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. DEPARTMENTOF 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,
No. 7:15-cv-151, Hon. Reed O'Connor

RESPONSE IN OPPOSITION TO PETITION
FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

The federal government respectfully opposes plaintiffs' petition for rehearing en banc. Plaintiffs' FRAP 35(b) statement asserts that this case presents two issues of exceptional importance: (1) whether "a federal administrative agency may delegate to a private entity the power to tax States"; and (2) "whether that agency may avoid judicial review of that delegation under the Administrative Procedures Act when the private entity waits more than six years to wield that delegated power." Pet. 1. Neither issue is presented by this case.

Congress has not delegated to a private entity the power to tax States. The tax at issue here was enacted by Congress, and it was imposed on private insurers. Section 9010 of the Patient Protection and Affordable Care Act of 2010 ("ACA") imposed a tax on covered entities engaged in the business of providing health insurance (the "Section 9010 tax," also referred to as the "Health Insurance Providers Fee" or "HIPF").[1] Congress exempted government entities. It also exempted certain private insurers that provide services for government programs. Congress exempted *non-profit* insurers that receive more than 80% of their gross revenue from government programs such as Medicaid. Congress did not exempt *for-profit* insurers that receive more than 80% of their gross revenue from government programs such as Medicaid.

[1] *See* ACA, Pub. L. No. 111-148, § 9010, 124 Stat. 119, 865 (2010) ("Imposition of Annual Fee on Health Insurance Providers"), as amended by the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, § 1406(a)(3), 124 Stat. 1029, 1065-66.

The plaintiff States have contracts with *for-profit* managed care organizations ("MCOs") to operate their Medicaid managed-care programs. The complaint alleged that, because those for-profit companies pass costs (including taxes) along to plaintiffs, the Section 9010 tax violates the Spending Clause and the Tenth Amendment doctrine of intergovernmental tax immunity to the extent that it is passed on to States. The district court rejected plaintiffs' challenges to the Section 9010 tax, and a unanimous panel of this Court affirmed. Plaintiffs' rehearing petition does not take issue with these rulings upholding the Section 9010 tax, and, indeed, makes no reference to these rulings.

Plaintiffs' rehearing petition focuses instead on a 2002 federal regulation requiring that the rates in Medicaid managed-care contracts be "actuarially sound." That regulation established no new substantive obligations. It simply specified that the rates must be "developed in accordance with generally accepted actuarial principles and practices" and certified by "actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board." 42 C.F.R. § 438.6(c)(1)(i)(A), (C) (2002).

Plaintiffs contend that this requirement is an unconstitutional delegation of legislative power to the Actuarial Standards Board, a private entity. The panel correctly rejected that claim on the merits. *See* Panel Op. 14-17. As the panel explained, the U.S. Department of Health and Human Services ("HHS") "has the

ultimate authority to approve a state's contract with MCOs; certification is a small part of the approval process." *Id.* at 16. Moreover, the requirement of actuarial soundness is established by the Medicaid statute itself and is binding on actuaries without regard to the challenged regulation. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii), (viii). Thus, in a second, related lawsuit, plaintiffs acknowledged that their own actuaries, "employing their best judgment and discretion," determined that the rates in their Medicaid managed-care contracts must account for the Section 9010 tax. *See* Compl. ¶ 45, *Texas v. United States*, No. 4:18-cv-779 (N.D. Tex. Sept. 20, 2018) (*Texas II*); *see also id.* ¶ 26. "Notably, the States don't challenge § 1396b here." Panel Op. 11.

Plaintiffs' understanding of non-delegation principles is in any event seriously mistaken. The Supreme Court has long recognized that governments may rely on private standards of a "technical nature," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), and plaintiffs' own state laws incorporate accounting standards like the ones they challenged here. *See, e.g.*, Tex. Tax Code Ann. § 11.1826(b)(1) (property may not be exempted for tax purposes unless the organization "has an audit prepared by an independent auditor" that is "conducted in accordance with generally accepted accounting principles"); *see also* Ind. Code Ann. § 27-16-8-4(3); Kan. Stat. Ann. § 9-2211(b)(2); La. Stat. Ann. § 22:461(D); Neb. Rev. Stat. Ann. § 76-1302(17); Wis. Stat. Ann. § 65.90(6).

In sum, the petition raises no issue warranting review by the full Court.

ARGUMENT

Plaintiffs' FRAP 35(b) statement asserts that this case presents two exceptionally important questions: (1) "whether a federal administrative agency may delegate to a private entity the power to tax States," and (2) "whether that agency may avoid judicial review of that delegation under the Administrative Procedures Act when the private entity waits more than six years to wield that delegated power." Pet. 1. Neither issue is presented by this case.

A. The tax at issue here was imposed by Congress on private health-insurance providers. Section 9010 of the ACA imposed an annual fee on covered entities engaged in the business of providing health insurance. Congress exempted government entities from that tax. *See* ACA § 9010(c)(2)(B), 124 Stat. at 866. Congress also exempted non-profit insurers that receive more than 80% of their gross revenue from government programs such as Medicaid. *See id.*; HCERA § 1406(a)(3), 124 Stat. at 1065-66. However, Congress did not exempt for-profit insurers from this tax. Plaintiffs' complaint alleged that, as applied to the for-profit insurers with which they contract, the Section 9010 tax violates the Spending Clause and the doctrine of intergovernmental immunity because for-profit insurers pass the tax along to plaintiffs. The district court rejected those claims on the merits, *see* Panel Op. 7, and the panel affirmed those rulings, *see id.* at 17-22.

Plaintiffs' rehearing petition abandons their challenges to the Section 9010 tax. Their petition focuses instead on a 2002 federal regulation requiring that the rates in

Medicaid managed-care contracts be actuarially sound. That regulation specified that the rates must be "developed in accordance with generally accepted actuarial principles and practices" and certified by "actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board." 42 C.F.R. § 438.6(c)(1)(i)(A), (C) (2002). The district court ruled that this certification requirement was an unconstitutional delegation of legislative power to the Actuarial Standards Board, but the panel unanimously reversed that ruling on the merits. *See* Panel Op. 14-17.

The panel's ruling is correct and consistent with settled precedent. The private non-delegation doctrine concerns instances in which the government delegates to a private entity the authority to take regulatory action. The 2002 regulation did not involve regulatory action; it addressed the standard applicable to rates for managed-care contracts under Medicaid, a spending program administered by HHS. And as the panel explained, "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.

Moreover, even in the regulatory context, the Supreme Court has long recognized that federal, state, and local governments may incorporate private standards of a "technical nature." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). Many federal statutes require private parties to comply with "Generally Accepted Accounting Principles," which "are the official standards adopted by the American Institute of Certified Public Accountants . . . , a private

professional association, through three successor groups it established." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 159 n.4 (2d Cir. 2000). *See, e.g.*, 15 U.S.C. § 78m(b)(2)(B); 25 U.S.C. § 3304(c)(2)(A); 42 U.S.C. § 300ee-15(b)(4); 42 U.S.C. § 11360a(g)(2)(A); *see Owens v. Jastrow*, 789 F.3d 529, 534 (5th Cir. 2015). Likewise, many state laws incorporate generally accepted accounting principles, even though state governments are bound by the Due Process principles that underlie the private non-delegation doctrine. *See Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017). Plaintiffs' own laws are illustrative. *See*, *e.g.*, Tex. Tax Code Ann. § 11.1826(b)(1) (property may not be exempted for tax purposes unless the organization "has an audit prepared by an independent auditor" that is "conducted in accordance with generally accepted accounting principles"); *see also* Ind. Code Ann. § 27-16-8-4(3); Kan. Stat. Ann. § 9-2211(b)(2); La. Stat. Ann. § 22:461(D); Neb. Rev. Stat. Ann. § 76-1302(17); Wis. Stat. Ann. § 65.90(6).

Federal, state, and local governments rely on private technical standards in many other contexts as well. *See American Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 440 (D.C. Cir. 2018) (observing that, "[a]cross a diverse array of commercial and industrial endeavors," "private organizations have developed written standards to resolve technical problems, ensure compatibility across products, and promote public safety" and that "Federal, state, and local governments" have "incorporated by reference thousands of these standards into law"). Laws like these present no constitutional problem.

B. The second issue that plaintiffs' petition purports to present is whether "federal administrative agencies can skirt the nondelegation doctrine whenever the delegee waits out the APA's six-year limitations period before wielding unconstitutionally delegated power." Pet. 6. No such issue is presented. The panel did not reject plaintiffs' non-delegation claim as untimely; it rejected that claim on the merits. *See* Panel Op. 14-17.

The panel's untimeliness ruling pertained to plaintiffs' other challenges to the 2002 regulation, such as their claims (rejected by the district court) that the 2002 regulation violated the APA's notice-and-comment requirement and exceeded the agency's statutory authority. Plaintiffs now concede that "APA claims are subject to a six-year statute of limitations," which means that "[a]ny challenge to the procedures by which the [2002] rule was adopted thus became untimely in 2008." Pet. 11-12. Moreover, with respect to the claims found to be time-barred, the panel correctly noted that plaintiffs were wrong in stating that their Medicaid managed-care contracts did not have to account for the Section 9010 tax before 2015, when the Actuarial Standards Board issued Actuarial Standard of Practice No. 49 ("ASOP 49"). As the panel explained, even before ASOP 49 was issued, "HHS's Office of the Actuary stated that actuarially sound capitation rates have consistently required that all reasonable, appropriate, and attainable costs be covered by rates which includes all taxes, fees, and assessments." Panel Op. 8 n.7; *see also* Centers for Medicare & Medicaid Services, HHS, *Medicaid and CHIP FAQs: Health Insurance Providers Fee for*

Medicaid Managed Care Plans 2 (Oct. 2014), https://go.usa.gov/xVMgu (indicating that "the amount of the [Section 9010] fee should be incorporated as an adjustment to the capitation rates and the resulting payments should be consistent with the actual or estimated amount of the fee").

C. The petition not only fails to present an issue of "exceptional importance," Fed. R. App. P. 35(b)(1)(B); the 2002 regulation has no practical impact on plaintiffs' Medicaid managed-care contract rates—as plaintiffs acknowledged in related litigation. Congress imposed the Section 9010 tax on insurers, and also legislated the requirement of actuarial soundness in the Medicaid statute, which has long required that the payments by States to their Medicaid managed care plans be "actuarially sound," 42 U.S.C. § 1396b(m)(2)(A)(iii); *see also* ACA § 2501(c)(1)(C), 124 Stat. at 308 (amending 42 U.S.C. § 1396b(m)(2)(A)(xiii))) (providing that Medicaid managed-care contracts are "subject to the Federal regulations requiring actuarially sound rates").

Thus, after the district court invalidated the 2002 regulation—but before that ruling was reversed on appeal—plaintiffs' actuaries continued to take the Section 9010 tax into account in reviewing and approving plaintiffs' managed-care contract rates. Indeed, plaintiffs filed a second, related suit in which they expressly acknowledged that the source of their alleged injury is the Medicaid statute itself and that the district court's ruling did not redress their asserted injuries. *See* Compl. ¶ 45, *Texas II*, No. 4:18-cv-779 (admitting that "the actuarial soundness requirement of 42 U.S.C. § 1396b(m)(2)(A)(iii) has caused Plaintiffs' actuaries, employing their best judgment

and discretion, to conclude that actuarial soundness in 2018 can only result from a full, dollar-for-dollar imposition upon Plaintiffs of any 2018 HIPF liability upon their Medicaid or CHIP [managed-care organizations]'"); *see id.* ¶ 26.

Accordingly, although the panel concluded that plaintiffs met the minimal requirements of Article III standing, it emphasized that plaintiffs did not challenge the Medicaid statute's actuarial soundness requirement in this suit. *See* Panel Op. 11 ("Notably, the States don't challenge § 1396b here."). Plaintiffs cannot argue—for the first time in a rehearing petition—that "Congress could not allow [HHS] to define 'actuarially sound' in the first instance." Pet. 7. In any event, plaintiffs expressly conceded in their other lawsuit that the 2002 regulation is having no real-world impact on their managed-care contracts. Clearly, this case does not meet the standards for rehearing en banc. The petition should be denied.[2]

[2] Because the panel rejected plaintiffs' non-delegation claim on the merits, it did not reach the government's additional arguments for why the district court erred in ordering the government to equitably disgorge to plaintiffs the Section 9010 tax that plaintiffs' for-profit contractors had paid to the Internal Revenue Service. *See* Panel Op. 7, 22 & n.15.

CONCLUSION

Plaintiffs' petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with type volume and typeface requirements in Federal Rule of Appellate Procedure 35 because it has been prepared in 14-point Garamond, a proportionally spaced font, and contains 2183 words, excluding the parts exempted by Federal Circuit Rule 35(c)(2).

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
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