

1 TIMOTHY SANDEFUR, Cal. Bar No. 224436\*  
E-mail: tms@pacificlegal.org  
2 Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
3 Sacramento, California 95834  
Telephone: (916) 419-7111  
4 Facsimile: (916) 419-7747

5 Attorneys for Amicus Curiae  
Pacific Legal Foundation

6 \*pro hac vice  
7

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA  
10

11 NICK COONS, et al., )  
12 Plaintiffs, )  
13 v. )  
14 TIMOTHY GEITHNER, et al., )  
15 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**

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

1		
2		<b>Page</b>
3	TABLE OF AUTHORITIES .....	ii
4	INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
5	ARGUMENT .....	2
6	I. 42 U.S.C. § 1395kkk, UNDER WHICH IPAB’S	
7	“RECOMMENDATIONS” AUTOMATICALLY BECOME LAW	
8	WITHOUT MEANINGFUL CONGRESSIONAL OVERSIGHT, IS AN	
9	UNCONSTITUTIONAL DELEGATION OF LAWMAKING POWER .....	2
10	A. How IPAB’s “Recommendations” Become Law	
11	Without Meaningful Congressional Review or Control .....	3
12	B. PPACA Exceeds the “Intelligible Principles” Rule	
13	by Giving IPAB Autonomous Lawmaking Authority	
14	Free of Legislative, Executive, or Judicial Oversight .....	6
15	II. PROVISIONS THAT MAKE REPEAL OF IPAB’S	
16	ENABLING LEGISLATION PRACTICALLY IMPOSSIBLE	
17	ARE A FORM OF UNCONSTITUTIONAL ENTRENCHMENT	
18	THAT FAILS THE STRICT SCRUTINY TEST .....	12
19	A. Section 1395kkk(f) Is an Unprecedented Anti-Repeal Provision .....	13
20	B. Section 1395kkk(f) Fails the Strict Scrutiny Test .....	15
21	C. Entrenchment Is Unconstitutional .....	17
22	D. Defendants’ Argument That Congress Can Disband	
23	IPAB in Some Other Way Does Not Resolve This Case .....	21
24	CONCLUSION .....	22
25		
26		
27		
28		

TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
1 <i>ACLU v. Napolitano</i> , No. CIV 00-505 TUC ACM, 2002 U.S. Dist. LEXIS 28303 (D. Ariz. June 14, 2002) .....	17
2 <i>Alaska Airlines, Inc. v. Brock</i> , 480 U.S. 678 (1987) .....	10-11
3 <i>Butchers' Union Slaughter-House &amp; Live-Stock Landing Co. v.</i> 4 <i>Crescent City Live-Stock Landing &amp; Slaughter-House Co.</i> , 111 U.S. 746 (1884) .....	3
5 <i>City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.</i> , 473 U.S. 432 (1985) .....	16
6 <i>Clark v. Martinez</i> , 543 U.S. 371 (2005) .....	15
7 <i>Clinton v. New York</i> , 524 U.S. 417 (1998) .....	7, 19
8 <i>Ctr. for Biological Diversity v. United States Fish &amp; Wildlife Serv.</i> , 9 450 F.3d 930 (9th Cir. 2006) .....	11
10 <i>Currin v. Wallace</i> , 306 U.S. 1 (1939) .....	6-7, 12
11 <i>Florida v. U.S. Dep't of Health &amp; Human Servs.</i> , No. 3:10-cv-91-RV/EMT, 12 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011) .....	16, 22
13 <i>Fourteen Diamond Rings v. United States</i> , 183 U.S. 176 (1901) .....	22
14 <i>Hawkins v. Bleakly</i> , 243 U.S. 210 (1917) .....	8
15 <i>Hirt v. Richardson</i> , 127 F. Supp. 2d 833 (W.D. Mich. 1999) .....	22
16 <i>INS v. Chadha</i> , 462 U.S. 919 (1983) .....	19
17 <i>Loving v. United States</i> , 517 U.S. 748 (1996) .....	7
18 <i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	20
19 <i>Michel v. Anderson</i> , 14 F.3d 623 (D.C. Cir. 1994) .....	15, 21
20 <i>Mistretta v. United States</i> , 488 U.S. 361 (1989) .....	7, 10-11
21 <i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935) .....	7
22 <i>Skaggs v. Carle</i> , 110 F.3d 831 (D.C. Cir. 1997) .....	6
23 <i>Stewart v. Blackwell</i> , 444 F.3d 843 (6th Cir. 2006), 24 <i>vacated as moot</i> , 473 F.3d 692 (6th Cir. 2007) .....	17
25 <i>Stone v. Mississippi</i> , 101 U.S. 814 (1880) .....	3, 7
26 <i>Synar v. United States</i> , 626 F. Supp. 1374 (D.C. Cir. 1986), 27 <i>aff'd sub nom. Bowsher v. Synar</i> , 478 U.S. 714 (1986) .....	1-2, 8, 11, 23

	<b>Page</b>
1	
2	<i>Touby v. United States</i> , 500 U.S. 160 (1991) . . . . . 12
3	<i>United States v. Bozarov</i> , 974 F.2d. 1037 (9th Cir. 1992) . . . . . 11
4	<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938) . . . . . 12, 15-17
5	<i>United States v. Lopez</i> , 938 F.2d 1293 (D.C. Cir. 1991) . . . . . 11
6	<i>United States v. Smith</i> , 286 U.S. 6 (1932) . . . . . 20-21
7	<i>United States v. Wenner</i> , 351 F.3d 969 (9th Cir. 2003) . . . . . 15
8	<i>United States v. Winstar Corp.</i> , 518 U.S. 839 (1996) . . . . . 2-3, 17, 20
9	<i>Whitman v. Am. Trucking Ass'ns, Inc.</i> , 531 U.S. 457 (2001) . . . . . 8
10	<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968) . . . . . 17
11	<i>Yakus v. United States</i> , 321 U.S. 414 (1944) . . . . . 7-8, 10
12	<b>United States Constitution</b>
13	U.S. Const. art. I . . . . . 19
14	U.S. Const. art. I, § 3 . . . . . 6
15	§ 5 . . . . . 19
16	U.S. Const. art. II, § 2 . . . . . 6
17	§ 3 . . . . . 9
18	<b>United States Statutes</b>
19	5 U.S.C. § 801, <i>et seq.</i> . . . . . 14
20	§ 801(g) . . . . . 14
21	28 U.S.C. § 994(p) . . . . . 11
22	§ 994(x) . . . . . 11
23	42 U.S.C. § 1395kkk . . . . . 2, 12-13, 16, 20
24	§ 1395kkk(b)(2) . . . . . 3
25	§ 1395kkk(b)(3) . . . . . 3
26	§ 1395kkk(c)(1)(B) . . . . . 3
27	§ 1395kkk(c)(2)(A)(i) . . . . . 3
28	§ 1395kkk(c)(2)(D) . . . . . 5

	<b>Page</b>
1	
2 § 1395kkk(c)(2)(E) .....	5
3 § 1395kkk(c)(3)(B)(iv) .....	4
4 § 1395kkk(c)(4) .....	9
5 § 1395kkk(c)(5) .....	9
6 § 1395kkk(d) .....	8, 21
7 § 1395kkk(d)(1)(D) .....	4
8 § 1395kkk(d)(2)(A) .....	5
9 § 1395kkk(d)(2)(D) .....	5
10 § 1395kkk(d)(3)(A) .....	4, 17, 19
11 § 1395kkk(d)(3)(B) .....	4-5, 10, 17, 19
12 § 1395kkk(d)(3)(C) .....	4-5, 10, 17, 19
13 § 1395kkk(d)(3)(D) .....	5
14 § 1395kkk(d)(4)(B)(ii) .....	5, 10
15 § 1395kkk(d)(4)(B)(iv) .....	5, 10, 13
16 § 1395kkk(d)(4)(D) .....	5
17 § 1395kkk(d)(5) .....	19
18 § 1395kkk(d)(5)(A) .....	21
19 § 1395kkk(d)(5)(B) .....	21
20 § 1395kkk(e)(1) .....	4, 15, 21-22
21 § 1395kkk(e)(3) .....	14
22 § 1395kkk(e)(3)(A) .....	13, 19
23 § 1395kkk(e)(3)(A)(i) .....	5-6
24 § 1395kkk(e)(3)(A)(ii) .....	6, 14-15, 18
25 § 1395kkk(e)(5) .....	10-11
26 § 1395kkk(f) .....	13-15, 17, 21-22
27 § 1395kkk(f)(1) .....	15
28 § 1395kkk(f)(1)(A) .....	6

	<b>Page</b>
1	
2 § 1395kkk(f)(1)(C) .....	13
3 § 1395kkk(f)(1)(D) .....	13
4 § 1395kkk(f)(2)(F) .....	13, 18-19
5 § 1395kkk(f)(3) .....	18
6 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) .....	10
7	<b>Miscellaneous</b>
8 Ackerman, Bruce, et al., <i>An Open Letter to Congressman Gingrich</i> , 104 Yale L.J. 1539 (1995) .....	6
9 <i>The Adams-Jefferson Letters</i> (Lester J. Cappon, ed., 1987) .....	1
10 Bacon, Francis, <i>Elements of the Common Lawes of England</i> (1630) .....	17
11 Blendon, Robert J. & Benson, John M., <i>Public Opinion at the Time of the Vote on</i> 12 <i>Health Care Reform</i> , 362 New Eng. J. Med. e55 (Apr. 22, 2010), available at 13 <a href="http://www.nejm.org/doi/full/10.1056/NEJMp1003844">http://www.nejm.org/doi/full/10.1056/NEJMp1003844</a> (last visited June 16, 2011) ....	16
14 Bruhl, Aaron-Andrew P., <i>Using Statutes to Set Legislative Rules:</i> 15 <i>Entrenchment, Separation of Powers, and the Rules of</i> 16 <i>Proceedings Clause</i> , 19 J. L. & Politics 345 (2003) .....	21
17 CNN Opinion Research Poll, June 3-7, 2011, available at <a href="http://i2.cdn.turner.com/cnn/2011/images/06/09/healthcare.pdf">http://i2.cdn.turner.com/cnn/2011/images/06/09/healthcare.pdf</a> (last visited June 16, 2011) .....	16
18 4 Coke, Edward, <i>Institutes</i> (1644) .....	17
19 Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 20 6 U.S. Op. Off. Legal Counsel 632, 1982 WL 170732 (Nov. 5, 1982) .....	9
21 Cook, Michael H., <i>Independent Payment Advisory Board— Part of the Solution</i> 22 <i>for Bending the Cost Curve?</i> 4 J. Health & Life Sci. L. 102 (2010) .....	13-14
23 Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510 .....	14
24 Dellinger, Walter, <i>Memorandum for Bernard N. Nussbaum</i> 25 <i>Counsel to the President</i> , 48 Ark. L. Rev. 333 (1995) .....	22
26 Ely, John Hart, <i>Democracy and Distrust</i> (1980) .....	16
27 Eule, Julian N., <i>Temporal Limits on the Legislative Mandate:</i> 28 <i>Entrenchment and Retroactivity</i> , 1987 Am. Bar Found. Res. J. 379 (1987) .....	20-21
<i>The Federalist</i> (Jacob E. Cooke ed., 1961) .....	1
Frederick, David C., <i>John Quincy Adams, Slavery, and the</i> <i>Disappearance of the Right of Petition</i> , 9 Law & Hist. Rev. 113 (1991) .....	18

	<b>Page</b>
1	
2	H.R. Res. 5, 105th Cong. 106(a) (1997) ..... 6
3	H.R. Res. 6, 104th Cong. 106(a) (1995) ..... 6
4	Jefferson, Thomas, A Bill for Establishing Religious Freedom, <i>reprinted in Jefferson: Writings</i> (Merrill D. Peterson ed., 1984) ..... 17
5	
6	Jost, Timothy Stoltzfus, <i>Focus on Health Care Reform:  The Independent Medicare Advisory Board</i> , 11 Yale J. Health Pol’y L. & Ethics 21 (2011) ..... 1-2, 13, 22-23
7	
8	Paulsen, Michael Stokes, <i>The Most Dangerous Branch:  Executive Power to Say What the Law Is</i> , 83 Geo. L.J. 217 (1994) ..... 22
9	<i>Plato: The Collected Dialogues</i> (Edith Hamilton & Huntington Cairns eds., 1961) ..... 1
10	Posner, Eric A. & Vermeule, Adrian, <i>Legislative Entrenchment: A Reappraisal</i> , 111 Yale L.J. 1665 (2002) ..... 18
11	
12	Quinnipiac University Poll, July 1, 2009, <i>available at</i> <a href="http://www.quinnipiac.edu/x1295.xml?ReleaseID=1344">http://www.quinnipiac.edu/x1295.xml?ReleaseID=1344</a> (last visited June 16, 2011) .... 16
13	Roberts, John C. & Chemerinsky, Erwin, <i>Entrenchment of Ordinary Legislation:  A Reply to Professors Posner and Vermeule</i> , 91 Cal. L. Rev. 1773 (2003) ..... 19-20
14	
15	S. Rep. No. 225, 98th Cong. 1st Sess. 180-81 (1983) ..... 11
16	Sidak, J. Gregory, <i>The Recommendation Clause</i> , 77 Geo. L.J. 2079 (1989) ..... 9-10
17	Statement by President Clinton on S. 2327, Oceans Act of 2000, Aug. 7, 2000, <i>available at</i> <a href="http://www.presidency.ucsb.edu/ws/index.php?pid=1470&amp;st=&amp;st1=#axzz1PO7KoNxV">http://www.presidency.ucsb.edu/ws/index.  php?pid=1470&amp;st=&amp;st1=#axzz1PO7KoNxV</a> (last visited June 14, 2011) ..... 9
18	
19	Statement by President Obama on H.R. 1105, Omnibus Appropriations Act, Mar. 11, 2009, <i>available at</i> <a href="http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105/">http://www.whitehouse.gov/the_press_office/Statement  -from-the-President-on-the-signing-of-HR-1105/</a> (last visited June 14, 2011) ..... 9
20	
21	1 Tribe, Laurence H., <i>American Constitutional Law</i> (3d ed. 2000) ..... 15
22	Wood, Gordon, <i>The Creation of the American Republic</i> (1998) ..... 20
23	
24	
25	
26	
27	
28	



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

9 **ARGUMENT**

10 **I**

11 **42 U.S.C. § 1395kkk,**  
12 **UNDER WHICH IPAB’S “RECOMMENDATIONS”**  
13 **AUTOMATICALLY BECOME LAW WITHOUT MEANINGFUL**  
14 **CONGRESSIONAL OVERSIGHT, IS AN UNCONSTITUTIONAL**  
15 **DELEGATION OF LAWMAKING POWER**

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

24 As Prof. Jost admits, “the conscious abdication of congressional responsibility to the IPAB  
25 is striking.” Jost, *supra*, at 31. It is not only striking, it also fails the intelligible principles test.  
26 PPACA’s provisions insulating IPAB from accountability, either to Congress, the public, or the  
27 courts, drastically limiting Congress’ power to abolish it, and otherwise rendering it independent  
28 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*

1 *States v. Winstar Corp.*, 518 U.S. 839, 874-75 (1996); *Butchers' Union Slaughter-House &*  
2 *Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746  
3 (1884); and *Stone v. Mississippi*, 101 U.S. 814 (1880). But however characterized, PPACA's  
4 unprecedented delegation of unreviewable, unaccountable, lawmaking authority to IPAB is  
5 unconstitutional.

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

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

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

1 But IPAB’s power is *not* recommendatory. Once its authority is triggered, IPAB is required  
2 to issue on January 15 a set of “recommendations” to reduce overall Medicare spending, along with  
3 “a legislative proposal that implements” these “recommendations.” Section 1395kkk(c)(3)(B)(iv).  
4 Congress, however, does not adopt or give lawful effect to these “recommendations.” On the  
5 contrary, the Secretary of Health and Human Services must “implement *the recommendations*  
6 *contained in a proposal submitted . . . to Congress,*” Section 1395kkk(e)(1) (emphasis added),  
7 regardless of whether Congress approves or disapproves of them. Congress, in fact, is given no  
8 significant opportunity to review or alter these “recommendations” at all; on the contrary, Section  
9 1395kkk(d)(3)(A) and (B) *deprives* Congress of such an opportunity by prohibiting either house  
10 from considering “any bill, resolution, or amendment . . . that fails to satisfy the requirements of  
11 subparagraphs (A)(i) and (C) of subsection (c)(2)” —that is, the statutory criteria IPAB itself is  
12 required to comply with when drafting the “recommendations.” In other words, Congress is only  
13 allowed to amend the “recommendations” by adding provisions that IPAB itself could have already  
14 drafted but failed to. This extraordinarily tight boundary on Congressional discretion is reinforced  
15 by a further prohibition against any repeal of the prohibition. Section 1395kkk(d)(3)(C).

16 Thus, the Secretary is required, “notwithstanding any other provision of law,” to enforce  
17 the “recommendations” IPAB drafts *regardless* of what Congress thinks of them. Section  
18 1395kkk(e)(1). Congress as a whole may add further “recommendations,” but may not reverse or  
19 alter them.

20 Congress has only one means of barring IPAB’s “recommendations” from automatically  
21 becoming law, and that method is rendered defunct if it is not exercised in a brief period in the year  
22 2017. Once IPAB’s “recommendations” are submitted to Congress, the President of the Senate and  
23 the Speaker of the House must, by the next business day, refer them to, respectively, the Senate  
24 Finance, House Energy And Commerce, and House Ways And Means Committees. *See* Section  
25 1395kkk(d)(1)(D).<sup>2</sup> But just as Congress as a whole is barred from altering these

26 \_\_\_\_\_  
27 <sup>2</sup> IPAB is also required to submit its “recommendations” to the Medicare Payment Advisory  
28 Commission and the Secretary of Health and Human Services for review and comment. *See*  
(continued...)

1 “recommendations,” the committees are *not* allowed to alter, or to recommend for or against  
2 passage of the “recommendations” and “legislative proposal”; rather, they to are allowed only to  
3 amend the “legislative proposal,” in ways that comply with the same instructions IPAB itself must  
4 follow when formulating the “recommendations” in the first place. *See* Section 1395kkk(d)(3)(B).  
5 Thus the committees may only add additional provisions that IPAB itself could have written but  
6 for some reason did not. With this trivial exception, the Congressional committees are required  
7 to report IPAB’s “legislative proposal” (which PPACA now refers to as a “bill”) on or before  
8 April 1—three months after IPAB first issues its “recommendations” and “legislative proposal.”  
9 Section 1395kkk(d)(2)(A).<sup>3</sup>

10 PPACA then requires the Senate to take up consideration of this bill, and *again* prohibits  
11 amendments, *see* Section 1395kkk(d)(4)(B)(ii), (iv), as well as severely restricting debate on it.  
12 Section 1395kkk(d)(4)(D). This prohibition on altering IPAB’s so-called “recommendation” is  
13 further reinforced by another provision that also forbids any change to the rule against alterations:  
14 “It shall not be in order in the Senate or the House of Representatives to consider any bill,  
15 resolution, amendment, or conference report that would repeal or otherwise change this  
16 subsection.” Section 1395kkk(d)(3)(C). The Senate—and *only* the Senate—may remove this  
17 obstruction, and only by a 3/5 vote of all *elected* Senators. Section 1395kkk(d)(3)(D).

18 Should Congress pass this bill—prefaced with the language required by Section  
19 1395kkk(e)(3)(A)(i)—it will supersede IPAB’s original “recommendations.” To repeat, this route  
20 does *not* allow Congress to alter or reverse those “recommendations,” but only to supplement the  
21 cuts in Medicare spending that IPAB originally “recommended” with further cuts that also fall  
22 within the same boundaries provided for IPAB. This alternative only allows Congress to do what  
23 IPAB could originally have done.

24 \_\_\_\_\_  
25 <sup>2</sup> (...continued)  
26 Sections 1395kkk(c)(2)(D) and (E). Although the Secretary must issue a report to Congress on the  
27 results of such review, PPACA does not give either the Secretary or Congress power to overrule  
28 the “recommendations.” *Id.*

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

1 But in 2020, these rules change. In that year, Congress loses its power to supplement  
2 IPAB’s recommendations if it has not *also* enacted a joint resolution, between January 1, and  
3 August 15, of 2017, to discontinue IPAB’s existence. The procedure for doing so is so complicated  
4 as to be unworkable. Such a resolution must be introduced during the 29 days between January 3  
5 (when Congress convenes) and February 1, 2017. *See* Section 1395kkk(f)(1)(A). It must receive  
6 a vote of 3/5 of all *elected* members of Congress—one of the most extreme supermajority  
7 requirements ever enacted in the history of American law.<sup>4</sup> And it must be enacted by August 15,  
8 2017. If these things do not occur, Section 1395kkk(e)(3)(A)(i) and (ii) become inoperative, and  
9 at that point, the process whereby IPAB’s “recommendations” automatically become law becomes  
10 utterly irreversible. From that point on, IPAB’s recommendations will automatically become law  
11 every year *regardless* of what Congress does.

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

18 **B. PPACA Exceeds the “Intelligible Principles” Rule**  
19 **by Giving IPAB Autonomous Lawmaking Authority**  
20 **Free of Legislative, Executive, or Judicial Oversight**

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

---

24 <sup>4</sup> By comparison, only two thirds of Senators *present* need to vote to remove a sitting president,  
25 U.S. Const. art. I, § 3, or to make a treaty the supreme law of the land. U.S. Const. art. II, § 2. The  
26 104th and 105th Congresses enacted a House rule requiring a 3/5 vote of all *present* members to  
27 approve tax increases. H.R. Res. 6, 104th Cong. 106(a) (1995); H.R. Res. 5, 105th Cong. 106(a)  
28 (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.”).

1 “details,” Congress may set up a “selected instrumentalit[y]” and allow it to make “subordinate  
2 rules within prescribed limits.” *Id.* (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421  
3 (1935)). Thus Congress may create administrative agencies and commissions, but may not yield  
4 its ultimate lawmaking role to another entity. Again, in *Yakus v. United States*, 321 U.S. 414  
5 (1944), the Court explained that Congress may make a law declaring that upon the occurrence of  
6 some fact or circumstance, a certain rule shall become operative, and then establish an agency to  
7 determine whether that fact or circumstance has occurred—but Congress may *not* give an agency  
8 “[t]he essentials of the legislative function,” which it defined as “the determination of the  
9 legislative policy and its formulation and promulgation as a defined and binding rule of conduct.”  
10 *Id.* at 424. In other words, Congress may authorize an agency to promulgate rules within Congress’  
11 legislative suzerainty, but may not yield to that agency the ultimate authority to *enact* laws.  
12 “Congress may not delegate the power to make laws and so may delegate *no more* than the  
13 authority to make policies and rules that *implement its statutes*.” *Loving v. United States*, 517 U.S.  
14 748, 771 (1996) (emphasis added).

15         There are two reasons Congress cannot give away its power to make law. First, the  
16 Constitution explicitly gives this power to Congress, and the Constitution’s procedures for  
17 lawmaking exclude any alternative methods. *Id.* at 758; *cf. Clinton v. New York*, 524 U.S. 417, 439  
18 (1998) (Constitution’s lack of alternative methods of lawmaking are “equivalent to an express  
19 prohibition.”). More fundamentally, the power to make law cannot be given away to an  
20 independent agency for the same reason that the legislature cannot contract away that power to a  
21 private party: because government is organized for the purpose of protecting public health and  
22 safety, so the legislature, which is the servant of the people, cannot part with that authority. *Stone*,  
23 101 U.S. at 819.

24         The “true distinction” between legitimate and illegitimate delegations of authority is  
25 “between the delegation of power to *make* the law,” which “cannot be done,” and statutes which  
26 “confer[] authority or discretion as to its *execution*, to be exercised *under* and *in pursuance* of the  
27 law.” *Loving*, 517 U.S. at 758-59 (citations omitted; emphasis added). That distinction is often  
28 “a question of degree,” *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting),

1 and “varies according to the scope of the power congressionally conferred.” *Whitman v. Am.*  
2 *Trucking Ass’ns, Inc.*, 531 U.S. 457, 475 (2001). As then-Judge Scalia explained in *Synar*, 626 F.  
3 Supp. at 1386,

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

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

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

1           The statute also restricts the *President's* oversight powers in a manner that violates the  
2 Separation of Powers. Section 1395kkk(c)(4) and (5) provide that in the event that IPAB fails to  
3 submit the "recommendations" as required, the Secretary of Health and Human Services must  
4 prepare such "recommendations," which the President is then required to submit, within two days,  
5 to Congress. The content of these "recommendations" is dictated by the same rules provided to  
6 IPAB. In other words, the statute specifies the content of the legislation that the President may  
7 submit to Congress. But the Constitution gives the President full discretion to "recommend to  
8 [Congress'] Consideration such Measures *as he shall judge necessary and expedient.*" U.S. Const.  
9 art. II, § 3 (emphasis added). Presidents have routinely asserted their full authority under the  
10 Recommendations Clause, opposing Congressional attempts to restrict or define the types of  
11 measures they may recommend. *See, e.g.*, Statement by President Obama on H.R. 1105, Omnibus  
12 Appropriations Act, Mar. 11, 2009 (citation omitted)<sup>5</sup> (declaring it unconstitutional under the  
13 Recommendation Clause for Congress to "require me and other executive officers to submit budget  
14 requests to the Congress in particular forms"); Statement by President Clinton on S. 2327, Oceans  
15 Act of 2000, Aug. 7, 2000<sup>6</sup> (because the Recommendation Clause "protects the President's  
16 authority to formulate and present his own recommendations, which includes the power to decline  
17 to offer any recommendation" to Congress, President would "construe section 4(a) not to extend  
18 to the submission of proposals or responses that the President finds it unnecessary or inexpedient  
19 to present."). *See also* Constitutionality of Statute Requiring Executive Agency to Report Directly  
20 to Congress, 6 U.S. Op. Off. Legal Counsel 632, 640; 1982 WL 170732, at \*8 (Nov. 5, 1982)  
21 ("[T]he Constitution gives to the President the right to present legislative recommendations on  
22 behalf of the Executive Branch," so Congress cannot "require a subordinate executive official to  
23 present legislative recommendations of his own."); J. Gregory Sidak, *The Recommendation Clause*,

24 ///

25 \_\_\_\_\_  
26 <sup>5</sup> Available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-from-the-President-on-the-signing-of-HR-1105/](http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105/) (last visited June 14, 2011).

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

1 77 Geo. L.J. 2079, 2121 (1989) (“the recommendation clause obviously contemplates that the  
2 President is the sole judge of what measures he will submit to Congress”).

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

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

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

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

23 ///

24 ///

25 \_\_\_\_\_  
26 <sup>7</sup> That statute provided that “[a]ny rule or regulation issued by the Secretary . . . shall be submitted  
27 to the Congress and shall become effective 60 legislative days after the date of such submission,  
28 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).

1 See 28 U.S.C. § 994(p).<sup>8</sup> But there, the statute provided elaborate and precise limits on the  
2 Commission’s authority, and Congress retained full power to modify or disapprove the  
3 Commission’s proposed rules. The statute also made ““ample provision for review of the  
4 guidelines by the Congress and the public,”” *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C.  
5 Cir. 1991) (quoting S. Rep. No. 225, 98th Cong. 1st Sess. 180-81 (1983)), because it made the  
6 notice and comment requirements of the Administrative Procedure Act applicable. *See id.* (citing  
7 28 U.S.C. § 994(x)). Thus even though that statute did bar judicial review, there were sufficient  
8 alternative mechanisms for ensuring that the agency was subordinate to Congress’ lawmaking role.

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

16 It is true, as Defendants argue, MTD at 51, that the lack of judicial review does not *by itself*  
17 render a delegation unconstitutional. *See United States v. Bozarov*, 974 F.2d. 1037, 1041-45  
18 (9th Cir. 1992). But the “intelligible principle” test is a holistic test, which requires the Court to  
19 evaluate “the totality of [PPACA]’s standards, definitions, context, and reference to past  
20 administrative practice,” *Synar*, 626 F. Supp. at 1389. The question in a delegation case is not  
21 whether any single factor is lacking, but whether all factors taken together “meaningfully

---

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

26 <sup>9</sup> PPACA does not *explicitly* immunize IPAB’s “recommendations” from the APA, but under the  
27 *exclusio alterius* rule, the fact that Congress established procedures that IPAB must follow when  
28 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.).

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

3 (a) insulates those “recommendations” from normal Administrative Procedure Act  
4 notice and comment rules,

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

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

8 (d) prohibits judicial review of the “recommendations,”

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

11 (f) provides that Congress may bar IPAB’s “recommendations” from automatically  
12 becoming only law if 3/5 of all elected members of Congress pass a joint resolution within a 29-day  
13 period of 2017 to disband IPAB, and

14 (g) eliminates even this impracticable opportunity of repeal in 2020 if Congress does  
15 not exercise it before August 15, 2017, whereupon it

16 (h) provides that, regardless of what any amendment or legislation Congress *does* adopt,  
17 the Secretary must still enforce the original “recommendations” that IPAB submits to Congress.

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

## 21 II

### 22 PROVISIONS THAT MAKE REPEAL OF IPAB’S 23 ENABLING LEGISLATION PRACTICALLY IMPOSSIBLE 24 ARE A FORM OF UNCONSTITUTIONAL ENTRENCHMENT 25 THAT FAILS THE STRICT SCRUTINY TEST

26 “[L]egislation which restricts those political processes which can ordinarily be expected to  
27 bring about repeal of undesirable legislation” is “subjected to more exacting judicial scrutiny” than  
28 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

1 compelling government interest. Section 1395kkk(f), combined with Sections 1395kkk(e)(3)(A)  
2 and 1395kkk(d)(4)(B)(iv), effectively eliminates Congress' power to restrict the repeal of IPAB's  
3 authority to draft "recommendations" which automatically become law. The purpose of these  
4 restrictions is to render IPAB independent of political accountability. *See Jost, supra*, at 31 ("In  
5 creating the IPAB, Congress is attempting to lash itself to the mast."); *see also* Michael H. Cook,  
6 *Independent Payment Advisory Board: Part of the Solution for Bending the Cost Curve?* 4 J.  
7 Health & Life Sci. L. 102, 111-12 (2010) ("The mandated quick timetable and requirement for a  
8 super majority vote reflect a concern that Congress would not have the fiscal discipline to enforce  
9 the spending targets the proposal requires."). This is not a legitimate state interest, and  
10 Section 1395kkk as a whole must therefore fail the heightened scrutiny test.

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

12 Under PPACA, IPAB's "recommendations" are automatically enforced by the Secretary  
13 of Health and Human Services, with only the narrow exceptions detailed above—which provide  
14 for only a temporary and impracticable opportunity for Congress to add additional  
15 "recommendations." The statute's limits on congressional discretion are reinforced by a provision  
16 that forbids Congress from discontinuing IPAB after 2020 unless, prior to August 15, 2017,  
17 Congress (a) introduces a joint resolution between January 3, and February 1, 2017, which (b) does  
18 not have any preamble, (c) has a title that PPACA lays out in full,<sup>10</sup> and (d) states "that Congress  
19 approves the discontinuation of the process for consideration and automatic implementation of the  
20 annual proposal of the Independent Medicare Advisory Board under section 1899A of the Social  
21 Security Act." Section 1395kkk(f)(1)(D). This resolution must be approved by three-fifths of all  
22 *elected* members (not just present members) of both houses. Section 1395kkk(f)(2)(F).

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

26 \_\_\_\_\_  
27 <sup>10</sup> It must be titled "Joint resolution approving the discontinuation of the process for consideration  
28 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).

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

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

20 Nor is the anti-repeal provision in PPACA anything like the Congressional Review Act,  
21 5 U.S.C. § 801, *et seq.*, as the government claims, *Opp. to Mtn. for Prelim. Inj.* at 4. That statute  
22 provides a means whereby Congress can disapprove the actions of administrative agencies, and the  
23 statute is clear that it is *not* the exclusive method for Congressional disapproval of agency action.  
24 *See* 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval . . . no court  
25 or agency may infer any intent of the Congress from any action or inaction of the Congress with  
26 regard to such rule."). Nothing in that statute provides—as PPACA does—that a specifically  
27 worded joint resolution is "required to discontinue" an agency, let alone provides that Congress'  
28 power to discontinue the agency expires if not used within a narrow time period. Indeed, *no other*

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

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

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

16 In *Carolene Products*, 304 U.S. at 152 n.4, the Supreme Court made clear that heightened  
17 scrutiny should apply to laws that obstruct the normal political process whereby undesirable laws  
18 can be repealed. This is because the judiciary has a special role to play "when the normal processes  
19 of democracy have broken down." 1 Laurence H. Tribe, *American Constitutional Law* 1052 (3d  
20 ed. 2000). The scheme of multiple tiers of scrutiny, which has prevailed from *Carolene Products*  
21 to this day, withholds judicial deference to the political branches when those branches abuse their  
22

---

23 <sup>11</sup> The government's invocation of the constitutional avoidance doctrine is unpersuasive. Opp. to  
24 Mtn. for Prelim. Inj. at 13-14. The rule against surplusage takes precedence over the constitutional  
25 avoidance doctrine. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005) (constitutional avoidance  
26 canon "comes into play only when, *after the application of ordinary textual analysis*, the statute  
27 is found to be susceptible of more than one construction; and the canon functions as a means of  
28 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.

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

10 The application of strict scrutiny to the anti-repeal provisions in Section 1395kkk is  
11 consistent with this goal. PPACA as a whole is not supported by a majority of Americans;  
12 although at the time of passage, PPACA’s popularity hovered around the 50% mark, a majority of  
13 Americans did not support it, *see* Robert J. Blendon & John M. Benson, *Public Opinion at the Time*  
14 *of the Vote on Health Care Reform*, 362 *New Eng. J. Med.* e55 (Apr. 22, 2010)<sup>12</sup> (“In none of the  
15 10 polls did a majority favor the proposed legislation.”). The Individual Mandate itself has  
16 remained consistently unpopular; six months before PPACA was passed, 51% of Americans  
17 opposed it,<sup>13</sup> and today that number has risen to 56%.<sup>14</sup> Indeed, President Obama himself opposed  
18 an individual mandate during his campaign. *See Florida v. U.S. Dep’t of Health & Human Servs.*,  
19 No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at \*138 n.30 (N.D. Fla. Jan. 31, 2011).  
20 To be clear, amici do *not* suggest that political polling should guide the Court’s consideration of  
21 a legal issue. Rather, the point is that the heightened scrutiny contemplated by *Carolene Products*  
22 was designed *exactly* for a case like this, in which an unpopular piece of legislation, which the  
23 general public did not support and may now wish to see repealed or amended, is entrenched by

24 \_\_\_\_\_  
25 <sup>12</sup> Available at <http://www.nejm.org/doi/full/10.1056/NEJMp1003844> (last visited June 16, 2011).

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

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

1 provisions that “restrict[] those political processes which can ordinarily be expected to bring about  
2 [its] repeal.” 304 U.S. at 152 n.4.

3 Heightened scrutiny places the burden on the government, not the plaintiffs, to demonstrate  
4 a substantial interest in support of the law, that the law directly and materially advances that  
5 interest, and that it is narrowly drawn—no broader than necessary to accomplish that substantial  
6 interest. *ACLU v. Napolitano*, No. CIV 00-505 TUC ACM, 2002 U.S. Dist. LEXIS 28303 (D.  
7 Ariz. June 14, 2002). The government cannot meet this burden, because a law explicitly designed  
8 to block future reconsideration and repeal—let alone to delegate Congress’ lawmaking power to  
9 an independent body, and to deprive the legislative, executive, and judicial branches of any  
10 meaningful control—is not a legitimate state interest. *Cf. Williams v. Rhodes*, 393 U.S. 23, 32  
11 (1968) (state has no legitimate interest in interfering with “competition in ideas and governmental  
12 policies.”); *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692  
13 (6th Cir. 2007) (“An individual’s vote is the lifeblood of a democracy. To that extent, we find it  
14 difficult to conjure up what the State’s legitimate interest is by the use of technology that dilutes  
15 the right to vote.”).

### 16 **C. Entrenchment Is Unconstitutional**

17 “Entrenchment”—the attempt to enact a law that cannot be repealed—has for centuries been  
18 considered beyond the reach of any legislature. *See* Francis Bacon, *Elements of the Common*  
19 *Lawes of England* 77 (1630) (“*perpetua lex est nullam legem*”—a perpetual law is void); 4 Edward  
20 Coke, *Institutes* \*43 (1644) (“though divers Parliaments have attempted to barre, restrain, suspend,  
21 qualifie, or make void subsequent Parliaments, yet could they never effect it.”); Thomas Jefferson,  
22 A Bill for Establishing Religious Freedom, *reprinted in Jefferson: Writings* 347-48 (Merrill D.  
23 Peterson ed., 1984) (“[T]his Assembly . . . ha[s] no power to restrain the acts of succeeding  
24 Assemblies, constituted with powers equal to our own.”); *Winstar*, 518 U.S. at 871-80 (legislature  
25 cannot make binding promise not to use its powers).

26 Congress’ attempt in Section 1395kkk(f) to bar itself from disbanding IPAB and, in Section  
27 1395kkk(d)(3)(A), (B), and (C), to bar itself from amending the “recommendations” that IPAB  
28 makes before they are enforced as law are unlike any other statute ever enacted. The only previous

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

8 | Nor is there any precedent regarding an attempt by Congress to establish a law that cannot  
9 | be repealed or an agency that cannot be eliminated. Still, scholars have addressed the question,  
10 | focusing first on whether it is logically possible to enact a law immune from repeal and, second,  
11 | on whether such a law would be constitutional. As Professors Eric Posner and Adrian Vermeule  
12 | observe, the intuitive notion that any attempt to create an unrepealable law would itself be subject  
13 | to repeal—asserted by the government, *Opp. to Mtn. for Prelim. Inj.* at 14—is not necessarily  
14 | correct. “Consider statute *PR*,” they write, “in which *P* prohibits bicycles in the park, and *R*  
15 | prohibits repeal . . . . The conceptual challenge to this statute is the claim that . . . *PR* would not  
16 | bind . . . a subsequent Congress,” because it “could first repeal the statute *PR*, enabling itself to  
17 | repeal *P*.” Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111  
18 | *Yale L.J.* 1665, 1668 (2002) (emphasis added). But this apparently obvious solution would fail in  
19 | the case of a statute that contains its own anti-repeal provision:

20 |         The original Congress could pass an additional entrenching provision, *R'*, which  
21 |         provides that *R* can be repealed only with a two-thirds majority, but then of course  
22 |         the next Congress could repeal *R'* with a simple majority, and so on down the line.  
23 |         But ordinary language can handle the infinite regress. Let the original Congress  
24 |         enact *R\**, which says that a two-thirds majority is necessary to repeal or amend both  
25 |         *P* and *R\**. The statute *PR\** is invulnerable to repeal. Self-reference solves the  
26 |         problem of infinite regress.

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

1 possibility of repeal under Section 1395kkk(f)(2)(F). In addition, Section 1395kkk(d)(3)(A) and  
2 (B) bar Congress from amending or altering IPAB’s recommendations in any way—except to add  
3 provisions that IPAB itself could have added but failed to—and Section 1395kkk(d)(3)(C) prohibits  
4 Congress from considering any measure “that would repeal or otherwise change” this gag rule.  
5 *These* restrictions on Congress’ discretion do *not* expire in 2020. In other words, these provisions  
6 combine to create a mechanism whereby IPAB’s authority can be restrained only until August 15,  
7 2017; thereafter, Congress loses all authority to abolish IPAB. And because the statute is self-  
8 referential in the manner described by Posner and Vermeule, it appears to be a logically consistent  
9 prohibition on repeal.

10 Posner’s and Vermuele’s article drew a sharp reply from John C. Roberts and Erwin  
11 Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*,  
12 91 Cal. L. Rev. 1773 (2003), who convincingly argue that if unrepealable laws are possible, they  
13 are unconstitutional for at least four reasons.

14 First, attempts to entrench legislation against future repeal violate Article I of the  
15 Constitution. That Article sets forth the exclusive method by which Congress may pass laws. *See*  
16 *id.* at 1784 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)); *see also Clinton*, 524 U.S. at 439  
17 (“There are powerful reasons for construing constitutional silence” as to alternative ways of  
18 enacting a statute “as equivalent to an express prohibition.”). A statute that prohibits its own repeal  
19 conflicts with this method and “destroys the legislative power as to that subject matter entirely.”  
20 Roberts & Chemerinsky, *supra*, at 1784.

21 Second, anti-repeal provisions conflict with the constitutional authority of subsequent  
22 Congresses to set their own rules. *Id.* at 1789-95. In 2020, Section 1395kkk(e)(3)(A) will  
23 automatically abolish the limited repeal option if not used by 2017, thereby limiting the rulemaking  
24 powers of Congresses elected after 2017, contrary to the rulemaking authority that each future  
25 Congress enjoys under Article I, section 5. Thus, notwithstanding the precatory assertion in  
26 Section 1395kkk(d)(5), that PPACA is consistent with *this* Congress’ constitutional rulemaking  
27 authority, the actual provisions of the statute restrict the rulemaking authority of *future* Congresses.

28 ///

1 *Cf. United States v. Smith*, 286 U.S. 6, 48-49 (1932) (Courts are not bound by the Senate’s  
2 characterization of its own rules).

3 Third, laws purportedly immune from repeal are contrary to the constitutional rotation in  
4 office. As Roberts and Chemerinsky argue, *supra*, at 1789, such provisions “allow members of  
5 Congress to effectively extend their terms in office beyond those prescribed in the Constitution,”  
6 because, if enforced, such rules would deprive newly elected representatives of legislative power.

7 Finally, entrenchment rules conflict with the nature of the Constitution itself, by elevating  
8 ordinary legislative action to the level of constitutional provisions. The American constitutional  
9 tradition rests on distinguishing a constitution—an act of the people which cabins legislative  
10 discretion—from ordinary laws passed by legislatures that employ delegated authority. *See*  
11 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“the constitution controls any legislative  
12 act repugnant to it . . . [and is not] alterable when the legislature shall please to alter it”); Gordon  
13 Wood, *The Creation of the American Republic* 276 (1998) (noting colonial era arguments that  
14 constitutions must be superior to legislative authority).

15 No legal precedent clearly covers the situation presented by Section 1395kkk, for the simple  
16 reason that no Congress has attempted previously to waive its lawmaking role to such an extreme  
17 degree. Indeed, this case is much more like precedents established under the Contracts Clause, in  
18 which the Court has made clear that except in certain very limited situations, “[t]he Government  
19 cannot make a binding contract that it will not exercise a sovereign power.” *Winstar*, 518 U.S.  
20 at 881 (citation omitted). Congress cannot give up its power to legislate because that power does  
21 not belong to Congress; it belongs to the people, who delegate that authority to Congress on certain  
22 limited conditions. One of those conditions is that Congress act within the boundaries of the  
23 Article I legislative process. To enact a law like Section 1395kkk, which creates a permanent,  
24 independent, law-making agency, the activities of which cannot be meaningfully overseen by  
25 Congress, and which is only subject to repeal through an extremely complicated process—which  
26 expires in 2017—is to abuse that entrusted power. *See* Julian N. Eule, *Temporal Limits on the*  
27 *Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. Bar Found. Res. J. 379, 396

28 ///

1 (1987) (“the question of whether a legislature—a subordinate, albeit representative body—can  
2 promulgate entrenching laws should ultimately be a question of agency”). This is unconstitutional.

3 **D. Defendants’ Argument That Congress Can Disband**  
4 **IPAB in Some Other Way Does Not Resolve This Case**

5 The Defendants contend that Congress could “repeal or suspend” the anti-repeal provision  
6 “and then vote to repeal [IPAB].” Opp. to Mtn. for Prelim. Inj. at 14. But this is simply to admit  
7 that the statute does *not* permit the repeal of IPAB. Nor is it clear that this alternative would  
8 actually be effective.

9 First, the anti-repeal provisions do *not* purport to be (as the Defendants claim, MTD at 47-  
10 48) merely Congress’ internal rules.<sup>15</sup> Sections 1395kkk(d)(5)(A) and (B) state only that sections  
11 (d) and (f)(2) are exercises of Congress’ internal rulemaking power. The other provisions of the  
12 statute—including the section withdrawing Congress’ limited power to discontinue IPAB if that  
13 power is not used by 2017—do *not* purport to be an exercise of the rulemaking power. No court  
14 or a legislative body has ever conclusively determined whether a rule established by a statute  
15 passed by both houses and signed by the president can be altered unilaterally by a single house.  
16 *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation*  
17 *of Powers, and the Rules of Proceedings Clause*, 19 J. L. & Politics 345, 368 (2003) (“Congress  
18 has expressed concern over whether it retains the ability to alter statutized rules as recently as  
19 1983.”).<sup>16</sup>

20 Second, as noted above, the argument that Congress must still retain an ultimate repeal  
21 power is contrary to the plain language of Section 1395kkk(f), which says that the joint resolution  
22 described therein is “required” to discontinue IPAB. Second, Section 1395kkk(e)(1) provides that  
23 “[n]otwithstanding any other provision of law,” the Secretary must implement IPAB’s  
24

---

25 <sup>15</sup> Even if they were merely Congress’ internal rules, however, they would be subject to judicial  
26 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).

27 <sup>16</sup> Although Congress often uses “disclaimer clauses” to reinforce its power to change even rules  
28 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).

1 “recommendations,” the sole exception being the enactment of the joint resolution described in  
2 Section 1395kkk(f). Merely repealing the so-called “fast track” provision in Section 1395kkk(f),  
3 therefore, would *not* bar the Secretary’s obligatory, ministerial implementation of IPAB’s  
4 “recommendations” under Section 1395kkk(e)(1).

5 Nor is it clear that the parties’ stipulation of March 8, 2011 (to the effect that the challenged  
6 sections pose no impediment to Congress disbanding IPAB) can bind Congress. The legislative  
7 branch has an equal and independent authority to determine the scope of its powers, at least until  
8 the judiciary pronounces an interpretation, and Congress cannot be bound by the interpretation  
9 adopted by the executive branch defendants in this case. *Cf. Fourteen Diamond Rings v. United*  
10 *States*, 183 U.S. 176, 180 (1901) (president is not bound by Congress’ interpretation of a treaty);  
11 *Hirt v. Richardson*, 127 F. Supp. 2d 833, 845 n.8 (W.D. Mich. 1999) (“the judiciary is not bound  
12 by the Executive Branch’s interpretations of [a federal law]”); Walter Dellinger, *Memorandum for*  
13 *Bernard N. Nussbaum Counsel to the President*, 48 Ark. L. Rev. 333, 340 (1995) (“it can be argued  
14 that the President simply cannot speak for Congress, which is an independent constitutional actor”);  
15 Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*,  
16 83 Geo. L.J. 217, 322 (1994) (“Congress is not bound by the President’s interpretation of the law.”)

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

## 19 CONCLUSION

20 PPACA is a law like no other in history. Not only is the Individual Mandate  
21 “unprecedented,” *Florida*, 2011 U.S. Dist. LEXIS 8822, at \*71, but so are the provisions  
22 establishing IPAB as a group of “Platonic Guardians,” Jost, *supra*, at 21. The danger of such an  
23 autonomous, unaccountable lawmaking body are obvious. As Prof. Jost writes,

24 There is no reason to believe that Congress is ready to adopt price controls in the  
25 private sector, and thus the gap between Medicare and private payment is likely to  
26 continue to be an issue. At some point, however, the gap may become  
27 unacceptable, which may require Congress to take the private sector  
28 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.

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

1 *Id.* at 31. When “the aggregate effect of the factors” are taken into account, *Synar*, 626 F. Supp.  
2 at 1390, it is clear that IPAB is an unconstitutional delegation of lawmaking authority. That  
3 delegation, and the anti-repeal provision in PPACA, cannot withstand the applicable strict scrutiny.  
4 The motion to dismiss should be *denied* and the motion for summary judgment should be *granted*.

5 DATED: June 20, 2011.

6 Respectfully submitted,

7  
8 By s/ Timothy Sandefur  
9 TIMOTHY SANDEFUR\*

10 Attorneys for Amicus Curiae  
11 Pacific Legal Foundation

12 \*pro hac vice  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28