No. 13-15324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK COONS, et al.,
Plaintiffs-Appellants,
v.
JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Regulations:

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment for the government on December 20, 2012. *See* Plaintiffs' Excerpts of Record ("ER") 1. Plaintiffs filed a timely notice of appeal on February 19, 2013. ER 16. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs challenge the constitutionality of two provisions of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"). Mr. Coons challenges 26 U.S.C. § 5000A ("Section 5000A"), which requires non-exempted individuals to make a specified payment to the Internal Revenue Service ("IRS") if they fail to maintain minimum health coverage. Dr. Novack challenges 42 U.S.C. § 1395kkk, which authorizes the creation of a federal board known as the Independent Payment Advisory Board ("IPAB" or "Board"), whose voting members will be appointed by the President and confirmed by the Senate, and which will be responsible for recommending ways to reduce the per capita rate of growth in Medicare spending consistent with specified statutory parameters. The questions presented are:

1. Whether the district court correctly rejected Mr. Coons's claims that Arizona law allows him to disregard Section 5000A; that Section 5000A violates

his substantive due process right to medical autonomy; and that Section 5000A violates his constitutional right to informational privacy.

2. Whether Dr. Novack lacks standing to challenge the provision that authorizes the creation of the Independent Payment Advisory Board, which currently has no voting members and has made no recommendations, and whether his non-delegation claim also fails on the merits.

STATUTES AND REGULATIONS

Pertinent regulatory and statutory provisions are reproduced in an addendum to plaintiffs' brief.

STATEMENT OF THE CASE

Plaintiffs brought pre-enforcement facial challenges to the constitutionality of two provisions of the Affordable Care Act. Mr. Coons, who alleges that he does not have health insurance, challenged 26 U.S.C. § 5000A. Beginning in 2014, Section 5000A will require non-exempted individuals to make a specified payment to the IRS if they fail to maintain minimum health coverage. Mr. Coons alleged that Section 5000A exceeds Congress's Article I authority; that it conflicts with Arizona's Health Care Freedom Act; that it violates his right to "medical autonomy" by reducing the amount of money he will have available to pay for health care of his choice; and that it violates his right to informational privacy by requiring that he disclose personal health information to insurance companies.

While this case was pending in district court, the Supreme Court upheld Section 5000A as a valid exercise of Congress's taxing power. *See National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). This decision foreclosed Mr. Coons's contention that Section 5000A exceeds Congress's Article I power. The district court subsequently rejected his other claims. ER 2-9.

Dr. Novack is an orthopedic surgeon whose patients include Medicare patients. He brought a pre-enforcement facial challenge to 42 U.S.C. § 1395kkk, which provides for the creation of a federal board known as the Independent Payment Advisory Board with 15 voting members to be appointed by the President and confirmed by the Senate. After the Board, which currently has no voting members, is constituted, it will have responsibility under 42 U.S.C. § 1395kkk for making recommendations to reduce the per capita rate of growth in Medicare spending consistent with specified statutory parameters. Dr. Novack alleged that the statute providing for the creation of the Board is "imminently likely to decrease his reimbursements for services that he renders to Medicare patients," ER 80 ¶ 128, and alleged that the statute does not contain an "intelligible principle" that will constrain the Board's exercise of its authority. ER 77-78 ¶ 116.[1]

[1] Two other plaintiffs, Senator Jeff Flake and Representative Trent Franks, were plaintiffs in district court but are not parties to the appeal. ER 16.

The district court rejected Dr. Novack's claim, finding that the Act easily meets the requirement that Congress provide an intelligible principle for the Board to follow. ER 12-13.

STATEMENT OF FACTS

1. Plaintiff Nick Coons challenges the constitutionality of 26 U.S.C. § 5000A, which is the provision that the Supreme Court upheld in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). This provision, which takes effect in 2014, requires non-exempted individuals to make specified payments to the IRS if they fail to maintain minimum health coverage for themselves or their dependents. *See NFIB*, 132 S. Ct. at 2580.

Mr. Coons is an approximately 34-year-old man who alleges that he does not have private health insurance. ER 51. As relevant to this appeal, he claims that Section 5000A interferes with his right under Arizona law not to purchase insurance. He also argues that Section 5000A interferes with his substantive due process right to "medical autonomy" by requiring him to spend money on insurance that he could otherwise devote to obtaining the medical care of his choice. And he argues that Section 5000A interferes with his right to privacy by requiring him to give personal health information to insurance companies in order to enroll in insurance. The district court rejected his claims on the merits and also found that his privacy claim is unripe. ER 5-9.

2. Plaintiff Novack is an orthopedic surgeon and managing partner of a surgery practice in Arizona. ER 51. He alleged that approximately 12.5% of his patients are covered by Medicare and that he receives payment from the federal government for their care. *Ibid.* He challenged the constitutionality of 42 U.S.C. § 1395kkk, which provides for the creation of the Independent Payment Advisory Board. Once it is constituted, the Board is to have fifteen voting members appointed by the President and confirmed by the Senate. At this point, however, the Board has no voting members, and no nominations have been made.

The Board is charged with responsibility for recommending ways to reduce the per capita rate of growth in Medicare spending, if certain conditions are met. During years in which the rate of growth in Medicare spending per beneficiary is expected to exceed a target growth rate, the Board, in consultation with the Secretary of Health and Human Services, is required to submit proposals recommending ways to "reduce the per capita rate of growth in Medicare spending[.]" 42 U.S.C. § 1395kkk(b)(2), (c)(2)(D)-(F), (c)(6). The Board's proposals must be "detailed and specific" and must, to the extent feasible, give priority to recommendations that "extend Medicare solvency." *Id.* § 1395kkk(c)(1)(A), (c)(2)(B)(i). The Board must also include recommendations that "improve the health care delivery system and health outcomes" and "protect and improve Medicare beneficiaries' access to necessary and evidence-based items

and services[.]" *Id.* § 1395kkk(c)(2)(B)(ii)(I)-(II). The Board is not permitted to "include any recommendation to ration health care, raise revenues or Medicare beneficiary premiums[,] . . . increase Medicare beneficiary cost-sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility criteria." *Id.* § 1395kkk(c)(2)(A)(ii). The Board's recommendations, which are to be implemented by the Secretary of Health and Human Services, can be superseded by legislation under a fast-track procedure, *see id.* § 1395kkk(e)(3)(A), as well as under ordinary legislative procedures.

In an attempt to establish standing, Dr. Novack alleged that the Board "is imminently likely to decrease his reimbursements for services that he renders to Medicare patients, and otherwise adversely affects his practice." ER 80 ¶ 128. He claimed that the Affordable Care Act does not provide an intelligible principle to guide the Board's exercise of its authority and that the statutory provision that authorizes the creation of the Board is thus an unconstitutional delegation of authority to this federal body. ER 77-80 ¶¶ 116-128. The district court rejected Dr. Novack's claim. ER 10-14.

SUMMARY OF ARGUMENT

In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court rejected a constitutional challenge to 26 U.S.C. § 5000A, which provides that, beginning in 2014, a non-exempted individual who fails to maintain minimum health coverage

must make a specified payment to the Internal Revenue Service. The Supreme Court held that individuals have the "lawful choice" to make payment to the IRS under Section 5000A "in lieu of buying health insurance," *id*. at 2597, 2600, and the Court upheld Section 5000A as a valid exercise of Congress's taxing power. *See id*. at 2593-2600.

The district court correctly rejected Mr. Coons's contention that Arizona's "Health Care Freedom Act" overrides Section 5000A. As the district court explained, state law cannot preempt federal law. If, as plaintiffs assert, Section 5000A "directly conflicts with" the Arizona law, Pl. Br. 46, then the Arizona law is preempted.

The district court was likewise correct to reject Mr. Coons's claim that Section 5000A violates his constitutional rights to medical autonomy or informational privacy. The Sixth Circuit, in rejecting the same claims, explained that individuals "remain free" under Section 5000A "to choose their medical providers and the medical treatments they will or will not accept"; that Section 5000A "does not actually compel plaintiffs to disclose personal medical information to insurance companies"; and that, "even if it did, the Supreme Court's reasoning in *Whalen* [v. *Roe*, 429 U.S. 589, 602 (1977)] dispenses with plaintiffs' position that the individual mandate is unconstitutional because it may require the

disclosure of private health information to insurance companies." *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601, 602-03 (6th Cir. 2013)

Dr. Novack's challenge to the Independent Payment Advisory Board fails both on standing grounds and on the merits. He speculates that the Board will make recommendations for reducing the per capita growth in Medicare spending that will adversely affect his medical practice. But, at this point, the Board does not have any voting members. Even after voting Board members have been appointed by the President and confirmed by the Senate, it is uncertain when the Board would begin to make recommendations. And, even after the Board begins to make recommendations, it is unknown whether such recommendations would have any impact on Dr. Novack's medical practice. Thus, he cannot demonstrate the "*certainly* impending" injury required for Article III standing. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in original).

In any event, Dr. Novack's non-delegation claim is also meritless. Congress's instructions to the Board easily meet the requirement that Congress set out an intelligible principle for the Board to follow. *In re National Sec. Agency Telecommunications Records Litigation*, 671 F.3d 881, 896 (9th Cir. 2011).

STANDARD OF REVIEW

This Court reviews questions of law de novo. *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1109 (9th Cir. 2013).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED MR. COONS'S CHALLENGES TO SECTION 5000A.

A. In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court rejected a facial challenge to the constitutionality of 26 U.S.C. § 5000A. The Supreme Court held that "Congress had the power to impose the exaction in § 5000A under the taxing power." *Id*. at 2598.

The Supreme Court's holding foreclosed Mr. Coons's claim that Section 5000A exceeds Congress's Article I powers. He nonetheless contends that Arizona's Health Care Freedom Act "directly conflicts" with Section 5000A, Pl. Br. 46, and that the state law is controlling. That contention is baseless. As the district court explained, state law cannot preempt federal law. ER 3. If, as plaintiffs contend, Arizona law directly conflicts with Section 5000A, then the state law is preempted by operation of the Supremacy Clause. *See* U.S. Const. Art. VI.

B. Mr. Coons's other challenges to Section 5000A are equally meritless. He invokes a fundamental right to medical autonomy, but as the district court explained, Section 5000A in no way implicates any such right. By its terms, Section 5000A does not require that people obtain medical services of any kind. Instead, when the provision takes effect in 2014, it will require that non-exempted individuals maintain a minimum level of health insurance or else make a specified

payment to the IRS. *NFIB*, 132 S. Ct. at 2597; 26 U.S.C. § 5000A. If individuals choose to enroll in insurance coverage, they will still be able to determine whether to obtain medical care, what care to obtain, when, and from whom. As the Sixth Circuit emphasized, individuals "remain free" under Section 5000A "to choose their medical providers and the medical treatments they will or will not accept." *U.S. Citizens*, 705 F.3d at 601.

Mr. Coons does not contend that Section 5000A will directly interfere with his ability to choose his medical providers and treatments. Instead, he asserts that the provision will require him to "divert his limited financial resources to obtaining a health care plan he does not desire" or to "cut other expenses to pay the exaction." Pl. Br. 18. The same thing could be said of any exercise of the taxing power. As the Sixth Circuit explained, this assertion amounts to a claim of economic liberty, and "[t]he Supreme Court long ago abandoned the protection of economic rights through substantive due process." *U.S. Citizens*, 705 F.3d at 601. "[N]o court has invalidated [an insurance] mandate[] under the Due Process Clause or any other liberty-based guarantee of the Constitution." *Id.* (quoting *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring in the judgment), *abrogated on other grounds in NFIB*).

C. Mr. Coons likewise fails to state a claim for violation of his right to informational privacy. Section 5000A "does not actually compel plaintiffs to

disclose personal medical information to insurance companies." *U.S. Citizens*, 705 F.3d at 602. Individuals "may lawfully choose" to make payment to the IRS "in lieu of buying health insurance." *NFIB*, 132 S. Ct. at 2597 (internal quotation marks omitted). Thus, Mr. Coons "can avoid any privacy concern altogether by simply foregoing insurance and complying with the individual mandate by making the shared responsibility payment." *U.S. Citizens*, 705 F.3d at 602.

Nor is it clear what information an insurance company would request from Mr. Coons as part of an enrollment application. He declares that insurance companies "routinely request information about an insured's pre-existing medical conditions." Pl. Br. 27. Beginning in 2014, however, provisions of the Affordable Care Act will bar most insurance plans from denying coverage or setting premiums on the basis of an individual's medical condition or history, and federal law also sets out the information that applicants can be required to provide when seeking insurance coverage through the health insurance exchanges that will be established by 2014. *See* 42 U.S.C. §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a) (prohibiting the use of health status as a basis for denying coverage or setting premium rates); 42 U.S.C. §§ 18081(a)-(b), 18083(a)-(b) (addressing specific information required from applicants and limiting information collection to that necessary to provide an eligibility determination). Thus, "any injury" that Mr.

Coons "may suffer by disclosing [his] private health information to insurance companies is highly speculative at this point." *U.S. Citizens*, 705 F.3d at 602-03.

In any event, the types of disclosures that are commonly made to insurance companies do not implicate the right to informational privacy. The Supreme Court has explained that "disclosures of private medical information to doctors, to hospital personnel, *to insurance companies*, and to public health agencies are often an essential part of modern medical practice" and do "not automatically amount to an impermissible invasion of privacy." *Whalen v. Roe*, 429 U.S. 589, 602 (1977) (emphasis added) (holding that disclosure of prescriptions for certain medications to state officials did not amount to an impermissible invasion of privacy). Thus, "*Whalen* dispenses with plaintiffs' position that [Section 5000A] is unconstitutional because it may require the disclosure of private health information to insurance companies." *U.S. Citizens*, 705 F.3d at 602.

Federal law places strict limits on the manner in which insurance companies may use or disclose individuals' medical information. *See* Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d, *et seq.*; 42 U.S.C. § 18081(h)(2); 45 C.F.R. §§ 155.260, 164.502. The Supreme Court and this Court have held that patients' informational privacy rights are not violated where there is a public interest in the disclosure and there are safeguards in place against further, unauthorized disclosure. *NASA v. Nelson*, 131 S. Ct. 746,

762 (2011) (considering that this information is "shielded by statute from unwarranted disclosure"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004) (upholding requirement that information regarding the patient and the procedure be disclosed following a death or serious injury where safeguards against further disclosure were in place and the state had an interest in disciplining substandard physician practice); *Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002) (upholding state law that provided for confidential judicial proceeding to determine whether a minor could terminate a pregnancy but allowed certain state employees access to the sealed records); *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996) (no violation of due process right to privacy where officers seized medical records of HIV test results in the course of investigating a crime and made a limited disclosure of the results); *Doe v. Attorney General of the United States*, 941 F.2d 780, 797 (9th Cir. 1991) (FBI agent who disclosed doctor's HIV status was entitled to qualified immunity even though there was a well-established privacy right in that information because the doctor performed invasive procedures and the agent made only a limited disclosure and intended to take steps to safeguard the confidentiality of the information).[2]

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[2] Plaintiffs argue that HIPAA allows the government to collect personal medical information from insurance companies, but the provisions on which they rely involve information that providers are required to share in order to receive payments under Medicare. Pl. Br. 24 (citing 42 U.S.C. §§ 1320a-3a, 1395cc).

Mr. Coons further errs to the extent that he argues that the right to informational privacy would be violated by the disclosure of any information at all to insurance companies. The cases in which this Court has recognized a right to privacy barring disclosure of medical information have been circumstances in which sensitive information was released in spite of a lack of a public interest justifying the disclosure. *See, e.g., Marsh v. County of San Diego*, 680 F.3d 1148, 1153-55 (9th Cir. 2012) (disclosure of child's autopsy photograph to press "without any legitimate governmental purpose"); *Tucson Woman's Clinic*, 379 F.3d at 551 (patients' informational privacy rights were violated by a statute that required disclosure to the state Department of Health Services of the names and full medical histories of all women who sought abortions at certain clinics because there were "no safeguards at all against release of information" to other government employees, no apparent penalties for disclosure of the information to the public, and the purposes of the act could be met if the patients' names were redacted); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269-70 & n.15 (9th Cir. 1998) (privacy rights would be violated if employer performed tests for syphilis, pregnancy, and sickle cell trait on employees without

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Regulations do allow the government to obtain certain information from insurance companies for law enforcement and regulatory purposes, 45 C.F.R. § 164.512, but these limited disclosures, justified by the public interest, do not create a substantive due process problem under this Court's precedent.

their knowledge or consent where employer "has not identified a single interest in performing the tests in question"); *see also Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) (holding that inclusion in a sex offender registration database does not violate a right to privacy and explaining that right to privacy would protect only information "generally considered 'private.'").[3]

II. DR. NOVACK LACKS STANDING TO CHALLENGE THE INDEPENDENT PAYMENT ADVISORY BOARD, AND HIS CHALLENGE ALSO LACKS MERIT.

A. Dr. Novack lacks standing to challenge the provision of the Affordable Care Act that provides for the creation of a federal Independent Payment Advisory Board because he cannot demonstrate that the Board will cause him the "*certainly* impending" injury that is the prerequisite for Article III standing. *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in original); *see also Hartman v. Summers*, 120 F.3d 157, 160 (9th Cir. 1997) ("[t]o confer standing, the threat of future injury must be credible rather than remote or hypothetical").

In an attempt to establish standing, Dr. Novack alleges that about 12.5% of his patients are Medicare patients. ER 51 ¶ 7. He alleges that that Board will

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[3] Plaintiffs also suggest (Pl. Br. 25 n.5) that they should be allowed to introduce new evidence regarding requirements to disclose insurance status on tax returns. The allegations in plaintiffs' complaint relate to disclosures only to insurance companies, not on tax returns, *see* ER 70-71. In any event, any informational privacy concerns are satisfied by protections already in place to protect the confidentiality of tax returns. *See* 26 U.S.C. § 6103.

"alter[] the procedure by which Dr. Novack and other physicians, including members of his practice, are reimbursed for treating Medicare patients." ER 80 ¶ 128. Based on these allegations, he claims that the statutory provision that authorizes the creation of the Board is "imminently likely to decrease his reimbursements for services that he renders to Medicare patients." *Ibid.*

But the Board does not yet exist. The Affordable Care Act provides for the Board to be composed of 15 voting members who are to be appointed by the President and confirmed by the Senate. At this point, however, the Board has no voting members, and no nominations have been made.

Moreover, it is a matter of sheer speculation whether the Board, once it has been formed, would make any proposals that would have any effect on Dr. Novack's medical practice. The Board would not make recommendations unless the Chief Actuary for the Centers for Medicare & Medicaid Services ("CMS") determines, among other things, that the per capita growth rate in Medicare expenditures exceeds a target growth rate, a criterion that will not be satisfied until 2016 at the earliest. *See* 42 U.S.C. § 1395kkk(c)(3)(i)-(ii); *IPAB Determination*, Office of the Actuary, Centers for Medicare and Medicaid Services (May 31, 2013), *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/IPAB-2013-05-31.pdf (CMS determination that the growth rate is not expected to exceed the target in 2015).

Moreover, even when the Board begins making recommendations, it is speculative whether the Board would issue any proposal that would change Medicare's physician fee schedule, let alone propose a change to the physician fee schedule that would reduce payments to orthopedic surgeons in particular.

B. Dr. Novack's non-delegation claim also fails on the merits. The Board would be a federal body whose members are appointed by the President and confirmed by the Senate. The Supreme Court has long recognized that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Accordingly, "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

"Courts have interpreted this mandate liberally." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437 (9th Cir. 1996). With two exceptions, the Supreme Court has upheld every challenge to allegedly impermissible delegations. One of the statutes invalidated by the Court "provided literally no guidance for the exercise of discretion, and the other . . . conferred authority to

regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (referring to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935)). "The Court has countenanced as intelligible seemingly vague principles in statutory text such as whether something would 'unduly or unnecessarily complicate,' or be 'generally fair and equitable,' in the 'public interest,' or 'requisite to protect the public health.'" *In re National Sec. Agency Telecommunications Records Litigation*, 671 F.3d 881, 896 (9th Cir. 2011).[4]

The Affordable Care Act contains far more than the required "intelligible principle" to guide the Board. The Act contains extensive provisions specifying requirements and additional considerations for the Board's proposals. The proposals "shall only include recommendations related to the Medicare program." 42 U.S.C. § 1395kkk(c)(2)(A)(vi). The proposal as a whole must "result in a net reduction in total Medicare program spending . . . at least equal to the applicable savings target." *Id.* § 1395kkk(c)(2)(A)(i). A proposal may not "be expected to result, over the 10-year period starting with the implementation year, in any

[4] There is no support for amicus's assertion that non-delegation challenges are subject to heightened scrutiny. *See* Amicus Br. 20. In any event, as discussed below, *see supra* 21-22, the fast-track procedures set out in the Act do not "obstruct the normal political process." *Ibid.*

increase in the total amount of net Medicare program spending relative to the total amount of net Medicare program spending that would have occurred absent such implementation." *Id.* § 1395kkk(c)(2)(C). Nor may a proposal "include any recommendation to ration health care, raise revenues or Medicare beneficiary premiums[,] . . . increase Medicare beneficiary cost-sharing (including deductibles, coinsurance, and copayments), or otherwise restrict benefits or modify eligibility criteria." *Id.* § 1395kkk(c)(2)(A)(ii). The proposals shall include recommendations "as appropriate . . . to reduce Medicare payments under parts C and D . . . such as reductions in direct subsidy payments to Medicare Advantage" and to specified prescription drug plans. *Id.* § 1395kkk(c)(2)(A)(iv). The statute also includes a host of additional considerations, to be addressed "to the extent feasible," including prioritizing recommendations that extend Medicare solvency, protecting and improving access to care, and "promoting integrated care, care coordination, prevention and wellness, and quality and efficiency improvement." *Id.* § 1395kkk(c)(2)(B). Also, to the extent feasible, the Board must consider the effects of its recommended changes in payments on Medicare beneficiaries and on the providers themselves, *id.* § 1395kkk(c)(2)(B)(iii), (iv), as well as the needs of beneficiaries who are eligible for both Medicare and Medicaid, *id.* § 1395kkk(c)(2)(B)(vi). Reductions in Medicare program spending must also be

targeted to sources of excess cost growth to the extent possible. *Id.* § 1395kkk(c)(2)(B)(iii).[5]

Plaintiffs are mistaken to claim that limitations on judicial review "of the implementation by the Secretary . . . of the recommendations contained in a proposal" from the Board, 42 U.S.C. § 1395kkk(e)(5), violate the non-delegation doctrine. As plaintiffs acknowledge, Pl. Br. 43, both the Supreme Court and this Court have upheld statutes against non-delegation challenges where judicial review was not available. *See, e.g., Mistretta*, 488 U.S. at 394; *United States v. Bozarov*, 974 F.2d 1037 (9th Cir. 1992); *see also United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991). Here, as in *Bozarov*, the statute does not preclude constitutional challenges to the creation of the federal body that will exercise delegated authority. *See Bozarov*, 974 F.2d at 1044.

C. Plaintiffs' brief also purports to challenge the statutory procedures that enable Congress to override the Board's recommendations through fast-track legislation. That claim is not properly before the Court, however, because

[5] Plaintiffs argue that the Board's powers are not limited to Medicare and that the Board can also issue reports and make recommendations regarding the private health care sector. Those recommendations are only advisory, however. 42 U.S.C. § 1395kkk(n), (o). Implementation by the Secretary of Health and Human Services would be an exercise of her own administrative discretion. 42 U.S.C. § 1395kkk(o)(1)(A).

plaintiffs voluntarily withdrew the count of the complaint on which the claim is based. *See* Dkt. No. 51 at 1 (withdrawing Count VI).

In any event, the Affordable Care Act provision on which plaintiffs rely does not limit the authority of Congress, which is of course free to amend the Act or amend the rules governing consideration of the Board's recommendations. The Act establishes an *additional* fast-track process by which Congress can entirely abolish the Board.[6] 42 U.S.C. § 1395kkk(f). This procedure does not and could not foreclose other legislation. The Act also establishes fast-track procedures by which Congress can review the Board's proposals. *Id.* § 1395kkk(d). Congress may always override a Board proposal by repealing or suspending the rules that govern Senate or House changes to the Board's recommendations, *see id.* § 1395kkk(d)(3), and then voting on superseding legislation. And, of course, nothing prevents Congress from repealing 42 U.S.C. § 1395kkk—or the Affordable Care Act as whole—via ordinary legislation, as the House of Representatives has repeatedly proposed to do.

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[6] Amicus argued that the joint resolution under Section 1395kkk(f)(1) is "required" to eliminate the Board. Amicus Br. 28. But, in fact, such a resolution is required only to meet the conditions of Section 1395kkk(e)(3)(A)(ii), which prohibits the Secretary from implementing Board recommendations after this type of resolution has been enacted. The statute does not provide that this process is the only way to repeal the statute. If Congress wished to eliminate the Board using other legislative procedures, it could at that time address the question of whether the Secretary should nonetheless implement Board recommendations.

Indeed, the Act expressly states that each House of Congress enacted the fast-track review provisions "as an exercise of [its] rulemaking power" and "with full recognition of the constitutional right of either House to change the rules . . . at any time." *Id.* § 1395kkk(d)(5).[7] Such rules are not unusual.[8] And Article I, § 5 "textually commits the question of legislative procedural rules to Congress." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007); *see also Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1997) ("The principle that such procedures are for the House itself to decide is as old as the British Parliament.").

Plaintiffs' other separation-of-powers claims were not alleged in the complaint and are in any event baseless. They incorrectly assume that no formal

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[7] Section 1395kkk(d)(3)(C) provides: "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." But Congress expressly recognized in paragraph (d)(5) that, notwithstanding subparagraph (d)(3)(C), either House remains free to change the rule created by subparagraph (d)(3)(C) at any time. In addition, subparagraph (d)(3)(D) clarifies that all of paragraph (d)(3) "may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members," § 1395kkk(d)(3)(D), further confirming that the Senate may waive the rule at any time.

[8] The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, for example, establishes rules governing Congress's consideration of the budget. Those rules—like the ones governing congressional review of IPAB proposals—include, among other things, requirements relating to committee consideration and the germaneness of amendments. And the procedures themselves may be repealed by either House using the same procedures that would apply to any other rule of that House.

rulemaking procedures are permitted by the Act. Pl. Br. 43. In fact, Section 1395kkk(e)(2)(B) permits the Secretary to use administrative rulemaking under the Administrative Procedure Act to implement the Board's recommendations. In any event, the validity of a delegation to a federal body does not depend on the administrative procedures by which the delegation is implemented. The discussion of rulemaking in *Mistretta v. United States*, on which plaintiffs rely, was relevant to the question whether the Sentencing Commission was an agency rather than a court; it did not bear on the validity of the delegation. Similarly, in *J.W. Hampton, Jr. v. United States*, 276 U.S. at 405, the Supreme Court simply observed that the Tariff Commission was required to give interested parties notice and an opportunity to be heard.

Plaintiffs object that the Board is not "bipartisan," *see* Pl. Br. 44-45, but there is no such constitutional requirement. In any event, both political parties have a voice in the nomination of Board members. *See* 42 U.S.C. § 1395kkk(g)(1)(E). Plaintiffs also rely on what they describe as "Congress's historic role in setting Medicare reimbursement rates and policy," Pl. Br. 45, but Congress and the Executive branch have long shared responsibility for Medicare.[9]

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[9] Dr. Novack also purports to raise a Recommendations Clause challenge. But Dr. Novack has not alleged any harm traceable to the Recommendations Clause and so does not have standing to raise this issue. His standing argument appears to be that, without the alleged interference with the recommendation

In short, plaintiffs' challenges to the statutory provision that authorizes the creation of the Independent Payment Advisory Board are not properly before this Court and, in any event, fail on the merits.

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power, the Board, which as yet has no voting members, would at some point in the future refrain from recommending something that would cause him harm, or Congress would override that recommendation. This is even more highly speculative than the rest of his claims, especially since the President is free to express his views regarding any recommendations that the Board may make. In any event, the transmittal of the Board's recommendations to Congress and the Congressional fast-track procedures *reduce* the likelihood that the Board's recommendations will take effect. Dr. Novack does not argue that the Recommendations Clause could be implicated by the Board's transmittal of recommendations to the Secretary for implementation.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned counsel certifies that she is not aware of any related cases within the meaning of Circuit Rule 28-2.6.

/s/ Dana Kaersvang
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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,559 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Dana Kaersvang
DANA KAERSVANG

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I caused the foregoing brief to be filed and served through the ECF electronic filing system.

/s/ Dana Kaersvang
DANA KAERSVANG