No. 14-525

IN THE

# Supreme Court of the United States

NICK COONS and DR. ERIC NOVAK,
*Petitioners,*

v.

JACOB J. LEW, SYLVIA BURWELL,
ERIC HOLDER JR. and BARACK OBAMA,
*Respondents.*

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

## BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned that the Constitution's fundamental framework of Separation of Powers be strictly maintained.

## STATEMENT OF THE CASE

The so-called Independent Payment Advisory Board (IPAB), established by the Patient Protection and Affordable Care Act ("ACA" or "Obamacare"), involves the most comprehensive assault on the fundamental Constitutional doctrine of Separation of Powers in the history of American law. The ACA, by its express terms, purports to exempt IPAB from *any* legislative, judicial, and even executive branch oversight. That makes IPAB the most authoritarian and anti-democratic institution in the history of American law, since slavery. As Cohen and Cannon write, in the most authoritative publication regarding IPAB,

> "IPAB truly is independent, but in the worst sense of the word. It wields power independent of Congress, independent of the president, independent of the judiciary, and independent of the will of the people."[2]

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[2] Diane Cohen and Michael F. Cannon, The Independent Payment Advisory Board, PPACA's Anti-Constitutional and Authoritarian Super-Legislature, Policy Analysis No. 700, Cato Institute, Washington, D.C., June 14, 2012, at 1.

The Board comprising IPAB is composed of 15 unelected bureaucrats not personally accountable to the public. Appointed by the President with the advice and consent of the Senate, 42 U.S.C. Section 1395kkk(g)(1)-(4), that is the end of any effective authority that any branch of government has over them. *Id.* While the ACA provides that Board members may serve up to two consecutive terms, "If a board member reaches the end of his term and the President declines to appoint (or the Senate fails to confirm) a successor, he may serve indefinitely." *Id*., at 3; 42 U.S.C. Section 1395kkk(g)(2).

Moreover, the ACA provides in regard to IPAB that,

> "[T]he board may conduct business whenever half of its appointed members are present, and may act upon a majority vote by all members present. When there are no vacancies, therefore, the board will reach a quorum whenever as few as eight members gather, and any five members could wield IPAB's considerable powers.

Cohen and Cannon, *supra*, at 3; 42 U.S.C. Section 1395kkk(h).

Indeed, it is possible under the express terms of the ACA for the vast powers of IPAB to be vested in and exercised by just one unelected person. Cohen and Cannon explain, "If there are 14 vacancies on the board, the Act allows the sole appointed member to constitute a quorum, conduct official business, and

issue 'proposals.'" Cohen and Cannon, *supra*, at 3; 42 U.S.C. Section 1395kkk(h).

The President, therefore, could appoint just one party loyalist to carry out all of IPAB's vast powers. Cohen and Cannon add,

> "Or none: if the President fails to appoint any board members (or the Senate fails to confirm the President's appointments, or a majority of the board cannot agree on a proposal) the Act authorizes the Secretary of Health and Human Services to exercise the Board's powers unilaterally."

Cohen and Cannon, *supra*, at 3; 42 U.S.C. Section 1395kkk(h).

Those powers, moreover, would include the power of the Secretary to assume legislative authority and appropriate funds to his or her own department to administer his or her own directives. Cohen and Cannon, *supra*, at 3; 42 U.S.C. Sections 1395kkk(c)(2)(A)(v) and 1395kkk(c)(3)(B)(iv)

In order to help finance the new health care benefits of the Act, the ACA provides for cuts to future Medicare spending of $716 billion over the first 10 years alone, as officially scored by CBO and Medicare's actuaries.[3] To further ensure funding for

[3] Letter to the Honorable Nancy Pelosi from Douglas Elmendorf, Director, Congressional Budget Office, March 20, 2010; Richard S. Foster, Chief Actuary, Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended, Centers for Medicare & Medicaid Services, U.S.

its new Obamcare benefits, the ACA created IPAB to adopt further cuts to Medicare to the extent necessary to keep Medicare spending within certain target limits. Starting in 2018, that target limit will be the rate of growth of the economy per capita plus one percentage point. Cohen and Cannon, *supra*, at 3-4.

For every year that the Medicare actuaries project that Medicare spending will exceed the specified limits, the ACA requires IPAB, no later than January 15 of the preceding year, to issue a "detailed and specific…legislative proposal…related to the Medicare program" that "shall…result in a net reduction in total Medicare program spending…that is *at least equal* to the applicable savings target." Cohen and Cannon, *supra*, at 4; 42 U.S.C. Section 1395kkk(c)(2)(A)(i). The ACA further authorizes IPAB to "propose" even greater reductions in projected Medicare spending. Cohen and Cannon, *supra*, at 4; 42 U.S.C. Section 1395kkk(c)(2)(A)(i).

If this Court does not act to consider this case, IPAB will be busy rewriting the Medicare Act for many years. Historically, per capita Medicare spending has grown an average of 2.6 percentage points higher than per capita GDP.[4] At those current, long term trends, IPAB will be cutting at least 1.6% of Medicare spending each and every year, for many years.

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Department of Health and Human Services, April 22, 2010; *See also* Cohen and Cannon, *supra*, at 2.

[4] Chapin White and Paul B. Ginsburg, "Slower Growth in Medicare Spending—Is This the New Normal?" *New England Journal of Medicine*, Vol. 366, at 1073-75 (2012); Cohen and Cannon, *supra*, at 4.

Moreover, IPAB's powers are not limited to Medicare under the language of the ACA. IPAB can issue any proposal "related to the Medicare program."[5] The Board can reason that if it is restricting spending on health care under Medicare, then it must also restrict spending on health care throughout the economy, or doctors and hospitals will flee Medicare and the seniors it is supposed to be serving, to provide better compensated health care to others. Indeed, Medicare's actuaries are already effectively making just this argument about the impact on Medicare from the ACA's restrictions and cuts for Medicare.[6]

The ACA's purported grant of power to IPAB to issue any proposal "related to Medicare" consequently covers the power to control all of health care to slash spending on health care outside of Medicare as well, so that Medicare and those that it is serving will not suffer a competitive disadvantage from the ACA's clamp on Medicare.

Indeed, as Cohen and Cannon report, the ACA "requires IPAB" to produce proposals to "slow the growth in national health expenditures" and "Non-Federal Health Care Programs." Cohen and Cannon,

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[5] Cohen and Cannon, *supra*, at 4; 42 U.S.C. Sections 1395kkk(b)(1)(3);(c)(1)(A) and (c)(2)(A)(vi);(d)(1)(A),(B),(C),(D); and (e)(1) and (3).

[6] John D. Shatto and Kent Clemens, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Medicare Providers*, Office of the Actuary, Centers for Medicare and Medicaid Services, August 5, 2010, at 5.

*supra*, at 7; 42 U.S.C. Section 1395kkk(o)(1). Cohen and Cannon further explain that the ACA

> "provides that if the Medicare actuaries project that the growth rate of national health expenditures will exceed that of per-enrollee Medicare spending, IPAB's 'proposals shall be designed to help reduce the growth rate [of national health expenditures] while maintaining or enhancing beneficiary access to quality care under [Medicare].'[7] This is a clear mandate to reduce both government and private sector health care spending. Indeed, the simplest way to reduce overall health care spending while maintaining access to care for Medicare enrollees is to limit spending on patients outside of Medicare.

Cohen and Cannon, *supra*, at 7.

Worst of all, under the ACA, IPAB's so-called proposals are not proposals at all. The ACA provides for them to automatically become law without Congressional action, Congressional approval, meaningful Congressional oversight, or possible subjection to a Presidential veto. Cohen and Cannon, *supra*, at 1. Congress can still act in regard to IPAB's "proposals," but its legislative powers to do so under Article 1 of the Constitution are purportedly sharply restricted under the ACA statute.

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[7] 42 U.S.C. Section 1395kkk(c)(2)(A)(vii).

As Cohen and Cannon explain,

> "IPAB's proposals will have force of law. The reasons for this are twofold. First, [the ACA] requires the Secretary of Health and Human Services to implement them. Second, it severely restricts Congress' ability to block their implementation by rejecting them or offering a substitute proposal. These provisions will effectively make IPAB's proposals law without the approval of Congress or the signature of the President."

Cohen and Cannon, *supra*, at 8; 42 U.S.C. Section 1395kkk(e)(1).

Under the ACA, "To prevent an IPAB proposal from becoming law, Congress must offer substitute …legislation that achieves the same budgetary result. [Alternatively], the Act requires a three-fifths vote of all the members of the Senate to waive [this requirement]." Cohen and Cannon, *supra*, at 9; 42 U.S.C. Section 1395kkk(d)(3)(C), (D), (E). Otherwise, "IPAB's legislative proposal automatically becomes law, and the Act requires the Secretary of Health and Human Services to implement it." Cohen and Cannon, *supra*, at 9; 42 U.S.C. Section 1395kkk(e)(1).

Moreover, under the ACA, "after 2020, Congress loses the ability even to offer substitutes for IPAB proposals….[I]n that case, the Act requires the Secretary to implement IPAB's proposals even if Congress does enact a substitute." Cohen and Cannon, *supra*, at 10; 42 U.S.C. Section 1395kkk(e)(3)(A).

The ACA also absurdly purports to sharply limit the legislative power of the Congress of the United

States to ever repeal IPAB. Under the ACA, Congress can only ever repeal IPAB by introducing a specifically worded "Joint Resolution" in the House and the Senate between January 1, 2017 and February 1, 2017. Then it must pass that resolution with a three-fifths vote of all members of each house by August 15, 2017. Cohen and Cannon, *supra*, at 10; 42 U.S.C. Section 1395kkk(f).

As Cohen and Cannon summarize, under the ACA,

> "Congress has only about 15 business days in the year 2017 to propose [a] joint resolution of repeal [of IPAB]. Otherwise, the Act forever precludes repeal [of IPAB]. Congress must then pass that resolution with a three-fifths supermajority by August 15, 2017, or the Act forever precludes repeal….If Congress fails to follow these precise steps, then [the ACA] states the American people's elected representatives may never repeal IPAB, ever."

Cohen and Cannon, *supra*, at 10.

In a final insult to Constitutional injury, the ACA provides that "Citizens will have no power to challenge IPAB's edicts in court." Cohen and Cannon, *supra*, at 1. Cohen and Cannon state, "Finally, [the ACA] gives IPAB and the Secretary the sole authority to judge their own actions by prohibiting administrative or judicial review of the Secretary's implementation of an IPAB proposal." Cohen and Cannon, *supra*, at 10; 42 U.S.C. Section 1395kkk(f).

Cohen and Cannon conclude,

> "The Independent Payment Advisory Board is worse than unconstitutional—it is *anti*-constitutional. Congress's legislative powers do not include the power to alter the constitutional procedure required for passage of laws. Nor does it include the power to entrench legislation by preventing it from being altered by future Congresses."

Cohen and Cannon, *supra*, at 1.

Note that President Obama has not made any appointments to IPAB. That means that the Secretary of HHS, who reports directly to President Obama, now personally holds *all* the powers of IPAB. 42 U.S.C. Section 1395kkk(c)(5). That includes plenary powers to reorder anything related to health care, as if property rights, freedom of contract, the rule of law, the Constitution, and democracy do not apply to any business or transaction related to health care. This is not a dictatorship of the proletariat.

Dr. Eric Novack is an Arizona orthopaedic surgeon. Doc. #41, Para. 7. About one-eighth of his practice is composed of Medicare patients, so much of his income depends directly on Medicare policy and reimbursement payments for health treatment and services he provides to seniors covered by Medicare. Those Medicare policies and payments are expressly the targets of the anti-Constitutional and anti-democratic institutional authority and powers of IPAB, under the express statutory language of the ACA. But, indeed, all of his income and all of his livelihood is now subject to those anti-Constitutional

and anti-democratic authorities and powers of IPAB, under the statutory language of the ACA.

Nick Coons is a small business owner in Arizona who does not have health insurance, which makes him one of the "uninsured." Doc. #41, Paras. 6, 14. He refuses to buy a health insurance policy as required by the individual mandate of the ACA, because he does not want to disclose his personal information and medical history to an insurance company and other third parties. *Id.*, Paras. 6, 14, 16. However, the individual mandate and associated tax penalty under the ACA force Mr. Coons to give up his personal privacy, and his funds to pay the premiums for the mandated, excessively expensive insurance, or pay a tax penalty to the federal government to preserve his Constitutional rights. *Id.*, Paras. 19-26, 83-85.

Moreover, Mr. Coons is and will be a consumer of health care. But the vitality of that health care, and its ability to preserve his health, and, indeed, his very life, is now subject to and threatened by the anti-Constitutional and anti-democratic institutional authority and powers of IPAB, under the express statutory language of the ACA.

On May 10, 2011, Plaintiffs Coons and Novak filed their Second Amended Complaint in the federal district court of Arizona seeking injunctive and declaratory relief against enforcement of the ACA. But the district court dismissed the privacy claim of Mr. Coons as unripe because "the tax penalty has not yet gone into effect" and Mr. Coons had not been asked to relinquish any information to any third party. (App. 30-31). The tax penalty, however, has now gone into

effect, or will inevitably be applied to Mr. Coons, unless he accedes to the burdens of the individual mandate of the ACA. Moreover, the specter of IPAB and its dictates is already affecting health care for Mr. Coons and all Americans, presently now and prospectively into the future.

The district court also held that IPAB does not violate the Separation of Powers Doctrine, declaring inexplicably that the government has met the test of "clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." (App. At 37). But the court failed to identify any "intelligible principle" in the ACA to guide or restrain it. Nor did it even consider whether IPAB violates the Constitution's fundamental framework of Separation of Powers by consolidating legislative, executive and judicial powers into one agency, which can be only one unelected bureaucrat not accountable to the public.

Plaintiffs filed a timely appeal to the Ninth Circuit, which upheld the district court without addressing this Court's doctrine of unconstitutional conditions. The Ninth Circuit concluded that the Separation of Powers claim is unripe because IPAB has not taken any action. (App. at 8-12). But because of IPAB's comprehensively unconstitutional structure, IPAB cannot take *any* action that would be Constitutional.

## SUMMARY OF ARGUMENT

This case involves important questions of law regarding the fundamental Separations of Powers framework of the Constitution.

IPAB involves the most extreme Delegation of Powers violation, and the most comprehensive assault on the Separation of Powers Doctrine, in the history of American law.

The Board comprising IPAB is composed of 15 unelected bureaucrats not personally accountable to the public. But it is possible under the express terms of the ACA for the vast powers of IPAB to be vested in and exercised by just one unelected person.

Under the ACA, IPAB's so-called "proposals" are not proposals at all. The ACA provides for them to automatically become law without Congressional action, Congressional approval, meaningful Congressional oversight, or possible subjection to a Presidential veto.

Congress can still act in regard to IPAB's "proposals," but *its* legislative powers to do so under Article 1 of the Constitution are purportedly sharply restricted under the ACA statute. To prevent an IPAB proposal from becoming law, Congress must offer substitute legislation that achieves the same budgetary result. Alternatively, the Act requires a three-fifths vote of all the members of the Senate to waive this requirement. Otherwise, IPAB's legislative "proposal" automatically becomes law, and the ACA requires the Secretary of Health and Human Services to implement it.

Moreover, under the ACA, after 2020, Congress loses the ability even to offer substitutes for IPAB proposals. At that time, the Act requires the Secretary to implement IPAB's proposals even if Congress does enact a substitute.

The immediate domain for IPAB attention is Medicare, with the ACA authorizing it to cut Medicare spending every year to half of its historic long term rate of growth going back 50 years to its founding. If this Court does not act to consider this case, IPAB will be busy rewriting the Medicare Act for many years.

Moreover, IPAB's powers are not limited to Medicare. IPAB can issue any proposal "related to the Medicare program." The Board can reason that if it is restricting spending on health care under Medicare, then it must also restrict spending on health care throughout the economy, or doctors and hospitals will flee Medicare and the seniors it is supposed to be serving, to provide better compensated health care to others.

Consequently, the ACA's purported grant of power to IPAB to issue any proposal "related to Medicare" covers the power to control all of health care to slash spending on health care outside of Medicare as well, so that Medicare and those that it is serving will not suffer a competitive disadvantage from the ACA's clamp on Medicare.

The ACA also purports to sharply limit the legislative power of the Congress of the United States to ever repeal IPAB. Under the ACA, Congress can only ever repeal IPAB by introducing a specifically

worded "Joint Resolution" in the House and the Senate between January 1, 2017 and February 1, 2017, a period including just 15 business days. Then it must pass that resolution with a three-fifths vote of all members of each house by August 15, 2017. If Congress fails to follow these precise steps, then the ACA states the American people's elected representatives may never repeal IPAB, ever.

In other words, the delegation of powers violation involved in IPAB is so extreme that the ACA even purports to sharply limit the legislative powers of Congress itself as well.

Finally, the ACA provides that citizens will have no power to challenge IPAB's edicts in court. The ACA gives IPAB and the Secretary the sole authority to judge their own actions by prohibiting administrative or judicial review of the Secretary's implementation of an IPAB proposal.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW REGARDING THE FUNDAMENTAL SEPARATION OF POWERS FRAMEWORK OF THE CONSTITUTION.

#### A. IPAB Involves The Most Extreme Delegation of Powers Violation In the History of American Law.

Article I, Section 1 of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. 1, Section 1. But the ACA and its sponsors and advocates beg to differ.

This Court has ruled that Congress may not "abdicate, or… transfer to others the essential legislative functions with which it is vested." *Currin v. Wallace*, 306 U.S. 1, 15 (1939). But the ACA and its sponsors and advocates disagree.

Congress enacted a Medicare program with per enrollee spending that has been growing for decades now at 2.6% a year on average faster than per capita GDP. Now with IPAB, Congress has delegated legislative power to an executive agency to rewrite Medicare every year to cut 1.6% of Medicare spending, so that per enrollee it will grow no faster than per capita GDP plus 1%. That 1.6% of spending cuts each year would amount to cuts of $83 billion over the first 10 years alone, at current levels of Medicare spending.

But that is just the beginning of IPAB's legislative powers. As discussed above, since IPAB has the power to enact so-called proposals "related to the Medicare program," that means it can legislate the transformation of private sector health care, so that health care provided under Medicare won't be at a competitive disadvantage, with doctors and hospitals fleeing Medicare and the seniors dependent on it for better compensated care under private sector health plans. Cohen and Cannon, *supra*, at 7.

As discussed above, the ACA provides that

> "[I]f the Medicare actuaries project that the growth rate of national health expenditures will exceed that of per-enrollee Medicare spending, IPAB's 'proposals shall be designed to help reduce the growth rate [of national health expenditures] while maintaining or enhancing beneficiary access to quality care under [Medicare].'"[8]

But that is what Congress was supposed to be doing under the ACA. Under the Constitution's Separation of Powers, Congress cannot just ultimately punt the reforms it was supposedly making in that Act over to an Executive Branch board of unelected bureaucrats to legislate the substantive changes to be made.

Cohen and Cannon explain that this Court has held that, "while Congress may create administrative agencies and commissions, it may not yield to another the ultimate power to make law." Cohen and Cannon, *supra*, at 12. This Court explained in *Loving v. United States*, 517 U.S. 748, 758-59, that the "true distinction" between legitimate and illegitimate delegations of authority is that an agency may not exercise the power to make law, but may be given the "authority or discretion as to its execution, to be exercised under and in pursuance of the law." Cohen and Cannon add, "In other words, the broader the authority conferred on an agency, the more tightly it must be bound by legislative, judicial, or executive oversight, and the more precise and narrow its

[8] 42 U.S.C. Section 1395kkk(c)(2)(A)(vii).

instructions from Congress must be." Cohen and Cannon, *supra*, at 12.

This Court's test as to whether a delegation is permissible is whether Congress has provided an "intelligible principle" to guide and limit the authority granted. *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928). As Cohen and Cannon write, "Congress's unprecedented delegation of legislative power to IPAB fails this test. The Act provides almost no limit on IPAB's legislative powers, and no intelligible standard constraining the exercise of those powers." Cohen and Cannon, *supra*, at 12.

Moreover, instead of tightly bound by legislative, judicial and executive oversight, the IPAB delegation is essentially free of any such oversight. It is exempt from judicial review, as noted above, as well as the requirements of the Administrative Procedures Act, factors which this Court has previously found relevant in evaluating permissible delegations. *J.W. Hampton, supra; Mistretta v. United States*, 488 U.S. 361, 393-94 (1989); *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, thus, "no additional review of the guidelines as a whole is either necessary or desirable."). As for legislative oversight, the ACA purports to effectively bar legislative review, by so sharply constraining legislative amendment or repeal as to effectively bar it.

### B. The Delegation of Powers Involved in IPAB Is So Extreme That the ACA Even Purports to Sharply Limit Congress's Legislative Powers As Well.

IPAB not only involves an extreme delegation of legislative powers to an executive agency. The ACA also absurdly purports to limit Congress's own legislative powers, by supposedly so sharply limiting Congress's legislative authority to repeal IPAB as to effectively nullify that authority. The ACA thereby seeks to repeal, by mere statute, basic legislative powers of Congress granted by the Constitution.

Cohen and Cannon write, "It is a maxim of representative government that Congress does not have the power to bind the hands of a subsequent Congress by statute." Cohen and Cannon, *supra*, at 14. Thomas Jefferson wrote in his *Notes on the State of Virginia* 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."[9]

In *Manigault v. Springs*, 199 U.S. 473, 487 (1905), this Court stated that it has long held that "a general law…may be repealed, amended, or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature." ACCORD: *Street v. United States*, 133 U.S. 299, 300 (1890)(holding that an act of Congress "could not have…any effect on the power of a subsequent Congress"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932)(stating that "the will

[9] Thomas Jefferson, *Notes on the State of Virginia* (Boston, MA: Wells and Lilly, 1829), at 126.

of a particular Congress…does not impose itself upon those to follow in succeeding years").

### C. IPAB Involves An Egregious, Anti-Constitutional Rejection of Separation of Powers, Establishing An Anti-Democratic Health Care Dictatorship.

IPAB involves an extreme Separation of Powers violation first and foremost because it involves an excessive and extreme delegation of legislative powers to an executive agency. Cohen and Cannon add,

> "The Act delegates these legislative powers to IPAB, and potentially to a single individual, without an intelligible standard. The Board's legislative powers are subject neither to the Administrative Procedures Act's rulemaking requirements, nor to Administrative or judicial review, nor to any meaningful Congressional review. Congressional review is not meaningful because [the ACA] severely limits Congress' ability to alter or amend IPAB's proposals. The Act curtails the president's constitutional authority to recommend only such measures as he considers expedient. The Act requires the Secretary of Health and Human Services to implement these legislative proposals without regard for congressional or presidential approval….If Congress fails to repeal IPAB through [the ACA specified] process, then Congress can never again alter or reject IPAB's proposals."

Cohen and Cannon, *supra*, at 13.

These factors together reveal an unprecedented combination, through IPAB and the ACA, of legislative, executive, and judicial authority in violation of the Constitution's fundamental Separation of Powers doctrine.

This Court should grant the requested Writ of Certiorari in this case, so that it can correct the Delegation of Powers violation and Separation of Powers violation upheld by the Ninth Circuit below.

## II. THE DECISION BELOW D CONFLICTS WITH DECISIONS OF THIS COURT, BY DENYING AGGRIEVED PARTIES THEIR SOLE MEANS OF RECOURSE AGAINST AN UNCONSTITUTIONAL, UNACCOUNTABLE AGENCY.

As discussed above, the Ninth Circuit below dismissed the Separation of Powers claim of Dr. Novack on the grounds that it was unripe because IPAB has not yet taken any action. But because of IPAB's comprehensively unconstitutional structure, IPAB cannot take *any* action that would be constitutional. This should easily be sufficient for Dr. Novack to bring a facial challenge to the constitutionality of IPAB, and end the threat of this so thoroughly unconstitutional, unaccountable, anti-democratic agency to his medical practice.

In *Buckley v. Valeo*, 424 U.S. 1, 116-117 (1976), this Court ruled that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their

rights." Consequently, candidates for public office and political organizations could challenge the Federal Elections Commission as in violation of the Separations of Powers Doctrine even though, as in the present case concerning IPAB, "*many of its…functions remained as yet unexercised."* (emphasis added).

This Court further applied the *Buckley* standard in *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991). The Court held that a citizens group formed to reduce aircraft noise could bring a separation of powers claim against a government Board empowered to veto what the citizens group sought – reductions in air traffic at Washington National Airport. Plaintiffs had standing to challenge the constitutionality of the Board, even though the Board had not yet taken any action against their interests, because the Board was empowered only to deny exactly what the citizens group was formed to accomplish. So an ultimate clash was inevitable.

The principle of these cases is that a plaintiff subject to an unconstitutional agency has standing to bring a challenge against the agency for separations of powers violations. The creation of the Board in *Metropolitan Wash. Airports Auth.* to maintain or increase air traffic at Washington airports decreased the ability of the Plaintiffs in that case to accomplish their goal of reducing airport noise. Analogously, IPAB's statutory mandate to "reduce the per capita rate of growth of Medicare spending," 42 U.S.C. Section 1395kkk(b), combined with broad and virtually unreviewable powers to enact law, decreases the ability of Dr. Novack to maintain Medicare

reimbursement rates for health care services he provides to seniors under Medicare.

The decision of the Ninth Circuit below is consequently in direct conflict with the decisions of this Court in *Buckley* and *Metropolitan Wash. Airports Auth.*

It is all the more important to open the courthouse doors to standing in these cases so that public officials cannot pursue "catch me if you can" constitutional abuses of power. It will often take years to bring a complex, constitutional legal action to court, and then get it resolved through all the levels of appeal. That can create incentives for constitutional abuse by public officials, as they can enjoy political gain while in office from certain constituencies due to such abuses, yet be long out of office by the time the courts get around to finalizing correction of their abuses. When those abuses involve violations of fundamental doctrines of Constitutional Law, such an extended period of abuse can be particularly harmful.

This is all the more urgent in this case because the threat and uncertainties produced by the blatantly unconstitutional powers claimed by IPAB are undoubtedly already causing harm to Dr. Novack's practice. Those threats and uncertainties most immediately affect the one eighth of revenues to Dr. Novack's practice represented by Medicare patients. But because of the very broad mandate claimed for IPAB, those threats and uncertainties actually apply to 100% of Dr. Novack's revenues, as IPAB's mandate applies to 100% of health care services and practices, all of which are ultimately "related to the Medicare

program," through the effects non-Medicare services and practices can still have on Medicare.

Finally, no further facts need to be developed to pursue a facial challenge to the transparent and fully developed constitutional violations involved in IPAB, as fully discussed above. Given the magnitude and fundamental nature of those violations, sidelining plaintiffs potentially for years while they await vindication of their fundamental constitutional rights, on the grounds of ripeness to develop further unnecessary and essentially irrelevant facts, is unwise to the point of becoming tragic.

## III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNCONSTITUTIONAL CONDITIONS DOCTRINE AND THE PRECEDENTS OF OTHER CIRCUITS.

This Court has long held that the exercise of a Constitutional right cannot be made conditional on paying a penalty or otherwise bearing the exaction of a government burden. *E.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013)(landowner could not be required to fund offsite construction projects on public lands he did not own, as a condition of receiving a development permit for unrelated land he did own); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828-30 (1987)(property owner could not be required to provide a public easement across property as a condition to approval of rebuilding permit); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)(property owner could not be required to dedicate some of his property to improve city drainage

system and provide a pedestrian pathway as a condition to approval of a building permit for his property). This is known as the unconstitutional conditions doctrine.

But the Ninth Circuit below failed to enforce this doctrine in regard to the right to privacy claim by Mr. Coons in this case. The ACA unconstitutionally imposes on Mr. Coons the choice of disclosing personal information to insurance companies, in violation of his constitutionally protected right to privacy regarding such information, or paying the individual mandate tax penalty for refusing to comply with the mandate by purchasing the required insurance.

But the Ninth Circuit below held that his claim was not ripe because the tax penalty for enforcing the individual mandate under the ACA had not yet gone into effect. That tax penalty, however, has now gone into effect, or will inevitably be applied to Mr. Coons, unless he accedes to the burdens of the individual mandate of the ACA, and gives up his Constitutionally protected right to privacy of his personal health information. Under this Court's unconstitutional conditions precedents, Coons should not have to pay the penalty to exercise that constitutionally protected right, before his right not to pay the penalty can be litigated.

The present case is also ripe for review because IPAB is already having negative effects on the availability and quality of health care available to Mr. Coons and his family. The uncertainties created by IPAB's supposed powers, and potential loss of payments and profits due to IPAB directives, is

discouraging investment in assuring the availability of health care to Mr. Coons and his family, and in innovation and development of improvements in the quality of such care.

The ruling of the Ninth Circuit below conflicts with the ruling of the Eleventh Circuit in *Whitney v. Heckler*, 780 F.2d 963, 968, n. 6 (11th Cir. 1986), where the court said, "It is well-established that an issue is ripe for judicial review when the challenging party is placed in the dilemma of incurring the disadvantages of complying or risking penalties for non-compliance."

Moreover, this issue is developing into a widening split between the Circuits, as the Sixth Circuit has ruled the same as the Ninth Circuit, in a similar case, *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 602-03 (6th Cir. 2013). That court ruled that the case there was not ripe for review because the individual mandate tax penalty had also not gone into effect yet.

This Court should grant the requested Writ of Certiorari to resolve this conflict between the Circuits.

## CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari requested by Petitioners should be granted.

Respectfully submitted,

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