No. _____

In the Supreme Court of the United States

AMERICAN PHYSICIANS & SURGEONS, INC. AND
ALLIANCE FOR NATURAL HEALTH USA,
Applicants

v.

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

Application from the United States
Court of Appeals for the District of Columbia Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

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RULE 29.6 STATEMENT

Association of American Physicians & Surgeons, Inc., is a nonprofit membership organization. No publicly-held corporation owns 10% or more of its stock.

Alliance for Natural Health USA is a nonprofit membership-based organization. No publicly-held corporation owns 10% or more of its stock.

Dated: January 3, 2014

Respectfully submitted,

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EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Pursuant to SUP. CT. R. 22 and 23, the Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA (collectively, "Applicants") respectfully seek to enjoin pending final judgment actions by respondents Kathleen Sebelius, Secretary of the Department of Health & Human Services ("HHS"), *et al.* (collectively, the "Administration") to require non-Medicare physicians to register in the online Provider Enrollment, Chain and Ownership System ("PECOS") in order to refer Medicare-eligible patients for Medicare-covered services (*e.g.,* bloodwork, x-rays, oxygen) by Medicare providers of those services. For several years, the Administration has had a pattern of setting an effective date for these changes, then administratively staying or deferring the deadline when it approached. In district court, the Administration successfully argued that its administrative stays and deferrals obviated the need for interim injunctive relief. In March of this year, while this litigation was on appeal, the Administration set a May 2013 effective date, against which Applicants unsuccessfully sought interim appellate relief, only to have the Administration again stay the effective date. The Administration has now set a new effective date of January 6, 2014, for these changes to take effect, thereby reinstating the emergency against which Applicants sought relief in the D.C. Circuit. Applicants seek interim relief to avoid irreparable harm to Applicants' physician members and their patients.

JURISDICTION

Applicants filed their initial complaint on March 26, 2010, in the U.S. District Court for the District of Columbia, which had jurisdiction under 28 U.S.C. §1331 and its own equity jurisdiction. D.C. CODE §11-501; *Stark v. Wickard,* 321 U.S. 288, 290 n.1 (1944). On October 31, 2012, the district court dismissed Applicants' Second Amended Complaint pursuant to Rules 12(b(1) and (b)(6). On December 28, 2012, Applicants noticed their appeal to the U.S. Court of Appeals for the District of Columbia Circuit, which had jurisdiction under 28 U.S.C. §1291. Applicants' appeal remains pending in the D.C. Circuit, with oral argument scheduled on January 10, 2014. A Circuit Justice has jurisdiction to grant interim relief, notwithstanding that the court of appeals has denied that relief and the matter remains pending in the court of appeals. 28 U.S.C. §§1651, 2106; *Coleman v. PACCAR, Inc.,* 424 U.S. 1301, 1302-04 (1976) (Rehnquist, J., in chambers); *Heckler v. Lopez,* 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers); *cf.* 28 U.S.C. §1254(1) (allowing writ of *certiorari* before appellate judgment).

STANDARD OF REVIEW

When the Court of Appeals denies interim relief, the Circuit Justice decides whether to grant or deny relief based on a series of factors that supplement the factors for relief under FED. R. APP. P. 8 and Circuit Rule 8.[1] The primary additional

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[1] Like the test for preliminary injunctions generally, FED. R. APP. P. 8 and Circuit Rule 8 set 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

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criteria relate to the likelihood of this Court's future review and – if the All Writs Act is invoked – the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Am. Trucking Ass'ns v. Gray,* 483 U.S. 1306, 1308 (1987) (requiring "significant possibility" of this Court's taking and reversing the decision and "a likelihood [of] irreparable injury") (Blackmun, J., in chambers); *Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers). "To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that the legal rights at issue are indisputably clear." *Lux v. Rodrigues,* 131 S. Ct. 5, 6-7 (2010) (internal quotations omitted) (Roberts, C.J., in chambers). When invoked, the All Writs Act also requires that "injunctive relief is necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Edwards,* 512 U.S. at 1301 (internal quotations omitted, alterations in original) (Scalia, J., in chambers).

STATEMENT OF THE CASE

1. Applicants' Second Amended Complaint ("SAC") challenges various components of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA") – as amended by the Health Care and Education

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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).

Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) – as well as some agency actions outside PPACA.

2. In Count IV of the SAC, Applicants challenge the Administration's requiring physicians to enroll in PECOS as a precondition to referring Medicare-eligible patients for Medicare services (*e.g.,* bloodwork, oxygen, x-rays) performed by third parties in the Medicare system. Applicants' challenge includes claims that these PECOS-related actions procedurally violated notice-and-comment rulemaking requirements under the Administrative Procedure Act ("APA"), as well as substantive legal arguments against the Administration's actions.

3. One of the arguments that Applicants raised in district court (App. 190) as well as the D.C. Circuit is that PPACA §§6402, 6405(c) provide substantive authority in these PECOS-related areas, 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*").[2]

4. Although their SAC requests preliminary relief on these issues, SAC

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[2] Although *NFIB* binds the D.C. Circuit, *Agostini v. Felton,* 521 U.S. 203, 237 (1997), and thus arguably the Circuit Justice, 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).

¶¶2(g), 118.C (App. 116, 144), Applicants did not move for a preliminary injunction in the district court 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"), App. 13-25), and an "Interim Final Rule with Comment Period" ("IFC"), 75 Fed. Reg. 24,437 (2010), App. 26-38.

5. On July 6, 2010, in response to the IFC, AAPS submitted comments to the regulation.gov website, Decl. of Lawrence J. Joseph, ¶2 (App. 159), and those comments are included in the Appendix (App. 39-43). *Id.*

6. At the request of the initial judge, the parties agreed that Applicants would move for interim relief only if and when the need arose, given that HHS "represented to [Applicants] that, before implementing claims edits that would automatically reject claims for failure to comply with the new regulations, it will provide [Applicants] with sufficient notice to move the Court for preliminary relief," which the parties agreed made it unnecessary "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) (App. 170-71).

7. 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 (App. 179).

8. In the *Federal Register* dated April 27, 2012, HHS promulgated its final rule in response to the IFC comments, 77 Fed. Reg. 25,284 (2012) (the "2012 Rule") (App. 44-79). The 2012 Rule explains that the effectiveness of the PECOS changes was administratively stayed at that time and commits to provide "ample notice" before those changes become effective. *Id.* at 25,293, 25,294, 25,300, 25,302 (App. 54, 55, 61, 63).

9. Although it now argues that its 2012 Rule moots the procedural aspects of Count IV, the Administration did not advise the district court of that relevant development when HHS promulgated the rule in April 27, 2012. Consequently, the district court therefore addressed Applicants' challenge to the IFC and CR6417/6421 in its decision rendered six months later, on October 31, 2012. App. 191-226.

10. On or about March 1, 2013, the Administration announced that it would activate the challenged PECOS changes on May 1, 2013 (App. 80), and Applicants requested that the Administration defer those changes. When the Administration refused, Applicants moved for interim relief in the D.C. Circuit, which denied Applicants' motion by order dated April 17, 2013 (App. 227).

11. On or about April 25, 2013, however, HHS deferred the effective date for the PECOS changes without supplying a new effective date. App. 90.

12. On or about November 6, 2013,[3] the Administration announced that it would activate the challenged PECOS changes on January 6, 2014 (App. 102), and the Administration's counsel notified Applicants' counsel of that announcement by email on the afternoon of December 26, 2013.

13. On December 30, 2013, Applicants filed a notice of supplemental authority of the new PECOS changes in the D.C. Circuit, and advised that Court that Applicants intended to seek interim relief from the Circuit Justice.

14. In response to an email from Applicant's counsel dated January 1, 2014, the Administration's counsel advised Applicants' counsel by email dated January 2, 2014, that the Administration would not defer the effective date of the PECOS changes. Decl. of Lawrence J. Joseph, ¶5 (App. 160).

ARGUMENT

I. APPLICANTS ARE LIKELY TO PREVAIL ON THE MERITS

Applicants make both substantive and procedural arguments against the lawfulness of the Administration's PECOS changes. The substantive argument lies under the Constitution's Origination Clause, whereas the procedural arguments lie under APA notice-and-comment requirements. While reviewing courts typically would proceed to the procedural argument first to avoid unnecessarily addressing a

[3] The dates provided for the three 2013 Administration notices on its PECOS changes are the dates ascribed to those notices by the Administration. Applicants lack knowledge on when those documents were prepared and posted online.

constitutional issue,[4] that constitutional issue constitutes the more likely basis for this Court to grant *certiorari* if Applicants do not prevail below. *See* Section II.B, *infra.* Under the circumstances, Applicants brief their constitutional argument first, although the APA procedural arguments provide an additional basis for Applicants to prevail.

A. 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.

1. 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 under the Origination Clause. Significantly, even if PPACA survives (and HHS thus retains whatever substantive authority PPACA provides), HHS still must comply with the APA's procedural requirements.

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

Under *NFIB,* PPACA is a strange type of bill. First, Congress lacked

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[4] The constitutional argument is that PPACA is void under the Origination Clause, and HHS thus lacks authority for the PECOS change. *See* Section I.A, *infra.*

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 actually *is* or could be.

a. Applicants Raised the Origination Clause Below

The district court held that Applicants could not rely on the Origination Clause because they did not raise it in their complaint. App. 210-11. Like Applicants' 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, Applicants argued against PPACA and the PECOS changes under the Origination Clause. App. 185-90. Applicants could not have done so sooner, and neither the Administration nor the district court protested (or could protest) when Applicants did so. *Cf.* FED. R. CIV. P. 15(b).

In the Court of Appeals, the Administration cited the district court decision (App. 210) for the proposition that Applicants waived arguments based on the Origination Clause, notwithstanding that Applicants raised the Origination Clause in response to the district court's request for supplemental briefing and notwithstanding the general pleading in Applicants' complaint.[5] The waiver argument is particularly inappropriate because the district court *invited* supplemental briefing on the impact of the Supreme Court's decision on PPACA, and Applicants' supplemental brief qualifies as raising the issue sufficiently for purposes of establishing the Administration's implied consent under FED. R. CIV. P. 15(b). *See, e.g., City of Green Cove Springs v. Donaldson,* 348 F.2d 197, 202 (5th Cir. 1965); *Strategic Outsourcing, Inc. v. Continental Cas. Co.,* 274 Fed.Appx. 228, 233 (4th Cir. 2008). Moreover, the Administration "waived the waiver" by failing to argue that Applicants waived the Origination Clause. *Freeman v. Pittsburgh Glass Works, LLC,* 709 F.3d 240, 250 (3d Cir. 2013) ("doctrine of … waiver is not somehow

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[5] Significantly, the district court did not hold that Applicants waived the right to argue that Origination Clause to invalidate the PECOS provisions; rather the district court held that Applicants waived the Origination Clause only with respect to PPACA's individual insurance mandate. App. 210.

exempt from itself [and] a party can waive a waiver argument by not making the argument below"); *U.S. v. Reider,* 103 F.3d 99, 103 n.1 (10th Cir. 1996); *U.S. v. Woods,* 148 F.3d 843, 849 n.1 (7th Cir. 1998); *Atkins v. New York City,* 143 F.3d 100, 102-03 (2d Cir. 1998).

This Court has rejected waiver on facts far less sympathetic to plaintiffs than the facts here. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 445-48 (1993):

> Respondents did not challenge the validity of section 92 before the District Court; they did not do so in their opening brief in the Court of Appeals or, despite the court's invitation, at oral argument. Not until the Court of Appeals ordered supplemental briefing on the status of section 92 did respondents even urge the court to resolve the issue, while still taking no position on the merits.

Id. at 445. Even under those circumstances, the Supreme Court allowed the plaintiff to challenge section 92 as part of the plaintiff's overall case. *Id.* at 446-47; *see also Students Against Genocide v. Dep't of State,* 257 F.3d 828, 835 n.11 (D.C. Cir. 2001) (rejecting waiver argument where plaintiff raised issue below). Indeed, this Court the Administration's theory of waiver does not appear to apply to Applicants' use of the Origination Clause against the PECOS changes. *See Yee v. City of Escondido,* 503 U.S. 519, 534-35 (1992) ("[h]aving raised a taking claim in the state courts, … petitioners could have formulated any argument they liked in support of that claim here").

Here, Applicants raised the issue during the briefing of the Administration's motion to dismiss via supplemental briefing requested by the district court. While it would have been inconceivable for Congress to have enacted PPACA as a sizable

income-tax increase on middle-income families, Second Am. Compl. ¶67 (App. 132), that is the implication of the controlling *NFIB* decision that the individual mandate was not a tax for statutory purposes but was a tax for constitutional purposes.[6] That sea change would have justified amending or supplementing the complaint under Rule 15(a) or (c) if the supplemental briefing had not taken place.

In the Court of Appeals, the Administration argued that the parties filed their supplemental briefs simultaneously, depriving the Administration of an opportunity to respond. *Id.* at 13 n.4. Of course, the Administration had no compunction against (and no rule or order prohibiting) the filing of a motion for leave to file supplemental authorities. To avoid Rule 15(b), the Administration needed to object. *Banks v. Dretke,* 540 U.S. 668, 704 (2004). Had the Administration done so, Applicants could have moved to amend and supplement their complaint, and the district court would have had to grant leave. *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.,* 148 F.3d 1080, 1083-85 (D.C. Cir. 1998). In any event, "[w]hen an issue or claim is properly before the court," as is the lawfulness of the Administration's PECOS-related actions here, "the court is not limited to the

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[6] This tax is not a direct tax, *NFIB,* 132 S.Ct. at 2599, but it also cannot constitutionally qualify as a duty, impost, or excise tax because Congress made it non-uniform throughout the United States to account for the differing costs of medical care in different parts of the United States (*e.g.,* medical care costs less in rural Kansas than in New York City). *See* 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). Of course, duties, imposts, or excise taxes must be uniform. U.S. CONST. art. I, §8. As explained in the text, the only type of tax that §5000A even could be is an income tax.

particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 99 (1991). The waiver argument is specious and should be rejected.

b. 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.[7]

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

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[7] Because the PPACA mandates originated *as taxes* in the *NFIB* "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.

larger governmental program. It must survive solely as a tax, or not at all.[8]

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[9]) only as an income tax under the Sixteenth Amendment. Unlike some 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

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[8] 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 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).

[9] See authorities cited in note 6, *supra.*

into the general Treasury. Indeed, while PPACA as a whole included provisions related to health insurance, it also focused on deficit reduction. SAC ¶¶84, 86 (App. 136). For the PPACA component at issue here – the so-called individual mandate, 26 U.S.C. §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). The D.C. 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). Nothing in the House-originated version of H.R. 3590 is germane to PPACA or taxes imposed on the failure to procure health insurance.

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) (App. 7-12) ("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 tax penalties falls within the Origination Clause's scope and thus is void because it did not originate in the House.

c. The House Bill Was Not a Revenue-Raising Bill for Purposes of the Origination Clause

The Senate's authority to attach revenue-raising amendments to House bills applies only to House *revenue* bills. James Saturno, Section Research Manager, Congressional Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement,* at 6 (Mar. 15, 2011) (*citing* 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); *Armstrong v. U.S.,* 759 F.2d 1378, 1382 (9th Cir. 1985); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously,* 35 BUFF. L. REV. 633, 688 (1986). If the Senate PPACA amendments raise revenue – as opposed to establishing a regulatory program – this Court must determine whether SMHOTA was a "bill[] for raising revenue" into which the Senate could import its PPACA amendments.[10]

(1) Bills that Close Revenue Streams Do Not "Raise" Revenue

To analyze whether SMHOTA "raises revenue," a court must define that phrase. Although this Circuit has not decided the issue, competing extra-circuit interpretations have focused on whether bills must *increase* revenues or merely *levy* revenues (*i.e.,* without increasing revenues).[11] Applicants respectfully submit that

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[10] In adopting the Senate amendments, the House did not acquiesce to an Origination-Clause violation, 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 clear. In any event, the House *cannot* acquiesce to a violation of the Constitution. *Munoz-Flores,* 495 U.S. at 391. Origination-Clause claims thus presents justiciable separation-of-powers questions on which courts have the final word. *Id.* at 393.

[11] *Compare Bertelsen v. White,* 65 F.2d 719, 722 (1st Cir. 1933) (statute that "diminishes the revenue of the government" "is not a bill to raise revenue") with *Armstrong,* 759 F.2d at 1381-82; *Wardell v. U.S.,* 757 F.2d 203, 204-05 (8th Cir. 1985); *Heitman v. U.S.,* 753 F.2d 33, 35 (6th Cir. 1984); *Rowe v. U.S.,* 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.* 749 F.2d 27 (3d Cir. 1984).

this increase-levy dichotomy obscures a third category of bill relevant here. Specifically, bills that *close* a particular revenue stream do not raise revenue.

The extra-circuit decisions holding "raise" to mean "levy" arise under the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) ("TEFRA"), and focus primarily on whether the Senate's tax-increasing amendment was "germane" to the House's tax-cutting bill under *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911). *See Wardell,* 757 F.2d at 204-05 (collecting cases). Because the House bill there *levied* revenues without *increasing* revenues, the TEFRA cases are inapposite to bills like SMHOTA that do not levy any revenue, but instead close various revenue streams.

Where they delve deeper than germaneness,[12] the TEFRA cases rely on the seminal 1870s congressional dispute on the Origination Clause. *See Armstrong,* 759 F.2d at 1381-82. That history supports the conclusion that closing revenue streams does not "raise" revenue. The 1870s dispute arose because the House relied on the Origination Clause first to return a Senate-initiated bill that repealed a tax, then to return Senate revenue-raising amendments to a House bill to repeal a tax. *See* 2 HINDS' PRECEDENTS §1489. In response to these mutually inconsistent measures, a Senate committee evaluated the Origination Clause and reported its findings to both the Senate and House:

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12 Plaintiffs address germaneness separately in Section I.A.2.d, *infra.*

> Suppose the existing law lays a duty of 50 per cent[.] upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent[.], is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment, in the Senate upon any House bill which did not provide for raising – the that is, collecting – revenue. This bill did not provide that the duty on tea and coffee should be laid at a less rate than formerly, but it provided simply that hereafter no revenue should be raised or collected upon tea or coffee. To say that a bill which provides that no revenue shall be raised is a bill "for raising revenue" is simply a contradiction of terms.

Id. (*quoting* S. REP. NO. 42-146 (1872)). The Senate report explains that, had the bill merely reduced the tea and coffee rates or even continued them while raising or lowering the rates for other articles, "it would have been a bill for 'raising revenue.'" S. REP. NO. 42-146, at 5. Because the bill "proposed no such thing" and "did not provide for raising *any* revenue," the report concluded that "it is therefore incorrect to call it a bill 'for raising revenue.'" *Id.* at 6 (emphasis in original). Applicants respectfully submit that the Senate report correctly analyzes the Origination Clause's contours with respect to bills that do not raise any revenue and instead terminate taxes on something or someone.

Indeed, targeted tax exemptions like SMHOTA's benefits to military personnel can achieve non-revenue purposes. This "willingness ... to sink money" into valuable government programs – here, national defense and foreign policy – is not indicative of a "bill for raising revenue" under the Origination Clause. *See U.S. v. Norton,* 91 U.S. 566, 567-68 (1875). Instead, such targeted tax exemptions can be

considered "tax expenditures," a form of spending. *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 859 (1995) (Thomas, J., concurring); *see* 2 U.S.C. §639(c)(2)-(3) (distinguishing revenues from tax expenditures). As government *spending,* targeted tax exemptions are not *revenue* bills.

(2) SMHOTA Did Not Raise Revenue

With that background, none of SMHOTA's six sections raised revenue within the Origination Clause's meaning.

1. SMHOTA §1 merely provided the bill's short title.

2. 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). These provisions not only *lowered* revenues but also zeroed out taxes for the affected sources of income. As such, these sections did not raise revenue.

3. 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.

4. SMHOTA §5 increased filing penalties by $21 (from $89 to $110) for failing to file certain returns. Such penalties do not "levy taxes in the strict sense of the word" required to trigger the Origination Clause. *Nebeker,* 167 U.S. at 202; *U.S. v. Herrada,* 887 F.2d 524, 527 (5th Cir. 1989). If this minor penalty

enhancement qualifies as "raising revenues" under the Origination Clause, that would invalidate numerous Senate-initiated bills that assess penalties.

5. 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 pay. But "[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.

In summary, as it passed the House, H.R. 3590 was not a revenue bill. "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), *appeal dismissed* 242 U.S. 654 (1916). The Origination Clause thus prohibited substituting the Senate's revenue-raising PPACA for SMHOTA.

d. Because SMHOTA Did Not "Raise Revenue" under the Origination Clause, this Court Need Not Consider the *Flint* Germaneness Test

As indicated, the Origination Clause applies not only to whole bills but also to discrete sections and amendments, *Nebecker,* 167 U.S. at 202-03, subject to a test for germaneness. *Flint,* 220 U.S. at 142-43. Unlike PPACA and the House and Senate bills in *Flint,* SMHOTA was in no way a "general bill for the collection of revenue." *Flint,* 220 U.S. at 142-43. In any event, no part of SMHOTA raised revenue within the meaning of the Origination Clause, *see* Section I.A.2.c, *supra,*

which obviates this Court's reviewing PPACA's germaneness to SMHOTA. To the extent that the Administration argues any specific SMHOTA section or sections "raised revenue," Applicants reserve the right to demonstrate that PPACA's broad regulation of one sixth of the national economy was not germane to any part of the narrow SMHOTA House bill.[13]

B. 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 rulemaking renders the challenged actions null and void. Moreover, as explained in Section III.A, *infra,* 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.

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[13] Because Sections 1 through 4 do not raise revenue under any possible definition of that phrase, the Administration cannot cite those four sections. Although it might have argued that Sections 5 and 6 raise revenue, the Administration has not done so in this litigation. Neither Section 5 nor Section 6 is even remotely a "general bill for the collection of revenue" under *Flint.* Thus, unless the Origination Clause were meaningless, the Senate bill would not qualify as a germane amendment under *Flint.*

1. The PECOS Changes Are Substantive Rules

The D.C. 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. App. 220 n.11. For the foregoing reasons, HHS's changes required a rulemaking.

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

Contrary to the district court (App. 224), 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 (App. 224) fails because HHS vastly understates the rule's impact on physicians and patients due to HHS's misunderstanding of §1395a(b), as outlined in Section III.A, *infra.* 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.

3. 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 III.A, *infra,* 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.

II. APPLICANTS MEET THE OTHER CRITERIA FOR INTERIM RELIEF

In this section, Applicants address the various equitable and limiting criteria that the Court must weigh to determine whether to grant or deny interim relief.

A. The Onset of the PECOS Requirements Will Cause Irreparable Harm

The challenged PECOS rules will cause the loss of necessary medical care, *see, e.g.,* Decl. of Laura Hammons, M.D., ¶¶4-7 (App. 145-47),[14] which courts 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*

[14] 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.*

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 (App. 154-55). As such, the irreparable harm caused by the challenged PECOS rules represents a nationwide problem.

B. *Certiorari* is Likely If Applicants Do Not Prevail

From the *NFIB* joint opinion of Justices Kennedy, Scalia, Alito, and Thomas, four Justices have stated their view that PPACA is unconstitutional, albeit under the Commerce Clause and the lack of a severability clause. That means that the primary question is whether the Circuit Justice, as author of the *NFIB* "saving construction" would agree that the Origination Clause eliminates PPACA's resort to the Taxing Power. If so, Applicants likely will prevail in establishing that PPACA is unconstitutional. As such, the question for the Circuit Justice here is not whether four justices would vote to grant a writ of *certiorari* but whether his vote would provide the crucial fifth vote to invalidate the statute and, with it, the PECOS

changes.[15]

C. Applicants' Rights Are Indisputably Clear

The Administration has facilitated a determination that Applicants are indisputably entitled to relief by declining to dispute Applicants' arguments under the Origination Clause. As indicated in Section I.A.2.a, *supra,* Applicants plainly did not waive the Origination Clause argument against either PPACA generally or against the PECOS-related authority that PPACA confers on HHS. Similarly, the Administration's mootness argument also is misplaced, *see* Section III.B, *infra,* but (in any event) does not apply to Applicants' merits-based arguments in Count IV. If the Administration deems it unwise to continue its waiver of any merits defense of PPACA in this Court, Applicants will address the Administration's new arguments in a reply in support of this application. If not, it would be ironic if PPACA – which throughout 2013 has scraped along by a series *ultra vires* waivers by Executive

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[15] Although Applicants do not press it here, their appeal also challenges the PPACA's individual-mandate penalty under the Fifth Amendment. In summary, that argument is that PPACA asks healthy private individuals to subsidize unhealthy private individuals by regulating insurance premiums and availability, which plainly violates the Takings Clause: "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." *Kelo v. City of New London,* 545 U.S. 469, 477 (2005) (emphasis in original). The saving construction that the individual mandate is simply an optional tax fairs no better because the government cannot selectively tax those who decline to subsidize other private citizens voluntarily: "Constitutional rights would be of little value if they could be thus indirectly denied." *Smith v. Allwright,* 321 U.S. 649, 664 (1944); *accord Harman v. Forssenius,* 380 U.S. 528, 540 (1965); *Frost v. R.R. Comm'n of State of California,* 271 U.S. 583, 593-94 (1926). The Circuit Justice might find Applicants' Fifth Amendment argument "cert-worthy," even if the Circuit Justice rejects their Origination Clause argument.

fiat – ultimately died by the Executive's waiving its defenses.

D. Injunctive Relief Is Appropriate to Aid the Court's Future Jurisdiction under the All Writs Act

Although this Court's jurisdiction to provide interim relief does not *require* resort to the All Writs Act, that Act provides additional and alternate jurisdiction for the relief that Applicants request. Here, Applicants have no alternate remedy to avoid irreparable harm. *Clinton v. Goldsmith,* 526 U.S. 529, 537 (1999) (relief is neither necessary nor appropriate when applicants have alternate remedies). When an applicant can and will continue its appeal in the absence of interim relief from the Circuit justice, the entry of relief can be considered *unnecessary* to the Court's future jurisdiction. *Hobby Lobby Stores, Inc. v. Sebelius,* 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). Even if not *necessary,* however, injunctive relief could be *appropriate* if it preserves the *status quo ante litem* to allow the issue to reach this Court without Applicants' members and their patients having to suffer irreparable harm from the Administration's *ultra vires* actions. Indeed, it remains theoretically possible that the deferral of relief would cause some members to waive the rights that should be theirs under Applicants' view of the law and instead relent by enrolling in PECOS, thus depriving this Court of future jurisdiction by mootness.

E. Applicants Satisfy Rule 8's Other Factors for Interim Relief

To the extent that the other criteria in FED. R. APP. P. 8 and Circuit Rule 8 apply, Applicants' requested injunction readily satisfies them. Accordingly, Applicants respectfully submit that the Circuit Justice – or full Court – should grant interim relief against the PECOS changes.

First, the requested relief will not cognizably harm others. The physician competitors of Applicants' 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 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.

Second, 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. Once the Court resolves the parties' dispute on their respective likelihoods of prevailing on the merits, it becomes relatively easy to resolve the public interest: the public interest favors the side with the better likelihood of prevailing. To the extent that the merits remain in question, the public interest favors 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.

F. Applicants' Failure to Seek a Preliminary Injunction in the District Court Provides No Basis to Deny Interim Relief Now

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); SUP. CT. R. 23.3. Applicants' appellate motion to the D.C. Circuit easily satisfies this test for three independent reasons.[16] Moreover, because Applicants *did* seek interim review in the D.C. Circuit consistently with the federal and Circuit rules, this Court's Rule 23.3 provides no basis to deny interim relief now. *Cf. U.S. v. Williams,* 504 U.S. 36, 41 (1992) (this Court's pressed-or-passed-upon-below test is in the disjunctive).

III. COUNT IV SATISFIES ARTICLE III

The district court found Applicants to lack standing for parts of Count IV (App. 217-22), and the Administration argues that a 2012 rulemaking moots the

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[16] First, as the Administration argued (successfully) in district court, 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). Alternatively, the district court's dismissal of Applicants' action is a final judgment into which all interim relief merges, *Fund for Animals, Inc. v. Hogan,* 428 F.3d 1059, 1063-64 (D.C. Cir. 2005), which makes the appellate courts the appropriate venue for interim relief. Third, as the Administration agreed in district court, Applicants' delay is seeking relief poses no barrier to obtaining such relief on appeal. *Gordon v. Holder,* 632 F.3d 722, 724-25 (D.C. Cir. 2011).

procedural aspects of Count IV. The doctrines of standing and mootness "relate in part, and in different though overlapping ways, to an idea … about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984) (*quoting Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Thus, even applicants for preliminary injunctions require jurisdiction. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983). But, justiciability doctrines cannot be abused to avoid a justiciable question today because deferring review might be convenient. As Chief Justice Marshall put it, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). Neither standing nor mootness presents an obstacle here.

A. Applicants Have Standing for Count IV

The district court found Applicants to lack standing because HHS action that Applicants did not challenge allegedly causes the same injuries that the challenged HHS actions cause, so the requested relief against CR6417/6421 and the IFC would be insufficient to redress Applicants' injuries. App. 218-19. 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 Applicants seek. Below the surface, the district court's reasoning is even more flawed.

Most basically, the district court's analysis improperly viewed standing from HHS's merits views, not (as required) *from Applicants' 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). Specifically, the district court ignored Applicants' requested declaratory 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 that "Medicare imposes no obligations on such providers beyond any applicable requirements of state law." SAC ¶118.A(xi) (App. 142-43). Thus, the district court erred in concluding that Applicants sought relief against only the IFC and CR6417/6421. The requested relief that the district court overlooked would cure any redressability problem.

In any event, the district court (like the Administration) is substantively wrong *on the merits* 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), which held the Medicare program is "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." *Id.* at 140; *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) ("lower courts are bound by summary decision by this Court 'until such time as the Court informs [them] that [they] are not'") (*quoting Doe v. Hodgson,* 478 F.2d 537, 539 (2d Cir. 1973)).

But even putting preclusion aside, this principle – reaffirmed in *FAIR* – is incontrovertible. While physicians who follow §1395a(b)'s opt-out 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).[17] Nothing in Medicare requires those who want nothing to do with Medicare to comply with §1395a(b) before seeing Medicare-eligible patients.[18]

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[17] *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).

[18] Because the 2012 Rule changed the forms required to enroll in PECOS, Applicants submit new declarations to make clear that the current form is just as unacceptable than the prior forms. See Decl. of Laura Hammons, M.D., ¶5 (App.

(Footnote cont'd on next page)

B. Count IV Is Not Moot

In the Court of Appeals' briefing of Applicants' motion for interim relief, the Administration argued for the first time that its rulemaking on April 27, 2012 (77 Fed. Reg. 25,284) moots Applicants' challenge to the IFC and CR6417/6421. While it is certainly correct that the rulemaking *changes* the issues presented by Count IV, the Administration is nonetheless wrong that the rulemaking *moots* Count IV.

Specifically, Count IV seeks to invalidate HHS actions and obtain declaratory relief on both procedural and substantive grounds, and the rulemaking could potentially moot only the *procedural* claims against the IFC and CR6417/6421. Moreover, to the extent that the new rulemaking itself is invalid, the procedural invalidity of the underlying IFC and CR6417/6421 would remain live questions. In other words, if the new rulemaking cannot withstand judicial scrutiny, the Administration then will need to retreat to defend the IFC and CR6417/6421. The following two subsections demonstrate Applicants' likelihood of prevailing on their procedural and substantive claims in Count IV, notwithstanding the 2012 rulemaking.

1. The 2012 Rulemaking Does Not Moot Applicants' Procedural Claims in Count IV

Applicants concede the premise that underlies the Administration's mootness argument: a valid new rulemaking rule generally would moot a procedural

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(Footnote cont'd from previous page.)

145-146); Decl. of Jane M. Orient, M.D., ¶23 (App. 151-52); App. 168 (certification on current form requiring compliance with Medicare in its entirety).

challenge to any prior rulemakings where the plaintiff sought only prospective injunctive or declaratory relief. As explained in Section III.B.2, *infra,* that argument obviously has no impact on substantive, merits-based arguments that would apply equally to all of the various agencies actions. In this section, Applicants argue that the 2012 Rule's procedural defects mean that the procedural arguments against the IFC and CR6417/6421 are not yet moot.

a. The 2012 Rulemaking Is Procedurally Invalid

In response to the IFC, AAPS submitted comments, arguing in part that HHS should not deny non-Medicare physicians the ability to refer Medicare-eligible patients for Medicare-covered services. App. 39. Presumably because of the same Administration misunderstanding that Section III.A, *supra,* describes regarding the reach of §1395a(b) to non-Medicare physicians, the 2012 Rule does not adequately consider the prevalence of this type of arrangement (namely, Medicare-eligible patients see non-Medicare physicians wholly outside Medicare). In any event, HHS failed to respond to the AAPS comment and instead persists – both in this litigation and in its 2012 Rule – in claiming that physicians must file an opt-out affidavit pursuant to §1395a(b) in order to treat Medicare-eligible patients for pay outside of the Medicare program. 77 Fed. Reg. at 25,291 (App. 52). Had it instead considered the AAPS comments, HHS might have decided that – even if HHS lawfully *could* require PECOS enrollment – HHS *should not* require PECOS enrollment as a condition to referring Medicare-eligible patients for Medicare-covered services.

Under the circumstances, the 2012 Rule is itself invalid for failing to respond adequately to comments. *Home Box Office, Inc. v. F.C.C.,* 567 F.2d 9, 35-36 (D.C.

Cir. 1977). Under the circumstances, the only appropriate judicial response to the 2012 Rule is vacatur and remand. *Am. Mining Congress v. U.S. E.P.A.,* 907 F.2d 1179, 1187-88 (D.C. Cir. 1990) (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

b. Applicants May Assert the Invalidity of the 2012 Rulemaking to Show Jurisdiction for Count IV

In light of the asserted invalidity of the 2012 Rule, *see* Section III.B.1.a, *supra,* Applicants respectfully submit not only that the procedural claims against the IFC and CR6417/6421 are not moot but also that dismissing those claims would not serve any purpose: Applicants would simply need to refile their claims against the IFC and CR6417/6421, coupled with the additional claims against the 2012 Rule. Significantly, the case is in this unusual posture because the Administration did not bring the 2012 Rule to the district court's attention in early 2012, when Applicants could have simply moved to supplement their complaint. In such unusual circumstances, appellate courts allow amending or supplementing the pleadings to avoid "needless waste" of litigants' and courts' time, which would "run[] counter to effective judicial administration." *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 833 (1989) (*quoting Mullaney v. Anderson,* 342 U.S. 415, 416-17 (1952)). Even if the parties and the appellate courts do not seek to amend the pleadings on appeal, the path pursued by the *en banc* Seventh Circuit in *Newman-Green* also remains open. Without deciding the merits of Applicants' procedural claims, the D.C. Circuit could remand Count IV to the district court for further proceedings on Applicants' procedural claims, unless the D.C. Circuit affirms or

reverses the district court on other aspects of Count IV (e.g., affirms Applicants' lack of standing or rejects the Administration's substantive authority). Since the Administration would not be prejudiced by that course, where Applicants can refile the same suit in district court or on remand. As such, it would constitute a "needless waste" to dismiss Count IV's procedural claims as moot.

2. The 2012 Rulemaking Does Not Moot Applicants' Substantive Claims in Count IV

Two substantive issues remain within Count IV, regardless of whether the April 2012 rulemaking cures all of the alleged procedural defects of the prior HHS actions: (1) whether the safe harbor for Medicare opt outs, 42 U.S.C. §1395a(b), imposes legal requirements on non-Medicare physicians, *see* Section III.A, *supra;* and (2) whether HHS has authority for its PECOS requirements in the first place. With regard to that second substantive question, Applicants proffer the Origination Clause as a basis to invalidate PPACA in its entirety, including the authorization for the PECOS requirements. *See* Section I.A.2, *infra.* Without PPACA, Applicants will prevail against the PECOS changes – including the new rulemaking – because HHS lacked authority to make the changes without the PPACA authority on which HHS specifically relied in those administrative actions. If that authority is voided, the HHS action must be vacated:

> The validity of the [agency's] action must, therefore, *stand or fall on the propriety of that finding[.]* If that *finding is not sustainable on the administrative record made,* then the [agency's] decision *must be vacated and the matter remanded to [it] for further consideration.*

Camp v. Pitts, 411 U.S. 138, 143 (1973) (emphasis added). Even before the APA's

enactment,"[t]he grounds upon which an administrative order must be judged [were] those upon which the record discloses that its action was based." *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943). Thus, whether under the APA or equity, the PECOS changes must be vacated and remanded if PPACA falls.

REQUESTED RELIEF

Applicants AAPS and ANH-USA respectfully request the entry of an injunction pending final judgment against the Administration's requiring non-Medicare physicians to enroll in PECOS as a precondition to refer Medicare-eligible patients for Medicare-covered services (*e.g.*, oxygen, bloodwork, and x-rays) from Medicare providers. In addition, AAPS and ANH-USA respectfully seek a stay to allow for orderly briefing and disposition of this application. Finally, to the extent that this Court's jurisdiction to issue the requested interim relief *requires* resort to 28 U.S.C. §1254(1), Applicants respectfully ask the Court to grant *certiorari* before judgment and to grant injunctive relief pending disposition of that petition.

CONCLUSION

The application for an injunction pending final judgment should be granted.

Dated: January 3, 2014

Respectfully submitted,

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BRIEF FORM CERTIFICATE

Pursuant to Sup. Ct. Rules 21 and 33, I certify that the attached motion is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 38 pages, excluding this Brief Form Certificate, the Table of Authorities, the Appendix, the Table of Contents, and the Certificate of Service.

Dated: January 3, 2014

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 3rd day of January, 2014, one true and correct copy of the foregoing application and its appendix was served on the following counsel via postage-prepaid U.S. Priority Mail:

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In addition to the foregoing service by priority mail, the undersigned also certifies that a PDF courtesy copy of the foregoing documents was served via electronic mail on the same counsel at the email address indicated above.

The undersigned further certifies that, on this 3rd day of January 2014, an original and two true and correct copies of the foregoing application and its appendix were served on the Court by messenger.

Executed January 3, 2014, at Washington, DC,

_____

Lawrence J. Joseph