No. 14-525

In The
Supreme Court of the United States

NICK COONS and DR. ERIC NOVACK,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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THE DECISION BELOW INFLICTS IRREPARABLE HARM ON THE EXERCISE OF PRIVACY RIGHTS

Petitioners challenge the decision below that Nick Coons must relinquish his privacy in order to bring his informational privacy challenge. The Government argues that the holding was narrower and that Coons' claim is unripe simply because he "has not alleged that 'any third party has *requested* that he disclose his medical information as a condition precedent to obtaining the minimum required coverage.'" Resp. 7 (quoting Pet. App. 16). But these are two sides of the same coin. Coons will not be asked to disclose that information unless and until he tries to comply with the minimum coverage requirement – which he also challenges as unconstitutional. For purposes of standing and ripeness, it is sufficient that "there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citations and quotation marks omitted).

The Affordable Care Act requires Coons to either purchase government-approved health insurance – compliance with which would inevitably require Coons to disclose the personal information to third parties such as insurance companies – or to pay the monetary penalty to preserve his privacy. Doc. #41 ¶¶ 88-92; 42 U.S.C. § 18081(g)(1); 26 U.S.C. § 5000A(f). The *only* way for Coons to legally avoid disclosing the information is for him to pay the penalty. This is sufficient to state a claim for an unconstitutional condition on the exercise of his privacy

rights. The ACA penalizes Coons for choosing to exercise his right to withhold his confidential information from third parties, such as insurance companies. It is *this* choice – having to decide now between disclosing private information and paying a penalty – that Coons challenges as an unconstitutional condition. That injury is ripe now, because he is confronted "with the present dilemma of invoking his right" of privacy, or paying a penalty to the government. *United States v. Ayers*, 371 F. App'x 162, 164 (2d Cir. 2010) (citing *United States v. Johnson*, 446 F.3d 272, 279 (2d Cir. 2006)); *see also United States v. Zinn*, 321 F.3d 1084, 1088 (11th Cir. 2003) (challenge to forced choice was ripe because prisoner was forced to make the choice); *United States v. Davis*, 242 F.3d 49, 51 (1st Cir. 2001) (*per curiam*) (same).

The Government insists that insurers will not solicit personal information because the ACA generally prevents companies from denying coverage or varying premiums, Resp. 7 (citing 42 U.S.C. § 300gg-1(a)), but this is false. The ACA delineates the basic information Coons must disclose to obtain government-approved insurance. *See* 42 U.S.C. § 18081(g)(1) (requiring disclosure of information to determine eligibility and coverage). Moreover, the Act's restrictions on insurance providers further induce insurance companies to solicit sensitive information from consumers. An insurance company's solvency depends on its ability to assess risk, which would be nearly impossible without having any information about a customer's

medical history. Nothing in the ACA forbids them from gathering such information.

Finally, what information Coons would be forced to turn over in exchange for a compliant insurance plan is a matter to be developed through discovery. As the Government itself admits, the appellate courts "have held that the contours of a right to informational privacy depend on [various] factors." Resp. 8. Yet while factors like "'the type of information requested,' 'the potential for harm in any subsequent nonconsensual disclosure,' 'the adequacy of safeguards to prevent unauthorized disclosure,' and the 'public interest' at issue," *id.* (quoting *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004)) are easily ascertainable without requiring Coons to submit to an unconstitutional condition, the holding of unripeness below is at odds with the holding of other circuits 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 noncompliance." *E.g., Whitney v. Heckler*, 780 F.2d 963, 968 n.6 (11th Cir. 1986).

The dangers of relinquishing his privacy and disclosing such information so that Coons can challenge this unconstitutional condition are severe. Once that information is surrendered to a third party, the Government can appropriate it without his consent – and without basic Fourth Amendment protections, *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) – for the vague purposes of "ensuring the efficient operation of the Exchange," 42 U.S.C. § 18081(g)(2)(A),

public health, law enforcement, and regulatory purposes. *See generally* 45 C.F.R. § 164.512 ("uses and disclosures for which an authorization or opportunity to agree or object is not required").

Meanwhile, the risk that this information will be further exposed to use by unauthorized parties has escalated even since the filing of the Petition for Certiorari in this case. There remain serious concerns regarding the government's failure to protect information disclosed in compliance with the ACA. Despite revelations that ACA websites disclose to private marketing companies without users' knowledge such information as "age, income, ZIP code, whether a person smokes, and if a person is pregnant" and "a computer's Internet address, which can identify a person's name or address when combined with other information," the government "did not explain how it ensures that companies were following the government's privacy and security policies." Ricardo Alonso-Zaldivar and Jack Gillum, *Government Health Care Website Quietly Sharing Personal Data*, Associated Press, Jan. 20, 2015.[1] The Government Accountability Office has concluded that the Government "did not take all reasonable steps to limit those [security and privacy] risks," and that "[u]ntil it addresses shortcomings in both the technical security controls and its information security program, CMS is exposing

[1] *Available at* http://bigstory.ap.org/article/31490a20926d4ed3b98ff2d0ed8fc81d/new-privacy-concerns-over-governments-health-care-website.

Healthcare.gov-related data and its supporting systems to significant risks of unauthorized access, use, disclosure, modification, and disruption." *Healthcare.gov: Actions Needed to Address Weaknesses in Information Security and Privacy Controls* (GAO-14-730), Sept. 16, 2014, at 54.[2]

Virtually every American currently faces the same choice as Coons: relinquish personal information and risk that this information will be further disseminated or misappropriated, or pay a penalty for refusing to do so. That Coons is now forced to choose whether to violate the minimum coverage requirement and be penalized, or to acquiesce in the compelled disclosure of private information, makes this case ripe for review now. *See further Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). This Court should grant the Petition to ensure the doctrine of unconstitutional conditions is not applied to bar such plaintiffs from court.

THE DECISION BELOW DEPRIVES PARTIES OF THEIR SOLE MEANS OF RECOURSE AGAINST UNACCOUNTABLE AGENCIES AND PERPETUATES CONFUSION AMONG LOWER COURTS

The Government's mischaracterization of Dr. Eric Novack's injury as "attributable to future agency

[2] *Available at* http://www.gao.gov/assets/670/665840.pdf.

action," Resp. 14, leads to both a misapprehension of the conflicting precedents governing ripeness of separation-of-powers claims and the importance of reviewing the vast powers of the unaccountable Independent Payment Advisory Board now rather than later. It is this very confusion that plagues lower courts, leading to an inconsistent understanding of when a plaintiff may bring facial constitutional challenges to an administrative agency. This Court should grant the Petition to clarify that claims like Novack's are ripe because the constitutional violation occurs when the agency is created, not when it issues its regulations.

The Government's misconstruction of Novack's injury leads it to conclude that the decision below does not conflict with other cases that "uniformly recognize that 'parties have to demonstrate a sufficient personal stake in the outcome of a controversy'" in order to have standing. Resp. 13 (quoting *Reuss v. Balles*, 584 F.2d 461, 470 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978)). But Novack does not advocate for a "relaxed version of Article III's injury-in-fact requirement," Resp. 12; rather, he has a personal stake because he is subject to, and affected by, IPAB. Indeed, this same misperception has caused confusion among lower courts regarding whether a plaintiff can challenge his subjection to an unconstitutional agency that affects his interests before that agency acts. *See KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 15 (1st Cir. 2012) ("The contours of *Buckley's* standing analysis are not well-defined."). There is no better

opportunity for resolving the confusion over what constitutes "a proper nexus with the agency-defendant . . . [to] have standing to assert a separation of powers claim" as the case at bar, where a plaintiff is subject to and affected by an unconstitutional agency and has no other means of recourse against its power. *See* William Marks, Bond, Buckley, *and the Boundaries of Separation of Powers Standing*, 67 Vand. L. Rev. 505, 519 (2014).

It is true that Novack brings his constitutional challenge before IPAB has acted. But his facial separation-of-powers claim challenges the creation of IPAB itself, not any particular action. Moreover, subjecting Dr. Novack's practice to IPAB's unconstrained bureaucracy directly implicates his financial and medical interests and subjects him to a procedure for determining reimbursements that IPAB's existence has already set in motion. Thus, his injury is not "a matter of sheer speculation," Resp. 10, and resolving his claim does not rely on further factual development. The unconstitutional provisions governing IPAB are already operating now, and because the ACA frees the Board of any meaningful checks and balances, waiting to consider this constitutional challenge could cause irreparable injury.

Although Novack's grievances derive from his subjection to an unconstitutional regime, the Government fixates on the likelihood that the Board will take specific action against Novack, dismissing that injury as "sheer speculation." Resp. 10. Even assuming the Government is correct that IPAB will not act

to reduce Novack's reimbursements before 2019, Resp. 5, 9, 14, the fact that this date occurs *after* the repeal window militates in favor of review *now*. Outside of a short window in 2017 where IPAB can only be repealed by an unprecedented super-majority vote, the ACA completely insulates IPAB from repeal and forever prohibits Congress from replacing IPAB proposals. 42 U.S.C. §§ 1395kkk(f)(1)-(3); (e)(3)(A)(ii). Even if Congress can accomplish this impractical feat, IPAB's repeal would not take effect until 2020. 42 U.S.C. § 1395kkk(e)(3)(A). Thus, if this Court does not take this case now, doctors like Novack will be left without recourse.

Of course, the Constitution does not permit one Congress to bind the actions of a subsequent Congress, nor may it use its rulemaking authority to surmount constitutional restraints. *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"). Nevertheless, the Government contends that Congress can simply change its rules or repeal the entire Act to eliminate constitutional concerns. Resp. 3 n.2. Shielding an otherwise unconstitutional law from review by claiming that Congress could simply ignore it provides no solace for those subject to the law's jurisdiction and

would effectively eradicate the Constitution's separation-of-powers protections.

It is this unprecedented consolidation of government power in this unaccountable Board – not any action IPAB may or may not take, Resp. 9 – that cries out for immediate review. IPAB's absolute immunity from judicial or administrative review separates it from its administrative predecessors, creating unparalleled "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. A constitutional challenge is Novack's only remedy against the extreme consolidations of power wielded by this unaccountable agency.

Moreover, there is no reason to believe that IPAB will police its own vast powers. Indeed, recent events indicate that the government may even *bolster* the Board's authority. For example, the President's

proposed 2016 budget relies on over $20 billion in savings from "[s]trengthen[ing] the Independent Payment Advisory Board (IPAB) to reduce long-term drivers of Medicare cost growth" by lowering the target growth rate that triggers IPAB's mandatory lawmaking. Office of Management and Budget, *Fiscal Year 2016 Budget of the U.S. Government*, Feb. 2, 2015, at 109.[3] This is why it is so important that the Court accept review in this case now, because doctors and patients subject to IPAB's vast regime will have no recourse later.

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Respectfully submitted,

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[3] *Available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf.