No. 14-114

IN THE
Supreme Court of the United States

DAVID KING, *ET AL.*,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, AS UNITED STATES SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* CITIZENS' COUNCIL FOR HEALTH FREEDOM, ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND INDIVIDUAL PHYSICIANS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act ("ACA"), authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established by the State under section 1311" of the ACA.

The following questions are presented:

1. Whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA.

2. Considering *Chevron* Step Zero, whether the underlying statutory grant of regulatory authority to the IRS is unconstitutional.

3. In light of *Chadha*, whether the IRS could have promulgated the May 23, 2012 Exchange Regulations, which are legislative in nature, scope and effect, without bicameral Congressional passage and presentment to the President.

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are individual physicians, a national association of physicians and surgeons, and a national association of patients and physicians. *Amici* file this brief in support of Petitioners and urge the Court to grant *certiorari*.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief with consent by all parties, with the required 10 days prior written notice, and those consents are filed concurrently with this brief.

of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000)(citing an AAPS *amicus* brief). Because AAPS has also commenced an action against the Respondents which contains allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *See Association of American Physicians and Surgeons, Inc. v. Burwell*, Supreme Court Docket No.14A67.

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to protect health care choices and patient privacy.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Robert L. Pyles, M.D., privately practices psychiatry and psychoanalysis in the Boston area. He has held a variety of leadership positions with organized medicine and psychiatry, locally, nationally and internationally.

Amicus Graham L. Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform. As active members of the

medical profession and pursuant to their ethical obligations, *Amici* have studied the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029. *Amici* have also studied the regulations promulgated by the IRS regarding federal tax credit subsidies for both state-created (§1311) and HHS-created (§1321) healthcare exchanges. 77 Fed. Reg. 30,377 *et seq*. (May 23, 2012)("Exchange Regulations" or "Regulations"). Because the Regulations were promulgated under the alleged authority of Sections 1311, 1321, and 1401 of ACA (the "Statutory Grants"), *Amici* believe the Regulations were promulgated *ultra vires* because the Statutory Grants themselves are unconstitutional.

SUMMARY OF ARGUMENT

The court below addressed the quanta of deference a federal court should accord to the IRS's construction of a statute[2] and whether the IRS has exceeded the scope of its delegated authority. Petitioners' Appendix at 6a, 14a-34a (majority opinion), 34a-41a (concurring opinion). These questions have received both judicial[3] and academic[4]

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[2] *See generally,* David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 Harv. J. L. & Pub. Policy 239, 243 (2003); Antonin Scalia, *How Democracy Swept the World*, Wall St. J., A24 (Sept. 7, 1999).

[3] *See e.g., United States v. Mead*, 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

[4] *See e.g.,* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L. Rev. 363 (1986); Cass R. Sunstein, *Nondelegation Canons*, 67 U.

attention. In some cases, courts defer to the agency. *See e.g., Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. ___, 131 S.Ct. 704 (2011); *Atlantic Mutual Insurance Co. v. Comm'r of Internal Revenue*, 523 U.S. 382 (1998); *National Railroad Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407 (1992). In other cases, courts are less deferential to the agency, especially where the agency establishes the scope of its own authority. *See generally, Whitman v. American Trucking Associations*, 531 U.S. 457, 473 (2001).

Delegation does not and indeed cannot exist *in vacuo*. It is derivative of a statutory grant of authority which itself must be constitutionally valid. Both the Exchange Regulations and the underlying Statutory Grants fall woefully short of complying with the Constitution.

The Statutory Grants defy several of the Constitution's procedural and substantive constraints. Assuming *arguendo* the Exchange Regulations are otherwise valid and meet the *Chevron* test, the IRS still is prohibited from promulgating the Exchange Regulations without a valid statutory grant of regulatory authority from Congress. *Amici* believe it is appropriate for the Court to raise the constitutionality of the Statutory Grants *sua sponte*.

Chi. L. Rev. 315, 329 (2000)("[*Chevron*] decision … dominates modern administrative law.").

ARGUMENT

Certiorari is appropriate. The Exchange Regulations and Statutory Grants are fatally flawed. *Amici* believe that because the Statutory Grants do not comply with the Constitution's strict lawmaking requirements those Statutory Grants and any ensuing regulation are void *ab initio*.[5] The delegation to the IRS in this case "strayed too far from our Founders' understanding of separation of powers." *Whitman* 531 U.S. at 487 (Thomas, J., concurring). One commentator poignantly said: "[i]t is one thing for Congress to tax a good or service into extinction. It is entirely another for an independent regulatory agency to do so." Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Debate*, 80 Ind. L. J. 239, 245 (2005) ("*Krotoszynski*").

Amici's position is framed by the following: First, *Amici* agree with Petitioners who argue: the plain meaning of phrase "established by the State" does not authorize the IRS to promulgate the Exchange Regulations for the federally-created exchanges. Petition at 11-17, 24-32.[6] Second, the Court should

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[5] The Supremacy and Oath Clauses require all actions by the Federal Government to comply with the Constitution, regardless of whether the action is undertaken by the Executive Branch, Congress, the Judiciary, or an independent agency. The Constitution is supreme regardless of a law's subject matter, regardless of its benefits upon society, and regardless of how urgently the law is needed. U.S. CONST. art. VI. Even a law passed unanimously by both chambers of Congress and signed by the President must comply with the Constitution.

[6] In addition to exceeding the scope of the statutorily delegated authority, the IRS's actions may be viewed as supplanting legislation in violation of the Bicameral and Presentment Clauses. *See* Argument II, *infra*.

revisit the *Chevron* Doctrine because it lacks robustness, *i.e.* one critical element – namely, whether the Statutory Grants are themselves unconstitutional. Third, because the Exchange Regulations are legislative in nature scope and effect, *Chadha* has been ignored.[7] Fourth, the Exchange Regulations have a broad-ranging, if not pervasive, affect. The many stakeholders include taxpayers, employees, employers, insurance companies, and the federal and state governments.

I. *CHEVRON*'S TWO-STEP TEST DOES NOT ADDRESS THE VALIDITY OF ACA'S PROVISIONS GRANTING REGULATORY AUTHORITY TO THE IRS TO ISSUE THE EXCHANGE REGULATIONS.

Thirty years ago, the question of judicial deference to an agency's construction of a statute came before this Court in *Chevron*. *Chevron* has been summarized as follows:

> *Chevron* famously creates a two-step inquiry for courts to follow in reviewing agency interpretations of law. The first step asks whether Congress has "directly spoken to the precise question at issue," an inquiry that requires an assessment of whether Congress's intent "is clear" and "unambiguously expressed." The second step asks whether the agency's interpretation is "permissible," which is to say reasonable in light of the underlying law.

Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 190-91 (2006) (footnotes omitted). In writing

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[7] *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983)("*Chadha*").

about the emerging law of *Chevron* Step Zero, Professor Sunstein noted that "the most important and confusing questions have involved neither step. Instead they involve *Chevron* Step Zero – the initial inquiry into whether the *Chevron* framework applies at all." *Id*. at 191. Because *Amici* believe the Statutory Grants are fatally flawed, this case presents a perfect opportunity to transform the *Chevron* test from a two-step to a three-step analysis by adding a Step Zero.

Furthermore the importance of *Chevron* cannot be overstated. *See* Stephen Breyer, *Judical Review of Questions of Law and Policy*, 38 Admin. L. Rev. 187 (1992); David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 S. Ct. Rev. 201 (2001). Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L. J. 511 (1989); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283 (1986). Note, *Judicial Deference to Agency Interpretations of Jurisdiction After Mead*, 78 S. Cal. L. Rev. 1327, 1328 & 1328 n.8 (2005)(According to a Westlaw KeyCite check performed on July 31, 2005, *Chevron* had been cited by courts 7,975 times, almost as many times as the combination of *Marbury v. Madison*, 5 U.S. 137 (1803), *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973) had been cited (cumulatively 8,501 times)).

This case involves the scope of certain regulatory authority granted to the IRS by Congress and whether Congress, the IRS, or the courts is empowered to determine the scope of that regulatory authority. *Amici* suggest only Congress is empowered to determine the scope of an agency's

regulatory authority. In *Whitman,* the Supreme Court said: "[t]he very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority." 531 U.S. at 473 (emphasis in original). The court below incorrectly allowed the IRS to define the scope of its own authority by allowing the IRS to expand the definition of "state exchange" to include the federally-created as well as state-created exchanges. PetApp at 33a ("[T]he IRS Rule is a permissible construction of the statutory language.").

Examining the validity of ACA's Statutory Grants to the IRS is consistent with the long-standing principal of statutory construction that when a court is asked to construe a law, it has authority to determine if that law exists. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-447 (1993)("*USNB*"). "There can be no estoppel in the way of ascertaining the existence of a law." *South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877). Furthermore, "a court may consider an issue 'antecedent to … and ultimately dispositive of' the dispute before it, ***even an issue the parties fail to identify and brief***." *USNB*, 508 U.S. at 447 (emphasis added, internal citations omitted).

> "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," … even where

> the proper construction is that a law does not govern because it is not in force.

USNB, 508 U.S. at 446 (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). The failure of litigants to argue the legal issues correctly does not render an appellate court powerless to address those issues properly:

> Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.

Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.) (en banc), *cert. denied*, 537 U.S. 823 (2002)(internal citation omitted). Indeed, appellate review of the proper law prevents misapplication of the law, injustice, and construction of hypothetical laws.

Because courts have independent authority to determine if a law exists, this Court may and should examine, *sua sponte,* the constitutionality of the Statutory Grants.

II. CONSIDERING *CHADHA*, THE IRS MAY NOT ISSUE A REGULATION THAT SUPPLANTS FEDERAL LEGISLATION BY REDEFINING "STATE-EXCHANGE" TO INCLUDE A FEDERALLY-CREATED EXCHANGE.

Although not every administrative action is subject to the bicameralism and presentment requirements, those requirements must be met whenever legislative power is exercised. Whether particular actions are an "exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Chadha*, 462 U.S. at 952 (internal citation omitted).

It is black-letter law that the power to tax belongs to Congress. The Taxing Clause provides: "The Congress shall have Power … To lay and collect Taxes, Duties, Imposts and Excises …." U.S. CONST. art. I, §8, cl. 1. Indeed, taxation is the first of the eighteen enumerated powers of Congress. "Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily…." *Krotoszynski*, 80 Ind. L. J., at 241. "The Supreme Court has explained that "[i]n the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937)(internal citations omitted).

The legislative character of an action may be established by an examination of the Congressional action it supplants. This "Supplantation Principle" was used to analyze the legislative veto in *Chadha,* 462 U.S. at 952 ("The legislative character of the one-House veto in these cases is confirmed by the

character of the Congressional action it supplants"). The Court should extend this principle to "legislative actions" undertaken by Executive departments, the Judiciary, and independent agencies.

In *Chadha*, the Court examined the constitutionality of the legislative veto found in section 244(c)(2) of the Immigration and Nationality Act of 1952. Pub. L. 82-414, 66 Stat. 163, 214 (1952). The Court found that §244(c)(2) had an essentially legislative purpose and effect. Despite acknowledging that §244(c)(2) authorized one house, by resolution, to require the Attorney General to deport an alien whose deportation would otherwise be canceled under §244, the Court reasoned that "the House took action that had the ***purpose and effect of altering the legal rights, duties, and relations of persons***, including the Attorney General, Executive Branch Officials and Chadha, all outside the Legislative Branch." *Chadha,* 462 U.S. at 952 (emphasis added).[8] The Court explained that absent the House's action, Chadha would remain in the United States. Chadha's deportation could be accomplished only by new legislation requiring deportation, if at all. *Chadha,* 462 U.S. at 953-954.

Furthermore, the power to "amend" an existing law is unquestionably a legislative power, which the Constitution vests in Congress. U.S. CONST. art. I, §1.

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[8] *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 276 (1991)("In short, when Congress '[takes] action that ha[s] the purpose and effect of ***altering the legal rights, duties, and relations of persons*** … outside the Legislative Branch,' it must take that action by the procedures authorized in the Constitution.")(brackets and ellipsis in original, emphasis added). *See also id.* at 258 n.4.

See Chadha, 462 U.S. at 954 and *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The first clause of the Constitution states: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, §1. Nothing is unclear or ambiguous about this language. "All" means "all".

The Court has repeatedly held "the lawmaking function belongs to Congress, U.S. CONST. art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (internal citation omitted). Accordingly, "Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is … vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952)(Jackson, J., concurring)("The Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1892)("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

Concerns of encroachment and aggrandizement of legislative power, as well as the abdication of legislative power by Congress, have been integral to this Court's Separation of Powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 382

(1989)("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'"). *Certiorari* is particularly appropriate where one branch of the Federal government encroaches upon the province of another branch and where one chamber of Congress encroaches upon the province of the other chamber.

It has been said "[t]he fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S.Ct. 2566, 2677 (2012) (Opinion of Justices Scalia, Kennedy, Thomas, and Alito, dissenting). The Constitution spells out in detail the processes by which the two branches of Congress bring their diffused power to bear on federal lawmaking.[9]

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[9] The Constitution begins by diffusing legislative power between the House and the Senate. U.S. CONST. art. I, §1("Bicameral Clause"). It is apparent from reading the Constitution's other provisions and *The Federalist* No. 51 that our Founders were concerned about the natural tendency of people to develop into factions that would promote their own self-interests. Therefore, the Founders designed a legislative process that, in theory and practice, would be modeled today as a series of non-cooperative games whereby a bill becomes a law if and only if the President, Senate and House reach the same equilibrium point by agreeing to identical statutory language. *Cf.* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944)(generally regarded as the formal beginning of game theory) and John Forbes Nash, *Non-Cooperative Games* (1950)(Princeton University Ph.D. Dissertation). *See generally*, Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the*

Whether or not the IRS has administratively amended Section 1311, to cover federally-created as well as state-created Exchanges, should be resolved by this Court because the IRS action, which redefines "state exchange," is legislative in both character and effect. The application of the Exchange Regulations to the federally-created exchanges is the functional equivalent of legislation because it affects the legal rights, duties and relations of many persons including "applicable taxpayers," employers, insurance companies and the state and federal governments.

III. THE §36B PREMIUM TAX CREDIT IS AN ADMITTEDLY PERMANENT APPROPRIATION WHICH: (1) VIOLATES THE PRESENTMENT, BICAMERAL AND APPROPRIATIONS CLAUSES; AND (2) DEFIES THE TEMPORAL LIMIT ON EACH TERM OF THE PRESIDENT, EACH SENATOR, AND EACH MEMBER OF THE HOUSE BECAUSE NO CONGRESS MAY WITHHOLD LEGISLATIVE POWER FROM FUTURE CONGRESSES AND VETO POWER FROM FUTURE PRESIDENTS.

Section 36B of the IRC, created by Section 1401 of ACA, provides certain taxpayers with premium assistance in the form of a premium tax credit ("PTC") for the taxpayer, with a subsidy flowing from the United States Treasury directly to the taxpayer's insurance carrier to be applied toward the cost of the health insurance premium. Jennifer Staman and Todd Garvey, Congressional Research Service, *Legal*

Separation of Powers, 99 Geo. L. J. 1119 (2011)(critiques theories of statutory interpretation including game theory).

Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act (July 23, 2012). *See also,* Bernadette Fernandez, Congressional Research Service, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA)* (March 12, 2014)("*Fernandez*").

The problem, under the Constitution, with a permanent appropriation is that it would change the Constitution's default setting: from a default of "no appropriation" without Congressional approval, to a default of making an "appropriation" unless Congress disapproves. In other words, the legislative triumvirate of the House, Senate, and President must all agree to "not appropriate" rather than to comply with the Appropriations Clause requirement that all three must agree in order "to appropriate." This is a fundamental and transformative change in the political calculus and is not authorized by the Constitution. Unless three-fourths of the States ratify an Article V Amendment, permanent appropriations are not permitted. Furthermore, the Appropriations Clause sought to insure Congressional involvement when money is to be withdrawn from the Treasury. Permitting a permanent appropriation defies the requirement of Congressional involvement.

According to the Congressional Research Service, "[f]or years beginning after December 31, 2013, 31 U.S.C. 1324 appropriates necessary amounts to the Treasury Secretary for disbursements due under §36B of the IRC. ***This permanent appropriation means that the premium credits do not require annual appropriations.***" *Fernandez*, at 1-2 n7 (emphasis added).

The PTC subsidy is a federal appropriation on "auto-pilot" for many years to come. It violates the Separation of Powers Doctrine. The PTC takes certain appropriations decisions from each future Congress and each future President, having been exercised by the 111th Congress and 44th President. Consequently, each future Congress will exercise less than its full complement of legislative powers and each future President will exercise less than his or her full veto power. The quanta and subject matter of future appropriations decisions already will have been made for them by the 111th Congress and President.

The financial risk associated with running federal appropriations on autopilot is analogous to the danger associated with flying a commercial jet aircraft on autopilot after it has lost both its engines. On January 15, 2009, U.S. Airways Flight 1549 lost both of its engines after being hit by a huge flock of birds. Unable to return the aircraft to LaGuardia Airport or to emergency land at either Teterboro or Newark Airport, Captain Chesley Sullenberger, made some mid-course corrections and was able to "glide" the aircraft for a landing on the Hudson River. His split-second decision saved the lives of the 150-plus passengers and crew. Wendy K. Mariner, George J. Annas, and Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 Drexel L. Rev. 341, 341 (2009). Similarly, the Constitution was designed to allow for "mid-course" corrections. Elections are held for members of the House of Representatives every two years. U.S. CONST. Art I, § 2, cl. 1. *See also* The Federalist Nos. 52 and 53.

This Court has recognized: "The Constitution's division of power among the three branches is

violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). In other words, the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.* Here, however, the encroachment is more subtle and perhaps even more dangerous. The 111th Congress and the 44th President consented to appropriations on behalf of their successors. That is to say, in connection with the PTCs, the 111th Congress and the President enlarged their own appropriations power at the expense of future Congresses and Presidents by encroaching upon the legislative and veto prerogatives of future Congresses and Presidents, respectively.

There is no doubt that our Framers sought to diffuse power to prevent tyranny. Justice O'Connor explained the diffusion of powers:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). "Just as the separation and independence of the coordinate

> branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S., at 458.

New York v. United States, 505 U.S. at 181-182. Not only did the Framers incorporate a Separation of Powers Doctrine and the concept of federalism into the Constitution, but they provided a temporal constraint upon the legislative mandate. The words of the Constitution and George Washington are abundantly clear on this point.[10]

The temporal constraint comes from the Constitution itself. The President, Senators, and members of the House of Representatives represent different geographic constituencies, have different times and modes of election, and have different requirements for holding office. U.S. CONST. art. I, §§ 2 & 3; U.S. CONST. art. II, §1; and U.S. CONST. amend. XVII. The Constitution further diffuses power by requiring periodic elections for President, Senators and members of the House, with each type of office having its own duration. Senators are elected for six years. U.S. CONST. art. I, §3, cls. 1&2; U.S. CONST. amend. XVII. The President is elected for four years. U.S. CONST. art. II, §1, cl. 1. Members of the House of Representatives are elected for two years. U.S. CONST. art. I, §2, cl. 1. The authority of each Representative, Senator, and President expires at the

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[10] In addition to being the first President, George Washington served as President of the 1787 Convention that proposed the Constitution for ratification.

end of his or her term in office, respectively. Exercising any legislative (or veto) authority beyond the "expiration date" unconstitutionally transfers power from the People, as exercised by their contemporarily elected representatives.

As George Washington explained the temporal constraint: "'The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and ***for a certain limited period***, to representatives of their own chusing; and whenever it is executed contrary to their Interest, … their Servants can, and undoubtedly will be, recalled.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 814 n.26 (1995) (internal citation omitted, emphasis added).

One commentator expressed the temporal constraint in real estate terms, *i.e.*, the holding of an elective office is a "temporary lease" from the nation's citizens. Alan B. Morrison, *A Non-Power Looks at the Separation of Powers*, 79 Geo. L. J. 281, 282 (1990). Expressed in real estate terms, the Constitution does not permit holdover tenancies by members of Congress or the President. By appropriating beyond the expiration of its term, the 111th Congress became a "holdover" Congress.

CONCLUSION

For the foregoing reasons, *certiorari* should be granted.

Respectfully submitted,

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