessary and expedient' . . . I shall treat these directions as precatory"); *see also* Statement by President Clinton on S. 2327, Oceans Act of 2000, Aug. 7, 2000 ("The Recommendations Clause . . . protects the President's authority to formulate and present his own recommendations [to Congress.]" President Clinton construed the statute so as not to extend to proposals or responses that he did not wish to present). When the Secretary develops a proposal in IPAB's stead, PPACA states the president "shall within 2 days submit such proposal to Congress." 42 USC § 1395kkk(c)(4). Without question, this "imped[es] the President's ability to perform his constitutional duty." *See* Siegel, *supra*, at 450.

In the face of this striking degree of agency autonomy, PPACA also expressly prohibits administrative and judicial review of IPAB's "proposals" (that automatically become law). § 1395kkk(e)(5). In a separation-of-powers challenge, just as this Court has held that the availability of judicial review weighs in favor of upholding a statute, *United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992), the lack of judicial review factors against a challenged statute. *See supra* Section IV(A). Moreover, notice-and-comment rulemaking normally imposes a public check on agencies. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004) (rulemaking is "designed to give interested persons, through written submissions and oral presentations, an opportunity to participate in the rulemaking process"); Kevin M. Stack, *Agency Independence After PCAOB*, 32 Cardozo L. Rev. 2391, 2398 (2011) (rulemaking "provides the most significant response to the dangers posed by combination of agency functions, and enforceable requirements for separation of functions"). Thus, on the rare occasion that an agency has been shielded from judicial review, that agency may still survive a separation-of-powers challenge if it is subject to rulemaking. *See J.W. Hampton*, 276 U.S. at 405 (Tariff Commission upheld because it issued recommendations only after giving notice and an opportunity to be heard); *Mistretta*, 488 U.S. at 394 (although not subject to judicial review, Sentencing Commission upheld because it engaged in APA notice-and-comment rulemaking and was fully accountable to Congress); *United States v.*

Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991) (the lack of judicial review in the Sentencing Reform Act was offset by "ample provision for review of the guidelines by the Congress and the public" and therefore, "no additional review of the guidelines as a whole is . . . necessary"). But IPAB is not subject to notice-and-comment rulemaking.

IPAB's immunity from judicial or administrative review can be viewed as "inverse delegation," where Congress provides some standard of conduct, "but then delegates to an agency the discretion to waive, nullify, or modify those standards," rendering them meaningless. *See* C. Boyden Gray, *Congressional Abdication: Delegation without Detail and Without Waiver*, 36 Harv. J. L. & Pub. Pol'y 41, 42 (2013). As the Congressional Research Service recognized, "If IPAB were to adopt an interpretation of its authority that exceeded that which Congress intended to delegate, . . . most challenges . . . would be foreclosed given the statute's restriction on administrative and judicial review." Congressional Research Service to Honorable David Phil Roe, from Todd Garvey, *Authority and Procedures of the Independent Payment Advisory Board Under the Affordable Care Act*, July 27, 2012, at 2.

Of course, there are other non-accountability factors at issue as well, including the fact that IPAB is not required to be bipartisan as many other agencies

are,[9] *see generally* § 1395kkk(g), and that IPAB provisions relinquish Congress's historic role in setting Medicare reimbursement rates and policy. Considering the totality of these factors, IPAB represents the most comprehensive consolidation of executive, judicial, and legislative power in a single administrative entity in American constitutional history. Congress has established independent agencies before, to make difficult decisions insulated from partisan influence. The Defense Base Closure and Realignment Commission, for example, issues recommendations on closing military bases, with reduced congressional control. But that agency is subject to notice and comment rulemaking, can be overridden by congressional disapproval, and the President can check it by refusing to submit its proposals to Congress. *See Dalton v. Specter*, 511 U.S. 462, 464-470 (1994). The Congressional Review Act implements expedited procedures for Congress to disapprove agency regulations. But it still subjects the agencies to administrative and judicial review. *See* 5 U.S.C. § 801(g). The Federal Reserve, which manages the money supply, is subject to notice-and-comment rulemaking, 5 U.S.C. § 553(b), judicial review, 12 USC § 1848, congressional oversight and audits, 31 U.S.C. § 714, independent audits, 12 U.S.C. § 248b, and repeal. The Federal Trade Commission is subject to

[9] For example, the Federal Communications Commission, Equal Employment Opportunity Commission, Federal Elections Commission, Federal Trade Commission, Securities and Exchange Commission, Commodities Futures Trading Commission, International Trade Commission, and the National Transportation Safety Board, Sentencing Commission, and the U.S. Postal Commission must be bipartisan.

notice-and-comment rulemaking, 15 U.S.C. § 57a, bipartisan membership, 15 U.S.C. § 41, and judicial review. 15 U.S.C. § 57a. IPAB is simply an unprecedented rejection of constitutional separation-of-powers principles. Because the district court conducted no analysis that considered the relevant factors when deliberating these allegations, Count VII was improperly dismissed.

V. PPACA conflicts with, but does not preempt, Arizona's Health Care Freedom Act.

Finally, the district court erred in dismissing Plaintiffs' non-preemption claim (Count VIII), determining that PPACA preempts Arizona's Health Care Freedom Act ("HCFA"). ER3-5. Arizona's Constitution protects the right to "pay directly for lawful health care services" without being subject to "penalties or fines" for doing so, Ariz. Const. art. XXVII, § 2(A)(2), and shields Arizonans from compulsory participation in a health care system, including inducement through "penalties or fines." §§ 2(A)(1); (D)(1). These protections extend to "tax[es]" as well as civil or criminal penalties. § 2(D)(5). Yet the Supreme Court explicitly recognized that the tax penalty "aims to induce the purchase of health insurance" and "seeks to shape decisions about whether to buy health insurance." *NFIB*, 132 S.Ct. at 2596. This is at odds with HCFA's explicit prohibition on inducing participation in a health care system. §§ 2(A)(1); 2(A)(2); 2(D)(5). Accordingly, PPACA, whether construed as a mandate or tax, directly conflicts with protections enshrined in the Arizona Constitution.

The government does not argue – nor is there evidence to support – that PPACA expressly preempts HCFA. But PPACA also does not preempt HCFA by implication. As the Supreme Court recently observed, "[i]mplied preemption analysis does not justify a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1985 (2011). Instead, where, as here, the federal law regulates an area traditionally governed by states, a "high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Id.* PPACA does not meet that "high threshold."

In considering whether a federal law preempts a state law, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194-95. This is especially true when "Congress has legislated . . . in a field which the States have traditionally occupied." *Id.* Protecting citizens' health is a core concern of the states' traditional police powers. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Wyeth*, 129 S. Ct. at 1195 n. 3. The Supreme Court has acknowledged that the "field of health care" is "a subject of traditional state regulation" rather than federal regulation. *Rush Prudential HMO, Inc.*, 536 U.S. at 387. It has been so as a matter of federal law under the McCarran-Ferguson Act for more than half a century. *See* 15 U.S.C. §§ 1011-12.

Even where a federal statute comprehensively regulates a field of law, preemption is not presumed where a state's police powers are implicated. *See, e.g.*, *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976). Thus, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court found that federal law did not empower the Attorney General to prohibit physicians from providing drugs for assisted suicide in conformity with state statute. To hold otherwise, the Court found, would "effect a radical shift of authority from the States to the Federal Government." *Id.* at 275. Here, Defendants argue for a far-greater shift of police powers to the federal government, while PPACA does not even assert comprehensive regulation. PPACA exempts from the tax penalty a variety of specified groups. 26 U.S.C. §§ 5000A(d)(2); (d)(3); (d)(4); (e). And Defendants have waived numerous other PPACA requirements. *See* 26 C.F.R. § 54.9815-2711(T)(d)(3). Furthermore, PPACA guarantees that:

> No individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act . . . or in any Federal health insurance program expanded by this Act . . . and there shall be no penalty or fine imposed upon any such issuer for choosing not to participate in such programs.

42 U.S.C. § 18115. Thus the law itself does not contemplate universal application, much less overriding a field traditionally reserved to the states.

NFIB's construction of PPACA as a tax does not disturb Plaintiffs' HCFA

claim because Congress cannot exercise its tax power in a manner that displaces constitutionally-reserved state sovereignty. The federal Constitution establishes a structure of government that divides sovereignty between the state and federal governments. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citations omitted) ("States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere'"); The Federalist No. 45, *supra*, at 289 ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite"). Limits on Congress's enumerated powers are "critical to ensuring that . . . legislation does not undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 132 S. Ct. at 2602. With narrow exceptions not applicable here, federal power that contravenes state sovereignty "is not within the enumerated powers of the National Government." *Bond*, 131 S. Ct. at 2366.

The sovereignty of the states accordingly constrains Congress's exercise of its tax power. *United States v. Butler*, 297 U.S. 1, 69 (1936) (citations omitted). "It would undoubtedly be an abuse of the [tax] power if so exercised as to impair the separate existence and independent self-government of the states." *Veazie Bank v. Fenno*, 75 U.S. *8 Wall.) 533, 541 (1869). Thus, "Congress is not empowered to

tax for those purposes which are within the exclusive province of the states." *Butler*, 297 U.S. at 69 (citations omitted).

The Founders envisioned a system of federalism which reserved to the states the power to protect the individual liberties of their citizens more broadly than the federal Constitution does. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights*, 26 Am. Crim. L. Rev. 1261, 1293 (1989). A state may fulfill this function by "exercis[ing] its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). This dual system of federalism enables states to "respond, through the enactment of positive law," to protect the rights of citizens "without having to rely solely upon the political processes that control a remote central power." *Bond*, 131 S. Ct. at 2364. Indeed, the Ninth and Tenth Amendments were meant to work in tandem to ensure federal power was circumscribed by state law guarantees of individual liberty enacted pursuant to the state's reserved powers. Wilmarth, *supra*, at 1302 & n.209 (citations omitted).

The people of Arizona did that by adopting HCFA, a positive protection of their rights in a field of law traditionally governed by states' police powers. *Rush Prudential HMO, Inc.*, 536 U.S. at 387 (the "field of health care" is "a subject of traditional state regulation"); *see also Gonzalez*, 546 U.S. at 271 (Controlled

Substances Act could not be enforced to prevent physicians who prescribed drugs, in compliance with state law, from assisting suicide of the terminally ill). HCFA was enacted by the people in a field of law—health insurance regulation—traditionally reserved to the states' police powers. Its employs the Constitution's system of divided sovereignty to preserve "[t]he promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). Enforcing PPACA's tax penalty would supersede Arizona's authority to shield individual liberty from federal power, thwarting the very aim of American federalism. That is why construing the mandate as a tax cannot be held to preempt HCFA in the absence of any clear and unequivocal indication Congress intended it to do so.

CONCLUSION

The issues of medical autonomy, privacy, separation-of-powers, and federalism at the core of this lawsuit deserve far greater judicial deliberation than they received. Indeed, abundant precedent requires such deliberation. As shown above, the district court improperly dismissed Plaintiffs' lawsuit, as Plaintiffs have stated viable claims that are ripe for review. Accordingly, Plaintiffs respectfully request that this Court reverse the decision below and remand for adjudication on the merits.

Respectfully Submitted,

/s/ Christina Sandefur
Clint Bolick

Kurt Altman
Nicholas C. Dranias
Christina Sandefur
Goldwater Institute
Scharf-Norton Ctr. for Const. Lit.
500 East Coronado Road, Phoenix, AZ 85004
(602) 462-5000
facsimile: (602) 256-7045
cbolick@goldwaterinstitute.org
kaltman@goldwaterinstitute.org
ndranias@goldwaterinstitute.org
csandefur@goldwaterinstitute.org

STATEMENT OF RELATED CASES

The above attorney certifies that she is not aware of any related cases as defined in 9th Cir. R. 28-2.6.

CERTIFICATE OF SERVICE

THE ATTACHED FILING AND EXCERPTS OF RECORD HAVE BEEN ELECTRONICALLY FILED AND SERVED BY ECF upon the persons identified in the below Service List. Additionally, one copy of the foregoing 2 volumes of the Excerpts of Record has been served upon the persons identified in the below Service List via U.S. Mail, sufficient postage prepaid, on May 30, 2013, at or before 5:00 p.m.

/s/ Christina Sandefur

SERVICE LIST

Alisa Beth Klein
Mark B. Stern
DOJ - U.S. Department of Justice
Civil Division - Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
alisa.klein@usdoj.gov
mark.stern@usdoj.gov
Attorneys for Appellees Timothy Geithner, Kathleen Sebelius, Eric Holder, Jr., and Barack Hussein Obama

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 12,107 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Word 2013 *(state font size and name of type style)* Times New Roman, 14 point, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____

Signature s/ Christina Sandefur

Attorney for Appellants

Date May 30, 2013