No. 21-379

In the Supreme Court of the United States

TEXAS, ET AL., PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In 2002, finding it too hard to give meaning to Medicaid's requirement that state Medicaid contracts with managed-care organizations (MCOs) be "actuarially sound," HHS punted the question to a private entity, the Actuarial Standards Board. The Board waited to exercise that authority until 2015, when it promulgated Actuarial Standards of Practice No. 49 (ASOP 49). HHS's delegation of authority to create federal law regarding a program that represents a quarter of many States' budgets to a private entity violates the most fundamental precepts of our federal system, and the Board's exercise of that unconstitutionally delegated authority triggered a new statute of limitations that makes the Plaintiff-States' lawsuit timely. By holding otherwise, the Fifth Circuit created circuit splits on important questions of federal law that merit this Court's review. *See* Sup. Ct. R. 10(a), (c).

I. The Constitutionality of the Certification Rule, Which Controls Access to Billions of Dollars in Federal Funding, Merits This Court's Review.

A. The federal government cannot delegate control over Medicaid funding to private parties.

The United States acknowledges that "[a] federal agency may not 'abdicate its statutory duties' by delegating them to a private entity." Response 15 (quoting Pet. App. 17a). For good reason: as the petition explains (at 15-16), the Executive's own constitutional authority permits an agency to take actions that can—at the margin—resemble legislation. But as members of this Court have recognized, there "is not even [that] fig leaf of constitutional justification" for delegation to private entities. *Dep't of Transp. v. Ass'n of Am. R.Rs.* (*Amtrak*), 575

U.S. 43, 62 (2015) (Alito, J., concurring); *see also, e.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 700-01 (2015) (Roberts, C.J., dissenting) ("It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions.").

And yet that is exactly what HHS did through the Certification Rule, which purports both to make the Board's standards binding federal law and to give private actuaries a veto over capitation rates in an MCO contract. The Certification Rule thus is an unconstitutional delegation to a private entity. Petition 18-22. In its response, the United States gives two reasons (at 15-20) why the Court should not be concerned that private parties are controlling access to billions of federal dollars. Neither has merit.

First, the United States insists (at 17-18) that because the Board is a disinterested party, the Certification Rule does not present the due-process concerns raised in many private delegation cases. This argument conflates two problems with private delegation: fairness to the regulated and power for the regulator. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 974 (2014). The latter problem is at issue here. Plaintiff-States' "[n]on-delegation doctrine" challenge to the Certification Rule "is structural and seeks to ensure that Congress makes the important decisions," which are then enforced by the Executive as interpreted by the Judiciary. *Id.* Because the Board is none of these institutions, "the Vesting Clauses . . . categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal

Government." *Amtrak*, 575 U.S. at 88 (Thomas, J., concurring in the judgment).[1]

Second, the federal government asks (at 16-17) that the Court allow this delegation to slide because HHS could have achieved the same substantive result "by promulgating regulations that adopted the substance of the . . . Board's standards." "To say that HHS can empower the Board to write whatever standards it chooses because it 'could achieve *exactly the same result*' by adopting the 'Board's standards' is to say that process doesn't matter." Pet. App. 185a n.5 (Ho, J., dissenting) (citation omitted). But process is at the heart of the structural provisions of our Constitution, which are "about respecting the people's sovereign choice to vest the legislative power in Congress alone," and thereby "protect their liberties, minority rights, fair notice, and the rule of law." *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). This Court has held that "when it comes to the Constitution and the separation of powers, the ends do not justify the means." Pet. App. 186a n.5 (Ho, J., dissenting); *e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam). The same principles doom the Certification Rule.

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[1] For similar reasons, the federal government cannot rely (at 19-20) on *state* law delegating authority to private entities. "[F]ederal separation-of-powers concerns . . . cannot dictate how state governments allocate their powers." *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017). States differ on whether their legislatures may delegate legislative authority. Volokh, *supra*, at 963-70.

B. Even if Congress can delegate some authority to private parties, agencies cannot.

The United States cannot avoid the conclusion that the Certification Rule is unconstitutional by citing (at 17-19) instances in which Congress permitted private entities some role in setting federal standards. Assuming those statutes pass constitutional muster, "[t]here is good reason to limit" the cases the United States cited "to only those delegations authorized by Congress itself": Congress "has express constitutional authority to legislate" and "is directly accountable to the American people. Neither is true of administrative agencies." Pet. App. 176a (Ho, J., dissenting). "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

C. The Fifth Circuit's decision creates a circuit split on when and how agencies may delegate authority to private parties.

The constitutionality of the Certification Rule is worthy of this Court's review because it creates a circuit split with the D.C. and Second Circuits. The United States's attempts to distinguish these cases fall flat.

1. The D.C. Circuit held in *U.S. Telecom Ass'n v. F.C.C.* that an agency may not "subdelegate [its] decision-making authority to . . . outside entities . . . absent affirmative evidence of authority to do so." *Id.* at 566. The United States does not attempt to argue that Congress authorized HHS to delegate its rulemaking authority to the Board. Instead, the United States tries (at 21) to distinguish *Telecom* by re-labeling HHS's delegation of substantive rulemaking authority as HHS adopting "'reasonable conditions' that make 'federal approval'

of capitation rates contingent upon 'an outside party's determination of [an] issue.'"

The distinction the United States seeks to draw is without merit because the Certification Rule does not involve the type of "reasonable conditions" contemplated in *Telecom*. Specifically, *Telecom* cited instances where a regulated party needed approval from multiple government entities to take a given action. *See Telecom*, 359 F.3d at 567 (citing *United States v. Matherson*, 367 F. Supp. 779, 782-83 (E.D.N.Y. 1973), *aff'd* 493 F.2d 1339 (2d Cir. 1974); *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983)). Under those circumstances, the D.C. Circuit concluded that it was permissible for the federal agency to condition its approval on the regulated entity *first* obtaining the approval of other governmental bodies. *See id.* Federal agencies thus "weren't subordinating their authority to outside entities—they were refusing to waste agency resources on futile approvals." Pet. App. 180a (Ho, J., dissenting). Here, by contrast, "[t]he 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." Pet. App. 180a.

To buttress its false distinction, the United States relies (at 22) on the D.C. Circuit's statement that the distinction between subdelegations to government entities and subdelegations to private entities "d[id] not alter the analysis," *Telecom*, 359 F.3d at 566. But the federal government takes that line out of context: the D.C. Circuit was referencing a distinction between an agency's "subdelegation to a *subordinate*" federal officer or agency and an agency's "subdelegation to an *outside party*." *Id.* at 565. The D.C. Circuit concluded that "while federal agency officials may subdelegate their decision-making

authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so." *Id.* at 566; *see also* Pet. App. 179a n.3 (Ho, J., dissenting). The United States does not dispute that such evidence is lacking here. The Fifth Circuit's decision upholding the Certification Rule thus creates a split between the Fifth and D.C. Circuits.

2. The federal government's attempt to distinguish the Fifth Circuit's decision from the Second Circuit's decision in *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008), similarly fails. In *Fund for Animals*, the Second Circuit recognized that "[i]f all [an agency] reserves for itself is 'the extreme remedy of totally terminating the [delegation agreement],' an agency abdicates its 'final reviewing authority.'" *Id.* at 133 (last alteration in original) (citation omitted). The United States tries to distinguish *Fund for Animals* on two grounds. Neither has merit.

First, the federal government notes (at 22) that HHS "retains authority to review and accept or reject the Board's standards." But that is true "only in the sense that the agency can amend or repeal the Certification Rule altogether." Pet. App. 183a (Ho, J., dissenting). That is precisely the type of "extreme remedy" the Second Circuit described as "an agency abdicat[ing] its 'final reviewing authority.'" *Fund for Animals*, 538 F.3d at 133 (citation omitted).

Second, the United States insists (at 22) that the MCO contract approval process "is closely 'superintended by HHS in every respect.'" But a certification from a Board-certified actuary that an MCO contract complies with standards promulgated by the Board is a necessary (if not independently sufficient) condition for

HHS to exercise any reviewing authority. *See* 42 C.F.R. § 438.6(c) (2002). If a private actuary *approves* the capitation rates, HHS may still disapprove them. Pet. App. 22a. But if a private actuary "determine[s] that a capitation rate is *not* actuarially sound," HHS's supposed "review process ends before it ever begins." Pet. App. 177a (Ho, J., dissenting). As a result, private actuaries "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." Pet. App. 178a. In other words, HHS has "abdicate[d] its 'final reviewing authority'" for any capitation rate that a private actuary disfavors. *Fund for Animals*, 538 F.3d at 133 (citation omitted). Such a rule would be unconstitutional under the Second Circuit's rule. By concluding otherwise, the Fifth Circuit created a split with the Second Circuit that merits this Court's attention.[2]

II. The Fifth Circuit's Statute of Limitations Ruling Creates a Circuit Split About an Important Federal Question.

Also worthy of this Court's review is the Fifth Circuit's conclusion that Plaintiff-States' APA claims were barred by the statute of limitations. That holding also creates a circuit split—this time with the D.C. and Ninth Circuits. *See* Sup. Ct. R. 10(a), (c).[3]

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[2] The need for review is particularly acute because, as this Court has recognized, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

[3] Because *both* questions presented are independently certworthy, the United States' assertion (at 31-33) that the existence of the second question presented makes this case a poor vehicle to address

When it promulgated the Certification Rule in 2002, HHS may have adopted a framework without content—which is impermissible under the APA. *E.g.*, *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989). Other Circuits have recognized that the absence of that content meant that Plaintiff-States could not be "expected to anticipate all possible future challenges to a rule and bring them within six years of the rule's promulgation, before a later agency action applying the earlier rule leads to an injury." *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049-50 (9th Cir. 2016) (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Here, the Fifth Circuit acknowledged that the Board did not adopt a binding standard for "actuarial soundness" for state Medicaid plans until 2015. *See* Pet. App. 6a-7a, 9a-10a. Under an earlier "*nonbinding* 'practice note,'" States had the option to exclude some or all of the HIPF from capitation rates in their contracts with MCOs. *See* Pet. App. 9a. As the United States's own authority demonstrates, this regime engendered "ambiguities around actuarial soundness." Aaron Mendelson et al., *New Rules of Medicaid Managed Care—Do They Undermine Payment Reform?*, 4 HEALTHCARE 274, 274 (2016) (footnote omitted). But the promulgation of ASOP 49 in 2015 led HHS to take "'direct, final agency actions' against" Plaintiff-States, "triggering . . . new six-year statute of limitations periods." Pet. App. 69a. Specifically, "HHS released a guidance document" making it explicit that actuaries were required to follow ASOP 49 when evaluating MCO contracts. Pet. App. 71a-72a.

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the first is entirely without merit. Moreover, adopting it would mean that the Certification Rule would never reach this Court because the Board chose not to exercise its delegated authority until the APA's statute of limitations had run. That cannot be the law.

Until then, any action involving the HIPF carried no legal consequence, meaning that there was no final agency action, so the statute of limitations had not yet begun to run. *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016).[4] Petitioners brought suit in October 2015, ROA.21-40—well within the six years permitted to challenge an improper regulation under the APA. *See* 28 U.S.C. § 2401(a).

But the Fifth Circuit concluded that HHS's 2015 guidance document "did not create any new obligations or consequences." Pet. App. 16a. In doing so, the Fifth Circuit split from the D.C. Circuit's decisions about when similar documents constitute final agency action. For example, in *National Environmental Development Ass'n's Clean Air Project v. E.P.A.*, the D.C. Circuit concluded that an agency directive represents a final agency action—and therefore starts the limitations clock—when the directive "provides firm guidance to enforcement officials about how to handle permitting decisions" and "*compels* agency officials to apply different permitting standards in different regions of the country." 752 F.3d 999, 1007 (D.C. Cir. 2014). Because HHS's 2015 guidance removed any discretion in when—and how much of—the HIPF must be included in capitation rates, Plaintiff-States had six years to challenge that guidance under the APA. *Cf. Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002).

The United States attempts (at 26) to distinguish these cases on the grounds that they did not "involve[] the application of a statute of limitations." But that is a distinction without a difference. The United States does

[4] Moreover, HHS began applying ASOP 49 as the binding standard applicable to States through the Certification Rule when it reviewed petitioners' 2015 MCO contracts. ROA.297-301, 3243.

not dispute that the Fifth Circuit correctly held that a party may bring an as-applied challenge to a final agency action applying an allegedly unlawful regulation even after a facial challenge to the rule would be untimely. Pet. App. 14a (citing *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)). The Fifth Circuit's opinion splits from the D.C. Circuit's rule on what constitutes a final agency action. *Compare* Pet. App. 14a, *with, e.g.*, *Nat'l Env't Dev. Ass'n's Clean Air Project*, 752 F.3d at 1006-07.

The Fifth Circuit also split with the Ninth Circuit's decision in *California Sea Urchin Commission v. Bean*, 828 F.3d 1046. There, as here, the plaintiffs challenged the application of an agency regulation that was promulgated outside the limitations period. *Id.* at 1049. The Ninth Circuit concluded that such an application triggered a new statute of limitations period. *Id.* The United States's proffered distinction of *California Sea Urchin* (at 26) merely reiterates that the Fifth Circuit reached a different conclusion than the Ninth Circuit did in a similar situation.

In sum, the Ninth and D.C. Circuit have correctly refused to allow agencies to shield their actions from judicial review by waiting until the statute of limitations has run to enforce the rule. This Court should grant review and correct the Fifth Circuit's contrary conclusion.

III. This Is a Proper Vehicle to Resolve the Questions Presented.

Finally, the United States's own brief demonstrates (at 27-31) why its justiciability arguments do not prevent this Court's review. Indeed, if it were serious about those concerns, the United States would have raised them as jurisdictional reasons the Court *cannot* reach the questions presented, not vehicle defects for why it *should* not.

The United States did not do so because the arguments are irreconcilable with its position that the States should have challenged the Certification Rule in 2002—before the HIPF was created, let alone repealed.

The United States' position is also wrong. As the Fifth Circuit held, petitioners have suffered "a particular injury in fact—having to pay millions of dollars" because of the HIPF—that is traceable to the Certification Rule's mandatory requirement that States pay the tax on behalf of their MCOs. Pet. App. 11a-14a. Although the HIPF has been repealed, the unconstitutional structure that allowed private entities to impose the HIPF (and other costs) on States will continue to regulate the "complex ongoing relationship" that is Medicaid. *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1330 (2020). Moreover, the relief the district court ordered—equitable disgorgement—would provide "effectual relief" for the Plaintiff-States' injuries, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and such relief is the type of "specific relief" available under the APA, *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988). As a result, there are no vehicle problems that prevent this Court from addressing the important nondelegation and statute of limitations issues presented here.

CONCLUSION

The Court should grant plenary review of the Fifth Circuit's holdings regarding the Certification Rule and should vacate its rulings regarding the HIPF statute under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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