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

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' UNOPPOSED MOTION TO STAY MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

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Certificate of Interested Persons

No. 18-10545

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Plaintiffs-Appellees / Cross-Appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
Lanora C. Pettit
Counsel of Record for Plaintiffs-Appellees / Cross-Appellants States of Texas, Kansas, Louisiana, Indiana, and Nebraska

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INTRODUCTION

In accordance with Federal Rule of Appellate Procedure 41(d)(1), Plaintiffs-Appellees / Cross-Appellants, the States of Texas, Kansas, Louisiana, Indiana, and Nebraska (Appellant States) respectfully request that the Court stay the issuance of the mandate pending the Appellant States' filing of a petition for a writ of certiorari. As reflected in the five-judge dissent from the denial of rehearing en banc, the petition for rehearing, and the panel opinion itself, the States' certiorari petition will present a substantial question. *See* Fed. R. App. P. 41(d)(1). Good cause also exists to grant the stay. *See id.* And defendants, the federal government, do not oppose this motion.

BACKGROUND

A. Many States contract with private health-insurance providers—also known as managed-care organizations (MCOs)—to run state Medicaid programs. ROA.3083-84. The State pays the MCO a monthly premium per Medicaid beneficiary, regardless of whether the beneficiary needs care. ROA.3083-84. In order to receive reimbursement for those payments from the federal government, the premiums must be "made on an actuarially sound basis." 42 U.S.C. § 1396b(m)(2)(A)(iii); ROA.3197.

Neither Congress nor the Centers for Medicare and Medicaid Services (CMS), has ever defined the term "actuarially sound." Instead, in 2002, CMS promulgated the Certification Rule, delegating the task of defining "actuarially sound" to a private entity, the Actuarial Standards Board. 42 C.F.R. § 438.6(c)(1)(i)(C) (2002). CMS also provided that the payments must be certified by an "actuar[y] who

meet[s] the qualification standards established by the American Academy of Actuaries and follow[s] the practice standards established" by the Board. *Id.* This "certification" must accompany the State's request for reimbursement. *Id.* § 438.6(c)(4)(i).

Two further developments led to this lawsuit. *First*, in 2010, the Patient Protection and Affordable Care Act (ACA) levied an unprecedented tax on the health-insurance industry to offset ACA's similarly unprecedented costs. *See* Pub. L. No. 111-148, 124 Stat. 119, § 9010 (Mar. 23, 2010); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 1406(a)(3) (amending ACA § 9010). Congress chose, however, not to impose that tax on States and other "governmental entit[ies]." ACA § 9010(c)(2)(B). *Second*, in March 2015, the Board finally published a binding rule defining "actuarially sound." ROA.1649-81. As relevant here, that definition, known as ASOP 49, requires States to pay the new taxes Congress chose to levy against the MCOs. ROA.1655.

B. In October 2015, six States sued to challenge (among other things) "the delegation of rulemaking authority to a private entity under the actuarial soundness requirements" as violative of the structural provisions of the Constitution. ROA.159 (capitalization altered). The operative complaint further alleged that the imposition of the tax on States was substantively and procedural improper under the APA.

In 2018, the district court granted partial summary judgment for each party. It held that CMS violated the nondelegation doctrine by allowing a private entity to (1) formulate and (2) certify compliance with the standards that determine whether a State may receive Medicaid funding. ROA.4000-10. The district court concluded,

however, that the Certification Rule as adopted in 2002 was lawful under the APA. ROA.4014-15. The court ordered the federal government to disgorge to plaintiff States the nearly $500 million they were forced to pay under ASOP 49's reallocation of tax liability during the years covered by this suit. ROA.4411; *see* ROA.4676-77.

C. On July 31, 2020, a panel of this Court reversed that judgment. *See Texas v. Rettig*, 987 F.3d 518, 523 (5th Cir. 2021). After the Appellant States filed a petition for rehearing en banc, the panel withdrew its initial opinion and substituted it with another that reached the same result. *Id.* at 523-24.

As relevant here, the panel held that CMS had not "subdelegate[d] its authority" to a private entity because "[t]he Certification Rule's conditions for actuarial soundness" reasonably "incorporated the Board's actuarial standards into its Certification Rule, a common and accepted practice by federal agencies." *Id.* at 531-32. In the alternative, the Court held the sub-delegation to be permissible because "HHS reviewed and accepted the Board's standards" and retained "ultimate authority to approve a state's contract with MCOs." *Id.* at 533 (quotation marks omitted).

The full Court subsequently denied a petition for rehearing en banc over the dissent of five Judges. *Texas v. Rettig*, No. 18-10545, --- F.3d ----, 2021 WL 1324382, at *1 (5th Cir. Apr. 9, 2021) (per curiam). As Judge Ho's dissent explained, the Certification Rule violates the nondelegation doctrine in three different ways:

> (1) It subdelegates substantive lawmaking power, rather than some minor factual determination or ministerial task; (2) the subdelegation is authorized by an administrative agency, rather than by Congress; and (3) the agency is subdelegating power to a private entity, rather than to another governmental entity that is at least minimally accountable to the public in some way.

Id. at *3 (Ho, J., dissenting from the denial of rehearing en banc). This combination is "uniquely offensive to the Constitution." *Id.*

ARGUMENT

I. The Petition Will Present A Substantial Question.

This Court should stay its mandate pending Appellant States' forthcoming petition for a writ of certiorari. There is a reasonable probability the Supreme Court will grant the Appellant States' petition for certiorari as this case presents several of the criteria the Court considers relevant in determining whether to grant a petition. *See* Sup. Ct. R. 10. And the Court's recent decisions also suggest that there is a significant possibility of reversal, should the Supreme Court grant the petition.

A. The Court is likely to reexamine the nondelegation doctrine in the near future, and at least five current members of the Supreme Court have expressed skepticism of the kind of delegation at issue here. In *Gundy v. United States*, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, explained that the Constitution requires Congress to "make[] the policy decisions when regulating private conduct," 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting), and that the Court's permissive approach to allowing the Executive Branch to fill gaps in existing law had over the years "been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Id.* at 2140. He further explained that such transfers of policymaking authority out of the legislative branch violated the separation of powers and prevented "[t]he sovereign people" from

"know[ing], without ambiguity, whom to hold accountable for the laws they would have to follow." *Id.* at 2134.

Justice Alito has also indicated an interest in revisiting the nondelegation doctrine generally, and has expressed his disagreement with private delegation of the type seen here specifically. Although he did not join the dissenters in *Gundy*, he explained that, "[i]f a majority of this Court were willing to reconsider the approach [to delegation] we have taken for the past 84 years, [he] would support that effort." *Id.* at 2130-31 (Alito, J., concurring in the judgment). In another case, Justice Alito described the "handing off [of] regulatory power to a private entity" as "legislative delegation in its most obnoxious form"—a delegation without "even a fig leaf of constitutional justification." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring); *see id.* at 61 ("Congress cannot delegate regulatory authority to a private entity." (quotation marks omitted)). For that reason, he has argued that a private entity may not "promulgate binding metrics and standards for [a regulated] industry," nor may it exercise "binding" decision-making authority. *Id.* at 62. Again, those are precisely the circumstances presented in this appeal. *See Rettig*, 2021 WL 1324382, at *5, *8 (Ho, J., dissenting).

Additionally, Justice Kavanaugh (who took no part in *Gundy*, *see* 139 S. Ct. at 2130) has agreed that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (capitalization altered).

There is therefore a reasonable probability that four or more members of the Court would consider the issue sufficiently important to grant certiorari.

B. Because this case presents a prime example of the types of abuse of which Justice Gorsuch warned, a majority of the Court is likely to find the case sufficiently meritorious to reverse. Congress did not define "actuarially sound." Even CMS acknowledged that "there is no universally accepted definition of the term actuarially sound" within the actuarial community. ROA.473. Nevertheless, it purported to subdelegate authority to define that term to a private party. That is, the Executive relied on a private group to craft binding rules as to which "Congress offered no meaningful guidance." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *see Rettig*, 987 F.3d at 531-32.

Worse, unlike sub-delegations that have previously been found to be lawful, CMS has no ultimate "authority . . . over [the actuary's] activities." *Rettig*, 987 F.3d at 532 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). As the panel observed, the federal government will only process a reimbursement request "[i]f the State provides all required documentation." *Id.* at 533. The "actuarial certification" is one such required document. 42 C.F.R. § 438.6(c)(4)(i). But there is no mechanism to challenge an actuary's decision to withhold a certification. And only the Board, not the federal government, has the power to discipline the actuaries that issue certificates. *See* ROA.1810. "Under the Certification Rule, then, HHS neither sets the regulatory standard nor exercises final authority over the application of that standard. Private actors wield final reviewing authority," *Rettig*, 2021 WL 1324382, at *5 (Ho, J., dissenting)—precisely the kind of unaccountable

decisionmaking the Constitution was designed to prevent. *See id.*; *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

Indeed, even the justices that upheld the challenged delegation in *Gundy* were of the view that the Court would "face a nondelegation question" if the challenged provision granted the delegee authority "to change her policy for any reason and at any time." 139 S. Ct. at 2123 (plurality op.). Here, the panel found that HHS "incorporated the Board's actuarial standards into its Certification Rule." *Rettig*, 987 F.3d at 531-32. The Certification Rule, however, speaks more broadly, requiring States to "follow the practice standards established by the" Board *generally*—not just the practice standard set out in ASOP 49, and not just the standards that existed at the time the Certification Rule was promulgated. 42 C.F.R. § 438.6(c)(1)(i)(C) (2002). The Board therefore remains free "to change [its] policy for any reason and at any time," in violation of the nondelegation doctrine. *Gundy*, 139 S. Ct. at 2123 (plurality op.); *see Rettig*, 2021 WL 1324382, at *7 n.5 (Ho, J., dissenting).

C. Even apart from the growing concern over the scope of the nondelegation doctrine, this case presents "an important question of federal law" for yet another reason. Sup. Ct. R. 10(c). Courts have recognized on several occasions the enormity of Medicaid's impact on the States. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581-82 (2012) (opinion of Roberts, C.J.); *Texas v. United States*, 945 F.3d 355, 376, 385 (5th Cir. 2019), *cert. granted sub nom. Texas v. California*, 140 S. Ct. 1262 (2020).

As a result, a challenge to the method by which Medicaid reimbursements are calculated implicates an issue "of deep economic and political significance." *King v.*

Burwell, 576 U.S. 473, 486 (2015). The Supreme Court has therefore "rejected agency demands that [the Court] defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits." *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (summarizing *King*, 576 U.S. at 485-86). This case implicates the same concerns, not least because nearly half a billion dollars of state funds are at stake. ROA.4676; *cf. Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (describing the "major questions" doctrine employed in *King* as serving the same purpose as the nondelegation doctrine).

In 2010, Congress wrote the rules for the imposition of its new tax: "Each covered entity engaged in the business of providing health insurance shall pay [the tax] to the Secretary." ACA § 9010(a)(1). "[T]he term 'covered entity' means any entity which provides health insurance for any United States health risk," but "does not include . . . any governmental entity." *Id.* §§ 9010(c)(1)-(2). The import is clear: Congress directed MCOs, but not the States, to pay the tax. *See Rettig*, 987 F.3d at 525. Nevertheless, *after* ACA's passage, the Board promulgated ASOP 49, requiring the States, rather than the MCOs, to pay the tax instead. CMS later blessed this reversal of the statutory scheme. ROA.3243. Though the HIPF has been repealed, the unconstitutional structure that allowed its imposition on States remains. And Congress did not—and cannot—empower any other body to "change the substantive preferences Congress enacted . . . and impose them on third parties." *Brackeen v. Haaland*, No. 18-11479, --- F.3d ----, 2021 WL 1263721, at *118 (5th Cir. Apr. 6, 2021) (en banc) (opinion of Duncan, J.).

D. Finally, as the panel recognized, *see Rettig*, 987 F.3d at 531 n.9, its opinion deepened a circuit split on the issue of sub-delegation. *Cf.* Sup. Ct. R. 10(a). The Tenth and D.C. Circuits have held that an agency engages in unconstitutional sub-delegation when it conditions agency action on the grant of a certification that a third party has unchecked discretion to deny. *See G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 211 (10th Cir. 2015). In those circumstances, the third party "effectively supplant[s]" the agency "as final decision-maker," *id.*, which is improper "[a]bsent Congressional authorization." *Id.* at 212; *see also U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566-67 (D.C. Cir. 2004) (holding that agencies "may not sub-delegate to outside entities—private or sovereign—absent affirmative evidence of [Congressional] authority to do so").

By contrast, the panel chose to follow the Third Circuit, which upheld as a "reasonable condition" the exact same delegation declared unlawful by the Tenth Circuit. *See La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 672–73 (3d Cir. 2014); *Rettig*, 987 F.3d at 531 & nn.9-10.

Indeed, the panel's decision appears to have created a three-way circuit split by misapplying *Louisiana Forestry Association*. "[T]he statute in that case specifically granted the [agency] the authority to" make its determination "after consultation with [other] appropriate agencies of the Government." *Rettig*, 2021 WL 1324382, at *7 n.4 (Ho, J., dissenting) (citing *La. Forestry Ass'n*, 745 F.3d at 660). No such statutory authorization exists here. *Id.* The Fifth Circuit therefore appears to stand alone in permitting "this kind of 'double delegation' from Congress to public bureaucrats to private parties" without congressional authorization. *See id.* at *2. Nor is there

any accepted theory of the separation of powers that would permit such a practice. *See id.* at *5 ("Agencies may play the sorcerer's apprentice but not the sorcerer himself." (quoting *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001)).

II. There Is Good Cause To Stay The Mandate.

"[T]he State has an interest in securing observance of the terms under which it participates in the federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607-08 (1982). Those terms are not observed when the federal government permits a private entity to set rules that are binding on a State, that may change whenever and however the entity pleases, that contradict a clear congressional command, and that serve a gatekeeping function not subject to agency review or appeal. Through this "inversion of … federalism principles," the Certification Rule—which remains in force—has inflicted and continues to inflict irreparable "institutional injury [on] Texas." *Texas v. U.S. E.P.A.*, 829 F.3d 405, 434 (5th Cir. 2016); *see In re Gee*, 941 F.3d 153, 166 (5th Cir. 2019) (per curiam) (observing that "the unlawful assertion of federal power" over a State "imposes [an] extraordinary harm[]").

Furthermore, if the petition for certiorari is granted and the States ultimately prevail in the Supreme Court, the parties and the district court will be spared the time and expense of proceedings on remand and in a related case that has been stayed pending final resolution of this appeal. *See* Order Granting Joint Motion To Stay, *Texas v. United States*, No. 4:18-cv-00779-O (N.D. Tex. Dec. 6, 2018) (ECF No. 26). This too weighs in favor of a stay. *Cf. In re Gee*, 941 F.3d at 165-66.

By contrast, a stay of the Court's mandate will not prejudice the federal government. During the pendency of this appeal, the IRS has continued to assess taxes to Medicaid MCOs using other regulations. Appellant States' Principal & Resp. Br. 12. And if the panel and federal government are correct that "HHS could achieve *exactly the same result* [as the Certification Rule and ASOP 49] by promulgating regulations that adopted the substance of the Board's standards," defendants lose little if they are unable to rely on the Board's independent promulgation and enforcement of those standards. *Rettig*, 987 F.3d at 532 (ellipsis omitted).

CONCLUSION

The Court should stay issuance of the mandate pending the filing of a petition for certiorari.[1] Appellant States also request that the Court administratively stay issuance of the mandate pending its disposition of this motion.

[1] If a stay is granted, the State will notify the Court when its certiorari petition is filed. *See* Fed. R. App. P. 41(d)(2)(B)(ii).

Respectfully submitted.

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Certificate of Conference

On April 16, 2021, counsel for Appellant States conferred with counsel for the federal government regarding this Motion to Stay the Mandate. Counsel for the federal government indicated that the government does not oppose Appellant States' motion to stay the issuance of the mandate pending a petition for certiorari in this case, on the understanding that Appellant States will not attempt to execute on the district court's judgment, and will join in any future motion by the government to the district court to stay execution of the judgment, until 30 days after all appellate avenues have been exhausted.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Service

On April 16, 2021, 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/ Lanora C. Pettit
Lanora C. Pettit

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 2,872 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/ Lanora C. Pettit
Lanora C. Pettit

Appendix 1: Panel Opinion

987 F.3d 518
United States Court of Appeals, 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

No. 18-10545
|
FILED February 12, 2021

Synopsis

Background: States brought action against Department of Health and Human Services (HHS) and its Secretary, and Internal Revenue Service (IRS) and its Acting Commissioner, alleging that HHS's certification rule, which required the States to pay Patient Protection and Affordable Care Act's (ACA) health insurance provider fee (HIPF), violated ACA, Administrative Procedure Act (APA), Spending Clause, Vesting Clause, and Tenth Amendment, seeking declaration that certification rule was unconstitutional and permanent injunction enjoining defendants from denying Medicaid funds to States based on their refusal to pay the HIPF or refusing to approve the States' proposed Medicaid capitation rates based on their failure to account for the HIPF, and seeking tax refund of their HIPF payments. The United States District Court for the Northern District of Texas, O'Connor, J., 2016 WL 4138632, entered interlocutory order dismissing States' tax refund claim, and subsequently, 300 F.Supp.3d 810, entered interlocutory order on States' partial summary judgment motion, finding States entitled to judgment as a matter of law on claim alleging that certification rule violated Vesting Clause, APA, and ACA, finding defendants entitled to judgment as a matter of law on all other counts, and declaring certification rule unlawful. Subsequently, the United States District Court for the Northern District of Texas, Reed O'Connor, J., 336 F.Supp.3d 664, granted states' motion for reconsideration, in part. Parties cross-appealed.

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:

[1] States had Article III standing to challenge certification rule;

[2] HHS letter was not direct and final action, as would trigger limitations period for APA claim;

[3] government's collection of provider fees was not direct and final action pertaining to State, under APA;

[4] guidance issued by HHS was not final agency action, as required to trigger limitations period for bringing APA claim;

[5] certification rule did not divest HHS of final reviewing authority, and thus, did not violate nondelegation doctrine;

[6] ACA's health insurance provider fee did not violate Spending Clause; and

[7] provider fee did not violate Tenth Amendment.

Affirmed in part, reversed in part, and vacated in part.

Opinion, 968 F.3d 402, superseded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (32)

[1] **Federal Courts** Summary judgment

The Court of Appeals reviews a district court's grant of summary judgment de novo. Fed. R. Civ. P. 56(a).

[2] **Federal Civil Procedure** By both parties
Federal Civil Procedure Presumptions

On cross-motions for summary judgment, a court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(a).

[3] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To satisfy Article III's standing requirement, plaintiffs must demonstrate (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief. U.S. Const. art. 3, § 2, cl. 1.

[4] **Federal Civil Procedure** In general; injury or interest

The party invoking federal jurisdiction bears the burden of establishing the elements of Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[5] **Federal Civil Procedure** In general; injury or interest

At the summary judgment stage, plaintiffs must set forth by affidavit or other evidence specific facts, which will be taken to be true, to support each element of Article III standing. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 56(a).

[6] **Federal Civil Procedure** In general; injury or interest

If one plaintiff has standing for a claim, then Article III is satisfied as to all plaintiffs. U.S. Const. art. 3, § 2, cl. 1.

[7] **Federal Courts** Standing

The Court of Appeals reviews Article III standing issues de novo. U.S. Const. art. 3, § 2, cl. 1.

[8] **Health** Standing

States had Article III standing to challenge certification rule promulgated by the Department of Health and Human Services (HHS), which required private actuarial certification of managed care organization (MCO) capitation rates, and effectively required states to pay health insurance provider fees imposed by Patient Protection and Affordable Care Act (ACA) in order to receive Medicaid funds from federal government; under the rule, States allegedly had to pay millions of dollars in provider fees, and invalidation of the rule was likely to redress States' alleged injury, as States would then allegedly be permitted to exclude the provider fees from capitation rates in their contracts with MCOs, so that States could not lose Medicaid funding for refusing to pay the provider fees. U.S. Const. art. 3, § 2, cl. 1; Social Security Act § 1903, 42 U.S.C.A. §§ 1396b(a), 1396b(m)(2)(A)(iii); 42 C.F.R. § 438.6(c)(1)(i)(C).

[9] **United States** Necessity of waiver or consent

The United States enjoys sovereign immunity unless it consents to suit, and the terms of its consent circumscribe a federal court's jurisdiction in a suit against the government.

[10] **United States** Time to sue, limitations, and laches

The failure of litigants to sue the United States under the Administrative Procedure Act (APA) within the applicable limitations period deprives a federal court of jurisdiction. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a).

[11] **Administrative Law and Procedure** Proceedings to Obtain Review

A plaintiff may challenge a regulation under the Administrative Procedure Act (APA) after the limitations period has expired if the claim is that the administrative agency exceeded its constitutional or statutory authority in promulgating the regulation. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a).

[12] **Administrative Law and Procedure** Proceedings to Obtain Review

To sustain an Administrative Procedure Act (APA) challenge to a rule or regulation after the applicable limitations period has expired, the plaintiff must show some direct, final agency action involving the particular plaintiff within six years of filing suit. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a).

[13] **Administrative Law and Procedure** What constitutes finality in general

To be a direct and final administrative agency action for purposes of judicial review under the Administrative Procedure Act (APA), the action must mark the consummation of the agency's decisionmaking process. 5 U.S.C.A. § 551 et seq.

[14] **Administrative Law and Procedure** What constitutes finality in general

To be a direct and final administrative agency action for purposes of judicial review under the Administrative Procedure Act (APA), the action must be one by which rights or obligations have been determined, or from which legal consequences will flow; these rights, obligations, or legal consequences must be new. 5 U.S.C.A. § 551 et seq.

[15] **Health** Time

Department of Health and Human Services (HHS) letter to State Medicaid Director, approving State's managed care organizations (MCO) contract because HHS determined that State had complied with rule that set forth standards for private actuaries, requiring State to pay Patient Protection and Affordable Care Act's (ACA) health insurance provider fees to MCOs in order to acquire private actuarial certification required to receive Medicaid funds, did not amount to "direct and final action" by HHS, as would trigger limitations period for State to assert Administrative Procedure Act (APA) challenge; letter did not show that HHS was issuing new ruling requiring State to include provider fees capitation rates, and State paid costs associated with and accounted for provider fees in capitation rates even before letter. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a); Social Security Act § 1903, 42 U.S.C.A. §§ 1396b(a), 1396b(m)(2)(A)(iii); 42 C.F.R. § 438.6(c)(1)(i)(C).

[16] **Health** Time

Government's collection of State's payment of Patient Protection and Affordable Care Act's (ACA) health insurance provider fees to managed care organizations (MCO) State contracted with to provide Medicaid services was not "direct and final agency action" pertaining to State, as required to trigger six-year limitations period within which State could assert challenge under Administrative Procedure Act (APA); government did not collect provider fees directly from States, but from MCOs. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a); 42 C.F.R. § 438.6(c)(1)(i)(C); Social Security Act § 1903, 42 U.S.C.A. §§ 1396b(a), 1396b(m)(2)(A)(iii).

[17] **Health** Time

Guidance issued by Department of Health and Human Service (HHS) for setting capitation rates for managed care program subject to rule requiring private actuarial certification of managed care organization (MCO) capitation rates, in order for capitation rates to be considered actuarially sound, which was requirement for State to receive Medicaid funds, was not "direct and final agency action," as required to trigger limitations period within which State could assert Administrative Procedure Act (APA) challenge; guidance did

not create any new obligations or consequences for States that were not already required by prior HHS rule. 5 U.S.C.A. § 551 et seq.; 28 U.S.C.A. § 2401(a); Social Security Act § 1903, 42 U.S.C.A. §§ 1396b(a), 1396b(m)(2)(A)(iii); 42 C.F.R. § 438.6(c)(1)(i)(C).

[18] **Health** Rules and Regulations in General

Certification rule promulgated by the Department of Health and Human Services (HHS), which required private actuarial certification of managed care organization (MCO) capitation rates, and effectively required States to pay health insurance provider fees imposed by Patient Protection and Affordable Care Act (ACA) in order to receive Medicaid funds from federal government, was reasonable condition that did not divest the HHS of its final reviewing authority, and thus did not violate nondelegation doctrine; although rule empowered Actuarial Standards Board, which was private organization, to establish definition of actuarial soundness for certification, HHS retained final reviewing authority to approve States' contracts with MCOs. U.S. Const. art. 1, § 1; Social Security Act § 1903, 42 U.S.C.A. § 1396b(m)(2)(A)(iii); 42 C.F.R. § 438.6(c)(1)(i)(C).

[19] **Constitutional Law** Delegation of powers by executive

A federal agency may not abdicate its statutory duties by delegating them to a private entity. U.S. Const. art. 1, § 1.

[20] **Constitutional Law** Delegation of powers by executive

Federal agency does not improperly subdelegate its authority when it reasonably conditions federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input. U.S. Const. art. 1, § 1.

[21] **Constitutional Law** Delegation of powers by executive

A condition that a federal agency makes on subdelegation of its authority is reasonable if there is a reasonable connection between the outside entity's decision and the federal agency's determination. U.S. Const. art. 1, § 1.

[22] **Administrative Law and Procedure** Scope or method of delegation or surrender of powers

Constitutional Law Delegation of powers by executive

Delegation of statutory duties of a federal agency to private entities is lawful if the entities function subordinately to the federal agency and the federal agency has authority and surveillance over their activities. U.S. Const. art. 1, § 1.

[23] **Administrative Law and Procedure** Scope or method of delegation or surrender of powers

An agency retains final reviewing authority, when it subdelegates to private entities, if it independently performs its reviewing, analytical, and judgmental functions. U.S. Const. art. 1, § 1.

[24] **United States** Health

Patient Protection and Affordable Care Act's (ACA) health insurance providers fee did not violate Spending Clause, since fee was valid tax; fee produced revenue for the government, and was enforced by the Internal Revenue Service (IRS). U.S. Const. art. 1, § 8, cl. 1; 26 U.S.C.A. § 4001; 26 C.F.R. § 57.8.

[25] **Internal Revenue** Nature of taxes and excises

For a payment requirement to qualify as a tax, it must produce at least some revenue for the government.

[26] **Internal Revenue** Nature of taxes and excises

A court considers the following three factors in determining whether a payment requirement is a tax rather than a penalty: (1) whether the payment is enforced by the Internal Revenue Service (IRS); (2) whether the payment imposes an exceedingly heavy burden; and (3) whether the payment has a scienter requirement, which is typical of a penalty.

[27] **Internal Revenue** Power to tax and regulate in general

States Federal laws invading state powers

The Tenth Amendment doctrine of intergovernmental tax immunity mandates that a tax enacted by Congress must not discriminate against states or those with whom they deal. U.S. Const. Amend. 10.

[28] **Internal Revenue** Power to tax and regulate in general

States Federal laws invading state powers

The Tenth Amendment doctrine of intergovernmental tax immunity mandates that the legal incidence of a tax enacted by Congress not fall on the states. U.S. Const. Amend. 10.

[29] **Internal Revenue** Power to tax and regulate in general

States Federal laws invading state powers

A tax is imposed directly on states, as may implicate the Tenth Amendment doctrine of intergovernmental tax immunity, only when the levy falls on the states themselves, or on an agency or instrumentality so closely connected to the states that the agency or instrumentality cannot be viewed as separate from the states. U.S. Const. Amend. 10.

[30] **Internal Revenue** Validity of Statutes in General

States Federal laws invading state powers

Patient Protection and Affordable Care Act's (ACA) health insurance provider fee did not violate Tenth Amendment doctrine of intergovernmental tax immunity; fee did not discriminate against the states, since it was imposed on "any entity providing health insurance," and the ACA expressly excluded states from payment of the fee. U.S. Const. art. 1, § 8, cl. 1; 26 U.S.C.A. § 4001; 26 C.F.R. § 57.8.

[31] **Internal Revenue** Validity of Statutes in General

States Federal laws invading state powers

The legal incidence of a tax, in the context of determining whether the tax violates the Tenth Amendment doctrine of intergovernmental tax immunity, is determined by the clear wording of the statute, not by who is responsible for the payment. U.S. Const. Amend. 10.

[32] **Taxation** Power of State

Taxation Buyer's or seller's liability

A state sales tax statute that directs each vendor in the state to add to the sales price and to collect from the purchaser the full amount of the tax imposed is a statute that imposes the legal incidence of the tax upon the purchaser, rather than the state, and thus, does not implicate the Tenth Amendment doctrine of intergovernmental tax immunity, because the text of the statute indisputably provides that the tax must be passed on to the purchaser. U.S. Const. Amend. 10.

***523** Appeal from the United States District Court for the Northern District of Texas, USDC No. 7:15-CV-151, Reed Charles O'Connor, U.S. District Judge

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Before BARKSDALE, HAYNES, and WILLETT, Circuit Judges.

Opinion

HAYNES, Circuit Judge:

We withdraw our prior opinion of July 31, 2020, *Texas v. Rettig*, 968 F.3d 402 (5th Cir. 2020), and substitute the following.

This case involves constitutional challenges to Section 9010 of the Affordable Care Act (the "ACA") and statutory and constitutional challenges to a U.S. Department of Health and Human Services ("HHS") administrative rule (the "Certification Rule"). Texas, Kansas, Louisiana, Indiana, Wisconsin, and Nebraska (the "States") sued the United States and its relevant agencies and officials (collectively, the "United States"), claiming that the Certification Rule and Section 9010 were unlawful. Both parties moved for summary judgment, and the district court granted both motions in part. The parties then cross-appealed. On the jurisdictional claims, we AFFIRM the district court's ruling that the States had standing, but we REVERSE the district court's ruling that the States' Administrative Procedure Act ("APA") claims were not time-barred and DISMISS those claims for lack of jurisdiction. On the merits, we AFFIRM the district court's judgment on the Section 9010 claims; however, we REVERSE the district court's judgment that the Certification Rule violated the nondelegation doctrine and RENDER judgment in favor of ***524** the United States. Because we hold that neither the Certification Rule nor Section 9010 are unlawful, we VACATE the district court's grant of equitable disgorgement to the States.

I. Background

A. Regulatory Background

In 1965, the Medicaid Act[1] "established the Medicaid program as a joint Federal and State program for providing financial assistance to individuals with low incomes to enable them to receive medical care." *See* Medicaid Program; Medicaid Managed Care: New Provisions, 67 Fed. Reg. 40,989, 40,989 (June 14, 2002) [hereinafter "2002 Final Rule"]. The federal government "provid[es] matching funds to State agencies to pay for a portion of the costs of providing health care to Medicaid beneficiaries."[2] *Id.*

States have two options for providing care to Medicaid beneficiaries: a "fee-for-service" model and a managed-care model. *Id.* Under the fee-for-service model, a doctor who treats a Medicaid beneficiary submits a reimbursement request to the state Medicaid agency. *Id.* The state pays the bill after confirming the individual's eligibility and need for service. *See id.* Then the state seeks reimbursement from the federal government for a percentage of the cost. *See* 42 U.S.C. § 1396b(a).

Under the more widely used managed-care model, the state pays a third-party health insurer ("managed-care organization" or "MCO") a monthly premium (the "capitation rate") for each Medicaid beneficiary the MCO covers, and the MCO provides care to the beneficiary. 2002 Final Rule, 67 Fed. Reg. at 40,989. States may receive reimbursement from the federal government for some percentage of the capitation rate so long as the underlying MCO contract is "actuarially sound." *See* 42 U.S.C. § 1396b(m)(2)(A)(iii).

As states began moving away from the fee-for-service model, HHS recognized that its definition of "actuarial soundness"—based on the cost of services under a fee-for-service model—was untenable. *See* 2002 Final Rule, 67 Fed. Reg. at 41,000 (stating that "there [was] an increasing number of States that lack[ed] recent [fee-for-service] data to use for rate setting"). It thus promulgated a final rule redefining "actuarial soundness" in 2002. *Id.* at 41,079–80 (redefining "actuarial soundness"). Under this new rule, capitation rates must satisfy three requirements to be actuarially sound. First, the rates must "[h]ave been developed in accordance with generally accepted actuarial principles and practices," 42 C.F.R. § 438.6(c)(1)(i)(A) (2002),[3] which, as explained by the actuarial office within HHS that reviews state-MCO contracts, requires accounting for all reasonable, appropriate, and attainable costs. Second, the rates must be "appropriate for the populations to be covered, and the services to be furnished under the contract." *Id.* § 438.6(c)(1)(i)(B). Third, the rates must satisfy the Certification Rule;[4] ***525** that is, they must "[h]ave been certified, as meeting the requirements of this [provision], 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 [(the "Board")]." *Id.* § 438.6(c)(1)(i)(C).

In 2010, Congress enacted the ACA, comprised by the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010). The ACA made two changes to the regulatory scheme requiring states that requested Medicaid reimbursements for their MCO contracts to provide actuarially sound capitation rates. First, Congress imposed a new cost on certain MCOs: a federal health-insurance provider tax (the "Provider Fee"). *See* PPACA § 9010, 124 Stat. at 865, *amended by* PPACA § 10905, 124 Stat. at 1017, *amended by* HCERA § 1406, 124 Stat. at 1066.[5] This Provider Fee must be paid annually by covered entities—"any entity which provides health insurance for any United States health risk," excluding governmental entities.[6] *Id.* § 9010(c)(1), (c)(2)(B), 124 Stat. at 866. Second, Congress amended the Medicaid Act to expressly require that capitation rates included in state-MCO contracts be actuarially sound. *Id.* § 2501(c)(1)(C), 124 Stat. at 308; 42 U.S.C. § 1396b(m)(2)(A)(xiii) ("[C]apitation rates ... shall be based on actual cost experience related to rebates and subject to the Federal regulations requiring actuarially sound rates[.]"). What remained unchanged was that actuarially sound capitation rates required accounting for all reasonable, appropriate, and attainable costs. Thus, when the Internal Revenue Service (the "IRS") began collecting the Provider Fee from covered entities in 2014, *see* PPACA § 9010(a), 124 Stat. at 865, states with MCO contracts were required to account for the Provider Fee to meet the actuarial soundness requirement of the Medicaid Act, *see* 42 U.S.C. § 1396b(m)(2)(A)(iii).

In 2015, the Board, an independent organization that sets appropriate standards for actuarial practices in the United States, published *Actuarial Standard of Practice 49: Medicaid Managed Care Capitation Rate Development and Certification* ("ASOP 49"). ACTUARIAL STANDARDS BD., ACTUARIAL STANDARD OF PRACTICE NO. 49: MEDICAID MANAGED CARE CAPITATION RATE DEVELOPMENT AND CERTIFICATION (2015) [hereinafter ASOP 49]. ASOP 49 provides "guidance for actuaries preparing, reviewing, or giving advice on capitation rates for Medicaid programs, including ***526** those certified in accordance with 42 CFR 438.6(c)." *Id.* at iv. Medicaid capitation rates are actuarially sound if they "provide for all reasonable, appropriate, and attainable costs," which "include ... government-mandated assessments, fees, and taxes." *Id.* at 2.

In summary, for states to receive federal reimbursement under the managed-care model, their MCO contracts must be approved by HHS as actuarially sound. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii); 42 C.F.R. § 438.6(c)(1)(i). To be actuarially sound, the capitation rate must account for all costs MCOs bear when providing care to Medicaid beneficiaries. *See* 2002 Final Rule, 67 Fed. Reg. at 41,000. When Congress enacted the ACA in 2010, the amount of money states paid MCOs as part of their capitation rate changed: In contracts with MCOs subject to the Provider Fee, states must account for the Provider Fee in their capitation rate to satisfy HHS's actuarial-soundness requirement. ASOP 49 states that the "costs" include government-mandated taxes. ASOP 49 at 2.

B. Procedural Background

The States sued the United States, claiming that the Certification Rule and Section 9010 were unconstitutional and/or unlawful. *See* *Texas v. United States* (*Texas I*),

300 F. Supp. 3d 810, 820 (N.D. Tex. 2018). Regarding the Certification Rule, they claimed that the rule violated the nondelegation doctrine from Article I, section 1, of the U.S. Constitution and that HHS violated the APA on multiple grounds. *See* *id.* at 826. Regarding Section 9010, they claimed that the statute violated the Spending Clause of the U.S. Constitution and the doctrine of intergovernmental tax immunity under the Tenth Amendment. *See* *id.* at 826, 854.

Both parties moved for summary judgment. *See* *id.* at 826. The United States argued that the States lacked Article III standing for their claims, the States' APA claims were time-barred, and the States' arguments failed on the merits. *See* *id.* The district court granted both parties' motions in part. *Id.* at 821. It held that the States had standing and that their APA claims were not barred by the six-year statute of limitations. *Id.* at 834, 840. On the merits of the States' Certification Rule claims, the district court held that the rule violated the nondelegation doctrine but otherwise complied with the APA. *Id.* at 848, 850–851. On the merits of the States' Section 9010 claims, the district court held that Congress did not violate the Spending Clause or the Tenth Amendment. *Id.* at 854, 856.

The district court thus set aside the Certification Rule. *Id.* at 856–57. It then granted the States equitable disgorgement of their Provider Fee payments under the APA, resulting in a final judgment against the United States for more than $479 million. *See* *Texas v. United States*, 336 F. Supp. 3d 664, 675 (N.D. Tex. 2018). Both parties timely appealed.

II. Standard of Review

[1] **[2]** We review a district court's grant of summary judgment de novo. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010). "On cross-motions for summary judgment, we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Id.* (citation omitted). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

III. Discussion

The parties contest the constitutionality and lawfulness of the Certification Rule ***527** and the constitutionality of Section 9010. We hold that both the Certification Rule and Section 9010 are constitutional and lawful; as a result, there can be no equitable disgorgement, regardless of whether such a remedy would be otherwise appropriate. We address each issue in turn.

A. The Certification Rule Claims

The States' challenge to the Certification Rule is based upon a sequence of events they allege is impermissible. Through the Certification Rule, HHS gave authority to the Board to promulgate binding rules through Actuarial Standards of Practice ("ASOPs"). Before it published ASOP 49 in 2015, the Board provided only a nonbinding "practice note" that permitted, but did not require, actuaries to consider fourteen separate factors in assessing expected MCO revenues and expenses under contracts with state Medicaid agencies, including any "state-mandated assessment and taxes." MEDICAID RATE CERTIFICATION WORK GROUP, ACTUARIAL STANDARDS BD., ACTUARIAL CERTIFICATION OF RATES FOR MEDICAID MANAGED CARE PROGRAMS 8–9 (2005). According to the States, ASOP 49 introduced the requirement that actuarially sound capitation rates account for government-mandated taxes. [7] The States thus contend that the Certification Rule unlawfully delegates to the Board the task of formulating, and making binding decisions about the applicability of, rules governing States' access to Medicaid funds. The States further argue that HHS's incorporation of ASOP 49 in the Certification Rule violated the APA in two respects: (1) the rule exceeded HHS's statutory authority, and (2) HHS adopted the rule without notice and comment.

The United States contends that we lack jurisdiction because the States lack standing to challenge the Certification Rule and because their APA claims were barred by the statute's six-year statute of limitations. On the merits, the United States argues that the States' Certification Rule challenges are premised on a misunderstanding of Section 9010 and the Certification Rule. It claims that the Board did not change the definition of actuarial soundness, but instead HHS permissibly chose to incorporate the Board's guidance on the subject.

Thus, at issue here are two jurisdictional questions: whether the States have standing and, if so, whether their APA claims are time-barred. If we have jurisdiction, we must next address the parties' merits claims: whether the Certification Rule violates the nondelegation doctrine, and whether HHS violated the APA. We hold that the States have standing for their Certification Rule claims but that their APA claims are time-barred which, in this context, is a jurisdictional issue. We therefore address the merits of only the States' nondelegation argument and hold that the Certification Rule is constitutional.

1. Standing

[3] [4] [5] [6] [7] To satisfy Article III's standing requirement, plaintiffs must demonstrate (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561, 112 S.Ct. 2130 (citations omitted). At the ***528** summary judgment stage, plaintiffs "must set forth by affidavit or other evidence specific facts, which ... will be taken to be true," to support each element. *Id.* (internal quotation marks and citation omitted). If one plaintiff has standing for a claim, then Article III is satisfied as to all plaintiffs. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citations omitted). We review standing issues de novo. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013) (citation omitted).

[8] Accepting their factual allegations, summarized above, as true, we hold that the States satisfy the three requirements for standing. First, the States alleged a particular injury in fact: having to pay millions of dollars in Provider Fees despite the ACA's explicit exemption for governmental entities. Second, the States' injury is arguably traceable to the Certification Rule. They contend that before the Board published ASOP 49, which is applied to the States via the Certification Rule, actuaries were advised that their capitation rate analysis must comport with state and federal law and that before Congress enacted the ACA, federal taxes were minor and not separately considered. ASOP 49, the States say, required them to pay the Provider Fee as part of their actuarially sound capitation rates. Though the facts underlying this argument of how the capitation rates worked under the Certification Rule before and after ASOP 49 are contested, we assume the States' view of the facts to be true for purposes of standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The attacks on ASOP 49, which have been applied to the States through the Certification Rule, are the core of this argument. Third, the States have alleged that their injury is likely to be redressed by invalidating the Certification Rule. They allege that before ASOP 49's adoption and application to the States via the Certification Rule, states still had the legal option to exclude the Provider Fee from capitation rates in their contracts with MCOs. Thus, they argue that in the rule's absence, states could not lose Medicaid funding for refusing to pay the Provider Fee "by virtue of that rule." *See Larson v. Valente*, 456 U.S. 228, 242, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (holding that setting aside an allegedly unlawful statutory provision that compels plaintiffs to register and report redresses the plaintiffs' alleged injury of registering and reporting because, even though the plaintiffs could be compelled to register and report through another statutory provision, they will no longer be compelled to do so under the statutory provision at issue). Were we to rule in their favor, the Certification Rule would be invalidated and ASOP 49's explicit requirement to pay the Provider Fee would be removed.

The United States counters that the States' injury would not be redressed by invalidating the Certification Rule because States are required to account for the Provider Fee under 42 U.S.C. § 1396b(m)(2)(A)(iii). Indeed, as the United States notes, the States were still required to account for the Provider Fee under § 1396b after the district court invalidated the Certification Rule. Notably, the States don't challenge § 1396b here. [8]

However true the United States's argument may be, the invalidation of the Certification Rule (and thereby, the removal of ***529** requiring compliance with ASOP 49) nonetheless would remove one explicit requirement to pay the Provider Fee. To be sure, the States may still be required to pay the Provider Fee under § 1396b, but this statutory injury is not complained of here. *Barrett Comput. Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 218 (5th Cir. 1989) ('[S]tanding concerns the right of a party to bring a *particular* suit." (emphasis added)). Here, the States allege they were directly forced to pay the Provider Fee per ASOP 49 and the

Certification Rule. *Larson*, 456 U.S. at 242–43, 102 S.Ct. 1673 (finding standing when appellants contested a "rule [that] was the sole basis for" the "discrete injury" that "gave rise to the present suit"). As such, the States attack an injury caused by the Certification Rule. Therefore, though the States may still have to pay the Provider Fee under § 1396b, success here will nonetheless remove one of two legal barriers to defeating this obligation—in other words, the States will no longer "be required to [pay the Provider Fee] by virtue of [ASOP 49 and the Certification Rule]." *Id.* at 242, 102 S.Ct. 1673. Taking the States' factual allegations to be true, *see* *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, we conclude that the States have alleged that the injury complained of in this case is redressable with a favorable decision. In sum, we hold that the States have standing to raise their Certification Rule claims. (Again, focusing solely on whether, assuming the facts in the States' favor, there is a traceable, redressable injury in fact.)

2. Statute of Limitations

[9] **[10]** However, we lack jurisdiction to address the States' APA claims because they are time-barred. APA challenges are governed by 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The United States enjoys sovereign immunity unless it consents to suit, "and the terms of its consent circumscribe our jurisdiction." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (citation omitted). "The applicable statute of limitations is one such term of consent," so, unlike the ordinary world of statutes of limitations, here the failure to sue the United States within the limitations period deprives us of jurisdiction. *Id.*

[11] **[12]** **[13]** **[14]** HHS published the Certification Rule in 2002, thirteen years before the States filed their complaint. *See* 2002 Final Rule, 67 Fed. Reg. at 40,989. However, a plaintiff may "challenge ... a regulation after the limitations period has expired" if the claim is that the "agency exceeded its constitutional or statutory authority. To sustain such a challenge, the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit." *Dunn-McCampbell*, 112 F.3d at 1287. An agency's action is direct and final when two criteria are satisfied. "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citation omitted). "[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178, 117 S.Ct. 1154 (quotation omitted). These rights, obligations, or legal consequences must be new. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 756 (5th Cir. 2011).

The district court concluded that HHS took three "direct, final agency actions" in 2015 against the States and that those actions triggered a new six-year statute of limitations period. *Texas I*, 300 F. Supp. 3d at 839 (citation omitted). But, as the United ***530** States argues, none of these actions were direct and final.

[15] First, the district court pointed to a 2015 letter sent by HHS to the Texas Medicaid Director approving Texas's amended MCO contract, which included Provider Fees in the capitation rates for additional groups of Medicaid beneficiaries. *Id.* This letter does not show that HHS was issuing a new ruling requiring Texas to include Provider Fees in its capitation rates. Further, Texas paid costs associated with Provider Fees for the 2013 calendar year even though the 2015 letter applied only from May 1, 2015 to August 31, 2015. Thus, even before the letter, Texas accounted for the Provider Fee in its capitation rates. The letter did not mark a change to Texas's obligation under the Certification Rule.

[16] Second, the district court stated that the government's collection of the Provider Fee through the States' 2015 capitation rate constituted direct, final agency action. *Id.* But, as explained above, the IRS does not collect the Provider Fee directly from states. The government's decision to collect from MCOs is not a "direct ... action involving the [States]." *See* *Dunn-McCampbell*, 112 F.3d at 1287. As such, this argument does not support the district court's conclusion.

[17] Third, the district court stated that HHS's 2015 guidance document "for use in setting [capitation] rates ... for any managed care program subject to the actuarial soundness requirements" obligated the States to include the cost of the Provider Fee in their capitation rate calculations in 2015. *Texas I*, 300 F. Supp. 3d at 839–40 (citation omitted). Once again, the guidance document did not create any new obligations or consequences; it restated that for capitation

rates to be actuarially sound, they had to be consistent with ASOPs, including ASOP 49. But this requirement has existed since HHS promulgated the Certification Rule. *See* 2002 Final Rule, 67 Fed. Reg. at 41,097 (requiring that capitation rates be "certified ... by actuaries who ... follow the practice standards established by the Actuarial Standards Board"). The publication of ASOP 49 in 2015 did not create any new obligation or legal consequence either. Actuarially sound capitation rates have consistently required that all reasonable, appropriate, and attainable costs be covered by rates; this includes all taxes, fees, and assessments.

We conclude that HHS took no direct, final agency action in 2015 to create a new obligation. The States identified no other such action that occurred after 2009 (when the six-year statute of limitations expired). We thus reverse the district court's judgment on the States' APA claims and dismiss those claims as time barred.

3. Nondelegation Doctrine

[18] Because we lack jurisdiction over the States' APA claims, the only claim we address on the merits is whether HHS unlawfully delegated authority to the Board when it promulgated the Certification Rule. The United States argues that the Certification Rule was not an unlawful delegation because HHS simply "prescribed the conditions" necessary to receive federal funds. *See* *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 83 L.Ed. 441 (1939) (brackets omitted). The States disagree, arguing that the Certification Rule impermissibly gave the Board and its actuaries—private actors—a discretionary veto over HHS's approval of States' Medicaid contracts, as well as the power to define the content of a federal law as it applies to someone else. The district court held that the Certification Rule unlawfully vested in the Board and its actuaries the legislative ***531** power to set rules on actuarial soundness and to veto executive action that does not comply with such rules. *Texas I*, 300 F. Supp. 3d at 843–48. We hold that it did not.

[19] **[20]** A federal agency may not "abdicate its statutory duties" by delegating them to a private entity. *See* *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974). But an agency does not improperly subdelegate its authority when it "reasonabl[y] condition[s]" federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566–67 (D.C. Cir. 2004). Therefore, the primary inquiry here is whether HHS's requirements—that state-MCO contracts be certified by a qualified actuary and that the Board's practice standards be followed—were reasonable conditions for approving the contracts. *See* *id.* at 567.

[21] A condition is reasonable if there is "a reasonable connection between the outside entity's decision and the federal agency's determination." *Id.* By way of example, the Third Circuit has upheld a U.S. Department of Homeland Security's ("DHS's") regulation requiring H-2B visa employers to first obtain a temporary labor certification from the U.S. Department of Labor ("DOL"). *La. Forestry Ass'n v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 672–73 (3d Cir. 2014). In so doing, the Third Circuit observed that there was a reasonable connection in DHS conditioning an H-2B visa on a certification from DOL: Congress charged DHS with admitting aliens into the United States to perform temporary work that cannot be performed by unemployed persons in this country, *id.* at 672 (citing 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1)), and DOL could help in that analysis by bringing to bear its "institutional expertise in labor and employment matters," *La Forestry Ass'n*, 745 F.3d at 673. [9]

The Certification Rule's conditions for actuarial soundness, like the DHS conditions addressed by the Third Circuit, [10] are reasonable. Congress requires capitation rates to be actuarially sound, as defined by HHS. *See* 42 U.S.C. § 1396b(m)(2)(A)(xiii). HHS imposed the Certification Rule as a condition for actuarial soundness. 42 C.F.R. § 438.6(c)(1)(i)(C). Certification by a qualified actuary who applies the Board's standards is reasonably connected to ensuring actuarially sound rates because the Board and a qualified actuary have institutional expertise in actuarial principles and practices. Indeed, HHS simply incorporated the Board's actuarial standards into its ***532** Certification Rule, a common and accepted practice by federal agencies. *See* *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018) (noting that federal agencies have incorporated by reference over 1,200 standards established by private organizations); [11] *Amerada Hess Pipeline Corp. v. F.E.R.C.*, 117 F.3d 596, 601 (D.C. Cir. 1997) (holding that a federal agency did not abdicate its authority by adopting generally accepted accounting

principles, noting that it would be anomalous to accord agency deference when an agency invented standards but not when an agency's expertise led the agency to incorporate standards endorsed by experts in the field). Thus, as the United States remarked, "HHS could achieve *exactly the same result* by promulgating regulations that adopted the substance of the ... Board's standards." Accordingly, we hold that the Certification Rule's actuarial certification requirement and incorporation of the Board's practice standards are reasonable conditions, not subdelegations of authority.

[22] **[23]** But, even assuming arguendo that HHS subdelegated authority to private entities, such subdelegations were not unlawful. Agencies may subdelegate to private entities so long as the entities "function subordinately to" the federal agency and the federal agency "has authority and surveillance over [their] activities." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399, 60 S.Ct. 907, 84 L.Ed. 1263 (1940);[12] *cf.* *Lynn*, 502 F.2d at 59 (holding that total delegation or "rubber stamping" is impermissible). An agency retains final reviewing authority if it "independently perform[s] its reviewing, analytical and judgmental functions." *Lynn*, 502 F.2d at 59. We have therefore held, for instance, that a federal agency's requirement that depreciation expenses reflect "state regulator approved depreciation rates" was not an unlawful subdelegation because the agency "exercised its role when it initially reviewed and accepted the ... incorporati[on] [of] the state agencies' depreciation rates."[13] *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 551–52 (5th Cir. 2014). The D.C. Circuit has even come to similar results with respect to approvals hinging on the work of private actuarial entities like those at issue in this case. *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 & n.5 (D.C. Cir. 1977) (holding that an agency may subdelegate certain components of actuary certification for administering federal pension plans to a private agency because the certification process was "superintended by the [agency] in every respect," insofar ***533** as the agency ultimately certified each actuary).[14]

Here, HHS's subdelegation of certain actuarial soundness requirements to the Board did not divest HHS of its final reviewing authority. HHS "reviewed and accepted" the Board's standards. *See La. Pub. Serv. Comm'n*, 761 F.3d at 552; *accord* 2002 Final Rule, 67 Fed. Reg. at 40,998. Further, HHS has the ultimate authority to approve a state's contract with MCOs; certification is a small part of the approval process. To obtain HHS approval of its capitation rate for reimbursement purposes, a state sends its MCO contract to the appropriate HHS Regional Office. If the state provides all required documentation, the Office of the Actuary ("OACT"), an office within HHS, will begin its actuarial review. OACT reviews the contract by looking at all of the assumptions, data, and methodology in the rate certification to ensure the certification is consistent with actuarial principles and methods. If OACT determines that the capitation rates are actuarially sound, it will write a memo confirming this conclusion and send the contract to HHS's Center for Medicaid and CHIP (Children's Health Insurance Program) Services[15] for final review. The Center will then review the rate certification and OACT's memo and approve the contract if it finds no issues. The contract approval process is closely "superintended by [HHS] in every respect." *See* *Tabor*, 566 F.2d at 708 n.5. Therefore, even assuming arguendo that HHS subdelegated certain actuarial soundness requirements to third parties, we hold that HHS's subdelegations were lawful.

B. Section 9010 Claims[16]

The States raise two constitutional challenges against Section 9010. They claim that it violates the Spending Clause and the Tenth Amendment doctrine of intergovernmental tax immunity. We address each claim in turn and hold that Section 9010 does not violate either constitutional provision.

1. Spending Clause

[24] The parties contest whether the Spending Clause applies to Section 9010 at all. The United States argues that Section 9010 is instead a constitutional tax that Congress imposed under its taxing power, which fully resolves the Spending Clause claim. The States argue that the Provider Fee, as applied to them, functions as a condition on spending and thus implicates the Spending Clause. We hold that the Provider Fee is a constitutional tax that fully resolves the States' Spending Clause claim and does not impose a condition on spending.

[25] **[26]** For a payment requirement to qualify as a tax, it must "produce[ ] at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 564, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). In addition, the Supreme Court has identified three factors to be considered in determining whether a payment requirement is a tax rather than a penalty: (1) whether the tax is enforced by

the IRS; (2) whether the tax "impose[s] an exceedingly heavy burden"; and (3) whether the tax has a scienter requirement, which is typical of a penalty. *Id.* at 565–66, 132 S.Ct. 2566. The Provider Fee produces revenue for the United States and satisfies at least two of the three factors. [17] The Provider Fee is enforced by the IRS, *see* 26 C.F.R. § 57.8, and applies to any covered entity regardless of scienter, PPACA § 9010(a), 124 Stat. at 865. Indeed, several Supreme Court justices have noted that the Provider Fee is a tax. *See NFIB*, 567 U.S. at 694, 698, 132 S.Ct. 2566 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (identifying Section 9010 as an "excise tax"). So have the parties.

Section 9010's constitutionality as a legitimate tax fully resolves the States' Spending Clause claim. *See id.* at 561, 563, 132 S.Ct. 2566 (holding that even though the ACA's individual mandate was unconstitutional under the Commerce Clause, it would uphold the mandate if it were constitutional under the taxing clause). Although the States argue that Section 9010 imposes a condition on their Medicaid funding, we conclude that it does not. *See* PPACA § 9010(a), 124 Stat. at 865. The specific Medicaid funding condition that the States contest is in the Medicaid Act. 42 U.S.C. § 1396b(m)(2)(A)(iii) (requiring that for states to receive Medicaid reimbursement, their expenditures "for payment ... under a prepaid capitation basis ... for services provided by any entity ... [must be] made on an actuarially sound basis"). The States do not contest the constitutionality of this section, [18] and they thus do not have a Spending Clause claim. In sum, we hold that the Provider Fee is a constitutional tax that does not violate the Spending Clause.

2. Tenth Amendment—Intergovernmental Tax Immunity

[27] **[28]** **[29]** Although a constitutional tax properly enacted through Congress's taxing power is generally not subject to other constitutional provisions, the Tenth Amendment doctrine of intergovernmental tax immunity imposes two limitations when the federal government imposes an indirect tax, like Section 9010, on states. *See* ***535** *South Carolina v. Baker*, 485 U.S. 505, 523, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). [19] First, the tax must not discriminate against states or those with whom they deal. *Id.* Second, the "legal incidence" of the tax may not fall on states. *United States v. Fresno Cty.*, 429 U.S. 452, 459, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977). We hold that Section 9010 satisfies both requirements.

a. Discrimination Against Entities

[30] The Provider Fee is nondiscriminatory because it is imposed on "any entity which provides health insurance," subject to certain non-state-based exclusions. PPACA § 9010(c), 124 Stat. at 866. It does not impose the Provider Fee on only states, nor on only those MCOs that deal with states. Thus, there is no unlawful discrimination, meaning MCOs contracting with states may impose "part or all of the financial burden" of the Provider Fee on the States. *See Baker*, 485 U.S. at 521, 108 S.Ct. 1355 (citations omitted).

The States make two arguments on this point, both of which are misplaced. First, the States argue that the Provider Fee discriminates against them because states are the only entities that run Medicaid programs and are the only government entities that stand to lose their exemption under Section 9010(c)(2)(B) as a result of the actuarial-soundness requirement. But the discrimination inquiry asks who Congress targets, not who ultimately bears the economic burden of paying the tax. *See id.* (stating that the Supreme Court has "completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to States ... unconstitutionally burdens state ... functions"); *Washington v. United States*, 460 U.S. 536, 543–44, 103 S.Ct. 1344, 75 L.Ed.2d 264 (1983) (holding that the discrimination analysis does not consider whether the tax burden would necessarily shift to state actors).

Second, the States argue that the Provider Fee discriminates against them because the fee has a disproportionate economic impact on them. They claim that because their contracts with MCOs have historically low profit margins, the MCOs pass the entire economic burden of the Provider Fee on to the states. They thus argue that states shoulder a harsher economic burden than other MCOs, which could afford to pay a portion of the Provider Fee.

Washington, which the States cite as support, holds that whether an unfair economic burden is discriminatory depends on "the whole tax structure of the state." 460 U.S. at 545, 103 S.Ct. 1344 (citation omitted). In that case, the Supreme Court held that the state's tax did not single out contractors who worked for the United States for discriminatory treatment

because the "tax on federal contractors [was] part of the same [tax] structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors." *Id.* Here, the Provider Fee is similarly imposed at the same rate for all entities, so there is no unfair economic burden. *See* PPACA § 9010(b)(1), 124 Stat. at 865. We thus hold that the Provider Fee is nondiscriminatory.

b. Legal Incidence

[31] **[32]** We also hold that the legal incidence of the Provider Fee does not fall ***536** on states. Legal incidence is determined by the "clear wording of the statute," not "by who is responsible for payment to the state of the exaction." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 607–08, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (cleaned up). For example, a state tax statute that directs each vendor in the state to "add to the sales price and [to] collect from the purchaser the full amount of the tax imposed" is a statute that "imposes the legal incidence of the tax upon the purchaser" because the text of the statute indisputably provides that the tax "must be passed on to the purchaser." *First Agric. Nat'l Bank of Berkshire Cty. v. State Tax Comm'n*, 392 U.S. 339, 347, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968) (citations omitted).

Here, as the States concede, Congress did not intend to tax States because the statute's "clear wording" shows that Congress clearly and expressly excluded states from the Provider Fee. *See* PPACA § 9010(c)(2)(B), 124 Stat. at 866; *accord* *State Tax Comm'n of Miss.*, 421 U.S. at 607, 95 S.Ct. 1872. It is also clear and "indisputable" that Section 9010 "by its terms" does not pass on the Provider Fee to states. *See* *First Agric. Nat'l Bank*, 392 U.S. at 347, 88 S.Ct. 2173. Thus, the legal incidence of the Provider Fee does not fall on states.

The States misunderstand the meaning of legal incidence. They argue that the legal incidence falls on them because all of the economic burden of the Provider Fee is charged to the States. But, as stated above, the question is not who practically bears the responsibility for paying the tax. *See* *State Tax Comm'n of Miss.*, 421 U.S. at 607–08, 95 S.Ct. 1872; *see also* *Baker*, 485 U.S. at 521, 108 S.Ct. 1355 (citations omitted) (upholding a nondiscriminatory tax collected from private parties as constitutional "even though ... all of the financial burden f[ell] on the other government"). The States also argue that because the legal consequence of not paying the Provider Fee falls on them, so too does its legal incidence; if they do not pay the Provider Fee, then they lose Medicaid funding. Assuming arguendo that the States' interpretation of healthcare law is correct, the Supreme Court explicitly held that legal incidence is not defined as "the legally enforceable, unavoidable liability for nonpayment of [a] tax." *State Tax Comm'n of Miss.*, 421 U.S. at 607, 95 S.Ct. 1872 (citation omitted).

In sum, we conclude that the Provider Fee does not discriminate against states or those with whom they deal because it is imposed on any entity that provides health insurance (with certain exclusions). We also conclude that the legal incidence of the Provider Fee does not fall on the states because Congress expressly excluded states from paying the fee. Accordingly, we hold that Section 9010 does not violate the Tenth Amendment doctrine of intergovernmental tax immunity.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's ruling that the States had standing. But we REVERSE the district court's ruling that the States' APA claims were not time-barred and DISMISS the States' APA claims for lack of jurisdiction. On the merits, we AFFIRM the district court's judgment that Section 9010 does not violate the Spending Clause or the Tenth Amendment, but we REVERSE the district court's judgment that the Certification Rule violates the nondelegation doctrine and RENDER judgment in favor of the United States. We thus VACATE the district court's grant of equitable disgorgement, ***537** [20] as there is nothing to remedy.

All Citations

987 F.3d 518, 127 A.F.T.R.2d 2021-924, Med & Med GD (CCH) P 306,954

Footnotes

1 42 U.S.C. §§ 1396–1396w-5.

2 Medicaid beneficiaries are those "individuals eligible for and receiving Medicaid benefits." 2002 Final Rule, 67 Fed. Reg. at 40,989.

3 In 2016, HHS recodified the actuarial soundness requirements and the Certification Rule in 42 C.F.R. §§ 438.2, 438.4(a). Because the States challenge the 2002 version of the Certification Rule, which was in effect in 2015, and because the definitions relevant to the States' claims are unchanged, we follow the district court and the parties in discussing this version of the regulation.

4 The Certification Rule at issue here is solely 42 C.F.R. § 438.6(c)(1)(i)(C), the certification component of the actuarial soundness definition. The States' operative complaint and motion for summary judgment objected to only that subsection. They made no mention of the other requirements. Moreover, in a motion for leave to file a second amended complaint, the States specified that the Certification Rule defined actuarial soundness as meeting the actuarial standards set by a private association of actuaries.
We clarify this point because the district court incorrectly determined that the Certification Rule at issue encompassed all three requirements. *See* *Texas v. United States* (*Texas I*), 300 F. Supp. 3d 810, 822 (N.D. Tex. 2018). On appeal, the States also seem to have confused which HHS regulation they were contesting, first referring to only subsection (c)(1)(i)(C) but later lumping in subsection (A) as well.

5 Section 9010 has not been codified in the United States Code and thus does not exist in one consolidated location.

6 There is an exclusion for governmental entities, "except to the extent such an entity provides health insurance coverage through the community health insurance option under section 1323." PPACA § 9010(c)(2)(B), 124 Stat. at 866. However, this exception is not relevant here.

7 This is an incorrect statement of the facts. 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.

8 The States have filed a second lawsuit, this time claiming that § 1396b(m)(2)(A)(iii) is being improperly interpreted and seeking to enjoin the IRS from collecting the Provider Fee from them. Complaint at 15, *Texas v. United States* (*Texas II*), No. 4:18-CV-00779, 2018 WL 4558515 (N.D. Tex. Sept. 20, 2018), ECF No. 1.

9 The Tenth Circuit, in an unpublished opinion, held opposite to the Third Circuit and concluded that DHS subdelegated authority to DOL. *G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 211 (10th Cir. 2015). It determined that DOL's certification was not a condition for granting agency approval because DOL has the final say when it denies a certification. *Id.* But that is the nature of conditions: any condition, if not satisfied, prevents federal approval. By the Tenth Circuit's logic, it seems that *every* third-party condition for granting federal agency approval is a subdelegation. That result is impossible to square with the very existence of a condition analysis. *See* *U.S. Telecom*, 359 F.3d at 565–68. The Third Circuit's reasoning is therefore more persuasive.

10 Although the Certification Rule differs from the DHS condition in *Louisiana Forestry* insofar as the Certification Rule incorporates the standards of and requires approval by private entities, this private/public distinction is not relevant to our analysis. *See* *U.S. Telecom*, 359 F.3d at 566 (rejecting the argument that the "limitations on an administrative agency's power to subdelegate might be less stringent if the delegee is a sovereign entity rather than a private group"). *Louisiana Forestry* therefore remains on-point and instructive.

11 Therefore, accepting the States' argument would jeopardize over a thousand regulations promulgated by federal agencies.

12 *See also* *R.H. Johnson & Co. v. S.E.C.*, 198 F.2d 690, 695 (2d Cir. 1952) (holding that an agency did not unconstitutionally subdelegate powers to a private entity because the agency retained power to approve or disapprove rules and to review disciplinary actions); *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999) ("Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority." (citations omitted)).

13 We also noted that the federal agency would "continue to exercise oversight of the state rates in a Section 206 complaint proceeding," which provides that any entity that wants to change the depreciation rates may seek modification with the agency through a Section 206 filing. *La. Pub. Serv. Comm'n*, 761 F.3d at 552. States retain a similar recourse here: any state dissatisfied with the Board's practice standards can petition HHS for "amendment[ ] or repeal" of the Certification Rule's requirement that the Board's practice standards be followed. *See* 5 U.S.C. § 553(e).

14 Applying similar reasoning, the D.C. Circuit also upheld an agency regulation that permitted nonprofit organizations to stage political candidacy debates so long as they "use[d] pre-established objective criteria to determine which candidates may participate in a debate." *Perot v. FEC*, 97 F.3d 553, 556, 559–60 (D.C. Cir. 1996) (per curiam) (quoting 11 C.F.R. § 110.13). Although the agency gave private entities "the latitude to choose their own 'objective criteria,' " such private entities acted at their peril if they did not first secure an agency advisory opinion that their criteria were satisfactory. *Perot*, 97 F.3d at 560. The court thus determined that "[t]he authority to determine what the term 'objective criteria' means rest[ed] with the agency" and held that the agency did not unconstitutionally subdelegate legislative authority. *Id.*

15 The Center for Medicaid and CHIP Services is the component of HHS that is "responsible for the various components of policy development and operations for Medicaid, [CHIP], and the Basic Health Program ...." *See Organization*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.medicaid.gov/about-us/organization/index.html (last visited July 17, 2020). In that regard, the Center oversees state-MCO contract approvals.

16 While the United States does not contest standing on this, we note that the States have standing for their Provider Fee claims. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) (per curiam) (citation omitted) (holding that courts must examine standing sua sponte if it has erroneously been assumed below). The States allege that they were injured when they were forced to pay the Provider Fee. This injury is traceable to the United States's allegedly unlawful conduct of enforcing Section 9010 after Congress imposed the Provider Fee as part of the ACA. *See* PPACA § 9010(a), 124 Stat. at 865. Invalidating the Provider Fee would thus redress the States' claimed injury.

17 The record does not indicate what percentage of a covered entity's net revenue is allocated to paying the Provider Fee. Thus, we cannot evaluate whether the Provider Fee "impose[s] an exceedingly heavy burden," *see NFIB*, 567 U.S. at 565, 132 S.Ct. 2566, but the absence of such evidence does not support the States' argument.

18 Indeed, they conceded as much at oral argument.

19 A tax is imposed directly on states only "when the levy falls on the [states themselves], or on an agency or instrumentality so closely connected to" the states that the agency or instrumentality cannot be viewed as separate from the states. *Baker*, 485 U.S. at 523, 108 S.Ct. 1355 (internal quotation marks and citation omitted). MCOs are not so closely connected to the states that they cannot be viewed as separate from them. *See* PPACA § 9010(c)(1), 124 Stat. at 866 (defining a "covered entity" as "any entity which provides health insurance for any United States health risk").

20 Therefore, we do not reach the issues surrounding the validity of such a remedy in this context.

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Appendix 2: Denial of Rehearing

2021 WL 1324382
Only the Westlaw citation is currently available.
United States Court of Appeals, 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; Xavier Becerra, Secretary, U.S. Department of Health and Human Services, Defendants—Appellants/Cross-Appellees.

No. 18-10545
|
FILED April 9, 2021

Appeal from the United States District Court for the Northern District of Texas, USDC No. 7:15-CV-151, Reed Charles O'Connor, U.S. District Judge

ON PETITION FOR REHEARING EN BANC (Opinion: Revised February 12, 2021, 5 CIR., 987 F.3D 518)

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Before Barksdale, Haynes, and Willett, Circuit Judges. [1]

Opinion

Per Curiam:

***1** The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, five judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Ho, and Duncan), and eleven judges voted against rehearing (Chief Judge Owen, and Judges Stewart, Dennis, Southwick, Haynes, Graves, Higginson, Costa, Willett, Engelhardt, and Wilson).

James C. Ho, Circuit Judge, joined by Jones, Smith, Elrod, and Duncan, Circuit Judges, dissenting from denial of rehearing en banc:
For those who believe in the text and original understanding of the Constitution, the panel decision is troubling for at least two different reasons.

First, the Constitution vests lawmaking power in the most politically accountable branch of our government—the Congress of the United States. Yet the panel blesses the placement of lawmaking power in purely private hands, wholly unaccountable to the people. That devalues the right to vote and desecrates the entire premise of our constitutional democracy—that our laws are supposed to be written by members of Congress elected by the American people, not by private interests pursuing unknown private agendas.

Second, judges swear an oath to uphold the Constitution, consistent of course with a judicial system based on precedent. That should mean that we decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent. Dutiful application of this standard is vital to respecting and restoring our nation's founding principles. But rather than apply this standard, the panel instead extends precedent unnecessarily, in a strained effort to uphold the uniquely unlawful delegation challenged here.

The Constitution vests "[a]ll legislative Powers herein granted" in Congress. U.S. CONST. art. I, § 1. And it makes clear that "any Bill ... shall not be a Law" unless it has complied with the bicameralism and presentment requirements of Article I. U.S. CONST. art. I, § 7, cl. 2. These provisions do not permit Congress to delegate its lawmaking powers elsewhere, any more than they permit the President to delegate the power to sign legislation. *See*, *e.g.*, *Gundy v. United States*, —— U.S. ——, 139 S. Ct. 2116, 2121, 204 L.Ed.2d 522 (2019) (plurality opinion by Kagan, J.) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."). *See also*, *e.g.*, *Electronic Presentment and Return of Bills*, 35 Op. O.L.C. 51, 62 (2011) ("[T]he President ... could not delegate his constitutional signing responsibility."); *Whether the President May Sign a Bill by Directing That His Signature Be Affixed to It*, 29 Op. O.L.C. 97, 124 (2005) (same).

This prohibition on delegation might seem inconvenient and inefficient to those who wish to maximize government's coercive power. But the purpose of the nondelegation doctrine is not to serve Congress, but to preserve liberty. *See*, *e.g.*, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty.").

***2** " '[B]icameralism and presentment make lawmaking difficult *by design*.' " *Id.* (quoting John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007)). This "deliberative process was viewed by the Framers as a valuable feature, ... not something to be lamented and evaded." *Id.* Indeed, "the framers went to great lengths to make lawmaking difficult," for "[a]n 'excess of law-making' was, in their words, one of 'the diseases to which our governments are most liable.' " *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (quoting THE FEDERALIST No. 62 (James Madison)). The processes for new legislation may be "arduous," "but to the framers these were bulwarks of liberty." *Id.*

The modern administrative state illustrates what happens when we ignore the Constitution: Congress "pass[es] problems to the executive branch" and then engages in "finger-pointing" for any problems that might result. *Id.* at 2135. The bureaucracy triumphs—while democracy suffers.

That's why our Founders deliberately designed the legislative power to be exercised "only by elected representatives in a public process"—so that "the lines of accountability would be clear" and "[t]he sovereign people would know, without ambiguity, whom to hold accountable." *Id.* at 2134. In short: When it comes to lawmaking, the buck stops with Congress.

Admittedly, the nondelegation doctrine has been more honored in the breach than in the observance. "[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Id.* at 2130–31 (Alito, J., concurring).

So when the panel upheld the unlawful delegation of legislative power challenged in this case, it no doubt assumed it could invoke precedents reflecting the general dormancy and underenforcement of the nondelegation doctrine, and call it a day.

But fidelity to the Constitution requires much more than this. Critical features of the delegation challenged here make it categorically different from—and unsupportable under—current precedent.

To begin with, this case involves a delegation of lawmaking power, not to another governmental entity, but to private bodies wholly unaccountable to the citizenry. In addition, the delegation was effectuated not by Congress, but at the whim of an agency—and without Congressional blessing of any kind. There is no precedent that permits this kind of "double delegation" from Congress to public bureaucrats to private parties—no case cited by the panel or the parties, and no case that I have independently uncovered.

To the contrary, the Supreme Court has made clear that delegation to "private persons" is "legislative delegation in its *most obnoxious form*." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S.Ct. 855, 80 L.Ed. 1160 (1936) (emphasis added). "[F]or it is not even delegation to an official or an official body." *Id.* Delegation of legislative power to private entities is "unknown to our law" and "utterly inconsistent with the constitutional prerogatives and duties

of Congress." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

After all, "[w]hen it comes to [delegating to] private entities, ... there is not even a fig leaf of constitutional justification." *Ass'n of Am. R.Rs.*, 575 U.S. at 62, 135 S.Ct. 1225 (Alito, J., concurring). "Private entities are not vested with 'legislative Powers.' Nor are they vested with the 'executive Power,' which belongs to the President." *Id.* (citations omitted). Indeed, "[e]ven the United States accepts that Congress 'cannot delegate regulatory authority to a private entity.' " *Id.* at 61, 135 S.Ct. 1225.

***3** At bottom, the regulation challenged here is uniquely offensive to the Constitution—and unsupported by precedent—for three reasons: (1) It subdelegates substantive lawmaking power, rather than some minor factual determination or ministerial task; (2) the subdelegation is authorized by an administrative agency, rather than by Congress; and (3) the agency is subdelegating power to a private entity, rather than to another governmental entity that is at least minimally accountable to the public in some way.

Not a single one of the precedents cited by the panel involves this toxic combination of constitutional abnormalities. Not one of them prevents us from enforcing the Constitution and the democratically accountable government for which it stands.

I dissent from the denial of rehearing en banc. The right to vote means nothing if we abandon our constitutional commitments and allow the real work of lawmaking to be exercised by private interests colluding with agency bureaucrats, rather than by elected officials accountable to the American voter. [1]

I.

The Medicaid program provides financial assistance to low-income individuals so that they may obtain medical care. "States have two options for providing care to Medicaid beneficiaries: a 'fee-for-service' model and a managed-care model." *Texas v. Rettig*, 987 F.3d 518, 524 (5th Cir. 2021). "Under the ... managed-care model, the state pays a third-party health insurer ('managed-care organization' or 'MCO') a monthly premium (the 'capitation rate') for each Medicaid beneficiary the MCO covers, and the MCO provides care to the beneficiary." *Id.*

In order for states to be reimbursed for these expenditures, MCO capitation rates must be "actuarially sound." 42 U.S.C. § 1396b(m)(2)(A)(iii), (xiii). In 2002, the Department of Health and Human Services (HHS) promulgated the "Certification Rule" to further delineate what it means for an MCO capitation rate to be "actuarially sound":

> (i) *Actuarially sound* capitation rates *means capitation rates that*—
>
> (A) Have been developed in accordance with generally accepted actuarial principles and practices;
>
> (B) Are appropriate for the populations to be covered, and the services to be furnished under the contract; *and*
>
> (C) *Have been certified*, as meeting the requirements of this paragraph (c), *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.*

***4** 42 C.F.R. § 438.6(c)(1)(i)(A)–(C) (2002) (emphases added). [2]

The Actuarial Standards Board is not a governmental entity accountable to the American people. It is a private organization that sets practice standards for private actuaries certified by the private American Academy of Actuaries (AAA). Yet the Certification Rule empowers the Board to determine the regulatory standard for whether a capitation rate is "actuarially sound," by allowing the Board to dictate the "practice standards" that an actuary must follow in so certifying the rate. *Id.* And other private entities—AAA-qualified private actuaries—determine whether a particular capitation rate meets the Board's private standards. *Id.*

One such privately promulgated "practice standard" is the requirement that capitation rates "certified in accordance with 42 CFR 438.6(c)" "provide for all reasonable, appropriate, and attainable costs," "includ[ing] ... government-mandated assessments, fees, and taxes." *Rettig*, 987 F.3d at 525–26. It is the issuance of this practice standard in 2015 that gives rise to the instant case. *Id.* With the issuance of this private rule, the Plaintiff States suddenly had a new legal obligation to account for (and thus pay) a new "Provider Fee"—

a "cost" (specifically, a "government-mandated ... tax[ ]") incurred by certain MCOs. *See id.* at 528–29.

In October 2015, the State of Texas filed suit, joined by Indiana, Kansas, Louisiana, Nebraska, and Wisconsin, challenging the validity of both the Provider Fee itself and the Certification Rule that enabled a private entity to impose the Provider Fee. They sought various injunctive and declaratory remedies to relieve them from the burden of paying the Fee. Most relevant here, Plaintiffs claimed that the Certification Rule violates the nondelegation doctrine. The district court agreed. *Texas v. United States*, 300 F. Supp. 3d 810, 820 (N.D. Tex. 2018).

A panel of this court reversed. First, the panel held that there is no subdelegation at all because "[c]ertification by a qualified actuary who applies the Board's standards is reasonably connected to ensuring actuarially sound rates," and the private parties "have institutional expertise in actuarial principles and practices." *Rettig*, 987 F.3d at 531. Second, the panel held that "even assuming arguendo that HHS subdelegated authority to private entities, such subdelegations were not unlawful" because HHS (the panel claimed) "reviewed and accepted" the Board's standards and retained "the ultimate authority to approve a state's contract," "superintend[ing]" the approval process "in every respect." *Id.* at 532–33.

II.

***5** As discussed, the Constitution vests legislative power in Congress and does not permit delegation of that power —especially not to private parties. *Ante*, at —— – ——. The panel responds by invoking various precedents. But at the very most, current precedent allows only Congress itself to involve private parties in the rulemaking process. *See* *Currin v. Wallace*, 306 U.S. 1, 15–16, 59 S.Ct. 379, 83 L.Ed. 441 (1939) (allowing Congress to condition agency action on private approval); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) (allowing Congress to permit private parties to propose prices and regulations for agency approval).

There is good reason to limit these precedents to only those delegations authorized by Congress itself. Congress has express constitutional authority to legislate. U.S. CONST. art. I, § 1. And it is directly accountable to the American people. Neither is true of administrative agencies. As our sister circuit once observed, "when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making .... In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004). "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

The Certification Rule plainly violates the private nondelegation doctrine. First, it delegates to a private entity the power to determine what constitutes an "actuarially sound" capitation rate. But Congress gave HHS no authority to turn this decision over to a private entity such as the Board. Moreover, there is no agency review of the Board's established "practice standards." If HHS disagrees with the Board's standards regarding capitation rates, its only recourse is to amend or repeal the rule delegating power to the Board in the first place. HHS has thus semi-permanently subjugated its regulatory power to that of the Board.

Second, there is no agency review of capitation rates unless and until they are approved by the private actuaries. The rule itself indicates that the Centers for Medicare and Medicaid Services (CMS) will not review an MCO contract before these actuaries confirm the capitation rates' actuarial soundness. *See* 42 C.F.R. § 438.6(c)(1)(i)(C) (2002) ("Actuarially sound capitation rates ... *[h]ave been certified* ... by actuaries who ... follow the practice standards established by the ... Board.") (emphasis added). And the record confirms that CMS does not in fact review an MCO contract unless and until private parties have blessed the capitation rates. *See* Declaration of Christopher J. Truffer at 10 ("*[T]he state actuary must certify the rates .... Next*, a state sends a contract ... to the appropriate ... Office ..., and the CMS actuarial review process *begins*. *After* ensuring that the documentation ... contains the rate certification, ... the [office] forwards the contract package to the Center for Medicaid and CHIP Services.") (emphases added)).

So before CMS even *begins* to exercise its own judgment and determine whether a rate meets the standards promulgated by the Board, private actuaries may apply the Board's private standards and determine that a capitation rate is *not* actuarially sound. In such cases, the agency's review process ends before it ever begins.

Under the Certification Rule, then, HHS neither sets the regulatory standard nor exercises final authority over the application of that standard. Private actors wield "final reviewing authority." *Rettig*, 987 F.3d at 532–33. They act as veto-gates that categorically preclude agency review—whether it's review of the "actuarially sound" standard itself, the determination that a capitation rate complies with that standard, or both. The Constitution forbids such delegations of government power to private entities.

III.

***6** The panel offers two arguments for why the Constitution permits the Certification Rule. Neither is persuasive.

A.

First, the panel denies that there is any subdelegation at all. It cites the D.C. Circuit's decision in *Telecom* for the proposition that "an agency does not improperly subdelegate its authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue," because "such conditions only amount to legitimate requests for input." *Rettig*, 987 F.3d at 531.

But the panel misreads *Telecom*. For starters, that case *rejected* an agency's unauthorized subdelegation of legal determinations. 359 F.3d at 567–68. And it had nothing at all to do with an agency delegating its substantive rulemaking power.

What's more, *Telecom* makes clear that any "subdelegation[ ] to outside parties [is] assumed to be improper absent an affirmative showing of congressional authorization." *Id.* at 565. *See also* *id.* at 566 ("A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates.").

In other words, under *Telecom*, at most only Congress may involve private parties in agency decision-making—an agency does not get to make that decision itself.

To be sure, the panel notes that, under *Telecom*, "specific types of legitimate outside party input into agency decision-making processes" do not amount to "subdelegation[s] of decision-making authority"—such as "establishing a reasonable condition for granting federal approval." *Id.* But *Telecom* limited this principle to *governmental* conditions—determinations by "state, local, or tribal government[s]." *Id.* at 567. It endorsed no such principle with respect to private parties. [3]

And it's clear why. In the cases cited in *Telecom*, the "reasonable connection between the outside entity's decision and the federal agency's determination" was patently obvious and justified—there was simply no reason for the agency to approve a federal permit if the state (in the case of *United States v. Matherson*, 367 F. Supp. 779 (E.D.N.Y. 1973)) or tribal entity (in the case of *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983)) was going to prevent the petitioner from engaging in the regulated activity anyway. So the agencies weren't subordinating their authority to outside entities—they were refusing to waste agency resources on futile approvals. *See* *Matherson*, 367 F. Supp. at 782 ("[I]t is apparent that a vehicular permit from the National Seashore is of little value without the corresponding vehicular permit from the appropriate local municipality .... [A]n individual holding only a National Seashore vehicular permit would be prohibited from traversing state land and thereby be precluded from ever reaching the National Seashore by motor vehicle. The promulgation of [the regulation] has foreclosed the possibility of such an anomaly ever existing."); *Southern Pacific*, 700 F.2d at 556 ("The regulation at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands.").

***7** The situation here could not be more different. The private Board and private actuaries would have no say at all in the approval of capitation rates or MCO contracts but for HHS's decision to hand them its rulemaking and review powers in the first place.

So the Certification Rule is plainly unconstitutional under *Telecom*. "Congress has not delegated to [HHS] the authority to subdelegate [the actuarial soundness requirement] to outside parties." 359 F.3d at 566. And "[i]n contrast to [*Matherson* and *Southern Pacific*], where an agency with broad permitting authority ... adopted an obviously relevant local [government] concern as an element of its decision process," HHS has not only "delegated to another [private] actor almost the entire determination of whether a specific statutory requirement ... has been satisfied," *id.* at 567—it has even granted a private party the power to *define* the statutory requirement in the first place. [4]

B.

Second, the panel argues that, if there is a subdelegation here, it's permissible under Supreme Court and circuit precedent. But all the panel's authorities are inapposite.

The panel first invokes *Adkins*. *Rettig*, 987 F.3d at 532. But as noted, in *Adkins* it was Congress itself, not the agency, that enlisted the assistance of private parties in rulemaking. As our sister circuit has noted, "*Adkins* ... affirmed a modest principle: *Congress* may formalize the role of private parties in proposing regulations." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *rev'd on other grounds by* *Ass'n of Am. RRs.*, 575 U.S. 43, 135 S.Ct. 1225 (emphasis added). *See also* *Telecom*, 359 F.3d at 565 ("[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.").

As explained, it is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to *re*-delegate that power out to a private entity. *See, e.g.*, *Gundy*, 139 S. Ct. at 2123 (plurality opinion by Kagan, J.) ("Accompanying [Article I, section 1's] assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.' ") (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43, 6 L.Ed. 253 (1825)); *Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2416, 204 L.Ed.2d 841 (2019) ("Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone.").

***8** Moreover, the private parties in *Adkins* truly "function[ed] subordinately to the Commission," 310 U.S. at 399, 60 S.Ct. 907—serving as merely "an aid" that "*propose[d]*" minimum prices and regulations. *Id.* at 388, 60 S.Ct. 907 (emphasis added). The agency exercised "pervasive surveillance and authority," including the power to "approve[ ], disapprove[ ], or modif[y]" the industry proposals. *Id.* It was therefore the agency, and "not the [private actors]," that set the regulations. *Id.* at 399, 60 S.Ct. 907. Ultimately, "*Adkins* ... affirmed a modest principle: Congress may formalize the role of private parties in proposing regulations *so long as that role is merely 'as an aid'* to a government agency that retains the discretion to 'approve[ ], disapprove[ ], or modif[y]' them." *Ass'n of Am. R.Rs.*, 721 F.3d at 671 (emphasis added).

Here, by contrast, HHS has delegated to the Board the power to *define* actuarial soundness. And that power is reviewable only in the sense that the agency can amend or repeal the Certification Rule altogether. So absent new rulemaking, the Board's practice standards and the actuaries' certifications can prevent a state's capitation rate and associated MCO contract from ever reaching CMS for review. In short, while the instant scheme arguably allows HHS to "approve[ ]" private standards and actuarial certifications, it emphatically does not leave HHS free to "disapprove[ ] or modif[y]" them. *Id.*

The panel also cites *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974). But *Sierra Club* did not decide whether an agency was unconstitutionally re-delegating its delegated rulemaking powers. Rather, it questioned whether an agency was "abdicat[ing] its statutory duties [under the National Environmental Policy Act] by reflexively rubber stamping a[n impact] statement prepared by others." *Id.* at 59.

At most, then, *Sierra Club* tells us how much "fact-finding" an agency can delegate. *See* *Telecom*, 359 F.3d at 567 ("[T]here is some authority for the view that a federal

agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information."). There, we allowed a private developer to assist an agency in compiling studies that were conditions precedent to federal approval. *See* *Sierra Club*, 502 F.2d at 47, 59. So a private party was *assisting* the agency in determining the *facts* underlying the agency's decision to exercise government power. That is a far cry from allowing private parties to both define and apply a legal standard, and to do so without congressional authorization or agency review.

In any event, the panel cites *Sierra Club* for the proposition that there is no impermissible subdelegation where an agency "retains final reviewing authority," and "independently perform[s] its reviewing, analytical and judgmental functions." *Rettig*, 987 F.3d at 532. But again, HHS doesn't review the Board's practice standards, or the capitation rates rejected by private actuaries. So even if *Sierra Club* could justify an unauthorized subdelegation of substantive rulemaking power, its standard hasn't been met.

The panel's reliance on *Louisiana Public Service Commission v. FERC*, 761 F.3d 540 (5th Cir. 2014), is unavailing for the same reason. No matter how many times the panel claims otherwise, HHS has never "reviewed and accepted" the Board's practice standards or the actuaries' rejected capitation rates—let alone "continue[d] to exercise oversight" over those actions. *Id.* at 552. It just made a one-time decision to hand the private parties a blank check.

In the end, then, the only "final reviewing authority" HHS retains is the ability to issue a new rule.

***9** Incredibly, the panel is fine with this: "[A]ny state dissatisfied with the Board's practice standards can petition HHS for 'amendment[ ] or repeal' of the ... Rule's requirement that the Board's practice standards be followed." *Rettig*, 987 F.3d at 532 n.13 (quoting 5 U.S.C. § 553(e)). But by that logic, *any* agency subdelegation of rulemaking power is permissible. After all, any agency can always claw back its delegated power by issuing a new rule. *See* *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2nd Cir. 2008) ("If all it reserves for itself is 'the extreme remedy of totally terminating the [delegation agreement],' an agency abdicates its 'final reviewing authority.' ") (alteration in original) (citation omitted). But that would render the nondelegation doctrine a dead letter. We might as well say that Congress can never violate the nondelegation doctrine, because the American people can always petition Congress to pass a new law and claw back its lawmaking power from an agency. [5]

IV.

As judges, we have sworn an oath to uphold the Constitution. So if we are forced to choose between upholding the Constitution and extending precedent in direct conflict with the Constitution, the choice should be clear: "[O]ur duty [is] to apply the Constitution—not extend precedent." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, AFL-CIO*, 974 F.3d 1106, 1116 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc). "[F]idelity to original meaning counsels against further extension of [ ] suspect precedents." *Hester v. United States*, —— U.S. ——, 139 S. Ct. 509, 509, 202 L.Ed.2d 627 (2019) (Alito, J., concurring in the denial of certiorari).

The Supreme Court has repeatedly applied this principle when confronted with the choice between fidelity to the Constitution and an otherwise logical extension of its own precedent. *See*, *e.g.*, *Seila Law LLC v. CFPB*, —— U.S. ——, 140 S. Ct. 2183, 2201, 207 L.Ed.2d 494 (2020) ("The question ... is whether to extend those precedents to the 'new situation' before us, namely an independent agency led by a single Director and vested with significant executive power. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.") (citation omitted); *id.* at 2211 ("A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today.") (referring to *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010)); *Hernandez v. Mesa*, —— U.S. ——, 140 S. Ct. 735, 749, 206 L.Ed.2d 29 (2020) ("In sum, this case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers.").

***10** We should do the same. "As inferior court judges, we are bound by Supreme Court precedent. Yet[ ] ... judges also have a 'duty to interpret the Constitution in light of its text, structure, and original understanding.' " *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (quoting

NLRB v. Noel Canning, 573 U.S. 513, 573, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (Scalia, J., concurring)). "While we must faithfully follow [Supreme Court] precedent ..., '[w]e should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history.' " *Id.* (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010)). *See also*, *e.g.*, *Alvarez v. City of Brownsville*, 904 F.3d 382, 401 (5th Cir. 2018) (en banc) (Ho, J., concurring) (noting that an important purpose of rehearing en banc is "to better align our precedents with the text and original understanding of the Constitution" "where the Supreme Court has not yet ruled").

* * *

Our Founders fought a war to defend the principle of "no taxation without representation." And that is precisely the principle Plaintiffs seek to vindicate today. The federal government forces them to pay nearly half a billion dollars—not by an act of their elected representatives in Congress, but by private entities acting in collusion with unelected public bureaucrats.

The Constitution forbids this result. And no precedent requires it. I respectfully dissent from the denial of rehearing en banc.

All Citations

--- F.3d ----, 2021 WL 1324382 (Mem)

Footnotes

1 Judge Oldham did not participate in the consideration of the rehearing en banc.

1 *See*, *e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 369 (2014) ("[T]he expansion of the electorate has been accompanied by the growth of administrative law .... One of the extraordinary achievements of American life over the past two centuries has been to make the theory of consensual government a reality. Yet when consensual government became a reality, the administrative state undermined that reality by shifting lawmaking away from people and their representatives .... [W]hether in 1870, 1920, or 1965 ... each time, after representative government became more open to the people, legislative power increasingly has been sequestered to a part of government that is largely closed to them."); *id.* at 374–75 ("[A]lthough [members of the knowledge class] mostly supported expanded suffrage, they also supported the removal of legislative power to administrative agencies staffed by persons who shared their outlook. The development of administrative power thus ... must be recognized as a sociological problem—indeed, a profoundly disturbing shift of power. As soon as the people secured the power to vote, a new class cordoned off for themselves a sort of legislative power that they could exercise without representation.").

2 The Certification Rule has since been recodified into multiple provisions. 42 C.F.R. § 438.4 now states that "[t]o be approved by [the Centers for Medicare and Medicaid Services], capitation rates must ... [b]e certified by an actuary as meeting the applicable requirements," while § 438.2 defines "[a]ctuary" as "an individual who meets the qualification standards established by the American Academy of Actuaries ... and follows the practice standards established by the Actuarial Standards Board."

3 The panel claims that, under *Telecom*, it does not matter whether an agency is conditioning its approval on that of a government entity or a private party. *Rettig*, 987 F.3d at 531 n.10. But *Telecom* equated governmental and private entities only to say that an unauthorized subdelegation to either is invalid: "[F]ederal agency officials ... may not subdelegate to outside entities—*private or sovereign—absent affirmative evidence of authority to do so*." 359 F.3d at 566 (emphasis added). And it is undisputed that Congress gave HHS no such authority here.

4 The panel also invokes *Louisiana Forestry Association v. Secretary of United States Department of Labor*, 745 F.3d 653 (3rd Cir. 2014). *Rettig*, 987 F.3d at 531 & n.10. But the statute in that case specifically granted the Department of Homeland Security (DHS) the authority to "determine[ ]" an alien's status "after consultation with appropriate agencies of the Government." *La. Forestry Ass'n*, 745 F.3d at 660. So of course DHS's decision to seek the "advice" of the Department of Labor in the form of a labor certification was not an unconstitutional subdelegation. It was one agency *acting pursuant to congressional authorization* to enlist the help of another agency in making a legal determination. There is no serious way to analogize the scheme in that case to the Certification Rule. Here, there is no statutory language granting HHS authority to give the *private* Board (or anyone else) *rulemaking power* to *craft* the legal standard.

5 According to the panel, holding the Certification Rule unconstitutional would also "jeopardize over a thousand regulations promulgated by federal agencies." *Rettig*, 987 F.3d at 532 n.11. But this collapses the distinction between the completely legitimate practice of codifying preexisting private standards and the novel, unconstitutional practice of handing private parties a blank check to fill (and amend) at their leisure.

As the panel notes, it is a "common and accepted practice" for agencies to incorporate by reference standards established by private organizations. *See id.* at 531–32 (citing *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 442 (D.C. Cir. 2018)). But this just tells us what HHS could have done in this case—not that what HHS *did* was okay. In *American Society*, the agencies exercised their rulemaking power to approve fixed, preexisting private standards. The standards were not automatically updated by the unilateral action of those outside entities. *See*, *e.g.*, 896 F.3d at 443 (describing a statute requiring the Secretary of Energy to decide whether to adopt revisions to incorporated materials); *id.* at 447 ("[W]e need not determine what happens when a regulation or statute *is revised to incorporate newer versions* of a particular standard.") (emphasis added); *id.* at 450 (explaining that the 2011 National Electrical Code had been incorporated into a power source regulation, "but not the 2014 edition"). *See also* Office of Mgmt. & Budget, Exec. Office of the President, *OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* 4 (2016) (requiring agencies "to ensure[ ] ... that regulations incorporating standards by reference are updated on a timely basis").

To say that HHS can empower the Board to write whatever standards it chooses because it "could achieve *exactly the same result* by promulgating regulations ... adopt[ing] the ... Board's standards," *Rettig*, 987 F.3d at 532, is to say that process doesn't matter. But when it comes to the Constitution and the separation of powers, the ends do not justify the means. *Ante*, at ——.

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