No. 13-15324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK COONS; ERIC N. NOVACK, M.D.,

Plaintiffs - Appellants,

v.

TIMOTHY F. 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 H. HOLDER, Jr., in his official capacity as Attorney General of the United States; BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Arizona
Honorable G. Murray Snow, District Judge

BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION AND MATT SISSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded more than 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic liberty, and limited government. PLF currently represents amicus Matthew Sissel in a case challenging the constitutionality of the Individual Mandate provision of PPACA, currently pending in the Federal District Court for the District of Columbia. *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263-BA (D.D.C. filed July 26, 2010). All parties have consented to the filing of this brief.

PLF has litigated and appeared as amicus curiae in numerous cases relating to the Patient Protection And Affordable Care Act (PPACA). In addition to representing Mr. Sissel, PLF participated as amicus curiae before the District Court in this case, as well as before the District Court and Court of Appeals in *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *rev'd*, 656 F.3d 253 (4th Cir. 2011), the Courts of Appeals in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), and *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), and the Supreme Court in *Thomas More Law Ctr. v. Obama*, 133 S. Ct. 61 (2012), and two briefs in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

Amici believe their legal and public policy experience will assist this Court in addressing the complex issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court erred in dismissing Plaintiffs/Appellants' seventh cause of action, which alleges that the provisions of PPACA relating to the Independent Payment Advisory Board (IPAB), are unconstitutional. Not only do Plaintiffs' allegations easily survive the standards of Fed. R. Civ. P. 12(b)(6), but those allegations are clearly meritorious, and require no further factual development. This Court should reverse and remand to the District Court with instructions to enter judgment for Plaintiffs on their seventh cause of action.

IPAB wields authority to make law without any meaningful legislative, executive, or judicial oversight. It is an autonomous lawmaking body purposely shielded from democratic checks and balances. It was designed, as one of PPACA's most prominent advocates has written, as a group of "Platonic Guardians." Jost, *The Independent Medicare Advisory Board*, 11 Yale J. Health Pol'y L. & Ethics 21, 21 (2011). But the Constitution is not compatible with any system of independent Platonic Guardians.[1] On the contrary, the framers rejected the idea of being governed

[1] Plato, who believed political power should reside "[o]nly in the hands of the select few or of the enlightened individual," *Statesman* 297c, *in Plato: The Collected Dialogues* 1067 (Hamilton & Cairns eds., 1961), imagined a society overseen by Guardians who would govern the "art of medicine" by laws which "will care for the bodies and souls of such of your citizens as are truly wellborn, but those who are not, such as are defective in body, they will suffer to die." *Republic* 409e-410a, *in id.* at 654. "This," he contended, "has been shown to be the best thing for the sufferers (continued...)

by "a will in the community independent of the majority," because such an independent entity could impose "unjust" legislation without any check by the people. *The Federalist* No. 51, at 351 (James Madison) (Cooke ed., 1961). They chose instead a system in which all branches of government enjoy clear and limited powers, balanced against each other and accountable to the public.

PPACA's provisions governing IPAB violate the separation of powers because they unconstitutionally empower this agency—supposedly an executive branch entity—to write law which the President must enforce without alteration and without legislative or judicial checks. IPAB enjoys more autonomy than any previous independent agency; its "recommendations" cannot be meaningfully altered or blocked by Congress, the courts, or the President, but are enforced automatically without regard to the will of elected representatives. Worse, PPACA allows Congress only a sharply limited, temporary power of repeal, which expires if not used by 2017. These factors, taken together, make it clear that IPAB is not merely a subordinate agency, but an autonomous lawmaking authority combining legislative, executive,

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[1] (...continued)
themselves and for the state." *Id.* at 410a. Thomas Jefferson and John Adams called Plato's ideas "shock[ing] . . . disgust[ing]" "unintelligible . . . nonsense" produced by a "foggy mind." *Compare* Letter from Jefferson to Adams, July 5, 1814, *in The Adams-Jefferson Letters* 432-33 (Cappon ed., 1987), *with* Letter from Adams to Jefferson, July 16, 1814, *in id.* at 437.

and judicial powers. Our concept of constitutional democracy does not allow Congress to commission such "Platonic Guardians."

ARGUMENT

I

42 U.S.C. § 1395kkk, UNDER WHICH IPAB DRAFTS "RECOMMENDATIONS" THAT AUTOMATICALLY BECOME LAW, VIOLATES THE SEPARATION OF POWERS

The Supreme Court recently emphasized that while Congress can create a "vast and varied federal bureaucracy," the Constitution requires that those entities remain subservient to elected officials. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). The Constitution bars Congress from handing off its lawmaking duties to independent appointees, so as to ensure that the government "functions without being ruled by functionaries, and . . . benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Id.* at 3156; *City of Arlington, Tex. v. FCC*, Nos. 11-1545 & 11-1547, 2013 WL 2149789, at *9 n.4 (U.S. May 20, 2013) (administrative agencies "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.' ").

But IPAB, although styled an executive agency, does not merely execute the law; it writes law. As Prof. Jost admits, *supra*, at 31, "the conscious abdication of

congressional responsibility to the IPAB is striking." PPACA's provisions insulating IPAB from accountability and drastically limiting Congress' power to abolish IPAB, are far beyond any existing precedent. IPAB's structure makes this less like prior lawsuits challenging administrative authority, and more akin to those Contracts Clause cases in which the Supreme Court has emphasized that legislatures may not give away their lawmaking powers. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 874-75 (1996); *Stone v. Mississippi*, 101 U.S. 814, 817 (1879).

A. IPAB's "Recommendations" Become Law Without Meaningful Congressional Review or Control

IPAB is charged with preparing "recommendations" to "reduce the per capita rate of growth in Medicare spending." 42 U.S.C. § 1395kkk(b). But these "recommendations" are much more than recommendations. Instead, the Secretary of Health and Human Services (HHS) is required to implement them without their being adopted by any agency process or legislative action. Sections 1395kkk(b)(2) and (3).

Once its authority is triggered, IPAB must issue its "recommendations," along with "a legislative proposal that implements" them. Section 1395kkk(c)(3)(B)(iv). But Congress does not adopt the "recommendations." Instead, the HHS Secretary must "implement *the recommendations . . . submitted . . . to Congress*," regardless of whether Congress approves or disapproves of them. Section 1395kkk(e)(1) (emphasis added). Congress gets no meaningful opportunity to review or alter these

"recommendations"; on the contrary, Sections 1395kkk(d)(3)(A) and (B) *deprive* Congress of oversight authority, by forbidding either house from considering "any bill, resolution, or amendment . . . that fails to satisfy the requirements of subparagraphs (A)(i) and (C) of subsection (c)(2)"—that is, the same statutory criteria IPAB itself must comply with when formulating "recommendations." This means Congress may only amend the "recommendations" by adding to them items IPAB itself could have included but failed to. Congress may not reverse or alter those "recommendations." This prohibition on Congressional alteration is reinforced by a further prohibition against any repeal of the statutory sections erecting the prohibition. Section 1395kkk(d)(3)(C). This is akin to Congress letting administrative agency set tariff rates without review or approval, and then disabling itself from acting except to increase the tariff.

The fact that IPAB's "recommendations" are *not* mere suggestions is emphasized by PPACA provisions that establish a *separate* procedure whereby IPAB may prepare truly *advisory* proposals. PPACA calls these proposals "advisory reports," and treats them in an entirely different manner than the "recommendations" IPAB prepares under Section 1395kkk(c)(2)(A)(i). Under Section 1395kkk(c)(1)(B), IPAB may, but need not, prepare "*advisory reports* on matters related to the Medicare program," which "*shall not be subject* to the rules for congressional consideration [which apply to the 'recommendations'] under subsection (d)." (emphasis added).

These provisions would be surplusage if IPAB's "recommendations" were really just "recommendations."

PPACA allows Congress only one way to bar IPAB's "recommendations" from automatically becoming law, and that power is rendered defunct if it is not exercised during a brief period in the year 2017. Once IPAB's "recommendations" are submitted to Congress, the President of the Senate and the Speaker of the House must, by the next business day, refer them to the Senate Finance, House Energy And Commerce, and House Ways And Means Committees, respectively. 1395kkk(d)(1)(D).[2] But just as Congress as a whole is barred from altering the "recommendations," these committees may *not* change, or recommend for or against passage of, the "recommendations"; rather, they may only amend them in ways that comply with the same instructions IPAB itself must follow when formulating the "recommendations" in the first place. *See* Section 1395kkk(d)(3)(B). Thus the committees may only add provisions that IPAB itself could have written but for some reason did not. With this trivial exception, the committees must report out IPAB's

[2] IPAB is also required to submit its "recommendations" to the Medicare Payment Advisory Commission and the HHS Secretary for review and comment. 1395kkk(c)(2)(D) and (E). Although the Secretary must issue a report to Congress on the results of such review, PPACA does not give either the Secretary or Congress power to overrule the "recommendations." *Id.*

"legislative proposal" (which PPACA thereafter refers to as a "bill") on or before April 1. Section 1395kkk(d)(2)(A).[3]

PPACA then requires the Senate to take up consideration of the bill, and again prohibits amendments, *see* Section 1395kkk(d)(4)(B)(ii), (iv), and severely restricts debate on it. *See* Section 1395kkk(d)(4)(D). This prohibition on alterations is reinforced by Section 1395kkk(d)(3)(C), which forbids changing the rule forbidding alterations: "It shall not be in order in the Senate or the House of Representatives to consider any bill, resolution, amendment, or conference report that would repeal or otherwise change this subsection." The Senate—and only the Senate—may remove this obstruction, and only by a 3/5 vote of all *elected* (not just *present*) Senators. *See* Section 1395kkk(d)(3)(D). Should Congress do this, it will supercede IPAB's original "recommendations." But this route does *not* allow Congress to alter or reverse the "recommendations," only to supplement the cuts in Medicare spending IPAB originally "recommended" with further cuts. This alternative, again, only lets Congress do what IPAB could have done.

But the rules change in 2020, when Congress loses its power to supplement IPAB's recommendations if it has not *also* enacted a joint resolution, between January 3, and February 1, 2017, which discontinues IPAB's existence. The

[3] Any committee that fails to meet this deadline is legally deprived of any further power over the bill. *See* Section 1395kkk(d)(2)(D).

procedure for passing this resolution is so complicated as to be basically unworkable. Such a resolution must be introduced during that 29-day window, *see* Section 1395kkk(f)(1)(A), and must receive a vote of 3/5 of all *elected* members of Congress—one of the most extreme super-majority requirements in the history of American law.[4] This resolution must pass by August 15, 2017. If these things do not occur, Section 1395kkk(e)(3)(A)(i) and (ii) become inoperative, and IPAB's power to make law without Congressional involvement becomes permanent.

These and other provisions insulating IPAB from democratic accountability are much more than mere "parliamentary procedures." On the contrary, PPACA deliberately ensures that the "recommendations" of this unelected, politically unaccountable agency automatically become law except in extremely unlikely circumstances.

[4] By comparison, only two thirds of Senators *present* can remove a sitting president, U.S. Const. art. I, § 3, or to make a treaty with a foreign nation. U.S. Const. art. II, § 2. The 104th and 105th Congresses enacted a House rule requiring a 3/5 vote of all *present* members to approve tax increases. H.R. Res. 6, 104th Cong. 106(a) (1995); H.R. Res. 5, 105th Cong. 106(a) (1997). Legal scholars argued that this supermajority requirement "strikes at the heart of the system of deliberative democracy established by the Constitution." Ackerman, et al., *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539, 1543 (1995).

B. By Giving IPAB Autonomous Lawmaking Authority Free of Legislative, Executive, or Judicial Oversight, PPACA Violates the Separation of Powers

Currin v. Wallace, 306 U.S. 1, 15 (1939), explained that Congress may not "abdicate, or . . . transfer to others, the essential legislative functions with which it is vested." Congress may set up a "'selected instrumentalit[y]'" and allow it to make "subordinate rules within prescribed limits,'" *id.*, so long as "their power to act and how they are to act is authoritatively prescribed by Congress." *City of Arlington*, 2013 WL 2149789, at *6. But "Congress may not delegate the power to make laws." *Loving v. United States*, 517 U.S. 748, 771 (1996). The people give Congress the power to protect public health and safety, so Congress cannot give away that authority. *Stone*, 101 U.S. at 819. It may "confer[] authority or discretion as to [administrative] *execution*, to be exercised *under* and *in pursuance* of the law," but may not "delegat[e] power to *make* the law." *Loving*, 517 U.S. at 758-59 (citations omitted; emphasis added).

As in *INS v. Chadha*, 462 U.S. 919, 962-63 (1983), courts weighing separation-of-powers challenges must be "mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental co-ordination.' " Thus the question of whether Congress has legitimately delegated executive functions, or has unconstitutionally yielded its lawmaking power, is often "a question of degree," *Mistretta v. United States*, 488

U.S. 361, 415 (1989) (Scalia, J., dissenting), and "varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001).

The District Court thus erred when it summarily dismissed the complaint by finding that PPACA applies an "intelligible principle" to IPAB. Whether a law satisfies the separation-of-powers requirement is not merely a question of whether the agency's instructions are clear; rather, a court must evaluate "the aggregate effect of the factors" to determine whether Congress has unconstitutionally combined legislative and executive powers. *Synar v. United States*, 626 F. Supp. 1374, 1389-90 (D.C. Cir.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). An agency is unconstitutional if it can "interfere impermissibly with [Congress'] performance of its constitutionally assigned function," or "assume[] a function that more properly is entrusted to [Congress]." *Chadha*, 462 U.S. at 963.

PPACA allows IPAB to write "recommendations" that not only require no legislative approval before being implemented, but that Congress is basically powerless to alter or block. With the one minor exception described above, the HHS Secretary must, beginning in 2020, implement the "recommendations" that are *submitted* to Congress, and Congress cannot prevent their enforcement. PPACA thus makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" by IPAB. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

But PPACA also restricts the *President's* authority. Sections 1395kkk(c)(4) and (5) provide that if IPAB fails to submit the "recommendations" as required —which now appears likely, *see* Waldman & Fuller, Congress, *The Death Panels' Death Panel*, The American Prospect, May 9, 2013[5]—the HHS Secretary must prepare those "recommendations" on her own. *See* Congressional Research Service, Memorandum to Sen. Tom Coburn, Mar. 18, 2011, at 3.[6] The content of the Secretary's "recommendations" is dictated by the same rules provided to IPAB. Section 1395kkk(d)(3)(A). The President may not alter them, but must submit them to Congress within two days.

In other words, PPACA specifies the content of legislation that the President must submit to Congress, while simultaneously depriving him of power to alter those "recommendations." Yet the Constitution gives the President authority to "recommend to [Congress'] Consideration such Measures *as he shall judge* necessary and expedient." U.S. Const. art. II, § 3 (emphasis added). Congress may not restrict this Recommendations Clause power. *See* Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 U.S. Op. Off. Legal Counsel 632, 640, 1982 WL 170732, at *8 (Nov. 5, 1982) (Congress cannot "require a subordinate

[5] *Available at* http://prospect.org/article/congress-death-panels-death-panel (last visited May 30, 2013).

[6] *Available at* http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=3fe9e198-fe6c-4fb2-9777-88c69ff72356 (last visited June 3, 2013).

executive official to present legislative recommendations of his own."); Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079, 2121 (1989) ("the recommendation clause obviously contemplates that the President is the sole judge of what measures he will submit to Congress.").

Finally, PPACA exempts IPAB from judicial review, *see* Section 1395kkk(e)(5), or from any duties under the Administrative Procedure Act.[7]

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

C. IPAB's Independence Is Unprecedented

IPAB enjoys powers far beyond those delegated to any previous independent agency. PPACA:

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[7] PPACA does not *explicitly* immunize IPAB's "recommendations" from the APA, but under the *exclusio alterius* rule, the fact that Congress left APA procedures out of the rules IPAB must follow means the APA does not apply. *Cf. United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 450 F.3d 930, 939 (9th Cir. 2006) (notice and comment provisions of APA did not apply to action of Fish and Wildlife Service because Congress specified other procedures for agency rulemaking.).

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

In *Mistretta*, 488 U.S. 361, and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), the Supreme Court upheld the constitutionality of "report and wait" procedures, which allow administrative agencies to draft rules and then "gives Congress an opportunity to review [them] and . . . enact legislation preventing the regulations from taking effect." *Id.* at 690. In *Alaska Airlines*, the Transportation Secretary was directed to submit proposed regulations to Congress, wait 30 days, and then issue them as final. *Id.* at 689-90. That law, The Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 32(f)(3), 92 Stat. 1705, 1752 (1978), did not preclude judicial review, or bar Congressional amendment, or restrict the President's recommendation power.

Mistretta also upheld a "report and wait" procedure under which the Sentencing Commission drafted guidelines for sentencing criminals. But that statute, 28 U.S.C. § 994(p), also precisely limited the Commission's authority, retained full congressional power to modify or disapprove the proposed guidelines, and made " 'ample provision for review of the guidelines by the Congress and the public,' " *Lopez*, 938 F.2d at 1297 (citation omitted), through APA notice and comment requirements. *See id.* (citing 28 U.S.C. § 994(x)). Thus even though that statute barred judicial review, there were sufficient alternatives to ensure that the agency was subordinate to Congress.

PPACA, by contrast, makes Congress a rubber stamp. It includes no provision for review of IPAB's "recommendations" by Congress, the President, the courts, or the public.

PPACA also differs from the "fast track procedures" which allow Congress to override an administrative agency's proposed regulations. For example, the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, created a Commission to recommend the decommissioning of military bases, which Congress found politically difficult. But it did not restrict Congress' power to disband the Commission.[8] And Congress retained other authority to reject its recommendations.

[8] It did require that Congress enact a joint resolution, by simple majority, to disband (continued...)

In *Free Enter. Fund*, 130 S. Ct. 3138, the Court said that Congress could not restrict the President's authority to remove members of an administrative agency, because that would tie the hands of future presidents. "The President can always choose to restrain himself . . . . He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own." *Id.* at 3155. To do so would hamper "the public's ability to pass judgment on [the President's] efforts," thus reducing accountability. *Id.* Yet by abdicating its authority to IPAB, Congress has tried to bind its successors, to pretend that IPAB's actions are not its own, and to hamper the public's ability to hold Congress accountable.

A statute is not unconstitutional just because it limits congressional supervision, or prohibits judicial review. *See, e.g.*, *United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (prohibition of judicial review did not render agency unconstitutional where alternative checks were provided). But reviewing, as this Court must, "the totality of [PPACA]'s standards, definitions, context, and [refer] to past administrative practice," *Synar*, 626 F. Supp. at 1389, it becomes clear that PPACA's rules do not "meaningfully constrain[]" IPAB's power. *Touby v. United*

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[8] (...continued)
the Commission. *See* Pub. L. No. 101-510, § 2904(b). That was modest by comparison to PPACA's anti-repeal provisions.

States, 500 U.S. 160, 166 (1991). IPAB is not an "instrumentalit[y]" or a "subordinate," *Currin*, 306 U.S. at 15, and is not, as it "*must be*," merely an executive entity. *City of Arlington*, 2013 WL 2149789, at *9 n.4. It is an autonomous lawmaking body that combines executive, legislative, and judicial power, unimpeded by democratic accountability. IPAB is therefore unconstitutional.

II

IPAB'S ENABLING LEGISLATION FAILS THE APPLICABLE STRICT SCRUTINY TEST

"[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is "subjected to more exacting judicial scrutiny" than "most other . . . legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). This heightened scrutiny requires that a law be narrowly tailored to advance a compelling government interest. PPACA fails that test.

Sections 1395kkk(f), 1395kkk(e)(3)(A), and 1395kkk(d)(4)(B)(iv), effectively eliminate Congress' power to revoke IPAB's authority. The purpose of these restrictions is to render IPAB politically unaccountable. *See* Jost, *supra*, at 31 ("In creating the IPAB, Congress is attempting to lash itself to the mast."); *see also* Cook, *Independent Payment Advisory Board—Part of the Solution for Bending the Cost Curve?*, 4 J. Health & Life Sci. L. 102, 111-12 (2010) ("The mandated quick

timetable and requirement for a super majority vote reflect a concern that Congress would not have the fiscal discipline to enforce the spending targets the proposal requires."). This is not a legitimate, let alone compelling, state interest. Section 1395kkk as a whole therefore cannot withstand heightened scrutiny.

A. Section 1395kkk(f) Is an Unprecedented Anti-Repeal Provision

Under PPACA, IPAB's "recommendations" are automatically enforced by the HHS Secretary, with only the temporary and impractible exceptions detailed above. This limit on congressional authority is reinforced by a provision—Section 1395kkk(f)(1)(D)—that forbids Congress from discontinuing IPAB after 2020 unless, prior to August 15, 2017, Congress (a) introduces a joint resolution between January 3, and February 1, 2017, which (b) has no preamble, (c) has a specific title,[9] and (d) states " '[t]hat Congress approves the discontinuation of the process for consideration and automatic implementation of the annual proposal of the Independent Medicare Advisory Board under section 1899A of the Social Security Act.' " If this resolution does not receive the votes of three-fifths of all *elected* members of both houses, Section 1395kkk(f)(2)(F), the HHS Secretary must, beginning in the year 2020, implement IPAB's "recommendations" into the indefinite

[9] It must be titled " 'Joint resolution approving the discontinuation of the process for consideration and automatic implementation of the annual proposal of the Independent Payment Advisory Board under section 1899A of the Social Security Act.' " 1395kkk(f)(1)(C).

future. *See also* Cook, *supra*, at 112 ("[PPACA] includes a one-time opportunity for Congress to terminate the IPAB.").

PPACA's anti-repeal provisions are nothing like the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, which allows Congress to disapprove the actions of administrative agencies. That Act states that it is *not* the exclusive means for blocking administrative rulemaking. *See* Section 801(g) ("If the Congress does not enact a joint resolution of disapproval . . . no court or agency may infer any intent of the Congress."). Nothing in it provides—as does PPACA—that a specifically-worded joint resolution is "required to discontinue" an agency, let alone that Congress's repeal power will expire if not used within a 29-day window. Indeed, *no* other federal statute of which amici are aware limits Congress's authority like PPACA does.

In the proceedings below, the Defendants conceded by stipulation that Congress "cannot preclude future Congresses from repealing or modifying any statute." Opp. to Mtn. for Prelim. Inj. at 14. Yet any other reading of Section 1395kkk(f) would render the word "required" surplusage, in violation of statutory construction rules. *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003).[10] Second, such a reading conflicts with Sections 1395kkk(e)(1), (e)(3)(A)(ii),

[10] This Court cannot employ the constitutional avoidance doctrine to ignore the clear (continued...)

and (f)(1), which together make the repeal resolution in Section 1395kkk(f) the *exclusive* method for preventing IPAB's "recommendations" from being implemented. In short, the joint resolution procedure is not just one means for Congress to eliminate IPAB; it is the *only* means, and it self-destructs in 2020 unless Congress uses it before 2017.

B. Section 1395kkk(f) Fails the Strict Scrutiny Test

Heightened scrutiny applies to laws that obstruct the normal political process whereby undesirable laws can be repealed. *Carolene Products*, 304 U.S. at 152 n.4. The scheme of multiple tiers of scrutiny withholds judicial deference to the political branches when they try to exempt decisions from the democratic oversight, because such abuses are "unlikely to be soon rectified by legislative means." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), and because the judiciary has a

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[10] (...continued)
anti-repeal provisions of the PPACA. The rule against surplusage takes precedence over the constitutional avoidance doctrine. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (constitutional avoidance canon "comes into play only when, *after the application of ordinary textual analysis*, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." (emphasis added)). In *Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir. 1994), the court rejected the argument that the constitutional avoidance canon could limit an unconstitutional House of Representatives rule because "we do not see how we can ascribe [the limiting construction] to the whole House. Nothing in the legislation reflects that understanding."

special role to play "when the normal processes of democracy have broken down." 1 Tribe, *American Constitutional Law* 1052 (3d ed. 2000).

Applying strict scrutiny to the anti-repeal provisions in Section 1395kkk is consistent with this role. PPACA as a whole is not supported by a majority of Americans; although at the time of passage, PPACA's popularity hovered around 50 percent, most Americans did not support it, *see* Blendon & Benson, *Public Opinion at the Time of the Vote on Health Care Reform*, 362 New Eng. J. Med. e55 (Apr. 2010)[11] ("In none of the 10 polls did a majority favor the proposed legislation."), and today only 37 percent approve of it.[12] Amici do *not* suggest that political polling should guide this Court's legal analysis. Rather, the point is that the heightened scrutiny contemplated by *Carolene Products* was designed *exactly* for a case like this, in which an unpopular piece of legislation, which the general public may now wish to see repealed or amended, is entrenched by provisions that "restrict[] those political processes which can ordinarily be expected to bring about [its] repeal." 304 U.S. at 152 n.4.

Heightened scrutiny places the burden on the government, not the plaintiffs, to demonstrate a compelling interest supporting the law, that the law directly and

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[11] *Available at* http://www.nejm.org/doi/full/10.1056/NEJMp1003844 (last visited May 30, 2011).

[12] Kaiser Foundation Poll, Mar. 2013, *available at* http://kff.org/health-reform/poll-finding/march-2013-tracking-poll/ (last visited May 30, 2013).

materially advances that interest, and that it is drawn no broader than necessary to accomplish that compelling interest. *Cf. Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 644 (1st Cir. 1995). Yet the district court failed to allocate this burden or conduct any legal analysis, and the government cannot meet this standard, because a law explicitly designed to block future alteration—let alone to abdicate Congress's lawmaking responsibility, and deprive the legislative, executive, and judicial branches of meaningful checks—serves no legitimate state interest. *Cf. Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (state has no legitimate interest in interfering with "[c]ompetition in ideas and government policies."); *Stewart v. Blackwell*, 444 F.3d 843, 873 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) ("An individual's vote is the lifeblood of a democracy. To that extent, we find it difficult to conjure up what the State's legitimate interest is by the use of technology that dilutes the right to vote.").

C. Entrenchment Is Unconstitutional

"Entrenchment"—the attempt to enact a law that cannot be repealed—has long been considered beyond the reach of any legislature. *See* Bacon, *Elements of the Common Lawes of England* 77 (1630) ("*perpetua lex est nullam legem*"—a perpetual law is void); 4 Coke, *Institutes* *43 ("though divers Parliaments have attempted to barre, restrain, suspend, qualifie, or make void subsequent Parliaments, yet could they

never effect it."); *Winstar*, 518 U.S. at 871-80 (legislature cannot make binding promise not to use its powers).

Congress's effort in Section 1395kkk(f) to bar itself from disbanding IPAB, and in Section 1395kkk(d)(3) to bar itself from amending IPAB's "recommendations," is unlike any other statute ever enacted. The only previous example of Congress attempting to pass rules or laws abdicating its lawmaking role is the "Gag Rule" adopted in the 1830s and 1840s to bar reception of any petitions for abolishing slavery—a rule Congressman John Quincy Adams rightly attacked as unconstitutional. *See* Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 Law & Hist. Rev. 113 (1991).

Nor is there any precedent regarding an attempt by Congress to establish a law that cannot be repealed or an agency that cannot be eliminated. Still, scholars have addressed the question, focusing first on whether it is logically possible to enact an unrepealable law, and second on whether such a law would be constitutional. As Professors Posner and Vermeule observe, the intuitive notion that a law against repeal could itself be repealed is not necessarily correct:

> Consider statute *PR*, in which *P* prohibits bicycles in the park, and *R* prohibits repeal . . . . The original Congress could pass an additional entrenching provision, *R'*, which provides that R can be repealed only with a two-thirds majority, but then of course the next Congress could repeal *R'* with a simple majority, and so on down the line. But ordinary language can handle the infinite regress. Let the original Congress enact *R**, which says that a two-thirds majority is necessary to repeal or amend

> both *P* and *R**. The statute *PR** is invulnerable to repeal. Self-reference solves the problem of infinite regress.

Posner & Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1668-69 (2002). This is what PPACA appears to do. It not only requires a 3/5 majority of all elected members of Congress to vote to disband IPAB, it also requires that this vote occur before August 15, 2017. If it does not, then IPAB's "recommendations" will be enforced as law beginning in 2020 without any possibility of repeal under Section 1395kkk(f)(2)(F). Sections 1395kkk(d)(3)(A) and (B) also bar Congress from amending or altering IPAB's recommendations in any way—except to add provisions that IPAB itself could have "recommended"—and Section 1395kkk(d)(3)(C) prohibits Congress from considering any measure "that would repeal or otherwise change" this rule. *These* restrictions on Congress's discretion do *not* expire in 2020. In other words, these provisions combine to create a mechanism whereby IPAB's authority can be restrained only until August 15, 2017; thereafter, Congress loses authority to abolish IPAB. And because the statute is self-referential in the manner described by Posner and Vermeule, it appears to be a logically consistent prohibition on repeal.

Posner and Vermuele's article drew a sharp reply from Professors Roberts and Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner*

and Vermeule, 91 Cal. L. Rev. 1773 (2003), who convincingly argue that if unrepealable laws are possible, they are unconstitutional for at least four reasons.

First, entrenching legislation against future repeal violates Article I, which sets forth the exclusive method by which Congress may pass laws. *See id.* at 1784; *see also Clinton v. City of New York*, 524 U.S. 417, 439 (1998) ("There are powerful reasons for construing constitutional silence" as to alternative ways of enacting a statute "as equivalent to an express prohibition."). An anti-repeal provision "destroys the legislative power as to that subject matter entirely." Roberts & Chemerinsky, *supra*, at 1784.

Second, anti-repeal provisions conflict with the constitutional authority of subsequent Congresses to set their own rules. *Id.* at 1789-95. In 2020, Section 1395kkk(e)(3)(A) will automatically abolish the limited repeal option if not used by 2017, thereby limiting the rulemaking powers of Congresses elected after 2017, contrary to the rulemaking authority that each future Congress enjoys under U.S. Const. art. I, § 5. Thus, notwithstanding the precatory assertion in Section 1395kkk(d)(5), that PPACA is consistent with *this* Congress' constitutional rulemaking authority, the statute tries to restrict the rulemaking authority of *future* Congresses. *Cf. United States v. Smith*, 286 U.S. 6, 48-49 (1932) (Courts are not bound by the Senate's characterization of its own rules).

Third, laws purportedly immune from repeal are contrary to the Constitutional rotation in office, because they "allow members of Congress to effectively extend their terms in office beyond those prescribed in the Constitution." Roberts & Chemerinsky, *supra*, at 1789; *cf. Free Enter. Fund*, 130 S. Ct. at 3155 (President may not bind future presidents).

Finally, entrenchment conflicts with the nature of the Constitution itself, by elevating ordinary legislation to the level of constitutional provisions. The American constitutional tradition rests on distinguishing constitutional acts of the people which limit legislative discretion from ordinary laws that employ delegated authority. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("the constitution controls any legislative act repugnant to it . . . . [and is not] alterable when the legislature shall please to alter it."); Wood, *The Creation of the American Republic* 276 (1998) (noting colonial era arguments that constitutions must be superior to legislative authority).

No legal precedent clearly covers the situation presented by Section 1395kkk, because Congress has never before tried to waive its lawmaking responsibility to such an extreme degree. Indeed, this case is much more like precedents established under the Contracts Clause which make clear that except in certain very limited situations, " '[t]he Government cannot make a binding contract that it will not exercise a sovereign power.' " *Winstar*, 518 U.S. at 881 (citation omitted). Congress cannot give up its power to legislate because that power does not belong to Congress; it

belongs to the people, who delegate that authority to Congress on certain conditions—one of which is that Congress respect the Article I legislative process. To enact a law like Section 1395kkk—which creates a permanent, independent, law-making agency, the activities of which cannot be meaningfully checked by any of the three branches, and which is only temporarily subject to a byzantine process of repeal—is to pervert that power. *See* Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. Bar Found. Res. J. 379, 396 ("the question of whether a legislature—a subordinate, albeit representative body—can promulgate entrenching laws should ultimately be a question of agency.").

D. Defendants' Argument That Congress Can Disband IPAB in Some Other Way Does Not Resolve this Case

Defendants contended below that Congress could repeal the anti-repeal provision and then eliminate IPAB. But this is simply to admit that PPACA does *not* allow the repeal of IPAB. Nor is it clear that this alternative would actually be effective.

First, the anti-repeal provisions do *not* purport to be merely Congress's internal rules.[13] Sections 1395kkk(d)(5)(A) and (B) say only that sections (d) and (f)(2) are exercises of Congress's rulemaking power. The other sections—including the one

[13] Even if they were, they would be subject to judicial review. *See*, *e.g.*, *Michel*, 14 F.3d at 627 ("There are [judicially enforceable] limitations to the House's rulemaking power."); *Smith*, 286 U.S. at 6 (same).

setting a deadline on Congress's limited power to discontinue IPAB—do *not* purport to be an exercise of the rulemaking power. No court or legislative body has ever decided whether a rule established by a statute, passed by both houses and signed by the president, can be altered unilaterally by a single house. *See* Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J. L. & Politics 345, 368 (2003) ("Congress has expressed concern over whether it retains the ability to alter statutized rules as recently as 1983.").[14]

Second, as noted above, the argument that Congress must still retain an ultimate repeal power is contrary to Section 1395kkk(f)'s plain language, which says that the joint resolution described therein is "required" to discontinue IPAB. Also, Section 1395kkk(e)(1) provides that "[n]otwithstanding any other provision of law," the HHS Secretary must implement IPAB's "recommendations," the sole exception being the enactment of the joint resolution described in Section 1395kkk(f). Merely repealing the so-called "fast track" provision in Section 1395kkk(f), would *not* bar the Secretary's obligatory, ministerial implementation of IPAB's "recommendations" under 1395kkk(e)(1).

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[14] Although Congress often uses "disclaimer clauses" to reinforce its power to change even rules enacted by statute, *see id.* at 368 n.96, the disclaimer clause here only applies to Section 1395kkk(d), and *not* to the anti-repeal provisions in Section 1395kkk(f).

Nor is it clear that the parties' stipulation of March 8, 2011 (that the challenged sections pose no impediment to repealing IPAB) can bind Congress. Congress has an equal and independent authority to determine the scope of its powers, at least until the courts pronounce an interpretation, and Congress cannot be bound by the executive branch on such matters. *Cf. The Diamond Rings*, 183 U.S. 176, 180 (1901) (president is not bound by Congress' interpretation of a treaty); *Hirt v. Richardson*, 127 F. Supp. 2d 833, 849 (W.D. Mich. 1999) ("the judiciary is not bound by the Executive Branch's interpretations of [a federal law]."); Dellinger, *Memorandum for Bernard N. Nussbaum, Counsel to the President*, 48 Ark. L. Rev. 333, 340 (1995) ("it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor.").

CONCLUSION

PPACA is a law like no other in history. Not only is the Individual Mandate "unprecedented," *Florida*, 648 F.3d at 1235; the provisions establishing IPAB as a group of "Platonic Guardians" are as well. Jost, *supra* at 21. The danger of such an autonomous, unaccountable lawmaking body are obvious. As Prof. Jost writes,

> There is no reason to believe that Congress is ready to adopt price controls in the private sector . . . . At some point, however, . . . Congress [may be forced] to take the private sector recommendations of the IPAB more seriously. If this leads to all-payer rate setting, this may be the most revolutionary contribution of the IPAB concept. If the IPAB plays a role in all-payer rate setting, it will truly have become the Platonic Guardian of our health care system.

Id. at 31. Taking into account "the aggregate effect of the factors," *Synar*, 626 F. Supp. at 1390, it is clear that IPAB violates the separation of powers, and its anti-repeal rule cannot withstand the applicable strict scrutiny. This Court should reverse and remand with instructions to enter judgment for the Plaintiffs on their seventh cause of action.

DATED: June 5, 2013.

Respectfully submitted,

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