No. 14-350

In the Supreme Court of the United States

ASS'N OF AM. PHYSICIANS & SURGEONS, INC.;
ALLIANCE FOR NATURAL HEALTH USA,

PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, IN HER OFFICIAL CAPACITY, *ET AL.*,

RESPONDENTS.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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PETITIONERS' REPLY

Petitioners Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA (collectively, "Plaintiffs") respectfully file this reply to the brief in opposition ("BIO") filed by the federal respondents (collectively, the "Administration").

RESTATEMENT OF THE CASE

In several material respects, the Administration misrepresents the proceedings below:

(a) Regarding Count I's challenge to requiring beneficiaries to repay Social Security benefits previously received in order to opt prospectively out of Medicare Part A in the Social Security Program Operations Manual System ("POMS"), the Administration claims that *Hall v. Sebelius,* 667 F.3d 1293, 1294 (D.C. Cir. 2012), "squarely rejected" an "identical claim." BIO 3, 8, 11 n.5. In fact, *Hall* does not address the repayment issue, focusing instead only on beneficiaries' inability to opt out of Medicare Part A without also opting out of Social Security. Unlike in *Hall,* Plaintiffs challenged the legality of requiring repayment of *prior* Social Security benefits as the cost of opting out prospectively. Pls.' Opp'n to Mot. to Dismiss, at 59; Appellants' Opening Br. at 55; Pet. 14. In rejecting Plaintiffs' claims based on *Hall,* the Court of Appeals did not rely on *stare decisis* because *Hall* did not *decide* the issue.

(b) Regarding Count IV's substantive and procedural challenge to informal agency actions to require physicians to submit themselves to Medicare requirements in order to refer (*i.e.,* to prescribe) Medicare-covered services for Medicare-eligible patients, the Administration argues that the trial

court held Plaintiffs to have waived Origination-Clause arguments for Count IV, that Plaintiffs do not raise substantive arguments other than the Origination Clause, and that Plaintiffs did not assert below that a 2012 final rule did not moot all of the prior, less-formal agency actions. BIO 13-15. The trial court dismissed Count IV on other bases and thus did not address whether to consider Origination-Clause issues for Count IV. Pet. App. 36a-37a, 45a-54a. In addition to raising the Origination Clause, Plaintiffs also argue that the Administration's actions are arbitrary, given that non-Medicare doctors may treat Medicare-eligible patients without satisfying the Medicare opt-out safe harbor – an issue the Administration disputes and thus did not consider in formulating the policies challenged in Count IV. Second Am. Compl. ¶¶100, 103, 118(a)(xi). Finally, Plaintiffs' appellate petition for reconsideration raised the non-mootness argument that the Administration claims Plaintiffs did not raise below. Pet. for Recon. 8-10.

The upshots of the Administration's inaccuracies are addressed in the Argument below. The petition also seeks review on Count III's challenge to 26 U.S.C. §5000A, which *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), held could qualify as a tax, even if beyond the Commerce Power that Congress intended to exercise in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA").

I. JURISDICTION EXISTS FOR THE POMS COUNT

Contrary to the Administration's claims, and as indicated, *supra,* the D.C. Circuit's *Hall* decision did

not resolve all the merits issues that Plaintiffs have pressed for Count I. Thus, invoking *Hall* to resolve Count I does indeed violate due process. *Compare* BIO 10-11 *with* Pet. 6 n.4, 11. The bigger question is whether that resolution was merits-based under a perceived exception to the jurisdiction-first holding of *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 98-101 (1998), as the Administration contends, or jurisdictional as an insubstantial federal question, as Plaintiffs contend. If anything, the BIO *adds* reasons to grant the writ by calling out yet another circuit split on this merits-jurisdiction issue.

Although *this Court's* decisions – including *Steel Company* – require a holding of *this Court* to reject claims under *Steel Company,* the Administration cites two lower-court decisions that use circuit precedent. BIO 9-10. There, the First Circuit relied on the Second Circuit, *Seale v. INS,* 323 F.3d 150, 155 (1st Cir. 2003) (*citing Ctr. for Reprod. Law v. Bush,* 304 F.3d 183, 194-95 (2d Cir. 2002)), which relied on an inapposite decision where standing merged with the merits. *Bush,* 304 F.3d at 194-95 (*citing Nippon Steel Corp. v. U.S.,* 219 F.3d 1348, 1352-53 (Fed. Cir. 2000)); *Land v. Dollar,* 330 U.S. 731, 735 (1947) (addressing instances "where the question of jurisdiction is dependent on decision of the merits"). Other circuits' published decisions appear silent on this issue. *But see U.S. v. Ortiz,* 2007 U.S. App. LEXIS 9461, *2-3, 2007 WL 1223991 (5th Cir. Apr. 25, 2007) (rejecting the Administration's merits-first position for mere circuit precedent). As shown below, *Bush* is wrong and thus requires this Court's correction to avoid its spreading.

There is no dispute that *Steel Company* cited *Norton v. Mathews,* 427 U.S. 524 (1976), and *Sec'y of*

Navy v. Avrech, 418 U.S. 676 (1974), as the principal authorities in support of the hypothetical-jurisdiction rationales that *Steel Company* vitiated. Further, it is indisputable both that *Norton* found a companion case's merits disposition to "render[] the merits in [*Norton*] a decided issue and thus one no longer substantial in the jurisdictional sense," *Norton,* 427 U.S. at 530-31, and that *Steel Company* quoted that as making it clear that *Norton* did not "overrule, *sub silentio,* two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." *Steel Co.,* 523 U.S. at 98. *Norton* thus falls unquestionably in the *Hagans-Goosby* line of cases cited by Plaintiffs. Pet. 12-13.

Avrech presented supplemental questions on "the jurisdiction of the District Court and … exhaustion of remedies" where a contemporaneous Court decision foreclosed recovery on the merits. 418 U.S. at 677-78. As *Steel Company* makes clear, however, the Court's use of the term "jurisdictional" was incorrect. *Steel Co.,* 523 U.S. at 99 ("the supposed jurisdictional issue was technically not that"); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510 (2006) ("Court … has sometimes been profligate in its use of the term"). Thus, *Avrech* also cannot support an exception to the jurisdiction-first requirement of "two centuries of jurisprudence."

Finally, as repeat players, the parties will vigorously litigate the jurisdictional question. Pet. 13-14. Thus, the concern in *Avrech* "that even the most diligent and zealous advocate could find his ardor somewhat dampened" in arguing jurisdiction "where the … merits [are] foreordained" is absent here.

II. THE PECOS COUNT IS NOT MOOT

The Administration elects to respond to less than half of Plaintiffs' arguments for reinstating Count IV. With most of what the Administration does not concede, its response heightens the reasons to grant the writ to resolve splits in circuit authority.

The Administration does not dispute that the D.C. Circuit splits with other circuits in dismissing a *case* simultaneously with a *complaint,* without an opportunity to file curative amendments before the case is dismissed. Pet. 25-27. Although it argues that Plaintiffs waived this argument by not moving to amend the complaint in district court, BIO 15 n.8, the Administration first raised mootness on appeal. Further, once cases are dismissed, the D.C. Circuit imposes not Rule 15's lenient standard for amended pleadings, but Rule 60(b)'s more-stringent standard for motions for reconsideration. *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996). Thus, the case-complaint distinction represents a material split in the availability of due process that requires this Court's resolution.

Deeming it Plaintiffs' "principal" argument, the Administration argues that FED. R. CIV. P. 15(b)(2) reaches only issues raised at trial, not dispositive motions. BIO 12. That brittle argument aside, Rule 15(b) has long applied to issues raised in dispositive motions. *Sierra Club v. U.S. Fish & Wildlife Serv.,* 245 F.3d 434, 440 n.37 (5th Cir. 2001); *Save Lake Washington v. Frank,* 641 F.2d 1330, 1339-40 (9th Cir. 1981); *Hayes v. Philadelphia Transp. Co.,* 312 F.2d 522, 523 (3d Cir. 1963); *Kulkarni v. Alexander,* 662 F.2d 758, 762-63 (D.C. Cir. 1978); *Muhs v. River Rats, Inc.,* 586 F. Supp. 2d 1364, 1375 (S.D. Ga. 2008). In this type of litigation, a "district court sits

as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether the [agency action] was factually flawed." *Marshall County Health Care Auth. v. Shalala,* 988 F.2d 1221, 1225 (D.C. Cir. 1993). As such, the Administration's proposed narrowing of Rule 15 would have profound implications that this Court should examine.

Plaintiffs showed that – by its own terms – the 2012 final rule does not moot Count IV's challenged pre-2012 actions. Pet. 23-25. The Administration concedes the non-mootness, arguing instead only (and falsely) that Plaintiffs did not raise this below. BIO 14-15. Plaintiffs' petition for reconsideration raised the same issues and cited 28 U.S.C. §1653 as supporting Count IV's ongoing vitality. Based not only on §1653 but also courts' duty to hear cases where jurisdiction exists, raising jurisdiction on rehearing is timely:

> just as a court must notice a lack of jurisdiction even when raised for the first time in a petition for rehearing, so the court must decide on the merits any case of which it has jurisdiction, even when the ground of jurisdiction appears belatedly.

Exchange Nat'l Bank v. Daniels, 768 F.2d 140, 142 (7th Cir. 1985); *Bismullah v. Gates,* 551 F.3d 1068, 1070 (D.C. Cir. 2009); *Ins. Co. of N. Am. v. Keeling,* 360 F.2d 88, 91 (5th Cir. 1966); *cf. Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). In sum, the Administration cannot – and does not try to – justify dismissing Count IV as moot.

But even if its procedural claims are moot, Count IV still includes two substantive issues: the lack of any authority to require non-Medicare doctors to use

the opt-out safe harbor in 42 U.S.C. §1395a(b) as a condition to prescribe Medicare-covered services for their Medicare-eligible patients and (if the authority exists) the arbitrariness of requiring that. Unlike Count III, Count IV expressly alleges that the Administration lacks this authority, Second Am. Compl. ¶102, which can be rebutted only by citing a PPACA section that Plaintiffs argue is void for lack of compliance with the Origination Clause. Because the district court never held that Plaintiffs waived the Origination Clause in this context, that issue would be open to lenient review under Rule 15 on remand.

The Administration answers Plaintiffs' argument that questions on the very existence of a law are not open to waiver, Pet. 17, with the *non sequitur* that constitutional arguments can be waived. BIO 12. The Administration ignores *South Ottawa v. Perkins,* 94 (4 Otto) U.S. 260, 266-67 (1877), which holds that "no estoppel in the way of ascertaining the existence of a law." As to Count IV, therefore, Plaintiffs cannot waive arguments under the Origination Clause.

The Administration emphasizes that Plaintiffs raised the Origination Clause *two years* after filing the complaint and after the briefing of the motion to dismiss was "fully briefed," BIO 4, without admitting that the only issue before the Court – due to its own successful and opposed stays of Plaintiffs' case – was its motion to dismiss. This procedural distinction of its own making distinguishes *Liberty Univ., Inc. v. Lew,* 733 F.3d 72, 87 n.3 (4th Cir. 2013), in which the plaintiffs did not argue the Origination Clause in the district court in response to the motion to dismiss.

The Administration cannot rely on *Sissel v. HHS,* 951 F. Supp. 2d 159 (D.D.C. 2013), *aff 'd,* 760 F.3d 1

(D.C. Cir. 2014), because Plaintiffs raise arguments that the *Sissel* courts did not consider and that the Administration makes no attempt to rebut. Pet. 18-21; Citizens' Council Br. at 13-24. Plaintiffs deserve their day in court on their claims.

III. THE INDIVIDUAL MANDATE VIOLATES THE TAKINGS CLAUSE

Having barely survived *NFIB* as a potential tax vis-à-vis a Commerce-Clause challenge, §5000A now is "an otherwise valid tax" entitled to "redistributive purpose[s]" as a tax, as the Administration's retells the story. BIO 7-8. Plaintiffs view §5000A differently.

First, otherwise-valid taxes "must still comply with other requirements in the Constitution." *NFIB,* 132 S.Ct. at 2598 (Roberts, C.J.). This litigation presents constitutional issues that *NFIB* did not resolve, so *NFIB* cannot control on the valid-tax issue. Pet. 6. Unless it meets all constitutional challenges, §5000A is not "otherwise valid."

Second, if §5000A's statutory intent as a non-tax mandate indeed violates the Takings Clause, it is not clear that the Chief Justice's deciding *NFIB* analysis would remain valid. Five *NFIB* votes held §5000A to have been enacted under the Commerce Power,[1] but the deciding fifth vote held that Congress *could have* enacted §5000A's penalty as a tax. But statutes must not only fall within an enumerated power (the *NFIB* issue) but also avoid the Constitution's *prohibitions* (the issue here). Pet. 28-29. This Court has never before allowed unelected judges to recast enacted

[1] This holding enabled avoidance of the Anti-Injunction Act's jurisdictional bar.

legislative mandates as taxes to avoid constitutional *prohibitions*.[2] As such, the defense that "taxes and user fees are not takings," BIO 16 (*quoting Koontz v. St. Johns River Water Mgmt. Dist.,* 133 S.Ct. 2586, 2600 (2013)) gets the Administration nothing because §5000A cannot be a tax if it is a taking. The government in *Koontz* could not avoid a taking by reclassifying its exaction as a tax on projects without permits, and neither the Administration nor this Court can evade the Takings Clause by reclassifying §5000A's taking as a tax.

Third, *NFIB* did not automatically put §5000A's tax penalty in the Administration's coveted garden-variety-tax category. No other tax in our history coerced purchasing private products, much less doing so in a private-product market that the Government stacked against one group of private consumers to benefit an opposite group of private consumers. The lack of precedent matters because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" and can reveal an "improper … purpose." Pet. 10 (*quoting U.S. v. Windsor,* 133 S.Ct. 2675, 2693 (2013)). Here, §5000A avoids congressional accountability for direct taxation and public-welfare spending by hiding

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[2] Plaintiffs address the two possible modes of analysis: reject the saving *NFIB* mandate-as-tax construction because §5000A violates the Fifth Amendment and reject the §5000A tax as an unconstitutional condition impairing Fifth-Amendment rights. Pet. 27-36. The Administration stands pat at rejecting the Fifth Amendment violation, conceding that a Fifth Amendment violations would vitiate the *NFIB* saving construction.

subsidies in compelled or coerced purchases, as Prof. Jonathan Gruber acknowledged:

> This bill was written in a tortured way to make sure CBO did not score the mandate as taxes. If CBO scored the mandate as taxes, the bill dies. Okay, so it's written to do that. In terms of risk-rated subsidies, if you had a law which said that healthy people are going to pay in, you made explicit healthy people pay in and sick people get money, it would not have passed. Lack of transparency is a huge political advantage. And basically, call it the stupidity of the American voter or whatever, but basically, that was really, really critical for the thing to pass.

James Taranto, *The Honest Man: In praise of Jonathan Gruber*, WALL ST. J., Nov. 12, 2014.[3] While the Federal Government may have the authority to tax the public generally and to provide benefits to some or all of the public, *Steward Mach. Co. v. Davis,* 301 U.S. 548, 585 (1937), the authority to proceed discretely and separately under the Taxing Power and the Spending Clause (as the government argued in *Steward Machine*) differs completely from PPACA's coerced or compelled private subsidies.

Fourth, the Administration does not dispute that §5000A makes "healthy people pay in and sick people

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[3] Available at http://www.wsj.com/articles/the-honest-man-1415825249 (last visited Dec. 9, 2014). Based on his experience with Massachusetts' state law, Prof. Gruber was a leading PPACA architect, *id.,* who helped "draft the specifics of the legislation." Catherine Rampell, *Mr. Health Care Mandate,* N.Y. TIMES, Mar. 29, 2012, at B1.

get money." Moreover, Gruber's comments concur with the complaint and peer-reviewed actuarial data. Pet. 6-7. And the Administration does not defend the panel's unsupported rejection of this Court's stating that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation" as not a holding. Pet. App. 3a (*quoting Kelo v. City of New London,* 545 U.S. 469, 477 (2005).[4] The Administration thus concedes that §5000A causes redistribution between private parties, arguing only that taxes can have *some* redistributive purpose without being so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." BIO 16 (*quoting* under *Brushaber v. Union Pac. R. Co.,* 240 U.S. 1, 24-25 (1916)).

The concession is fatal, however, because *this* tax (if indeed a tax) fails the *Brushaber* test. When government regulates neutrally to avoid free-rider problems, it provides alternatives (*e.g.,* self-insurance, bonds, certificates of deposit) for the required coverage. *See, e.g.,* OHIO REV. CODE ANN. §4509.45; LA. REV. STAT. ANN. §32:104. Here, §5000A prohibits pure insurance – high-deductible, catastrophic-loss plans – and pads PPACA-approved plans with private subsidies.

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[4] Even this Court's *dicta* is entitled to more respect than the panel gave *Kelo. Myers v. Loudoun County Pub. Schs,* 418 F.3d 395, 406 (4th Cir. 2005) (Supreme Court's "dicta … has considerable persuasive value in the inferior courts") (interior quotations omitted); *Schwab v. Crosby,* 451 F.3d 1308, 1325-26 (11th Cir. 2006) (collecting decisions from eleven circuits).

Fifth, Plaintiffs have consistently argued that, as a tax, §5000A would be void as a non-uniform excise or un-apportioned direct tax, Second Am. Compl. ¶118(a)(vii), but *amici* show that the size of §5000A's "tax" (or penalty) is tied to a census or enumeration, in violation of either the Sixteenth Amendment (as *amici* argue) or the Fifth Amendment's equal-protection component. Citizens' Council Br. at 26. If §5000A cannot be a lawful excise, direct, or income tax, it cannot be a lawful tax.

NFIB allows Congress to tax the uninsured to tackle free-rider problems. Unlike a hypothetical other tax, however, *this provision* – §5000A – does not "comply with other requirements in the Constitution," *NFIB,* 132 S.Ct. at 2598 (Roberts, C.J.), and thus cannot be a tax.

CONCLUSION

The petition for writ of *certiorari* should be granted.

December 9, 2014

Respectfully submitted,

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