No. 14-20039

In the United States Court of Appeals for the Fifth Circuit

STEVEN F. HOTZE, M.D., AND BRAIDWOOD MANAGEMENT, INC.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, U.S. SECRETARY OF HEALTH & HUMAN SERVICES, AND JACOB J. LEW, U.S. SECRETARY OF THE TREASURY, IN THEIR OFFICIAL CAPACITIES,
Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CIVIL NO. 4:13-CV-01318, HON. NANCY F. ATLAS

AMICUS CURIAE BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is 14-20039. The case is styled as *Hotze v. Sebelius.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Steven F. Hotze, M.D.,
Appellant

Braidwood Management, Inc.,
Appellant

Kathleen Sebelius, U.S. Secretary of Health & Human Services, in her official capacity,
Appellee

Jacob J. Lew, U.S. Secretary of the Treasury, in his official capacity,
Appellee

Foundation for Moral Law,
Amicus Curiae

U.S. Reps. Trent Franks, Michele Bachmann, Joe Barton, Kerry L. Bentivolio, Marsha Blackburn, Jim Bridenstine, Mo Brooks, Steve Chabot, K. Michael Conaway, Ron DeSantis, Jeff Duncan, John Duncan, John Fleming, Bob Gibbs, Louie Gohmert, Andy Harris, Tim Huelskamp, Walter B. Jones, Jr., Jim Jordan, Steve King, Doug LaMalfa, Doug Lamborn, Bob Latta, Thomas Massie, Mark Meadows, Markwayne Mullin, Randy Neugebauer, Stevan Pearce, Robert Pittenger, Bill Posey, David P. Roe, Todd Rokita, Matt Salmon, Mark Sanford, David Schweikert, Marlin A. Stutzman, Lee Terry, Tim Walberg, Randy K. Weber, Sr., Brad R. Wenstrup, Lyne A. Westmoreland, Rob Wittman, Ted S. Yoho (collectively, "House *Amici Curiae*"),
Amici Curiae

Citizens' Council for Health Freedom, Janice Chester, M.D., Mark Hauser, M.D., Graham L. Spruiell, M.D. (collectively, "Health Freedom *Amici Curiae*") ,
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Dated: May 15, 2014

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons, Inc. ("AAPS") is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS members include thousands of physicians nationwide in all practices and specialties, many in small practices. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship. The members of *amicus* AAPS include without limitation medical caregivers – who also are consumers of medical care – as well as medical employers and owners and managers of medical businesses subject to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). In addition to participating at the legislative and administrative levels in national, state, and local debates on health issues, AAPS also participates in litigation, both as a party, *see, e.g.*, *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 113 A.F.T.R.2d (RIA) 1196 (D.C. Cir. 2014); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and as *amicus curiae*. *See, e.g.*, *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (citing and relying on AAPS argument); *U.S. v. Rutgard*, 116 F.3d 1270 (9th

[1] *Amici* file this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for the *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Cir. 1997). AAPS *amicus* briefs also have been cited in decisions of the U.S. Supreme Court. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *District of Columbia v. Heller*, 554 U.S. 570, 703 (2008) (Breyer, Stevens, Souter and Ginsburg, JJ., dissenting). For the foregoing reasons, AAPS has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Dr. Steven Hotze and Braidwood Management (collectively, "Plaintiffs") sue the Secretaries of the Treasury and of Health and Human Services (collectively, the "Administration") for declaratory and injunctive relief against enforcement of the "Employer Mandate" and "Individual Mandate," 26 U.S.C. §§4980H, 5000A, of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). Plaintiffs challenge these "mandates[2]" on two alternate theories: (1) PPACA's insurance provisions compel private insureds to subsidize private third parties in violation of the Fifth Amendment, U.S. CONST. amend. V, and (2) the Senate-initiated PPACA raises revenue in violation of the U.S. Constitution's requirement that revenue-raising measures

[2] Like the District Court (ROA.243 n.5), this *amicus* brief uses the Employer and Individual Mandate nomenclature because of its use in other cases, even though – under *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2587-600 (2012) ("*NFIB*") – these provisions allow payment of a tax as an alternate means of compliance and therefore do not, strictly speaking, "mandate" that employers provide, or that individuals have, health insurance.

originate in the House of Representatives. U.S. CONST. art. I, §7, cl. 1. Finding that it had both Article III jurisdiction and statutory subject-matter jurisdiction over these claims, the District Court dismissed Plaintiffs' complaint on the merits for failing to state a claim on which relief could be granted.

As indicated in note 2, *supra*, PPACA comes to this Court with the Supreme Court's *NFIB* decision as a backdrop. In a facial challenge under the Commerce Clause, *NFIB* held that §5000A's Individual Mandate to purchase health insurance exceeds the Commerce Power, 132 S.Ct. at 2587-89, but could be "saved" by interpreting its penalty for non-compliance as within the Taxing Power for constitutional purposes, *id.* at 2598-2600, notwithstanding that Congress did not intend that penalty as a tax for statutory purposes. *Id.* at 2582-84. In reaching that holding, the Supreme Court did not consider – much less decide – either of the two constitutional arguments that Plaintiffs raise here: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). To the contrary, *NFIB* expressly recognized that "any tax must still comply with other requirements in the Constitution," 132 S.Ct. at 2598, which tees up the two new constitutional issues that Plaintiffs raise.

STATEMENT OF FACTS

Amicus AAPS adopts the facts as stated in Plaintiffs' brief. Opening Br. at 4-12. The major fact relevant here is the allegation that PPACA compels Plaintiffs to

subsidize insurance companies and "lower insurance premiums for others who have government-approved pre-existing conditions that [PPACA] requires insurance companies to cover." ROA.14-15. PPACA's subsidies refer not to insurance's usual "spread-the-risk" aspect (*i.e.*, everyone pays a relatively small, actuarially determined premium to cover the expected costs of those in the insurance pool who will require care). Instead, the subsidization refers to PPACA's favoring various groups (*e.g.*, those with pre-existing conditions) with subsidies to lower their premiums below their actuarial risk. For example, an article in CONTINGENCIES, the peer-reviewed journal of the American Academy of Actuaries, estimates this "spread-the-wealth" component of PPACA premiums at 17 to 20 percent of a healthy person's premium:

> Analysis of representative carrier data suggests that eliminating health status as a rating factor itself may increase premiums by roughly 17 percent to 20 percent for those who have preferred rates because of lower-than-average health risks. Young adults often qualify for these preferred rates. These increases would be in addition to any premium rate change due to age compression, required increases to benefits, or other factors discussed above.

Kurt Giesa & Chris Carlson, *My Generation: Age Band Compression Under Health Care Reform,* 25-1 CONTINGENCIES 30, 33 (Jan.-Feb. 2013) (hereinafter, "*My Generation*"). So, for example, an annual family premium of $12,000 would include approximately $2,000 to subsidize lower rates for others. In this *amicus*

brief, AAPS refers to this as the "spread-the-wealth" payment to distinguish from the typical risk-spreading aspect of health insurance.

SUMMARY OF ARGUMENT

Amicus AAPS fully agrees with Plaintiffs' arguments under the Origination Clause, but has nothing gainful to add over those arguments and the arguments in the *amicus* briefs on that issue. On jurisdiction, AAPS argues that Plaintiffs have standing and a ripe challenge to PPACA's mandates because (as in *NFIB*) the economic and administrative burdens are both cognizable and sufficiently imminent under Article III and prudential considerations. Sections I.A-I.B. Further, as in *NFIB,* the Anti-Injunction Act does not bar review because PPACA's mandates are not taxes for statutory purposes. Section I.C.

On the merits, *amicus* AAPS argues that *NFIB* did not consider – and thus did not decide – the issues Plaintiffs raise. Section II.A. Prior to the Chief Justice's saving construction in *NFIB,* §5000A provided a mandate to purchase government-compliant health insurance with a penalty imposed for failing to purchase that insurance. Viewed (as intended) as a mandate, this violates the Takings Clause because it takes private property in form of an ascertainable portion of a health-insurance premium that subsidizes lower rates for private, government-favored third parties. Section II.B. The *NFIB* saving construction fares no better as a tax because the unconstitutional conditions doctrine prohibits Congress from using the

Taxing Power selectively to coerce the "voluntary" surrender of the right to be free from unlawful takings, which is what the "tax" taxes. Section II.C.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO JUDICIAL REVIEW

Before addressing the merits under the Fifth Amendment, *amicus* AAPS first establishes this Court's jurisdiction to reach the issues that Plaintiffs ask this Court to reach. Under the circumstances here, nothing precludes review.

A. Plaintiffs Have Standing

To establish standing, a plaintiff must show an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For injuries directly caused by government action, a plaintiff can show an injury in fact with "little question" of causation or redressability; by contrast, when the government causes third parties to inflict injury, the plaintiff must show more to establish causation and redressability. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, Plaintiffs suffer their injuries directly from PPACA's allegedly unconstitutional requirements, which makes causation and redressability obvious: enjoin

enforcement of PPACA, and Plaintiffs' injuries will cease.

Plaintiffs obviously have standing to challenge actions that negatively impact them economically, *Diamond v. Charles*, 476 U.S. 54, 66 (1986), but administrative burdens also "[c]learly… me[e]t the constitutional requirements" for injury such that a plaintiff can assert the "right to be free of arbitrary or irrational [government] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Significantly, the burden need not be crushing: an "identifiable trifle" suffices. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996). Moreover, plaintiffs suffer first-party injuries when the government imposes illegal restrictions on the terms under which the plaintiffs may interact with third parties such as insurance companies: "a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction." Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984); *accord FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (Scalia, J.); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988) (R.B. Ginsburg, J.); *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942). Here, PPACA makes insurance not only more expensive but also less suitable to Plaintiffs' interests, ROA.206, and imposes administrative

burdens and restricts the terms on which Plaintiffs can contract with insurers. Plaintiffs plainly have standing to complain about all these injuries.

Significantly, cognizable injury includes both actual and threatened injury, *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), so (as with *NFIB*) any perceived lag time between filing the suit and assessing the penalties and burdens cannot negate standing. Indeed, PPACA's violation of the Origination Clause are a procedural injury, which makes redressability and immediacy apply to the *present procedural violation* (which may someday injure a concrete interest) rather than to the concrete future injury. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7; *U.S. v. Johnson*, 632 F.3d 912, 921 (5th Cir. 2011); *cf. DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) ("once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate"); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). For these reasons, Plaintiffs' injuries are obviously sufficiently imminent for Article III, just as the *NFIB* injuries were.

Standing's "zone-of-interest" test is a prudential doctrine that asks whether the interests to be protected *arguably* fall within those protected by the relevant statute. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.,* 522 U.S. 479,

492 (1998). Here, Plaintiffs challenge the taking of their property under the Fifth Amendment and the enactment of PPACA without following the Origination Clause's requirements. Both claims are at the dead center of the zone of interests protected by the respective provision of the Constitution.

B. Plaintiffs' Claims Are Ripe

Like standing, ripeness has a constitutional and a prudential component, with the constitutional component essentially mirroring the constitutional standing component of a case or controversy. U.S. CONST. art. III, §2; *Choice Inc. v. Greenstein,* 691 F.3d 710, 714-15 (5th Cir. 2012). If Plaintiffs currently have constitutional standing, their claims are constitutionally ripe, and vice versa.

The timing of future impacts – even if years off – provides no barrier to justiciability: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 559 U.S. 662, 670 n.2 (2010). Here, Plaintiffs will hit this wall, circa 2014 or 2015, and Plaintiffs already are facing burdens from the impending wall. While third-party injuries face heightened scrutiny for standing, *Defenders of Wildlife,* 504 U.S. at 561-62, they face *relaxed* scrutiny for ripeness:

> Our decision that the Union's claims are now nonjusticiable does not mean that employees must wait

> until after they are to be disciplined under the policy to challenge it in federal court. As *Solomon* and *Eaves* demonstrate, indirect injury, in the absence of enforcement, may be sufficient to establish a justiciable controversy, as long as that indirect injury is specific. For example, if an employee has a concrete and plausible desire to say something in particular and refrains from doing so because the statement arguably violates the policy, he may have the ingredients for a ripe, justiciable dispute.

Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 764 (11th Cir. 1991) (*citing International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979)); *cf. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993). As the Eleventh Circuit recognized in *Hallandale*, this Court cannot turn away injured parties who face concrete, indirect injury caused by government action, even if the insurance companies that injure Plaintiffs (like the union in *Hallandale*) lack a ripe claim against the government. Plaintiffs are suffering their administrative injuries now in planning for 2015, and they need relief now.

While takings claims often must await not only the taking but also inadequate compensation before a ripe claim arises, *see Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-97 (1985), those restrictions do not apply to Plaintiffs' takings claims for two reasons. First, PPACA does not provide for compensation. Second, even if PPACA did, Plaintiffs mount a facial challenge alleging that PPACA is void under the

Takings Clause, no matter how PPACA is applied, which is ripe now. *Yee v. City of Escondido,* 503 U.S. 519, 533-36 (1992). Moreover, prudential ripeness applies only to Plaintiffs' *substantive* injuries because procedural injuries from the Origination Clause are extant today and "can never get riper." *Ohio Forestry Ass'n, Inc., v. Sierra Club,* 523 U.S. 726, 737 (1998). *Amicus* AAPS respectfully submits that no possible purpose could be served by hearing Plaintiffs' procedural challenge under the Origination Clause while deferring their substantive challenge under the Fifth Amendment for these purely legal claims. In any event, as the District Court recognized, this action is prudentially ripe. ROA.212-214.

C. Federal Courts Have Statutory Subject-Matter Jurisdiction

The Anti-Injunction Act, 26 U.S.C. §7421(a), and the Declaratory Judgment Act, 28 U.S.C. §2201(a), restrict – without outright *prohibiting*[3] – federal courts' issuance of injunctive and declaratory relief related to taxation. These provisions pose no barrier to judicial review here because – while PPACA's penalties qualify as taxes for *constitutional purposes* under the *NFIB* "saving construction" – those penalties are not taxes for *statutory purposes*. *NFIB,* 132 S.Ct. at 2584. Plaintiffs' challenge to PPACA and its Individual and Employer Mandates can thus proceed in federal court under federal-question jurisdiction. 28 U.S.C. §1331.

[3] Because these restrictions on judicial relief do not apply, Plaintiffs and this Court need not address the applicability of the exceptions to those restrictions.

D. This Court Should Reach the Merits on the Origination Clause, Even if the Court Rules for Plaintiffs on the Fifth Amendment

Even if this Court holds for Plaintiffs in invalidating the Individual Mandate and Employer Mandate under the Fifth Amendment and Commerce Clause, the Court still may need to address whether PPACA is void in its entirety, given the lack of a severability clause. *See Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). For that reason, *amicus* AAPS respectfully submits that this Court should reach the merits of Plaintiffs' claim under the Origination Clause, even if it holds for Plaintiffs under the Fifth Amendment.[4]

II. THE INDIVIDUAL MANDATE IS VOID BECAUSE IT VIOLATES THE FIFTH AMENDMENT

Whether directly as the command that Congress intended or indirectly as a tax under *NFIB*, the Individual Mandate's "spread-the-wealth" component seeks to coerce private insureds to subsidize lower premiums for PPACA's favored classes by paying premiums higher than actuarially required under insurance's "spread-the-risk" framework. Directly or indirectly, the Fifth Amendment prohibits that.[5]

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[4] If this Court holds that the Individual and Employer Mandates are not taxes under a savings construction because they violate the Fifth Amendment, PPACA still would trigger the Origination Clause with other revenue-raising provisions, such as the excise taxes on medical devices. *See* Pub. L. No. 111-148, §9009, 124 Stat. at 862-65. With the possible exception of driving high-paying technology jobs abroad, the medical-device tax has no conceivable regulatory purpose that could subsume or mask its revenue-raising purpose under the Origination Clause.

[5] Precisely to avoid equal-protection violations, states that condition the *privilege* of a driver's license on maintaining minimum insurance *for third-party*

A. PPACA's Mandates Violate the Commerce Power and All Other Enumerated Powers Except *Potentially* the Taxing Power

Although they press Origination-Clause and Fifth-Amendment claims that *NFIB* did not reach, Plaintiffs also rely on *NFIB* for its holding that Congress lacks authority for the Individual Mandate under its enumerated powers, with the possible exception of the Taxing Power. While *NFIB* binds this Court under *stare decisis* on the issues that *NFIB* considered and addressed, due process prohibits having *NFIB* control on issues that *NFIB* did not address.

1. *NFIB* Controls on the Issues that *NFIB* Decided

Although non-mutual collateral estoppel is not available against the federal government, *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984), the Supreme Court's *NFIB* decision will control this litigation under principles of *state decisis* unless the Administration can raise an argument that would compel revisiting *NFIB.* Until the Supreme Court reconsiders its holding, the Individual Mandate will remain outside of the federal government's enumerated powers, however, except potentially under the Taxing Power:

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liability allow alternatives like self-insurance, bonds, and certificates of deposit for the required coverage. *See, e.g.*, CAL. VEH. CODE §16053; OHIO REV. CODE ANN. §4509.45; LA. REV. STAT. ANN. §32:104. Failure to provide these alternatives on equal terms with the insurance option constitutes an equal-protection violation. *Hebard v. Dillon*, 699 So.2d 497, 503 (La. App. 1997); *Jitney Bus Ass'n v. City of Wilkes-Barre*, 256 Pa. 462, 469, 100 A. 954, 956 (Pa. 1917); *People v. Kastings*, 307 Ill. 92, 108-09, 138 N.E. 269, 275 (Ill. 1923).

> "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). In any event, the Administration does not appear to challenge *NFIB* here.

2. *NFIB* Does Not Control on the Issues that *NFIB* Did Not Consider, which Could Affect the Individual Mandate's Status as a Tax

The Due Process Clause prohibits not only applying issue preclusion to non-parties like Plaintiffs, *Baker v. Gen'l Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998), but also applying *stare decisis* so conclusively that it operates as *res judicata*. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). Thus, where a plaintiff raises an argument not considered in prior litigation to which the plaintiff was not party, the new argument can lead to a different outcome in the plaintiff's case, notwithstanding the prior precedent. *Waters*, 511 U.S. at 678; *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004). *Amicus* AAPS respectfully submits that Plaintiffs' arguments under the Fifth Amendment and the Origination Clause require a different result here.[6]

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[6] The *NFIB* litigation did not consider the Origination Clause or the Takings Clause at all. The *NFIB* plaintiffs raised substantive due process under the Fifth Amendment in district court, but did not appeal the issue to the Supreme Court or Eleventh Circuit. *NFIB*, 132 S.Ct. at 2623 (Opinion of Ginsburg, J.) ("Plaintiffs have abandoned any argument pinned to substantive due process"); *Florida ex rel.*

The Origination Clause would have the more complete and more obvious effect on PPACA. A ruling for Plaintiffs would render PPACA void in its entirety. If Plaintiffs prevailed under the Fifth Amendment, their victory might invalidate only the PPACA provisions that violate the Fifth Amendment – *e.g.*, the Individual or Employer Mandates. That said, PPACA's lack of a severability clause and the centrality of those mandates to PPACA might render PPACA void in its entirety. *Alaska Airlines*, 480 U.S. at 685. As explained below, the Fifth Amendment could lead a court to reject the *NFIB* saving interpretation of the Individual Mandate as a tax for one of two alternate reasons: (a) as an unlawful taking, the Individual Mandate cannot be interpreted as a tax in the first place, or (b) even if interpreted as a tax under the *NFIB* approach, the Individual Mandate would itself violate the Fifth Amendment as a tax.

In recasting the Individual Mandate as a tax – notwithstanding that Congress *intended* it as a penalty for violating a command under its Commerce Power – the *NFIB* saving construction followed a "cardinal principle," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), of statutory construction to choose constitutional interpretations over unconstitutional ones:

Atty. Gen. v. U.S. Dept. of Health & Human Serv., 648 F.3d 1235, 1292 n.93 (11th Cir. 2011) (same).

> "[T]he rule is settled that as between two possible interpretations of a statute, *by one of which it would be unconstitutional and by the other valid*, our plain duty is to adopt that which will save the Act."

NFIB, 132 S.Ct. at 2593 (*quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)) (alteration in *NFIB*, emphasis added). "It is well-settled that … the federal courts have the duty to *avoid constitutional difficulties* by [adopting a saving construction] if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (emphasis added). The point of this approach is that, "'unless the terms of an act rendered it unavoidable,'" courts interpreting a statute must not "'give a construction to it which should involve a violation, however unintentional, of the constitution.'" *NFIB*, 132 S.Ct. at 2593 (*quoting Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830)); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). To paraphrase the poem, when am unconstitutional dead end and a constitutional path diverge, reviewing courts must take the only viable path.

Unfortunately for the Administration, Plaintiffs' takings claim reveals that the penalty path under the Commerce Power and the tax path under the Taxing Power *both are unconstitutional dead ends.* Although *NFIB* did not confront that problem, this litigation squarely presents it and requires a different result.

The Administration faces a second constitutional difficulty as well. The holding on which the Administration relies – basically, the law exceeds the

Commerce Power but *could* fall within the Taxing Power – derives from the nature of the federal government as one of enumerated powers:

> "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it … is now universally admitted."

U.S. v. Lopez, 514 U.S. 549, 566 (1995) (*quoting McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)) (alterations in *Lopez*). In essence, this canon allows reviewing courts to seek an enumerated power that *allows* the challenged law, in the event that the enumerated power that Congress intended does not do so. In *McCulloch*, however, Chief Justice Marshall recognized two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 423. Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution." *U.S. v. Comstock*, 560 U.S. 126, 135 (U.S. 2010) (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). The Administration has not cited a single decision in which a court interpreted a federal statute contrary to the clear legislative intent when the statute *violated* an express constitutional *prohibition*, rather than merely failing to fall within an enumerated power allowed to the federal government.

Amicus AAPS respectfully submits that the foregoing authorities present this

Court with two possible modes of analysis. First, before evaluating whether the Individual Mandate could qualify as a lawful tax, evaluate whether the Individual Mandate violates the Takings Clause. If it does, a court cannot save it by recasting it as a tax. *See* Section II.B, *infra*. Second, the Court could follow *NFIB* in declaring the Individual Mandate a tax, then evaluate whether the Takings Clause renders it an illegal tax. *See* Section II.C, *infra*. *Amicus* AAPS respectfully submits that courts must take the first path because recasting a penalty as a tax is an option to cure only a *lack of authority,* not an option to cure a *violation of an express prohibition.* As demonstrated in the next two sections, however, either path leads to the same result: namely, the Individual Mandate violates the Fifth Amendment. As such, choosing the path may be unnecessary here.

B. Viewed in its Pre-*NFIB* Form as a Mandate, the Individual Mandate Violates the Fifth Amendment

Assuming *arguendo* that the Individual Mandate remained the government program that Congress enacted – and not the optional tax of the *NFIB* savings construction – PPACA's insurance regime would "take" that portion of Plaintiffs' premiums that subsidizes lower premiums for those with pre-existing conditions and other premium-elevating circumstances:

> To take from one because it is thought that his own industry and that of his father's has acquired too much, in order to spare to others, who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association – the guarantee to every

> one of a free exercise of his industry and the fruits acquired by it.

Thomas Jefferson, "Addition to Note for Destutt de Tracy's TREATISE ON POLITICAL ECONOMY" [ca. 18 May 1816], reprinted in THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES: VOLUME 10: 1 MAY 1816 TO 18 JANUARY 1817, at 65 (Princeton Univ. Press. 2014 J. Jefferson Looney ed.).[7] The "spread-the-wealth" aspect of PPACA premiums violates the Takings Clause in several respects.

1. The Takings Clause Prohibits Taking Private Property for Private Use

First, under the Takings Clause, "public burdens … should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). But, in an attempt to avoid the appearance of taxation and welfare spending, PPACA asks healthy private individuals to support unhealthy private individuals. That plainly violates the Takings Clause: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Our Constitution does not allow the federal government to use indirection to short circuit accountability for

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[7] The Supreme Court relied on President Jefferson's personal letters to fashion the "wall of separation" between Church and State under the First Amendment, *Reynolds v. U.S.*, 98 U.S. (8 Otto) 145, 163-64 (1878), and *amicus* AAPS respectfully submits that his letters are as persuasive here under the Fifth Amendment.

taxing and spending.

2. When Exercising the Power of Eminent Domain, Private Companies Acting as Public Utilities and Common Carriers Must Comply with the Takings Clause

Second, even private entities with the power of eminent domain must comply with constitutional limits on takings. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,* 363 S.W.3d 192, 197, 55 Tex. Sup. J. 380 (Tex. 2012) (common carrier via pipeline); *Pacific Gas & Electric Co. v. Hay,* 68 Cal.App.3d 905, 910-11 (Cal. App. 1977) (public utility). Thus, when private insurers apply Plaintiffs' funds to subsidize third parties' insurance premiums, the insurers' private nature cannot protect PPACA from the Fifth Amendment. *Pennell v. San Jose*, 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring in part and dissenting in part) (the private relationship "does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionately burden particular individuals"). Without the procedural and substantive protections required by the Fifth Amendment, any such public-private regime is as fully unconstitutional as it would be if only the government attempted to impose the restrictions. *Missouri P. R. Co. v. Nebraska,* 217 U.S. 196, 208 (1910). Insurers' private nature cannot shelter PPACA from the Fifth Amendment.

3. The Takings Clause Applies to Takings of Money and Portions of Money Accounts Just as Much as It Applies to Takings of Other Forms of Property

Third and finally, the Takings Clause can apply to money paid into an account like insurance. *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 357 (1935); *cf. Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 2600 (2013) (Takings Clause and the "unconstitutional conditions" doctrine to apply to coerced takings of money). Clearly, laws that require part of a money account to be "transferred to a different owner for a legitimate public use … could be a *per se* taking requiring the payment of 'just compensation' to the" money's original owner. *Brown v. Legal Found.*, 538 U.S. 216, 240 (2003). The part of Plaintiffs' premiums that subsidizes artificially low premiums for those with preexisting conditions is taken – for private use, no less – and requires compensation and indemnity.[8]

C. Viewed in its Post-*NFIB* Form as a Tax, the Individual Mandate Violates the Fifth Amendment

Even under the *NFIB* saving interpretation, however, the Individual Mandate violates the Fifth Amendment by offering the choice between (1) buying PPACA-compliant insurance that subsidizes private third parties (which the Takings Clause

[8] Under actuarial principles, the "spread-the-wealth" component of PPACA insurance premiums easily qualifies as a "specific, separately identifiable fund of money" subject to the Takings Clause. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 555 (1998) (Breyer, J., dissenting); *accord* 524 U.S. at 529 (plurality). *See* Giesa & Carlson *My Generation*, at 33.

would prohibit if imposed directly) and (2) paying a tax penalty for the privilege of declining to subsidize others voluntarily. The Constitution does not allow this use of coercion to surrender constitutional rights, which is particularly important where Congress otherwise lacks authority to compel the behavior that the selective tax seeks to coerce.

The *NFIB* Court was unanimous that a tax cannot violate the Fifth Amendment and remain lawful. *NFIB*, 132 S.Ct. at 2598 (Roberts, C.J., for the Court); *id.* at 2624 (Ginsburg, J.); *id.* at 2650 (Joint Opinion of Scalia, Kennedy, Thomas, and Alito, J.J.). PPACA presents just such a tax and therefore is void under the Fifth Amendment.[9]

Given "the substantial conceptual overlap between takings and taxes, legal scholars … have long puzzled over the apparently inconsistent treatment the two topics receive under the applicable constitutional law." Eduardo Moisés Peñalver,

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[9] Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). In other words, the Takings Clause does not swallow the Taxing Power. By the same token, "any tax must still comply with other requirements in the Constitution," *NFIB*, 132 S.Ct. at 2598 (Roberts, C.J., for the Court), which means that the Taxing Power does not swallow any other provision of the Constitution either. Exercise of the Taxing Power can amount to a taking, if the tax is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber*, 240 U.S. at 24; *accord Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937) ("discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment").

Regulatory Taxings, 104 COLUM. L. REV. 2182, 2185 (2004). Taken back to first principles, the two concepts are distinct enough. Takings concerned eminent domain for real property, which was distinct from taxation. The advent of regulatory takings and regulatory taxation, however, has blurred the two concepts and requires resolution. *Id.* at 2188-89 ("reconciling takings with taxation has come into sharper relief"). Notwithstanding this recently "sharper relief," courts have long recognized a connection in extreme cases:

> the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Vill. of Norwood v. Baker, 172 U.S. 269, 278-79 (1898). Plaintiffs respectfully submit that this is just such an "extreme case" and that the *Norwood* principle requires declaring PPACA invalid under the Fifth Amendment.

1. The Fifth Amendment Prohibits Taxing People for Failing to Consent "Voluntarily" to a Prohibited Taking

Assuming *arguendo* that its insurance requirements would be unconstitutional as a public program, PPACA cannot escape review by coercing the public's "voluntary" participation under the threat of a penalty:

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be … indirectly denied or manipulated out of existence.

Harman v. Forssenius, 380 U.S. 528, 540 (1965) (citations and interior quotations omitted, alteration in original). Simply put, the government cannot use indirection to defeat constitutional rights that the government cannot defeat directly. *Frost v. R.R. Comm'n of State of California*, 271 U.S. 583, 593-94 (1926); *cf. Rust v. Sullivan*, 500 U.S. 173, 175 (1991) (unconstitutional to "condition the receipt of a benefit … on the relinquishment of a constitutional right").

"[T]he unconstitutional conditions doctrine … vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up" and "forbid[s] the government from engaging in out-and-out … extortion that would thwart the Fifth Amendment right to just compensation." *Koontz*, 133 S.Ct. at 2594. As applied here, the doctrine prohibits the government's taxing the public for declining to consent voluntarily to a taking without just compensation (*i.e.*, declining to consent to confiscation). Put another way, the Administration "could not have constitutionally ordered [Plaintiffs] to do what it attempted to pressure [Plaintiffs] into doing" (namely, subsidize private third parties' insurance premiums), where "directly seiz[ing]" subsidies from those who fail to volunteer them "would have [been] a *per se* taking." *Id.* at 2605 (interior quotations omitted). But that is precisely what PPACA does: present the "choice" of either (a) purchasing PPACA-sanctioned insurance – which the Administration has absolutely no authority to compel the public to purchase – that subsidizes those

with preexisting conditions, or (b) paying PPACA's penalty for exercising the right to say "no, thanks" to PPACA's request to subsidize others.

PPACA is no different than a hypothetical "Good Neighbor Act" that gives property owners with lots greater than an acre the "choice" between giving a half acre to house the homeless or else paying a "Bad Neighbor Tax." Insofar as excluding others is "traditionally … one of the most treasured strands in an owner's bundle of property rights," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982), the Good Neighbor Act's Bad Neighbor Tax indirectly nullifies property rights in violation of *Harman*, *Frost*, *Rust*, and the Fifth Amendment. So too does PPACA's tax penalty.

2. Plaintiffs' Theory Does Not Negate the Taxing Power

Citing *Koontz* for the proposition that "it is beyond dispute that taxes and user fees … are not takings," ROA.227, the District Court rejected Plaintiffs' takings arguments as "fly[ing] in the face of … *NFIB*," and threatening to "render Congress's taxing authority nugatory." ROA.228.

Regarding *Koontz*, the *general* statement that taxes are not takings does not respond to Plaintiffs' argument that taxation can violate the Fifth Amendment in *unusual* circumstances. Clearly, the *Koontz* defendants could not save their unlawful taking of money merely by interpreting that confiscatory exaction could be a tax. "Discriminations of an unusual character especially suggest careful

consideration to determine whether they are obnoxious to the constitutional provision" and help establish "improper … purpose." *U.S. v. Windsor*, 133 S.Ct. 2675, 2693 (2013) (*quoting Romer v. Evans*, 517 U.S. 620, 633 (1996), *quoting Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Like *Windsor* and *Coleman* on which *Windsor* relies, this case applies equal-protection principles to taxation:

> [T]he equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.

Coleman, 277 U.S. at 37; *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 131 S.Ct. 1101, 1108-09 (2011) (selective taxation can be unlawfully discriminatory). As the majorities in *Coleman, Romer,* and *Windsor* held, the challenged statutes' unprecedented distinctions were relevant: "The absence of precedent for [the statute] is itself instructive." *Romer*, 517 U.S. at 633 (*citing Coleman*). Similarly here, it is wholly unprecedented to impose monetary exactions for private failures to purchase a private product, coupled with that private product's requiring – under federal statute – that some private purchasers to subsidize other private purchasers. *Coleman*, 277 U.S. at 37 ("the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act … and can never be made arbitrarily and without any such

basis") (interior quotations omitted). PPACA seeks to subsidize private third parties to lower their insurance rates without imposing a lawful tax. To do so, PPACA singles out healthy people who decline to purchase into PPACA's over-priced, over-regulated insurance regime. The Fifth Amendment prohibits that.

Regarding *NFIB,* the Supreme Court did not consider Plaintiffs' arguments, and Due Process requires that a reviewing court hear *Plaintiffs' case,* not the case presented by the *NFIB* plaintiffs. *NFIB* upheld the power to tax for failure to purchase "spread-the-risk" insurance, without considering whether "spread-the-wealth" insurance was constitutional. Nothing argued here conflicts with *NFIB.*

Finally, regarding a nugatory Taxing Power, it is likely true that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change" such as with "[e]xercises of the taxing power." *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). But that does not help the Administration. First, this argument simply disregards PPACA's unusual cobbled-together combination of public and private subsidies, which departs from the more-obvious, traditional solution of separate taxing and spending programs that the federal government adopted in Social Security. *Steward Mach. Co.*, 301 U.S. at 585. No one argues that Congress cannot "go on" or even that a national health-insurance program cannot "go on." The point is that the Administration's means of mandating or

coercing its implementation violates the Constitution. Second, *amicus* AAPS has no quarrel with the proposition that *some* tax could meet constitutional muster, which is all that *NFIB* held; but this litigation concerns *this* tax. The District Court's generalizations do not respond to Plaintiffs' claims, and neither does *NFIB.*

3. Saving Constructions Cannot Protect Elements of Tax Statutes that Exceed the Needs of the Taxing Power

NFIB recognized that the "taxing power to influence conduct is not without limits" and that taxes can "lose[] [their] character as [taxes] and become[] mere penalt[ies]." *NFIB*, 132 S.Ct. at 2599-600. *NFIB* cites *U.S. v. Kahriger*, 345 U.S. 22 (1953), as outlining the permissible modern boundaries of regulatory taxation. *Id.* at 2599. In *Kahriger*, the Court recognized that the Taxing Power permissibly may "fall[] with crushing effect on businesses deemed unessential or inimical to the public welfare," but can neither exceed the powers of Congress nor "adopt measures … prohibited by the constitution." 345 U.S. at 28-29 (interior quotations omitted). Tax penalties for regulatory breaches in fields "subject only to state regulation [render] the enactments invalid;" on the other hand, provided that "there are [no] provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." *Id.* at 31; *Linder v. U.S.*, 268 U.S. 5, 18 (1925) ("[i]ncidental regulation … by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure").

Without this limitation, Congress could "take over to its control … subjects reserved to [the states or the People] by the Tenth Amendment [by] enact[ing] a detailed measure of complete regulation of the subject and enforc[ing] it by a so-called tax upon departures from it." *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). By bringing the Taxing Power selectively to bear on those who decline to pay PPACA's coerced private subsidies, the Individual Mandate falls outside the taxing need and thus outside the Taxing Power.

CONCLUSION

Amicus AAPS respectfully submits that the Court should reverse and order the entry of judgment for Plaintiffs under the Fifth Amendment and the Origination Clause of the U.S. Constitution.

Dated: May 15, 2014

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No. 14-20039, *Hotze v. Sebelius.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6.951 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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I hereby certify that, on May 15, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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