No. 13-5003

In the U.S. Court of Appeals for the District of Columbia Circuit

AMERICAN PHYSICIANS & SURGEONS, INC. AND
ALLIANCE FOR NATURAL HEALTH USA,
Plaintiffs-Appellants,

vs.

KATHLEEN G. SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES,
IN HER OFFICIAL CAPACITY, *ET AL.*,
Defendants-Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, CIVIL CASE NO. 1:10-cv-00499-ABJ,
HON. AMY BERMAN JACKSON

APPELLANTS' EMERGENCY MOTION FOR INTERIM RELIEF ON COUNT IV

LAWRENCE J. JOSEPH
(D.C. Bar No. 464777)
1250 Connecticut Ave., NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

TABLE OF CONTENTS

ADDENDUM TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

REGULATIONS AND RULES

OTHER AUTHORITIES

GLOSSARY

AAPS	Association of American Physicians & Surgeons
Add.	Addendum
AMC	*Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993)
ANH-USA	Alliance for Natural Health USA
APA	Administrative Procedure Act, 5 U.S.C. §§551-706
CR6417/6421	Change Requests 6417 and 6421
FAIR	*Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47 (2006)
HHS	Department of Health & Human Services
Medicare	Medicare Act, 42 U.S.C. §§1395-1395kkk-l
NFIB	*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012)
PECOS	Provider Enrollment, Chain and Ownership System
PPACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010)
SAC	Second Amended Complaint
SMHOTA	Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009)

INTRODUCTION

Plaintiffs-appellants Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA (collectively for purposes of this motion, "Physicians") ask this Court to preliminarily enjoin defendants-appellees Kathleen Sebelius, Secretary of the Department of Health & Human Services ("HHS"), *et al.* (collectively, the "Administration") from requiring referrers for Medicare services to register in the Provider Enrollment, Chain and Ownership System ("PECOS"). Without relief from this Court, under an HHS notice issued March 1, 2013 (Add. 39-48), that change will take effect May 1, 2013.

Although their Second Amended Complaint ("SAC") seeks preliminary relief on these issues, SAC ¶¶2(g), 118.C (Add. 51, 79), Physicians did not move for a preliminary injunction below because the Administration delayed implementing the precursor actions, namely two "change requests" and the accompanying provisions of the Center for Medicare and Medicaid Services Manual System (hereinafter, "CR6417/6421"), Add. 13-25, and an "Interim Final Rule with Comment Period" ("IFC"), 75 Fed. Reg. 24,437 (2010), Add. 26-38. At the request of the initial judge, the parties agreed that they would brief preliminary relief if and when the need arose, given that HHS "represented to [Physicians] that, before implementing claims edits that would automatically reject claims for failure to comply with the new regulations, it will provide [Physicians] with sufficient

notice to move the Court for preliminary relief," which eliminated the "need to brief a motion for a preliminary injunction with respect to Count IV at this time." Joint Ltr. to Hon. Amy Berman Jackson, 1-2 (June 27, 2010) (Add. 90-91). HHS also relied on its deferral of the challenged actions to refute any claims of irreparable harm from those actions while "Defendants … have delayed the implementation of claims edits that would automatically reject Medicare claims for failure to comply with them." Reply in Support of Defendants' Motion to Stay Case Pending Resolution of Appeals Raising Identical Issues, at 8 (Add. 99).

Physicians challenge these PECOS-related actions procedurally as violating notice-and-comment rulemaking requirements of the Administrative Procedure Act ("APA") and substantively as *ultra vires.* Substantively, the Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA") provides some substantive authority in these areas, *id.* §§6402, 6405(c); but PPACA is void in its entirety for constitutional infirmities not addressed in *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*").[1]

---

[1] Although *NFIB* binds this Court, *Agostini v. Felton,* 521 U.S. 203, 237 (1997), three points bear emphasis: (1) issue preclusion cannot bind on those who did not participate in the prior litigation, *Baker v. Gen'l Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998); *cf. U.S. v. Mendoza,* 464 U.S. 154 (1984) (no non-mutual preclusion against United States); (2) *stare decicis* does not extend to issues that were not conclusively settled, *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004); *Waters v. Churchill,* 511 U.S. 661, 678 (1994); and (3) *stare decisis* should not – and lawfully cannot – apply so conclusively that it violates due process, *S. Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999).

STANDARD OF REVIEW

Circuit Rule 8 sets out a four-part test for interim relief: (1) whether movants have a substantial likelihood of success on the merits, (2) whether they would suffer irreparable injury without interim relief, (3) whether interim relief would harm other parties, and (4) the public interest. Circuit Rule 8(a)(1)(i)-(iv). Courts apply this familiar test on a "sliding scale," where "an unusually strong showing on one of the factors" allows "not necessarily hav[ing] to make as strong a showing on another factor." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009); *but see Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011). These factors are addressed in Sections II-IV, *infra*.

When it applies, Rule 8 "ordinarily" requires seeking relief in district court unless "moving first in the district court would be impracticable" FED. R. APP. P. 8(a)(1), (a)(2)(A)(i). Although Federal Rule 8 does not apply by its terms, *compare id. with Nken v. Holder*, 556 U.S. 418, 428-30 (2009), Physicians easily satisfy it. First, as the Administration argued (successfully) below, delayed implementation of its planned PECOS changes negated irreparable injury, which "must be both certain and great; it must be actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006) (internal quotations omitted). Second, now that the district court has dismissed this action, resort to the district court would be futile. *McClendon v. City of Albuquerque*, 79 F.3d 1014,

1020 (10th Cir. 1996); *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). Third, viewing the district court's dismissal of Physicians' action another way, that final action merges into it all interim relief, *Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059, 1063-64 (D.C. Cir. 2005), which is now properly before this Court. Fourth, as the Administration agreed below, Physicians' delay is seeking relief poses no barrier. *Gordon v. Holder*, 632 F.3d 722, 724-25 (D.C. Cir. 2011).

I. PHYSICIANS HAVE STANDING FOR COUNT IV

The district court found Physicians to lack standing because several HHS actions that Physicians did not challenge allegedly cause the same injuries that the challenged HHS actions cause, so the requested relief against CR6417/6421 and the IFC is insufficient to redress Physicians' injuries. Add. 140. At a surface level, the district court's reasoning is flawed. Absent the challenged actions, the PECOS changes would never take effect, which is the status-quo redress that Physicians seek. Below the surface, the district court's reasoning is even more misguided.

Most basically, the district court's analysis improperly viewed standing from HHS's merits views, not (as required) *from Physicians' merits views:* "court … must … assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003). Thus, the district court ignored Physicians' requested relief that "[n]on-Medicare providers lawfully may see Medicare-eligible patients and charge those patients a fee that is

lawful under applicable state laws, without complying with [§1395a(b)'s] safe harbor, and Medicare imposes no obligations on such providers beyond any applicable requirements of state law." SAC ¶118.A(xi) (Add. 77-78). Thus, the district court erred in concluding that Physicians sought relief against only the IFC and CR6417/6421. This overlooked extra relief cures any redressability problem.

In any event, the district court (like the Administration) is substantively wrong about §1395a(b). Medicare does not require state-licensed physicians to subject themselves to §1395a(b)'s opt-out provisions before treating Medicare-eligible patients. Spending Clause legislation like Medicare operates as a contract, in which recipients and beneficiaries agree to the federal terms as conditions of federal funds or benefits. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 59 (2006) ("*FAIR*"). But recipients and beneficiaries remain free to forgo the federal funds and the federal conditions. *Id.* Indeed, plaintiff AAPS preclusively established that principle in *Ass'n of Am. Physicians & Surgeons v. Weinberger*, 395 F.Supp. 125, 140 (N.D. Ill.), *aff'd* 423 U.S. 975 (1975);[2] *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Preclusion aside, this principle – reaffirmed in *FAIR* – is incontrovertible. While physicians who follow §1395a(b)'s opt-out

[2] This prior AAPS litigation upheld the Medicare program as "a voluntary one in which a physician may freely choose whether or not to participate," such that physicians "must then comply with [Medicare] requirements in order to be compensated for [their] services" "should a physician choose to participate." *Weinberger*, 395 F.Supp. at 140.

procedures have the valuable benefit of *HHS's* recognizing that those physicians may treat Medicare-eligible patients outside Medicare (albeit in accordance with §1395a(b)), Medicare does not and cannot require state-licensed physicians who decline to participate to file *anything* under Medicare. To the contrary, courts apply a presumption against preemption in fields like medicine traditionally occupied by the states. *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009).[3] Nothing in Medicare requires those who want nothing to do with Medicare to comply with §1395a(b).

II. THE PECOS CHANGES ARE PROCEDURALLY INVALID

Although the APA exempts matters "relating to … grants, benefits, or contracts," 5 U.S.C. §553(a)(2), HHS enforceably committed itself to following notice-and-comment rulemaking for such matters. *Nat'l Welfare Rights Org'n v. Mathews*, 533 F.2d 637, 646 (D.C. Cir. 1976) (*citing* 36 Fed. Reg. 2532 (1971)). Thus, to the extent that the challenged actions qualify as substantive rules and do not qualify for any APA exemptions, the failure to follow notice-and-comment

---

[3] *See also Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original).

rulemaking renders the challenged actions null and void. Moreover, as explained in Section I, *supra*, the district court and HHS are simply wrong about §1395a(b)'s requiring compliance with §1395a(b)'s opt-out process, and that error undercuts the district court's and HHS's analysis of the APA procedural requirements.

A. The PECOS Changes Are Substantive Rules

This Circuit recognizes four general criteria that trigger the notice-and-comment procedure: (1) whether, absent the rule, the agency would lack adequate authority to confer benefits or require performance; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general legislative authority; and (4) whether the rule effectively amends prior legislative rules. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("*AMC*"). Together, CR6417/6421 and the IFC trigger the first three of these criteria. In addition,"guidance" that purports to narrow an agency's discretion also requires notice-and-comment procedures, *General Elec. Co. v. E.P.A.*, 290 F.3d 377, 383-84 (D.C. Cir. 2002), which applies here. Finally, an interpretation that changes a prior interpretation requires notice-and-comment rulemaking, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), which the district court acknowledges CR6417/6421 to have done in rescinding HHS's prior allowance for these referrals under change request 6093.

Add. 141 n.11. For the foregoing reasons, HHS's changes required a rulemaking.

B. APA's Good-Cause Exception Does Not Apply

Contrary to the district court (Add. 145), the APA exception where "the agency for good cause finds" that APA procedures "[would be] impracticable, unnecessary, or contrary to the public interest" does not apply. 5 U.S.C. §553(b)(B). First, "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dep't of Envtl. Prot. v. U.S. E.P.A.*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same); *see also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)). Second, HHS's purportedly good cause (Add. 145) fails because HHS vastly understates the rule's impact on physicians and patients due to HHS's misunderstanding §1395a(b), as outlined in Section I, *supra*. Finally, the challenged aspects of the IFC and CR6417/6421 are not the type of "exigent circumstances" that fit within the "narrow 'good cause' exception of section 553(b)(B)," such as "emergency situations" or instances where "the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare." *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C.

Cir. 2006) (collecting cases). In short, the good-cause exception does not apply.

C. APA's "Housekeeping" Exception Does Not Apply

Similarly, HHS cannot resort to the APA exception for "rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(A). When (as here) the agency action determines the availability of a benefit, that exception – which is merely a "housekeeping" measure, *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979) – does not apply. *AMC*, 995 F.2d at 1112; *Chamber of Commerce of U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (exception does not cover rules that alter rights or interests). Moreover, the exception "must be narrowly construed," *U.S. v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989), and its "distinctive purpose ... is to ensure that agencies retain latitude in organizing their *internal* operations." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (emphasis added, interior quotations omitted). Indeed, "regardless whether [a rule presents] a new substantive burden," a "change [that] substantively affects the public to a [sufficient] degree" will "implicate the policy interests animating notice-and-comment rulemaking." *Electronic Privacy Info. Ctr v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5-6 (D.C. Cir. 2011). Here again, HHS's misunderstanding of §1395a(b), *see* Section I, *supra*, explains the misplaced reliance on this exception. Far from a mere internal procedure, the changes proposed here would impact the rights and privileges of countless physicians and patients.

III. THE PECOS CHANGES ARE SUBSTANTIVELY INVALID

The merits question hinges on PPACA's validity because – without PPACA §§6402, 6405(c) – HHS would lack the authority to require referrers to register with HHS. The next two sections address the relevant two arguments.

A. PECOS Changes Would Be *Ultra Vires* without PPACA

PPACA §6405(c) gave HHS discretionary authority over various services ordered, prescribed, or referred under Medicare. If this Court invalidates PPACA in its entirety, HHS would lack substantive authority for the relevant actions that PPACA authorized. Accordingly, the next section argues that PPACA is facially invalid as a tax. Significantly, even if PPACA survives (and HHS thus retains whatever substantive authority PPACA provides), HHS still must comply with the APA's procedural requirements.

B. PPACA's Mandates Violate the Origination Clause as Revenue Measures that Originated in the Senate

Under *NFIB,* PPACA is a strange and unprecedented type of bill. First, Congress lacked authority for 26 U.S.C. §5000A under any enumerated powers except the taxing power. 132 S.Ct. at 2585-93. Second, for *statutory* purposes (*i.e.*, those subject to the Anti-Injunction Act), §5000A is not a tax, *id.* 2582-84, but for *constitutional* purposes, it could be a tax, which would make it constitutional, *id.* 2593-600, provided that it meets the other constitutional criteria for valid taxes. *Id.* 2598 ("any tax must still comply with other requirements in the Constitution"). But

NFIB did not consider – and thus did not decide – whether the *NFIB* tax originating in a Senate amendment is invalid under the Origination Clause: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with amendments as on other bills." U.S. CONST. art. 1, §7, cl. 1. Similarly, although it held that §5000A is not a direct tax requiring apportionment, *NFIB* did not determine what other type of tax §5000A might be.

1. Physicians Raised the Origination Clause Below

The district court held that Physicians could not rely on the Origination Clause because they did not raise it in their complaint. Add. 131-33. Like Physician's SAC, virtually every complaint in federal court requests "such other relief as the Court deems proper" or words to that effect. This ubiquitous line is known as the "general pleading," and it entitles the pleader to relief on theories not contained in a complaint's specific pleadings. *Scheduled Airlines Traffic Offices, Inc., v. Dep't of Defense,* 87 F.3d 1356, 1358-59 (D.C. Cir. 1996); *People for the Ethical Treatment of Animals, Inc., v. Gittens,* 396 F.3d 416, 421 (D.C. Cir. 2005); *Bemis Brothers Bag Co. v. U.S.,* 289 U.S. 28, 34 (1933); *Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 424, 455 (1997); *Lockhart v. Leeds,* 195 U.S. 427, 436-37 (1904). As soon as *NFIB* declared §5000A a tax, Physicians argued against PPACA and the PECOS changes under the Origination Clause. Add. 105-111. They could not have done so sooner, and neither the Administration nor the district

court protested (or could protest) when Physicians did so. *Cf.* FED. R. CIV. P. 15(b).

2. PPACA Is a Senate-Originated Revenue Bill

Although the Supreme Court has declined definitively to outline what qualifies as raising revenue under the Origination Clause, *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), the Court's decisions have done so sufficiently to classify PPACA: "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Id.* (*citing* 1 J. Story, COMMENTARIES ON THE CONSTITUTION §880, pp. 610-611 (3d ed. 1858)); *U.S. v. Norton*, 91 U.S. 566, 569 (1875). PPACA meets that test.[4]

Under "this general rule … a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 397-98. As justified by *NFIB* solely as a tax, §5000A does not qualify as part of larger governmental program. It survives solely as a tax.[5]

---

[4] Because the PPACA mandates originated *as taxes* in the Chief Justice's "saving construction" contrary to the legislative intent that those mandates *were not taxes*, institutional and separation-of-powers concerns that otherwise might counsel for looking no farther than PPACA's enrolled bill number (H.R. 3590), *see, e.g., Rainey v.U.S.*, 232 U.S. 310, 317 (1914); *U.S. v. Munoz-Flores*, 495 U.S. 385, 408-10 (1990) (Scalia, J., concurring), are inapposite.

[5] Because Congress lacks Commerce-Clause authority (or any other authority than the taxing power) for the PPACA mandates, *NFIB*, 132 S.Ct. at 2585-93, the

The "general rule" in *Munoz-Flores* applies to governmental programs that raise revenue via targeted provisions such as the "special assessment provision at issue in th[at] case." *Id.* at 398; *accord Nebeker*, 167 U.S. at 202-03; *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906). Here, however, §5000A can avoid other constitutional infirmities (*e.g.*, non-uniform excise taxation[6]) only as an income tax under the Sixteenth Amendment. Unlike special-purpose taxes, income taxes go to the general funds of the U.S. Treasury. 44 Cong. Rec. 4420 (1909) (Mr. Heflin); *Haskin v. Secretary of the Dep't of Health & Human Serv.*, 565 F.Supp. 984, 986-87 (E.D.N.Y. 1983) (*citing* 2 H. McCormick, SOCIAL SECURITY CLAIMS AND PROCEDURES 418 (3d ed. 1983)).

Contrary to *Munoz-Flores*, *Nebeker*, and *Millard*, where "special assessment provision[s were] passed as part of a particular program to provide money for that program" and where "[a]ny revenue for the general Treasury … create[d] is thus 'incidenta[l]' to that provision's primary purpose," *Munoz-Flores*, 495 U.S. at 399, *NFIB* justifies the tax here solely for its revenue-raising purpose by providing funds into the general Treasury. Indeed, while PPACA as a whole included

---

cases that uphold revenue-raising measures under the Commerce Power are irrelevant here. *See, e.g.*, *Mulroy v. Block*, 569 F.Supp. 256, 265 (N.D.N.Y. 1983), *aff'd*, 736 F.2d 56 (2d Cir.1984); *Rodgers v. U.S.*, 138 F.2d 992, 994-95 (6th Cir. 1943); *U.S. v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957).

6 *Compare* U.S. CONST. art. I, §8 *with* 26 U.S.C. §5000A(e)(1)(B)(ii), (f)(1)(C), (f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32).

provisions related to health insurance, it also focused on deficit reduction. SAC ¶¶84, 86 (Add. 71). For the PPACA components at issue here – the so-called employer and individual mandates, 26 U.S.C. §§4980H, 5000A – *NFIB* justifies them solely as taxes that raise revenue.

Significantly, the Origination Clause applies not only to whole bills but also to discrete sections and amendments, *Nebecker*, 167 U.S. at 202-03 (looking to whether the "act, or by *any of its provisions*" had the purpose of "rais[ing] revenue to be applied in meeting the expenses or obligations of the government") (emphasis added), subject to a germaneness test. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 142-43 (1911), *abrogated in part on other grounds, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540-43 (1985). This Circuit has cited *Flint* for the proposition that the "Senate may propose any amendment 'germane to the subject-matter of the bill.'" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 949 n.8 (D.C. Cir. 1984), *abrogated in part on other grounds, Raines v. Byrd*, 521 U.S. 811 (1997). In *Flint*, the Senate substituted a corporation tax for a House-originated inheritance tax in a "general bill for the collection of revenue." *Flint*, 220 U.S. at 142-43. Here, by contrast, the House-originated version of H.R. 3590 primarily concerned minor tax breaks for members of the armed forces, *see* Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009) (Add. 6-12) ("SMHOTA"), not a "general bill for the collection of

revenue" as in *Flint.* As such, the Senate Majority Leader's wholesale substitution of PPACA for SMHOTA was in no way "germane" to SMHOTA's limited scope.

In summary, to the extent that they could be constitutional at all, PPACA's mandates qualify as income taxes that supply revenue to the Treasury. As income taxes, PPACA's mandates therefore "levy taxes in the strict sense of the word," rather than "incidentally create revenue." *Nebeker*, 167 U.S. at 202. Even while deeming special assessments levied against criminals to compensate victims as falling outside the Origination Clause's reach, *Munoz-Flores* acknowledged that "[a] different case might be presented if the program funded were entirely unrelated to the persons paying for the program." *Munoz-Flores*, 495 U.S. at 401 n.7. As applied to individuals like Dr. Smith with adequate – but PPACA-noncompliant – insurance, PPACA's mandates are "entirely unrelated to the persons paying for the program," *id.*, with no "element of contract" to justify the exchange. *Roberts*, 202 U.S. at 437. For all of the foregoing reasons, PPACA's individual and employer tax penalties fall within the Origination Clause's scope and thus are void because they did not originate in the House.

3. The House's Actions on H.R. 3590 Have No Bearing on the Origination Clause

The Administration likely will argue that H.R. 3590 originated in the House and that the House acquiesced in the Senate's revenue-raising amendments. This Court should reject both arguments.

First, the House could hardly acquiesce to an Origination-Clause violation that had not yet occurred, given that §5000A (as passed by Congress) was not even a tax as far as Congress was concerned. *NFIB*, 132 S.Ct. at 2582-84. The Senate cannot avoid the Origination Clause merely by "enact[ing] revenue-raising bills so long as it merely describes such bills as 'user fees'" or (here) penalties. *Sperry Corp. v. U.S.*, 925 F.2d 399, 402 (Fed. Cir. 1991). Only now that §5000A is unambiguously a tax, and *only a tax*, is the Origination Clause violation made plain. In any event, the House cannot acquiesce to a violation of the Constitution. *Munoz-Flores*, 495 U.S. at 391 ("congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny"). This case thus presents a separation-of-powers issue over which the courts have the final word. *Id.* at 393.

Second, as it originated in the House, H.R. 3590 was not a revenue bill, and the Senate's authority to attach revenue-raising amendments to House bills applies only to House *revenue* bills. 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907); *Sperry Corp. v. U.S.*, 12 Cl. Ct. 736, 742 (1987), *rev'd on other grounds*, 853 F.2d 904 (Fed. Cir. 1988); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 688 (1986) (Senate cannot amend "a bill for some purpose other than raising revenue into a bill that raises revenue"). None of H.R. 3590's provisions qualify as "bills for raising revenue" as the Origination Clause requires:

- SMHOTA §§2-3 modified the first-time homebuyers' tax credit by waiving recapture of the credit for members of the armed forces ordered to extended duty service overseas. In the absence of this waiver, first-time homebuyers who sold their homes soon after claiming the credit would lose the credit. *See* 26 U.S.C. §36(a), (f). This "willingness ... to sink money" into valuable government programs – namely, national defense and foreign policy – is not indicative of a "bill for raising revenue" under the Origination Clause. *See Norton*, 91 U.S. at 567-68. These provisions *lowered* revenues.
- SMHOTA §4 expanded exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" under 26 U.S.C. §132, which does not raise revenue for the same reason that SMHOTA §§2-3 do not raise revenue. *Norton*, 91 U.S. at 567-68.
- SMHOTA §5 increased filing penalties by $21 (from $89 to $110) for failure to file certain returns. While certainly *related* to taxation, filing penalties do not "levy taxes in the strict sense of the word" required to trigger the Origination Clause. *Nebeker*, 167 U.S. at 202.
- SMHOTA §6 amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to increase the amount of *estimated* tax that certain corporations must pay. While certainly *related* to taxation, "[w]ithholding and estimated tax remittances are not

taxes in their own right, but methods for collecting the income tax." *Baral v. U.S.*, 528 U.S. 431, 436 (2000). Because estimated-tax payments are not "revenue," §6 cannot make H.R. 3590 a revenue bill.

As it passed the House, H.R. 3590 was not a revenue bill. The Origination Clause thus prohibited substituting the Senate's revenue-raising PPACA for SMHOTA.

"Any and all violations of constitutional requirements vitiate a statute," even if they represent merely "this kind of careless journey work" in originating a revenue bill in the wrong body. *Hubbard v. Lowe*, 226 F. 135, 140 (S.D.N.Y. 1915). As revised by *NFIB*, PPACA would not have passed either legislative body. But if the House wants to re-enact PPACA as revised, the House is free to do so.

IV. RULE 8'S OTHER THREE FACTORS FAVOR INTERIM RELIEF

As explained below, Physicians' requested injunction readily satisfies the other three factors for interim relief. Accordingly, the Administration has no basis on which to deny Physicians' members the continued ability to refer Medicare services for their Medicare-eligible patients.

First, the challenged PECOS rules will cause the loss of necessary medical care, *see, e.g.*, Decl. of Laura Hammons, M.D., ¶¶4-7 (Add. 80-81),[7] which courts

[7] Dr. Hammons is an AAPS member and the *pro bono* medical director at Little Sisters of the Poor Home for the Aged in Gallup, New Mexico; her elderly patients there (who cannot afford market-priced medical care) will suffer the loss of urgently needed medical care (*e.g.*, oxygen, physical therapy, x-rays, bloodwork) under the challenged PECOS rules. *Id.* The situations described by the

uniformly have recognized as constituting irreparable harm. *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 8-9 (1st Cir. 1987) (Breyer, J.); *Comm. Workers of Am., Dist. 1, AFL–CIO v. NYNEX Corp.*, 898 F.2d 887, 891 (2d Cir. 1990); *U.A.W. v. Exide Corp.*, 688 F.Supp. 174, 186–87 (E.D. Pa.), *aff'd mem.*, 857 F.2d 1464 (3d Cir. 1988); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 584 (6th Cir. 2006); *Risteen v. Youth for Understanding, Inc.*, 245 F.Supp.2d 1, 16 (D.D.C. 2002). Comprehensive, rationed-care regimes like Medicaid, Medicare, and their counterparts in other countries such as Canada create scarcity that covered beneficiaries can avoid only by going outside their coverage to physicians who offer their services outside the rationed-care regime. *See* Decl. of George Keith Smith, M.D., ¶¶4-5 (Add. 83-84). As such, the irreparable harm caused by the challenged PECOS rules represents a nationwide problem.

Second, the requested relief will not cognizably harm others. Competitors of Physicians' members have no cognizable interest in denying the ability to refer under Medicare, and HHS remains free to proceed by the rulemaking process that Congress ordained and to which HHS bound itself for benefits program, provided that HHS indeed has the statutory authority. The "results do not constitute substantial harm for the purpose of delaying injunctive relief" where "[they] are no

---

district-court declarants have not changed materially in the intervening two years. Second Decl. of Lawrence Joseph, ¶¶2-4 (Add. 88-89).

different from the Department's burdens under the statutory scheme." *Nat'l Ass'n of Farmworkers Orgs. v. Marshall,* 628 F.2d 604, 615 (D.C. Cir. 1980). Moreover, the three-year delay in implementing these PECOS changes demonstrates that HHS will not suffer significant harm from a preliminary injunction's further delay.

Third, the requested relief would serve the public interest, which collapses into the merits. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4. To the extent that the merits are in question, there is a public interest in preserving the status quo until a court reaches the merits, *Maryland Undercoating Co. v. Paine,* 603 F.2d 477, 481 (4th Cir. 1979); *Valdez v. Applegate,* 616 F.2d 570, 572 (10th Cir. 1980), as part of the "greater public interest in having governmental agencies abide by the federal laws that govern their… operations." *Washington v. Reno,* 35 F.3d 1093, 1103 (6th Cir. 1994). Finally, this Court should strike a balance in favor of the beneficiaries that Congress intended Medicare to protect. *Marshall,* 628 F.2d at 616.

CONCLUSION

At least with respect to AAPS and ANH-USA members, the PECOS changes should be preliminarily enjoined pending final judgment.

Dated: March 13, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave., NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Appellants Association of American Physicians & Surgeons and Alliance for Natural Health USA

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March 2013, I have caused the foregoing document, together with its addendum, to be served on the following counsel via the Court's CM/ECF System:

Dana Kaersvang
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm 7533
Washington, D.C. 20530
Tel: 202-307-1294
Email: Dana.L.Kaersvang@usdoj.gov

/s/ Lawrence J. Joseph
Lawrence J. Joseph