No. 18-10545

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF INDIANA; STATE OF WISCONSIN; STATE OF NEBRASKA,
Plaintiffs-Appellees / Cross-Appellants,

v.

CHARLES P. RETTIG, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES INTERNAL REVENUE SERVICE; ALEX M. AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Wichita Falls Division

UNOPPOSED MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Unopposed Motion for Leave to File Reply in Support of Petition for Rehearing En Banc

Counsel for Plaintiffs-Appellees / Cross-Appellants, the States of Texas, Kansas, Louisiana, Indiana, and Nebraska ("Movant States"), respectfully move for leave to file a reply in support of their petition for rehearing en banc. The reply is attached to this motion. Counsel for Defendants-Appellants / Cross-Appellees (the "United States") has confirmed that the United States does not oppose the relief sought in this motion.

Argument

Movant States seek this Court's leave to file a reply brief in support of their petition for rehearing en banc. In particular, the Movant States wish to respond to two points raised in the United States's brief. First, the United States contends that neither of the issues raised in the petition are properly presented to the Court. But the United States conflates two different arguments addressed by the panel and disregards one of the grounds upon which the district court ruled in favor of the plaintiff States.[1] Second, the United States contends that the Movant States have admitted that the 2002 Certification Rule, which is the focus of the petition for rehearing, is having "no real world impact on their managed care contracts." Resp. at 9. But Movant States have done no such thing; they have simply brought a second lawsuit when the district court's ruling afforded only partial relief for their injuries. The United

[1] Wisconsin was a plaintiff in the district court and is an appellee in this matter, but it did not seek rehearing en banc.

States thus misapprehends the core legal issues the petition presents; a reply brief will aid the Court's consideration of this matter.

This Court routinely entertains reply briefs in support of petitions for rehearing en banc, *e.g.*, *Brackeen v. Bernhardt*, No. 18-11479 (5th Cir.) (reply in support of rehearing en banc filed Oct. 31, 2019); *Uranga v. Davis*, No. 15-10290 (5th Cir.) (reply in support of rehearing en banc filed May 7, 2018)—even over objection, *Lewis v. Hughs*, No. 20-50654 (5th Cir.) (order granting leave issued Sept. 22, 2020). It should do so here as well, particularly as the United States does not oppose the filing of the enclosed reply brief.

Conclusion

Movant States respectfully request that the Court grant them leave to file the attached reply in support of their petition for rehearing en banc.

Respectfully submitted.

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Certificate of Conference

On October 13, 2020, counsel for Movant States conferred with counsel for the United States regarding this Motion for Leave to File Reply in Support of Petition for Rehearing En Banc, and the United States does not object to the relief sought.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On October 13, 2020, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 395 words, excluding the parts of the motion exempted by Rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

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Introduction

At stake in this case is nearly $500 million in taxes that plaintiff States seek to reclaim from the federal government. The origin of those taxes lies in the interaction between the Affordable Care Act of 2010 and a 1981 law requiring States to pay "actuarially sound" premiums when they buy insurance for Medicaid beneficiaries from private insurers. 42 U.S.C. § 1396b(m)(2)(A)(iii). If States do not pay these taxes, the rates they paid those insurers would not be "actuarially sound" as that term has been defined by a private entity, the Actuarial Standards Board or "ASB," pursuant to a 2002 regulation. The panel concluded that this arrangement may continue because the plaintiff States have not properly challenged the rulemaking authority of the private party as a constitutional matter. And the panel held that the States *could not* challenge it under the Administrative Procedures Act because they waited more than six years after that regulation was promulgated—even though the private entity did not exercise its authority to make rules for thirteen years after the regulation was promulgated.

Defendants-Appellants / Cross-Appellees (the "United States") do not seriously dispute that the questions presented in the petition for rehearing en banc represent important issues of federal law. Instead, the United States repeatedly asserts that "[n]either issue is presented by this case." Resp. at 1, 4. The United States is wrong. Its argument disregards the panel's holding, omits one of the bases upon which the district court ordered judgment for the plaintiff States, and misstates the content and significance of a separate lawsuit that those States have brought but that

has never been adjudicated. The United States' response only confirms that the en banc Court should review this exceptionally important case.

ARGUMENT

I. CMS Has Impermissibly Delegated Authority to a Private Entity in Violation of the Constitution.

Since 1981, Congress has required States who choose to manage their Medicaid through private MCOs to pay those companies rates that are "actuarially sound." 42 U.S.C. § 1396b(m)(2)(A)(iii). In 2002, CMS sought to promulgate a prescriptive rule regarding how that terms should be defined and was unable to do so. ROA.1411. So, it punted by delegating two distinct powers to private actuaries: (1) the power to set rules by which actuarial soundness was determined, and (2) the power to certify compliance with those rules. 42 C.F.R. § 438.6. It is undisputed that, as a result of this certification requirement, plaintiff States have paid nearly $500 million in taxes to the federal government. ROA.4675-77. The panel concluded that the second part of the delegation was permissible because "HHS has the ultimate authority to approve a state's contract with MCOs; certification is a small part of the approval process." Panel Op. 16. It held, however, that the States had not actually challenged the first part of the delegation. *Id.* at 4 n.4. As the petition explained (at 8-11), the first conclusion creates a circuit split; the second is based on a misstatement of the record.

Nowhere in its response does the United States address the split between the panel's reasoning and *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977), and *Cospito v. Heckler*, 742 F.2d 72, 89 (3d Cir. 1984). Nor does it defend the panel's conclusion that the plaintiff States failed to challenge the

ASB's rulemaking authority in their complaint. *See* Resp. at 4-5. The United States argues (at 4-5) that the panel decision can be upheld because the "2002 regulation did not involve regulatory action; it addressed the standard applicable to rates for managed-care contracts under Medicaid." *Id.* at 5.[1] The United States has never taken this position before—for good reason: Setting standards used to judge State Medicaid contracts *is* a regulatory action. *Texas v. EEOC*, 933 F.3d 433, 443 (5th Cir. 2019) (citing *Nat. Res. Def. Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011)). And in any event, the United State' argument is nonresponsive. Even if "HHS has the ultimate authority" to approve or disapprove a private actuary's individualized certification decision, Resp. at 5 (quoting Panel Op. at 16),[2] that would not cure the problem that the standards being applied are *set* by a private actuary, Panel Op. at 4 n.4 (acknowledging this to be a separate question). The panel was incorrect to conclude that the States challenged the certification requirement without challenging the rule-setting function, *id.*, and the United States does not argue otherwise. That alone merits further review.

[1] The United States also re-asserts (at 4) a statutory construction argument that it presented to the panel, but that the panel did not adopt. For an explanation of why this interpretation is incorrect, see pages 16-18 of the States' principle brief.

[2] HHS has no such "ultimate authority" to approve contracts that private actuaries have rejected for the reasons explained in the petition (at 10-11).

II. The Panel Misapplied the Court's Standards Regarding The APA's Time Bar.

The panel's application of this Court's jurisprudence regarding the six-year statute of limitations creates intra-circuit conflict meriting further review. As discussed in the petition, no one ever disputed that a challenge to the 2002 process by which CMS decided to abdicate its responsibility to define "actuarially sound" would be time-barred. 28 U.S.C. § 2401(a).[3] Similarly, however, there is no dispute that the ASB only promulgated a binding definition of "actuarial soundness" years later. *See* Panel Op. at 10-11. The district court concluded this was final agency action restarting the statute of limitations because it removed any discretion that actuaries and States previously had to exclude the HIPF from state capitation rates. ROA.3996-97. The Panel disagreed because, in its view, "[a]ctuarially sound capitation rates have consistently required" the States to account for the HIPF since 2002. Panel Op. at 14. This conclusion directly conflicts with *EEOC*, 933 F.3d at 442 (quoting *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016)). And, if allowed to stand, it would permit a federal agency to avoid review of an improper delegation because the party to whom it delegated authority waited six years to act upon the delegation.

Again, the United States does not dispute that this presents an important question. Instead, it insists (at 7) that the "untimeliness ruling pertained to plaintiffs'

[3] Contrary to the United States' implication (at 7), this is not a new concession made in the petition. *See* States Principle Br. 21-22. Nor is the petition raising some new argument regarding the scope of the States' nondelegation challenge. *Id.* at 28-30; States Reply Br. 3-4. *Contra* Resp. 9.

other challenges," not the nondelegation issue. This reflects a lack of understanding of the record: The district court's judgment in favor of the plaintiff States was based in part on its conclusion that the Certification Rule was substantively improper under the APA because it violated the nondelegation doctrine. ROA.4012-14. Moreover, the United States misses the point. In 2002, CMS may have adopted a framework without content, which is impermissible under the APA. *E.g.*, *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989). But the absence of that content meant that plaintiff States could not be "expected to anticipate all possible future challenges to a rule and bring them within six years of the rule's promulgation, before a later agency action applying the earlier rule leads to an injury." *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049-50 (9th Cir. 2016) (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

In this instance, that subsequent action which caused the plaintiff States' injury was the adoption of ASOP 49, which the panel acknowledges was the first binding standard for "actuarial soundness" ever adopted for a state Medicaid plan. *See* Panel Op. 5, 8. That this action was undertaken by a private party that lacked legal "authority to promulgate substantive rules" means that the adoption of ASOP 49 violated *both* the APA *and* the Constitution. *EEOC*, 933 F.3d at 451; *see also Pittston Co. v. United States*, 368 F.3d 385, 396 (4th Cir. 2004). But that does not mean that it was not a final action that restarts the APA statute of limitations. *EEOC*, 933 F.3d at 451. Tellingly, the United States asserts that "even before ASOP 49 was issued," HHS had required States to apply a similar rule, but the authority it cites is guidance from 2014. Resp. at 7-8 (citing Centers for Medicare & Medicaid Services, HHS,

Medicaid and CHIP FAQs: Health Insurance Providers Fee for Medicaid Managed Care Plans 2 (Oct. 2014), https://www.medicaid.gov/federal-policy-guidance/downloads/faq-10-06-2014.pdf). It is unclear on what basis this guidance could be legally binding as the Certification Rule incorporates only the standards promulgated by the ASB. 42 C.F.R. § 438.6. But even if 2014 were the relevant starting date, this case would be timely as it was filed on October 22, 2015.

III. Allegations that Plaintiff States Made in a Separate Lawsuit that Has Been Stayed Pending Resolution of this One Have No Bearing on this Petition.

Finally, the United States cannot avoid the conclusion that the panel's reasoning creates inter- and intra-circuit conflict by asserting (at 9) that the plaintiff States have "expressly conceded in their other lawsuit that the 2002 regulation is having no real-world impact on their managed-care contracts." Plaintiff States have done no such thing. As the States explained in their principle brief (at 20), the other lawsuit to which the United States refers has no bearing on the questions presented here. The case currently before the Court challenges the Certification Rule, which CMS had cited in imposing 100% of the burden of the HIPF on States during the years at issue in the operative complaint. *Id.* Since the district court issued its ruling, the United States has continued to force the States to pay the HIPF in different tax years, citing a different IRS regulation.

The panel correctly concluded that this other rule does *not* deprive the States of standing in this lawsuit because the Certification Rule prevents the States from negotiating with their insurers. Panel Op. 11. The United States has not sought

additional review of that conclusion, which is dictated by decades of precedent. *E.g.*, *Larson v. Valente*, 456 U.S. 228, 242-43 (1982); *Dep't of Tex., Veterans of Foreign Wars of the U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432-33 (5th Cir. 2014) (en banc).

The existence of this IRS regulation also does not mean that the Certification Rule is "having no real-world impact." Resp. at 9. Indeed, according to the United States's own theory about the statute of limitations, the Certification Rule has been having an impact since 2002—even before it was given any content by the adoption of ASOP 49. The panel's conclusions about that legality of that rule and the timeliness of plaintiff States' claims are binding precedent in this Court regardless of any other rule in the Code of Federal Regulations. And unless the Court acts, the inter- and intra-circuit conflicts that reasoning creates—which the United States nowhere denies—will persist regardless of the district court's conclusion in the State's separate lawsuit.

Conclusion

The Court should grant the petition for rehearing en banc.

Respectfully submitted.

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/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This brief contains 1,852 words, excluding the parts of the brief exempted by Rule 32(f). The Federal Rules of Appellate Procedure do not detail requirements for reply briefs in support of petitions for rehearing en banc. Analogizing from similar rules, Defendant-Appellant has limited the length of this brief to less than one-half the length of an en banc petition. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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