1-1-2011

Coons v. Geithner - Amicus Brief for Pacific Legal Foundation

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

NICK COONS, et al., Plaintiffs, v. TIMOTHY GEITHNER, et al., Defendants.	No. 2:10-cv-01714-GMS **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Pacific Legal Foundation offers this brief to address in more depth Plaintiffs' seventh cause of action, that the provisions of the Patient Protection and Affordable Care Act (PPACA), which establish the Independent Payment Advisory Board (IPAB), describe its powers, and insulate it from legislative, executive, or judicial oversight, violate the separation of powers.

IPAB is an autonomous lawmaking body purposely shielded from any meaningful accountability to Congress, voters, or the courts. It is designed to be free of oversight so that it can act (in the words of one of PPACA's most prominent advocates) as a group of "Platonic Guardians," or an "independent 'Federal Health Board' of experts." Timothy Stoltzfus Jost, *Focus on Health Care Reform: 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] Indeed, the framers explicitly rejected the idea of being governed by "a will in the community independent of the majority," because such an independent entity "may as well espouse . . . unjust views," *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961). They chose instead a system of checks and balances, in which all branches of government enjoy clear and limited powers, and are ultimately accountable to the public, so as to protect both the majority and the minority.

The provisions governing IPAB violate the separation of powers because they unconstitutionally delegate lawmaking power to this independent agency without oversight and control. Considering "the aggregate effect of the factors," *Synar v. United States*, 626 F. Supp. 1374, 1390 (D.C. Cir. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986), it becomes

[1] Plato, of course, 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 (Edith Hamilton & Huntington Cairns eds., 1961). His ideal state would therefore be overseen by Guardians who would govern the "art of medicine" by a law 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, and those who are evil-natured and incurable in soul they will themselves put to death." *Republic* 3:409e-410a, *in id.* at 654. "This," he contended, "has been shown to be the best thing for the sufferers themselves and for the state." *Id.* at 3:410a. Thomas Jefferson and John Adams agreed that Plato's work was "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 (Lester J. Cappon, ed., 1987), *with* Letter from Adams to Jefferson, July 16, 1814, *in id.* at 437.

clear that IPAB is not subordinate to Congress, because its "recommendations" cannot be meaningfully altered or blocked, but are automatically enforced without regard to the will of elected representatives. Worse, PPACA provides only a sharply limited, and temporary, power of repeal, which expires if not used by 2017, leaving Congress without power to discontinue IPAB's existence. These factors, taken together, make it clear that IPAB is not merely a subordinate agency, but enjoys autonomous lawmaking authority, contrary to the Constitution. Separation of powers principles—not to mention the concept of constitutional democracy—does not allow Congress to commission "Platonic Guardians."

ARGUMENT

I

42 U.S.C. § 1395kkk, UNDER WHICH IPAB'S "RECOMMENDATIONS" AUTOMATICALLY BECOME LAW WITHOUT MEANINGFUL CONGRESSIONAL OVERSIGHT, IS AN UNCONSTITUTIONAL DELEGATION OF LAWMAKING POWER

Courts reviewing nondelegation cases employ the "intelligible principle" test, but this test is more than a simple inquiry into whether Congress' instructions to a challenged agency are sufficiently clear. Instead, it is a holistic, totality-of-the-circumstances test, which determines whether, considering "the aggregate effect of the factors," the agency is employing the essential legislative power of enactment independent of Congressional control. *Synar*, 626 F. Supp. at 1390. Delegation is permissible only where Congress retains sufficient supervisory authority over the agency's actions that the agency can properly be characterized as an *instrument* of Congress, instead of an *autonomous law-making body*.

As Prof. Jost admits, "the conscious abdication of congressional responsibility to the IPAB is striking." Jost, *supra*, at 31. It is not only striking, it also fails the intelligible principles test. PPACA's provisions insulating IPAB from accountability, either to Congress, the public, or the courts, drastically limiting Congress' power to abolish it, and otherwise rendering it independent of executive, legislative, or judicial control, are far beyond any previous example of delegation, and so extensive that this case is less like prior nondelegation situations and more akin to the Contracts Clause cases holding that legislatures may not contract away the police power. *See, e.g., United*

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States v. Winstar Corp., 518 U.S. 839, 874-75 (1996); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884); and *Stone v. Mississippi*, 101 U.S. 814 (1880). But however characterized, PPACA's unprecedented delegation of unreviewable, unaccountable, lawmaking authority to IPAB is unconstitutional.

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

IPAB is legally charged with the duty of preparing "recommendations" which will "reduce the Medicare per capita growth rate." But these "recommendations" are much more than recommendations. Instead, the Secretary of Health and Human Services is required to implement them, without regard to Congress' views on the matter. 42 U.S.C. § 1395kkk(b)(2) and (3). These and other statutory provisions insulating IPAB's "recommendations" from meaningful Congressional oversight are much more than mere "parliamentary procedures," as the government characterizes them. *See* Defendants' Response to Plaintiffs' Motion for Preliminary Injunction (Opp. to Mtn. for Prelim. Inj.) at 1. On the contrary, PPACA deliberately ensures that the "recommendations" of this unelected, politically unaccountable agency automatically become law except in extremely rare circumstances.

The first indication that IPAB's "recommendations" are not just recommendations is that PPACA establishes a *separate* procedure whereby IPAB is authorized to prepare truly *advisory* proposals for Congress' consideration—and these proposals, identified in the statute as "advisory reports," are treated in an entirely different way than the "recommendations" IPAB is required to prepare under Section 1395kkk(c)(2)(A)(i). Under Section 1395kkk(c)(1)(B), IPAB is permitted (but not required) to prepare "advisory reports on matters related to the Medicare program, regardless of whether or not the Board submitted a proposal for such year . . . . Any advisory report submitted under this subparagraph *shall not be subject to the rules for congressional consideration* under subsection (d)." (emphasis added). This separate authority would be redundant and unnecessary if IPAB's "recommendations" under Section 1395kkk(c)(2)(A)(i) were, in fact, mere "recommendations."

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But IPAB's power is *not* recommendatory. Once its authority is triggered, IPAB is required to issue on January 15 a set of "recommendations" to reduce overall Medicare spending, along with "a legislative proposal that implements" these "recommendations." Section 1395kkk(c)(3)(B)(iv). Congress, however, does not adopt or give lawful effect to these "recommendations." On the contrary, the Secretary of Health and Human Services must "implement *the recommendations contained in a proposal submitted . . . to Congress*," Section 1395kkk(e)(1) (emphasis added), regardless of whether Congress approves or disapproves of them. Congress, in fact, is given no significant opportunity to review or alter these "recommendations" at all; on the contrary, Section 1395kkk(d)(3)(A) and (B) *deprives* Congress of such an opportunity by prohibiting 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 statutory criteria IPAB itself is required to comply with when drafting the "recommendations." In other words, Congress is only allowed to amend the "recommendations" by adding provisions that IPAB itself could have already drafted but failed to. This extraordinarily tight boundary on Congressional discretion is reinforced by a further prohibition against any repeal of the prohibition. Section 1395kkk(d)(3)(C).

Thus, the Secretary is required, "notwithstanding any other provision of law," to enforce the "recommendations" IPAB drafts *regardless* of what Congress thinks of them. Section 1395kkk(e)(1). Congress as a whole may add further "recommendations," but may not reverse or alter them.

Congress has only one means of barring IPAB's "recommendations" from automatically becoming law, and that method is rendered defunct if it is not exercised in 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, respectively, the Senate Finance, House Energy And Commerce, and House Ways And Means Committees. *See* Section 1395kkk(d)(1)(D).[2] But just as Congress as a whole is barred from altering these

[2] IPAB is also required to submit its "recommendations" to the Medicare Payment Advisory Commission and the Secretary of Health and Human Services for review and comment. *See* (continued...)

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"recommendations," the committees are *not* allowed to alter, or to recommend for or against passage of the "recommendations" and "legislative proposal"; rather, they to are allowed only to amend the "legislative proposal," 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 additional provisions that IPAB itself could have written but for some reason did not. With this trivial exception, the Congressional committees are required to report IPAB's "legislative proposal" (which PPACA now refers to as a "bill") on or before April 1—three months after IPAB first issues its "recommendations" and "legislative proposal." Section 1395kkk(d)(2)(A).[3]

PPACA then requires the Senate to take up consideration of this bill, and *again* prohibits amendments, *see* Section 1395kkk(d)(4)(B)(ii), (iv), as well as severely restricting debate on it. Section 1395kkk(d)(4)(D). This prohibition on altering IPAB's so-called "recommendation" is further reinforced by another provision that also forbids any change to the rule against 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." Section 1395kkk(d)(3)(C). The Senate—and *only* the Senate—may remove this obstruction, and only by a 3/5 vote of all *elected* Senators. Section 1395kkk(d)(3)(D).

Should Congress pass this bill—prefaced with the language required by Section 1395kkk(e)(3)(A)(i)—it will supersede IPAB's original "recommendations." To repeat, this route does *not* allow Congress to alter or reverse those "recommendations," but only to supplement the cuts in Medicare spending that IPAB originally "recommended" with further cuts that also fall within the same boundaries provided for IPAB. This alternative only allows Congress to do what IPAB could originally have done.

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[2] (...continued)
Sections 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.*

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

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But in 2020, these rules change. In that year, Congress loses its power to supplement IPAB's recommendations if it has not *also* enacted a joint resolution, between January 1, and August 15, of 2017, to discontinue IPAB's existence. The procedure for doing so is so complicated as to be unworkable. Such a resolution must be introduced during the 29 days between January 3 (when Congress convenes) and February 1, 2017. *See* Section 1395kkk(f)(1)(A). It must receive a vote of 3/5 of all *elected* members of Congress—one of the most extreme supermajority requirements ever enacted in the history of American law.[4] And it must be enacted by August 15, 2017. If these things do not occur, Section 1395kkk(e)(3)(A)(i) and (ii) become inoperative, and at that point, the process whereby IPAB's "recommendations" automatically become law becomes utterly irreversible. From that point on, IPAB's recommendations will automatically become law every year *regardless* of what Congress does.

Thus Defendants are more correct than they realize when they say that PPACA "allow[s] Congress, if it wishes, to act quickly to supersede a Board proposal." Defendants' Motion to Dismiss (MTD) at 46. Congress can, in fact, *only* supersede IPAB's "proposals" if it acts quickly! If Congress does not pass a joint resolution discontinuing IPAB during the 29-day window between January 3 and February 1, in the years 2012, 2013, 2014, 2015, 2016, or 2017, it loses any ability to bar IPAB's "recommendations" from being automatically enforced as law.

B. PPACA Exceeds the "Intelligible Principles" Rule by Giving IPAB Autonomous Lawmaking Authority Free of Legislative, Executive, or Judicial Oversight

In *Currin v. Wallace*, 306 U.S. 1, 15 (1939), the Supreme Court explained that Congress may not "abdicate, or . . . transfer to others, the essential legislative functions with which it is vested." Because it is sometimes "impracticable for the legislature to deal directly" with certain

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[4] By comparison, only two thirds of Senators *present* need to vote to remove a sitting president, U.S. Const. art. I, § 3, or to make a treaty the supreme law of the land. 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). The constitutionality of this rule was challenged in *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997), but the court dismissed the case in its equitable discretion. *See also* Bruce Ackerman, et al., *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539, 1543 (1995) (arguing that this supermajority requirement "strikes at the heart of the system of deliberative democracy established by the Constitution.").

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"details," Congress may set up a "'selected instrumentalit[y]'" and allow it to make "'subordinate rules within prescribed limits.'" *Id.* (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935)). Thus Congress may create administrative agencies and commissions, but may not yield its ultimate lawmaking role to another entity. Again, in *Yakus v. United States*, 321 U.S. 414 (1944), the Court explained that Congress may make a law declaring that upon the occurrence of some fact or circumstance, a certain rule shall become operative, and then establish an agency to determine whether that fact or circumstance has occurred—but Congress may *not* give an agency "[t]he essentials of the legislative function," which it defined as "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Id.* at 424. In other words, Congress may authorize an agency to promulgate rules within Congress' legislative suzerainty, but may not yield to that agency the ultimate authority to *enact* laws. "Congress may not delegate the power to make laws and so may delegate *no more* than the authority to make policies and rules that *implement its statutes*." *Loving v. United States*, 517 U.S. 748, 771 (1996) (emphasis added).

There are two reasons Congress cannot give away its power to make law. First, the Constitution explicitly gives this power to Congress, and the Constitution's procedures for lawmaking exclude any alternative methods. *Id.* at 758; *cf. Clinton v. New York*, 524 U.S. 417, 439 (1998) (Constitution's lack of alternative methods of lawmaking are "equivalent to an express prohibition."). More fundamentally, the power to make law cannot be given away to an independent agency for the same reason that the legislature cannot contract away that power to a private party: because government is organized for the purpose of protecting public health and safety, so the legislature, which is the servant of the people, cannot part with that authority. *Stone*, 101 U.S. at 819.

The "true distinction" between legitimate and illegitimate delegations of authority is "between the delegation of power to *make* the law," which "cannot be done," and statutes which "confer[] authority or discretion as to its *execution*, to be exercised *under* and *in pursuance* of the law." *Loving*, 517 U.S. at 758-59 (citations omitted; emphasis added). That distinction 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). As then-Judge Scalia explained in *Synar*, 626 F. Supp. at 1386,

> the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions . . . the standards must be correspondingly more precise.

Thus the "intelligible principle" test is not merely a question of whether the agency's instructions are clear (which is already covered by due process and equal protection standards, *see, e.g.*, *Hawkins v. Bleakly*, 243 U.S. 210, 216 (1917) (for an "administrative body [to be] clothed with an arbitrary and unbridled discretion [is] inconsistent with a proper conception of due process of law")). Rather, the Court must evaluate "the aggregate effect of the factors" to determine whether Congress has unconstitutionally given away its lawmaking role. *Synar*, 626 F. Supp. at 1390. The question is whether the agency is confined to act in "compliance with the legislative will," *Yakus*, 321 U.S. at 425, meaning subordinate to Congress' ultimate lawmaking authority. A delegation of authority is unconstitutional "if . . . there is an absence of standards for the guidance of the Administrator's action, so *that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.*" *Id.* at 426 (emphasis added).

Unlike any previous delegation in American history, PPACA allows the politically unaccountable IPAB to write "recommendations" that not only require no Congressional approval before being implemented by the Secretary of Health and Human Services, but which Congress is basically powerless to alter or block. With one minor exception—*i.e.*, if and only if 3/5 of all elected members of Congress approve a joint resolution disbanding IPAB during a 29-day period in January of the five years between now and 2017—the Secretary must, beginning in 2020, implement the "recommendations" that are *submitted* to Congress, and Congress is deprived of any legal opportunity to prevent their enforcement. Between now and 2020, Congress can only amend IPAB's "recommendations" by adding to these provisions that IPAB could have drafted but did not—that is, its discretion is bound by the same criteria that apply to IPAB. *See* Section 1395kkk(d).

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The statute also restricts the *President's* oversight powers in a manner that violates the Separation of Powers. Section 1395kkk(c)(4) and (5) provide that in the event that IPAB fails to submit the "recommendations" as required, the Secretary of Health and Human Services must prepare such "recommendations," which the President is then required to submit, within two days, to Congress. The content of these "recommendations" is dictated by the same rules provided to IPAB. In other words, the statute specifies the content of the legislation that the President may submit to Congress. But the Constitution gives the President full discretion to "recommend to [Congress'] Consideration such Measures *as he shall judge necessary and expedient*." U.S. Const. art. II, § 3 (emphasis added). Presidents have routinely asserted their full authority under the Recommendations Clause, opposing Congressional attempts to restrict or define the types of measures they may recommend. *See, e.g.*, Statement by President Obama on H.R. 1105, Omnibus Appropriations Act, Mar. 11, 2009 (citation omitted)[5] (declaring it unconstitutional under the Recommendation Clause for Congress to "require me and other executive officers to submit budget requests to the Congress in particular forms"); Statement by President Clinton on S. 2327, Oceans Act of 2000, Aug. 7, 2000[6] (because the Recommendation Clause "protects the President's authority to formulate and present his own recommendations, which includes the power to decline to offer any recommendation" to Congress, President would "construe section 4(a) not to extend to the submission of proposals or responses that the President finds it unnecessary or inexpedient to present."). *See also* 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) ("[T]he Constitution gives to the President the right to present legislative recommendations on behalf of the Executive Branch," so Congress cannot "require a subordinate executive official to present legislative recommendations of his own."); J. Gregory Sidak, *The Recommendation Clause*,

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[5] *Available at* http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105/ (last visited June 14, 2011).

[6] *Available at* http://www.presidency.ucsb.edu/ws/index.php?pid=1470&st=&st1=#axzz1PO7KoNxV (last visited June 14, 2011).

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").

The statute unambiguously deprives the judiciary of any oversight responsibility, as well. It explicitly prohibits any judicial or administrative review of the "recommendations" that the Secretary is required to implement. Section 1395kkk(e)(5).

PPACA's process of automatic lawmaking without meaningful oversight by the legislative, executive, or judicial branches—and its nullification of Congress' power to approve or disapprove of the "recommendations" before they are enforced—makes it impossible "to ascertain whether the will of Congress has been obeyed," *Yakus*, 321 U.S. at 425. Even if Congress were unanimously to *disapprove* of IPAB's "recommendations," the Secretary would still enforce them, and Congressional attempts to alter IPAB's bill before it goes into effect are deemed by statute to be out of order. *See* Sections 1395kkk(d)(3)(C), (d)(3)(B), (d)(4)(B)(ii), and (d)(4)(B)(iv).

This goes far beyond the delegations upheld in previous cases, such as *Mistretta* and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 690 n.12 (1987), which involved "report and wait" procedures. A "report and wait" provision "gives Congress an opportunity to review the regulations and either to attempt to influence the agency's decision, or to enact legislation preventing the regulations from taking effect." *Id.* at 690. In *Alaska Airlines*, the Secretary of Transportation was directed to submit proposed regulations to Congress, wait 30 days, and then issue them as final. 480 U.S. at 689-90.[7] That law did not preclude judicial review of the regulations, or bar Congressional amendment, or restrict the President's recommendation power.

A "report and wait" procedure was also upheld in *Mistretta*, in which the Sentencing Commission was empowered to write mandatory guidelines for the sentencing of criminal convicts.

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[7] That statute provided that "[a]ny rule or regulation issued by the Secretary . . . shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations." Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 32(f)(3), 92 Stat. 1705, 1752 (1978).

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See 28 U.S.C. § 994(p).[8] But there, the statute provided elaborate and precise limits on the Commission's authority, and Congress retained full power to modify or disapprove the Commission's proposed rules. The statute also made "'ample provision for review of the guidelines by the Congress and the public,'" *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991) (quoting S. Rep. No. 225, 98th Cong. 1st Sess. 180-81 (1983)), because it made the notice and comment requirements of the Administrative Procedure Act applicable. *See id.* (citing 28 U.S.C. § 994(x)). Thus even though that statute did bar judicial review, there were sufficient alternative mechanisms for ensuring that the agency was subordinate to Congress' lawmaking role.

By contrast, PPACA plainly intends Congress to act as a rubber stamp. It does *not* include ample—or even modest—provision for review of IPAB's "recommendations" by Congress or the public. IPAB's "recommendations" are not subject to the Administrative Procedure Act, for example,[9] and PPACA precludes judicial review entirely. Section 1395kkk(e)(5). More importantly, unlike the "report and wait" procedure in *Alaska Airlines* or *Mistretta*, the law at issue here bars Congressional control over IPAB's "recommendations" in all but the most extreme circumstances.

It is true, as Defendants argue, MTD at 51, that the lack of judicial review does not *by itself* render a delegation unconstitutional. *See United States v. Bozarov*, 974 F.2d. 1037, 1041-45 (9th Cir. 1992). But the "intelligible principle" test is a holistic test, which requires the Court to evaluate "the totality of [PPACA]'s standards, definitions, context, and reference to past administrative practice," *Synar*, 626 F. Supp. at 1389. The question in a delegation case is not whether any single factor is lacking, but whether all factors taken together "meaningfully

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[8] The Commission . . . may promulgate . . . and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect . . . . Such . . . shall take effect . . . no earlier than 180 days after being so submitted . . . except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

[9] PPACA does not *explicitly* immunize IPAB's "recommendations" from the APA, but under the *exclusio alterius* rule, the fact that Congress established procedures that IPAB must follow when promulgating those "recommendations" mean that APA procedures do not apply. *Cf. Lopez*, 938 F.2d at 1297; *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.).

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constrain[]" the delegatee's power. *Touby v. United States*, 500 U.S. 160, 166 (1991). PPACA does not just render IPAB's "recommendations" immune from judicial review. It also:

(a) insulates those "recommendations" from normal Administrative Procedure Act notice and comment rules,

(b) prevents Congress from altering or amending the "recommendations" in any way except to add provisions that IPAB could itself have added but for some reason failed to,

(c) forbids Congress from repealing the restriction against alteration or amendment,

(d) prohibits judicial review of the "recommendations,"

(e) curtails the President's constitutional power to recommend such measures as he considers expedient,

(f) provides that Congress may bar IPAB's "recommendations" from automatically becoming only law 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.

When all these factors are considered together, the "intelligible principles" test tilts against this delegation. Section 1395kkk as a whole makes IPAB not an "instrumentalit[y]" or a "subordinate," *Currin*, 306 U.S. at 15, but an autonomous—and unconstitutional—lawmaker.

II

PROVISIONS THAT MAKE REPEAL OF IPAB'S ENABLING LEGISLATION PRACTICALLY IMPOSSIBLE ARE A FORM OF UNCONSTITUTIONAL ENTRENCHMENT THAT FAILS THE 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 are "most other types of 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. Section 1395kkk(f), combined with Sections 1395kkk(e)(3)(A) and 1395kkk(d)(4)(B)(iv), effectively eliminates Congress' power to restrict the repeal of IPAB's authority to draft "recommendations" which automatically become law. The purpose of these restrictions is to render IPAB independent of political accountability. *See* Jost, *supra*, at 31 ("In creating the IPAB, Congress is attempting to lash itself to the mast."); *see also* Michael H. 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 state interest, and Section 1395kkk as a whole must therefore fail the heightened scrutiny test.

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

Under PPACA, IPAB's "recommendations" are automatically enforced by the Secretary of Health and Human Services, with only the narrow exceptions detailed above—which provide for only a temporary and impracticable opportunity for Congress to add additional "recommendations." The statute's limits on congressional discretion are reinforced by a provision 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) does not have any preamble, (c) has a title that PPACA lays out in full,[10] and (d) states "that 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." Section 1395kkk(f)(1)(D). This resolution must be approved by three-fifths of all *elected* members (not just present members) of both houses. Section 1395kkk(f)(2)(F).

Contrary to the Government's contention, *see* Opp. to Mtn. for Prelim. Inj. at 13, Section 1395kkk(f) is not a mere "fast track procedure[]" for overriding IPAB's recommendations; it is the exclusive—and perishable—method whereby IPAB can be discontinued.

[10] It must be titled "Joint resolution approving 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." 1395kkk(f)(1)(C).

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For example, PPACA differs from the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, which did not restrict in any way Congress' power to disband that Commission. The Defense Base Closure and Realignment Act simply provided Congress with authority to enact a joint resolution (by simple majority) whereby the Secretary of Defense would be barred from carrying out a base closure recommendation. *See* Pub. L. No. 101-510, § 2904(b). The word "require," however, appeared nowhere in this or the other sections regarding the Commission's authority. By contrast, Section 1395kkk(f) provides that a joint resolution is "*required* to discontinue the Board." (emphasis added).

The fact that IPAB can be discontinued *only* by passage of a joint resolution described in Section 1395kkk(f) also is supported by Section 1395kkk(e)(3), which contemplates IPAB's *perpetual existence* after the year 2020. Under Section 1395kkk(e)(3)(A)(ii) the Secretary must implement IPAB's "recommendations" unless Congress enacts "a joint resolution described in subsection (f)(1) . . . not later than August 15, 2017," meaning that if Congress fails to enact such a resolution before that date, the Secretary must, beginning in the year 2020, do so into the indefinite future. *See also* Cook, *supra*, at 112 (PPACA gives Congress only a "a one-time opportunity . . . to terminate the IPAB," whereby "Congress may introduce by February 1, 2017, a Joint Resolution to terminate. . . . If the resolution passes by a three-fifths vote of the members of each house, by August 15 of that year, the IPAB will be terminated effective for its recommendations for the 2020 implementation year and thereafter.")

Nor is the anti-repeal provision in PPACA anything like the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as the government claims, Opp. to Mtn. for Prelim. Inj. at 4. That statute provides a means whereby Congress can disapprove the actions of administrative agencies, and the statute is clear that it is *not* the exclusive method for Congressional disapproval of agency action. *See* 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval . . . no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule."). Nothing in that statute provides—as PPACA does—that a specifically worded joint resolution is "required to discontinue" an agency, let alone provides that Congress' power to discontinue the agency expires if not used within a narrow time period. Indeed, *no other*

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federal statute of which amicus is aware has a provision requiring a joint resolution, passed by 3/5 of all elected members of Congress, before an agency or board can be discontinued, or discontinues Congress' repeal power after a specified deadline.

The Defendants concede (and have stipulated) that Congress "cannot preclude future Congresses from repealing or modifying *any* statute," Opp. to Mtn. for Prelim. Inj. at 14, yet Section 1395kkk(f) is not susceptible of any other interpretation. First, such a reading would render the word "required" in Section 1395kkk(f) surplusage, in violation of basic maxims of statutory construction. *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003).[11] Second, such a reading conflicts with Sections 1395kkk(e)(1), (e)(3)(A)(ii), and (f)(1), which together make the repeal resolution in Section 1395kkk(f) the *exclusive* method for preventing IPAB's "recommendations" from being implemented as law. In short, the joint resolution procedure is not just one alternative Congress can use to eliminate IPAB; it is the only way that Congress is allowed to discontinue IPAB, and that mechanism self-destructs in 2020 unless Congress uses it before 2017.

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

In *Carolene Products*, 304 U.S. at 152 n.4, the Supreme Court made clear that heightened scrutiny should apply to laws that obstruct the normal political process whereby undesirable laws can be repealed. This is because the judiciary has a special role to play "when the normal processes of democracy have broken down." 1 Laurence H. Tribe, *American Constitutional Law* 1052 (3d ed. 2000). The scheme of multiple tiers of scrutiny, which has prevailed from *Carolene Products* to this day, withholds judicial deference to the political branches when those branches abuse their

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[11] The government's invocation of the constitutional avoidance doctrine is unpersuasive. Opp. to Mtn. for Prelim. Inj. at 13-14. The rule against surplusage takes precedence over the constitutional avoidance doctrine. *See Clark v. Martinez*, 543 U.S. 371, 385 (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." For exactly the same reason, the government's attempt to avoid the plain language of PPACA cannot succeed.

power in a manner that cannot be overcome through the normal democratic process. In other words, footnote four establishes a "representation-reinforcing theory of judicial review," John Hart Ely, *Democracy and Distrust* 181 (1980), according to which courts should "assess claims . . . that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are." *Id.* at 103. As the Court explained in *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985), courts apply heightened scrutiny to laws that subvert the democratic process, precisely because such abuses are "unlikely to be soon rectified by legislative means."

The application of strict scrutiny to the anti-repeal provisions in Section 1395kkk is consistent with this goal. PPACA as a whole is not supported by a majority of Americans; although at the time of passage, PPACA's popularity hovered around the 50% mark, a majority of Americans did not support it, *see* Robert J. Blendon & John M. Benson, *Public Opinion at the Time of the Vote on Health Care Reform*, 362 New Eng. J. Med. e55 (Apr. 22, 2010)[12] ("In none of the 10 polls did a majority favor the proposed legislation."). The Individual Mandate itself has remained consistently unpopular; six months before PPACA was passed, 51% of Americans opposed it,[13] and today that number has risen to 56%.[14] Indeed, President Obama himself opposed an individual mandate during his campaign. *See Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *138 n.30 (N.D. Fla. Jan. 31, 2011). To be clear, amici do *not* suggest that political polling should guide the Court's consideration of a legal issue. 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 did not support and may now wish to see repealed or amended, is entrenched by

[12] *Available at* http://www.nejm.org/doi/full/10.1056/NEJMp1003844 (last visited June 16, 2011).

[13] Quinnipiac University Poll, July 1, 2009, *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1344 (last visited June 16, 2011).

[14] CNN Opinion Research Poll, June 3-7, 2011, *available at* http://i2.cdn.turner.com/cnn/2011/images/06/09/healthcare.pdf (last visited June 16, 2011).

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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 substantial interest in support of the law, that the law directly and materially advances that interest, and that it is narrowly drawn—no broader than necessary to accomplish that substantial interest. *ACLU v. Napolitano*, No. CIV 00-505 TUC ACM, 2002 U.S. Dist. LEXIS 28303 (D. Ariz. June 14, 2002). The government cannot meet this burden, because a law explicitly designed to block future reconsideration and repeal—let alone to delegate Congress' lawmaking power to an independent body, and to deprive the legislative, executive, and judicial branches of any meaningful control—is not a legitimate state interest. *Cf. Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (state has no legitimate interest in interfering with "competition in ideas and governmental policies."); *Stewart v. Blackwell*, 444 F.3d 843, 872 (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 for centuries been considered beyond the reach of any legislature. *See* Francis Bacon, *Elements of the Common Lawes of England* 77 (1630) ("*perpetua lex est nullam legem*"—a perpetual law is void); 4 Edward Coke, *Institutes* *43 (1644) ("though divers Parliaments have attempted to barre, restrain, suspend, qualifie, or make void subsequent Parliaments, yet could they never effect it."); Thomas Jefferson, A Bill for Establishing Religious Freedom, *reprinted in Jefferson: Writings* 347-48 (Merrill D. Peterson ed., 1984) ("[T]his Assembly . . . ha[s] no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own."); *Winstar*, 518 U.S. at 871-80 (legislature cannot make binding promise not to use its powers).

Congress' attempt in Section 1395kkk(f) to bar itself from disbanding IPAB and, in Section 1395kkk(d)(3)(A), (B), and (C), to bar itself from amending the "recommendations" that IPAB makes before they are enforced as law are unlike any other statute ever enacted. The only previous

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example of Congress attempting to pass rules or laws barring itself from exercising its lawmaking power is the "Gag Rule" adopted in the 1830s and 1840s to bar any reception of petitions for abolishing slavery—a rule that Congressman John Quincy Adams rightly attacked as unconstitutional. *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 Law & Hist. Rev. 113 (1991). That rule was never challenged in court, but ever since it was repealed in 1844, Congress has never attempted to legislate away (by law or internal rule) its power to make law on a subject.

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 a law immune from repeal and, second, on whether such a law would be constitutional. As Professors Eric Posner and Adrian Vermeule observe, the intuitive notion that any attempt to create an unrepealable law would itself be subject to repeal—asserted by the government, Opp. to Mtn. for Prelim. Inj. at 14—is not necessarily correct. "Consider statute *PR*," they write, "in which *P* prohibits bicycles in the park, and *R* prohibits repeal . . . . The conceptual challenge to this statute is the claim that . . . *PR* would not bind . . . a subsequent Congress," because it "could first repeal the statute *PR*, enabling itself to repeal *P*." Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1668 (2002) (emphasis added). But this apparently obvious solution would fail in the case of a statute that contains its own anti-repeal provision:

> 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.

Id. at 1669 (emphasis added). This is what PPACA appears to do. It not only requires (under Section 1395kkk(f)(2)(F)) a 3/5 majority of all elected members of Congress to vote to disband IPAB, it also requires (under Sections 1395kkk(e)(3)(A)(ii) and 1395kkk(f)(3)) that this vote occur before August 15, 2017. If it does not occur by that time, then IPAB's "recommendations" will be enforced as law beginning in 2020 and extending into the indefinite future without any

possibility of repeal under Section 1395kkk(f)(2)(F). In addition, Section 1395kkk(d)(3)(A) and (B) bar Congress from amending or altering IPAB's recommendations in any way—except to add provisions that IPAB itself could have added but failed to—and Section 1395kkk(d)(3)(C) prohibits Congress from considering any measure "that would repeal or otherwise change" this gag rule. *These* restrictions on Congress' 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 all 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's and Vermuele's article drew a sharp reply from John C. Roberts and Erwin 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, attempts to entrench legislation against future repeal violate Article I of the Constitution. That Article sets forth the exclusive method by which Congress may pass laws. *See id.* at 1784 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)); *see also Clinton*, 524 U.S. at 439 ("There are powerful reasons for construing constitutional silence" as to alternative ways of enacting a statute "as equivalent to an express prohibition."). A statute that prohibits its own repeal conflicts with this method and "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 Article I, section 5. Thus, notwithstanding the precatory assertion in Section 1395kkk(d)(5), that PPACA is consistent with *this* Congress' constitutional rulemaking authority, the actual provisions of the statute restrict the rulemaking authority of *future* Congresses.

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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. As Roberts and Chemerinsky argue, *supra*, at 1789, such provisions "allow members of Congress to effectively extend their terms in office beyond those prescribed in the Constitution," because, if enforced, such rules would deprive newly elected representatives of legislative power.

Finally, entrenchment rules conflict with the nature of the Constitution itself, by elevating ordinary legislative action to the level of constitutional provisions. The American constitutional tradition rests on distinguishing a constitution—an act of the people which cabins legislative discretion—from ordinary laws passed by legislatures 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"); Gordon 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, for the simple reason that no Congress has attempted previously to waive its lawmaking role to such an extreme degree. Indeed, this case is much more like precedents established under the Contracts Clause, in which the Court has made 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 limited conditions. One of those conditions is that Congress act within the boundaries of 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 overseen by Congress, and which is only subject to repeal through an extremely complicated process—which expires in 2017—is to abuse that entrusted power. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. Bar Found. Res. J. 379, 396

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(1987) ("the question of whether a legislature—a subordinate, albeit representative body—can promulgate entrenching laws should ultimately be a question of agency"). This is unconstitutional.

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

The Defendants contend that Congress could "repeal or suspend" the anti-repeal provision "and then vote to repeal [IPAB]." Opp. to Mtn. for Prelim. Inj. at 14. But this is simply to admit that the statute does *not* permit 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 (as the Defendants claim, MTD at 47-48) merely Congress' internal rules.[15] Sections 1395kkk(d)(5)(A) and (B) state only that sections (d) and (f)(2) are exercises of Congress' internal rulemaking power. The other provisions of the statute—including the section withdrawing Congress' limited power to discontinue IPAB if that power is not used by 2017—do *not* purport to be an exercise of the rulemaking power. No court or a legislative body has ever conclusively determined 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* Aaron-Andrew P. 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.").[16]

Second, as noted above, the argument that Congress must still retain an ultimate repeal power is contrary to the plain language of Section 1395kkk(f), which says that the joint resolution described therein is "required" to discontinue IPAB. Second, Section 1395kkk(e)(1) provides that "[n]otwithstanding any other provision of law," the Secretary must implement IPAB's

[15] Even if they were merely Congress' internal rules, however, 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. 6 (same).

[16] 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).

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"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), therefore, would *not* bar the Secretary's obligatory, ministerial implementation of IPAB's "recommendations" under Section 1395kkk(e)(1).

Nor is it clear that the parties' stipulation of March 8, 2011 (to the effect that the challenged sections pose no impediment to Congress disbanding IPAB) can bind Congress. The legislative branch has an equal and independent authority to determine the scope of its powers, at least until the judiciary pronounces an interpretation, and Congress cannot be bound by the interpretation adopted by the executive branch defendants in this case. *Cf. Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901) (president is not bound by Congress' interpretation of a treaty); *Hirt v. Richardson*, 127 F. Supp. 2d 833, 845 n.8 (W.D. Mich. 1999) ("the judiciary is not bound by the Executive Branch's interpretations of [a federal law]"); Walter 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"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 322 (1994) ("Congress is not bound by the President's interpretation of the law.")

Given these considerations, clarification by this Court, in the form of declaratory relief, is at least warranted to clarify the reach of their repeal authority.

CONCLUSION

PPACA is a law like no other in history. Not only is the Individual Mandate "unprecedented," *Florida*, 2011 U.S. Dist. LEXIS 8822, at *71, but so are the provisions establishing IPAB as a group of "Platonic Guardians," 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, and thus the gap between Medicare and private payment is likely to continue to be an issue. At some point, however, the gap may become unacceptable, which may require Congress 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. When "the aggregate effect of the factors" are taken into account, *Synar*, 626 F. Supp. at 1390, it is clear that IPAB is an unconstitutional delegation of lawmaking authority. That delegation, and the anti-repeal provision in PPACA, cannot withstand the applicable strict scrutiny. The motion to dismiss should be *denied* and the motion for summary judgment should be *granted*.

DATED: June 21, 2011.

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