UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., *et al.,*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0499-RJL
KATHLEEN G. SEBELIUS, Secretary of Health & Human Services, in her official capacity, *et al.,*	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS

In opposition to the defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE and their accompanying memorandum of law, plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA hereby file the attached memorandum of law. Plaintiffs respectfully request an opportunity for oral argument.

A proposed order is attached.

Dated: January 10, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., *et al.,*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0499-RJL
KATHLEEN G. SEBELIUS, Secretary of Health & Human Services, in her official capacity, *et al.,*	)	
Defendants.	)	

[Proposed] Order

On considering defendants' motion to dismiss, the memoranda in support thereof and in opposition thereto, and the entire record herein, the Court holds that plaintiffs have alleged cognizable injuries within the Court's jurisdiction and that the Court can grant the requested relief. For the foregoing reasons, it is hereby

ORDERED that defendants' motion is denied.

Dated: _____, 2011

_____
UNITED STATES DISTRICT JUDGE

Copy to:

LAWRENCE J. JOSEPH
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Counsel for Plaintiffs

JUSTIN M. SANDBERG
ERIC B. BECKENHAUER
Federal Programs Branch
20 Mass. Ave., NW, Rm. 7302
Washington, DC 20001
Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., *et al.,*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0499-RJL
KATHLEEN G. SEBELIUS, Secretary of Health & Human Services, in her official capacity, *et al.,*	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA

Dated: January 10, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

In this action, plaintiffs Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health-USA ("ANH-USA") challenge actions by the United States as federal sovereign and three officer defendants associated with the federal Department of Health and Human Services ("HHS"), Department of the Treasury ("Treasury"), and the Social Security Administration ("SSA") who are responsible for implementation of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"), the Medicare statute, 42 USC §§1395-1395kkk-l ("Medicare"), and the Medicare and the Social Security trust funds. In brief, Plaintiffs challenge the following unlawful action and inaction:

(1) Counts II and III challenge PPACA's mandate that most individuals and employers with more than 50 fulltime employees procure PPACA-compliant health insurance;

(2) Counts I and IV challenge Defendants' burdening or restricting Medicare-eligible patients' ability to obtain medical treatment outside of Medicare and burdening or restricting non-Medicare-enrolled physicians' referring Medicare-eligible patients for services that Medicare entitles those patients with requirements related to the Provider Enrollment, Chain and Ownership System ("PECOS") and National Provider Identifiers ("NPIs"); and

(3) Counts V and VI challenge the officer defendants' mismanaging the Medicare and Social Security trust funds – on which many Americans rely – and violating their fiduciary duties with respect to those funds in an effort to support the "party line" on PPACA.

See Compl. ¶¶2, 118. Defendants move to dismiss under FED. R. CIV. P. 12(b)(1) and (b)(6), which Plaintiffs address in three separate sections on jurisdiction (Section I), the relevant causes of action (Section II), and the substantive merits (Section III).

CONSTITUTIONAL AND STATUTORY BACKGROUND

This section summarizes the relevant constitutional and statutory background.

Constitutional Authority

Under the federal Constitution, defendant United States is a sovereign of limited powers, and – to its credit – it has consented to suit in federal court. 5 U.S.C. §702. Long before the 1976 statute granting that consent, however, our political and legal tradition allowed suit to compel government officers to comply with the government's laws and Constitution:

> that the King's courts… could order his officers to account for their conduct [] was the essence of… "the rule of law." Whatever the logical contradictions between this doctrine and sovereign immunity, [it] had become firmly established [and] as much a part of the law as… sovereign immunity.

Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 165 (1803) ("the law… entertains no respect or delicacy [for the Crown's officers]; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice") (*quoting* 3 WILLIAM BLACKSTONE, COMMENTARIES *255). Thus, notwithstanding defendant United States' sovereignty, Plaintiffs can enforce the sovereign rights retained to the People and the States, U.S. CONST. amend. IX ("enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"), to whom the Constitution reserves all powers not expressly provided to the federal government. U.S. CONST. amend. X.

Under U.S. CONST. art. I, §8, Congress has the authority "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the … general welfare," provided that "all duties, imposts and excises shall be uniform throughout the United States." That section also authorizes Congress to "regulate commerce … among the several states" and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Id.*

As amended, the federal Taxing Power requires that direct taxes "shall be apportioned among the several states … according to their respective numbers," except that Congress may "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. CONST. art. I, §2; *id.,* amend. XVI. Except as provided by the Sixteenth Amendment for "taxes on income," U.S. CONST. amend. XVI, "[n]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." U.S. CONST. art. I, §9.

The Fifth Amendment prohibits the taking of private property for public use without just compensation. U.S. CONST. amend. V. In addition, the Fifth Amendment includes an equal-protection component against federal discrimination that parallels the Equal Protection Clause of the Fourteenth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976).

PPACA

PPACA represents a massive expansion of the federal role in healthcare and health insurance, passed on party-line votes and unusually explicit state-by-state deal-making in the Senate (*e.g.,* the "Cornhusker Kickback" and "Louisiana Purchase" to secure the votes of moderate Democrats) to secure the last votes for cloture and thereby avoid a filibuster. For purposes of responding to Defendants' motion to dismiss, Plaintiffs focus on only a few PPACA provisions: (1) PPACA §1501 requires individuals to obtain PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §5000A (the "Individual Mandate"); (2) PPACA §1513 requires employers with fifty or more "fulltime" (as defined) employees to provide PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §4980H (the "Employer Mandate"); (3) PPACA §2704(a), §2711(a)(2), and §2714(a) collectively drive up the cost of insurance by prohibiting the exclusion of insureds with pre-existing conditions, prohibiting insurers from setting lifetime

limits, requiring insurers to cover preventive health services and to allow children to remain on their parents' plans through age 26, and restricting insurers' use of annual limits on coverage; (4) PPACA §6402 and §6405 amended Medicare to require that providers include NPIs and to authorize HHS to require referrers to include NPIs on Medicare orders; and (4) PPACA §9003 excludes drugs not prescribed by a physician from reimbursement through health savings accounts and flexible spending accounts, effective January 1, 2011. In addition, Plaintiffs also rely on something that PPACA *does not* contain – a severability clause – to signal congressional intent to have the entire PPACA rendered invalid if courts invalidate its key provisions. Compl. ¶2(e).

Administrative Procedure Act

Although the Constitution vests "[a]ll legislative Powers" in Congress, U.S. CONST. art. I, §1, Congress has delegated rulemaking authority to federal executive agencies via the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"). Under APA's familiar provisions for notice-and-comment rulemaking, agencies generally must propose so-called legislative rules in the *Federal Register* and accept comments, to which the agencies must respond in issuing a final rule in the *Federal Register*. 5 U.S.C. §553(b)-(c). APA exempts rules from these requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B). In addition, the notice-and-comment requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(A).

REGULATORY BACKGROUND

The promulgations associated with Counts I and IV provide the entire regulatory background for those counts because Defendants issued them without notice-and-comment

rulemaking. As such the record on those actions consists of the actions themselves, which Plaintiffs allege to constitute legislative rules that required notice-and-comment rulemaking:

- The Social Security Program Operations Manual System ("POMS") revisions on (a) Waiver of Hospital Insurance Entitlement by Monthly Beneficiary, POMS HI 00801.002, (b) Withdrawal Considerations, POMS HI 00801.034, and (c) Withdrawal Considerations When Hospital Insurance is Involved, POMS GN 00206.020; and
- The Center for Medicare and Medicaid Services ("CMS") Manual System's Charge Request 6417 and Charge Request 6421 (collectively, "CR6417/6421"); and
- Department of Health & Human Services ("HHS") Interim Final Rule with Comment Period ("IFC"), 75 Fed. Reg. 24,437 (2010).

When a district court reviews the actions of an administrative agency, it essentially sits as an appellate court reviewing the administrative record on which the agency acted. *Marshall County Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 (D.C. Cir. 1993). Because the agencies did not conduct the required notice-and-comment rulemaking, these documents constitute the only relevant record for the legal question presented, namely whether the agencies could promulgate these rules without notice-and-comment rulemaking.

FACTUAL BACKGROUND

For purposes of a motion to dismiss, the facts are those set forth in the Second Amended & Supplemented Complaint ("Compl."), along with any reasonable inferences from those

allegations and the affidavits[1] that Plaintiffs submit in support of their opposition to the Defendant's Motion to Dismiss and its accompanying memorandum ("Defs.' Memo.").

ARGUMENT

I. THIS COURT HAS SUBJECT-MATTER JURISDICTION

Motions to dismiss under Rule 12(b)(1) allege that the pleadings fail to establish subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). To assess subject-matter jurisdiction – *i.e.,* "courts' statutory or constitutional *power* to adjudicate the case," *Steel Co. v. Citizens for a Better Envt.,* 523 U.S. 83, 89-90 (1998) (emphasis in original) – courts "must assume the challenging party's view of the merits." *Ciba-Geigy Corp. v. EPA,* 801 F.2d 430, 439 (D.C. Cir. 1986) (ripeness); *City of Waukesha v. EPA,* 320 F.3d 228, 235 (D.C. Cir. 2003) (standing); *Sierra Club v. Gorsuch,* 715 F.2d 653, 658 (D.C. Cir. 1983) (finality of agency action). In ruling on Rule 12(b)(1) motions, courts take the plaintiff's factual allegations as true and also "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990); *accord Nat'l Wildlife Fed'n v. Burford,* 835 F.2d 305, 311-12 (D.C. Cir. 1987).

Courts may explore matters outside the pleadings to determine their jurisdiction. *Land v. Dollar,* 330 U.S. 731, 735 n.4 (1947); *Herbert v. National Academy of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992). Before going outside the pleadings, however, a court first should provide notice to the parties and an opportunity to submit affidavits and other materials. *Gordon v. Nat'l Youth Work Alliance,* 675 F.2d 356, 360 (D.C. Cir. 1982). But "ruling on a Rule 12(b)(1) motion

[1] Plaintiffs submit the Declarations of Dr. Kenneth Christman, Gretchen DuBeau, Dr. Laura Hammons, Lawrence Joseph, Dr. Jane Orient, and Dr. George Keith Smith (Ex. 1 to Ex. 6, respectively).

may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction." *Herbert,* 974 F.2d at 198. Finally, "where the question of jurisdiction is dependent on decision of the merits," courts may merge the merits and jurisdictional stages. *Land,* 330 U.S. at 735; *Herbert,* 974 F.2d at 198 (if "disputed jurisdictional facts… are inextricably intertwined with the merits of the case [the court] should usually defer its jurisdictional decision until the merits are heard").

A. Standing

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). Statutes can confer rights, the denial of which constitutes injury redressable by a court. *Warth v. Seldin,* 422 U.S. 490, 514 (1975). For injuries directly caused by agency action, a plaintiff can show an injury in fact with "little question" of causation or redressability, but when an agency causes third parties to inflict injury, the plaintiff must show more to establish causation and redressability. *Defenders of Wildlife,* 504 U.S. at 561-62.

Membership organizations may establish standing either in their own right or on behalf of their members. *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). An association may sue on behalf of "any one" of its members, notwithstanding that that member's interest conflicts with the interests of other members. *National Lime Ass'n v. E.P.A.,* 233 F.3d

625, 636 (D.C. Cir. 2000). At the summary disposition phase, members' affidavit suffice, *id.,* but at the pleadings phase mere allegations suffice. *Burford,* 835 F.2d at 312-13.[2]

To establish their standing, Plaintiffs set forth six distinct injuries in fact. The following sections outline these injuries in fact and the applicable zone-of-interest analyses.[3]

1. Injuries in Fact

Injury includes both injury and threatened injury, *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983), which "need not be to economic or … comparably tangible" interests: an "identifiable trifle" suffices. *Pub. Citizen v. FTC,* 869 F.2d 1541, 1547-48 (D.C. Cir. 1989). Although an abstract or generalized interest (*e.g.,* ensuring proper government operation and general compliance with the law) cannot *establish* standing, the mere fact that many people share an

---

[2] Defendants cite *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1151 (2009), and *Am. Chemistry Council v. Dep't of Transp.,* 468 F.3d 810, 820 (D.C. Cir. 2006) ("*ACC*"), for the proposition that complaints must name a specific affected member to establish standing. Defs.' Memo. 10. Both cases related to jurisdiction to enter injunctive relief *on the merits, Summers,* 129 S.Ct. at 1150-52; *ACC,* 468 F.3d at 814 (*ACC* involved direct appellate review under 49 U.S.C. §§5127(a), 20114(c) and 28 U.S.C. §2342, which are merits proceedings), and thus had nothing to do with jurisdiction at the pleading stage. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (interior quotations omitted, alterations in original); *Bennett v. Spear,* 520 U.S. 154, 167-68 (1997) (recognizing that, at pleading stage, plaintiff need not establish standing with the same specificity as for summary judgment) (*citing Defenders of Wildlife,* 504 U.S. at 561). In *Bennett,* the issue was not the plaintiffs' names but whether they themselves would lose water *at all* as part of an aggregate diminution of water, which the Court found it could simply *assume* (under a pro rata diminution) at the pleading stage. *Bennett,* 520 U.S. at 167-68. In sum, a plaintiff's required showing at the Rule 12(b) stage differs markedly from its required showings on the merits. In any event, plaintiffs can identify members by affidavit or declaration in defending a motion to dismiss, *National Taxpayers Union, Inc. v. U.S.,* 68 F.3d 1428, 1435 (D.C. Cir 1995), and the requirement to name affected members is inapposite when the challenged action affects an entire group. *Summers,* 129 S.Ct. at 1150.

[3] Beyond the bases for dismissal pressed by Defendants' motion, no legal or equitable principles preclude this action. Plaintiffs address Defendants' specific arguments as they arise.

injury cannot *defeat* standing. *FEC v. Akins,* 524 U.S. 11, 23 (1998). Moreover, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006). Thus, Plaintiffs can challenge Defendants' action for any unlawfulness, once Plaintiffs establish their standing to challenge that action. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing).

a. Statutory Freedom of Choice

In response to PPACA, many states – including Virginia, Idaho, Arizona, Georgia, Missouri, Oklahoma, and Louisiana – have adopted state "Freedom of Choice in Health Care Acts" to prohibit compelling their residents to purchase health insurance. *See* Compl. ¶81; OKLA. CONST. art. II, §37(B)(1) ("law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system"); Smith Decl. ¶8 (Oklahoman physician suffering from PPACA's coercion of Oklahomans in his personal capacity and through patients); Orient Decl. ¶14 (Arizona physician). Although PPACA and the Supremacy Clause, U.S. CONST. art. VI, cl. 2, plainly would preempt these laws *if PPACA is lawful,* an unconstitutional federal statute cannot preempt state law. Accordingly, to the extent that PPACA is unlawful, these state statutes create rights, the denial of which establishes standing. *Warth,* 422 U.S. at 514; *Am. Trucking Ass'ns v. Dep't of Transp.,* 166 F.3d 374, 385 (D.C. Cir. 1999). PPACA violates these state-law rights of Plaintiffs' members and – for physician members – the members' patients.

b. Competitive Injuries and Unequal Footing

Under the "competitor standing doctrine," the "injury claimed … is not lost sales, *per se;*… [r]ather the injury claimed is exposure to competition." *Bristol-Myers Squibb Co. v.*

Shalala, 91 F.3d 1493, 1499 (D.C. Cir. 1996); *Liquid Carbonic Indus. Corp. v. FERC,* 29 F.3d 697, 701 (D.C. Cir. 1994) ("Increased competition represents a cognizable Article III injury") (citing cases). Moreover, "there is no need to wait for injury from specific transactions to claim standing" when the challenged action "will almost surely cause [Plaintiffs] to lose business. *El Paso Natural Gas Co. v. FERC,* 50 F.3d 23, 27 (D.C. Cir. 1995); *Diamond v. Charles,* 476 U.S. 54, 66 (1986) (physicians have standing to challenge state actions that financially affect their practices); *cf. Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (even a small increase in incremental risk caused by government action "suff[ices] to create a case or controversy"). Either by excluding Plaintiffs' physician members from the relevant PPACA and Medicare markets or by advantaging their competitors, the challenged government actions constitute an "invasion of a legally protected interest…. in a manner that is 'particularized'" to Plaintiffs' members, which is an injury *per se,* whether or not the member would secure the benefit with the injury removed.[4] *Adarand Constructors, Inc., v. Pena,* 515 U.S. 200, 211 (1995). Plaintiffs' members suffer competitive and unequal-footing injuries with respect to Counts I, II, III, and IV. *See* Compl. ¶8; Orient Decl. ¶¶24-25; Smith Decl. ¶¶7-8, 10.

c. Economic Injury and Regulatory Burden

Defendants' actions negatively impact Plaintiffs' members, both with direct economic costs and administrative burdens, which Plaintiffs have standing to challenge. *Diamond,* 476 U.S. at 66; *Indep. Bankers Ass'n of Am. v. Heimann,* 613 F.2d 1164, 1167 (D.C. Cir. 1979) (standing to challenge agency action that forces regulated entity to choose between more costly

[4] Although some would confine this "unequal footing" analysis, for example to equal-protection cases, *Clinton v. New York,* 524 U.S. 417, 456-57 (1998) (Scalia, J., dissenting), the analysis plainly applies, not only outside the equal-protection context but also to indirect-injury cases. *See Clinton v. New York,* 524 U.S. at 433 & n.22.

method); *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 62 (1976) (standing for "[person] against whom [the act] directly operate[s]… assert a sufficiently direct threat of personal detriment"). Similarly, unlawful administrative burdens "[c]learly… me[e]t the constitutional requirements, and… [Plaintiffs] therefore ha[ve] standing to assert [their] own rights," the "[f]oremost" of which is the "right to be free of arbitrary or irrational [agency] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 263 (1977). Even if Plaintiffs or their members must seek review in future proceedings on the specific levels of benefits, they have standing to challenge the federal guidelines that govern how the government implements federal benefit programs. *Int'l Union v. Brock,* 477 U.S. 274, 284 (1986). In all of the foregoing analysis, "courts routinely credit" "basic economic logic" for standing. *United Transp. Union v. I.C.C.,* 891 F.2d 908, 912 n.7 (D.C. Cir. 1989); *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 94 (D.C. Cir. 2002) ("basic economic logic" establishes "*prima facie* claim of injury," which defendant must rebut).

In addition to the foregoing and distinct from the third-party injuries discussed in Section I.A.1.e, *infra,* Plaintiffs' physician and patient members also suffer from Defendants' unlawfully restricting the terms on which they may interact with third parties. Significantly, such injuries are first-party, not third-party, injuries because they *directly* impair the freedom to interact with others. Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.,* 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan); *Columbia Broadcasting System, Inc. v. U.S.,* 316 U.S. 407, 422-23 (1942) (broadcasters had standing to challenge regulations that altered the terms on

which third-party station owners could interact with broadcasters) ("*CBS*"); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.,* 843 F.2d 517, 524 (D.C. Cir. 1988) (discussing cases); *Haitian Refugee Center v. Gracey,* 809 F.2d 794, 811 n.13 (D.C. Cir. 1987) (no "independent need…. to establish third party standing since the legal right they asserted – the right not to be injured by unauthorized agency action – was their own").

Economic injuries cover Counts I, II, III, IV, V, and VI, and administrative burdens cover Counts IV. *See* Smith Decl. ¶¶6-15 (Counts (I, II, IV); DuBeau Decl. ¶7-8 (Counts II, III); Orient Decl. ¶¶23-25 (I, IV); Christman Decl. ¶¶5-9 (Count II); Hammons Decl. ¶¶5-7 (Count IV); Compl. ¶¶23-27.

d. Equal Protection Injury

Defendants purportedly seek to protect the federal fisc from uninsured patients' imposing costs on the health system, arguing circularly that Defendants' decision to require emergency rooms to treat the public regardless of any ability to pay justifies Defendants' acting against private citizens – who have not and will not contribute to any burden on the federal fisc, Christman Decl. ¶5; Smith Decl. ¶11 – to make up for the voluntary expenditure of federal funds. Defs.' Memo. at 38-39.[5] At least with respect to individuals who prefer and choose to maintain

[5] Even defendants must have standing to proceed, and Defendants' argument here reflects a self-inflicted injury. *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (no standing to redress "self-inflicted" injuries); *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injury does not support standing if it is "so completely due to the [complainant's] own fault as to break the causal chain") (*quoting* 13C. WRIGHT, A. MILLER & E. COOPER, FED. PRACTICE & PROCEDURE: Jurisdiction 2d §3531.5 (2d ed. 1984). While defendant United States may have the authority to tax the public generally and to provide benefits to some or all of the public, *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 585 (1937), the authority to proceed discretely under the Taxing Power and under the Spending Clause (as the government argued in *Steward Machine*) differs completely from PPACA's cobbled-together mandates of private actions and private subsidies. *See* Section III.A, *infra.*

high-deductible, catastrophic-risk insurance and can make their deductible payments, Smith Decl. ¶11, the decision to impose burdens on these "self-paying" citizens, greater than the burdens imposed on citizens who hold the type of insurance that Defendants prefer, discriminates against those with high-deductible plans who do not impose any burdens on the federal fisc. These members, therefore, may invoke the right to equal treatment via an exemption from PPACA's penalties for maintaining their preferred method of health insurance and payment. *Gratz v. Bollinger,* 539 U.S. 244, 262 (2003) ("'*injury in fact*'… is the denial of equal treatment [from] imposition of the barrier") (emphasis added). "[W]hen the "right invoked is that of equal treatment," "the appropriate remedy is a mandate of *equal* treatment, [which] can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 740 (1984) (emphasis in original). Plaintiffs therefore have equal-protection rights to enforce against PPACA's insurance mandates.

Precisely to avoid equal-protection arguments and injuries, states that condition the *privilege* of a driver's license on maintaining minimum insurance *for third-party liability* typically allow alternatives, such as self-insurance, bonds, and certificates of deposit for those minimum amounts. *See, e.g.,* CAL. VEH. CODE §16053; OHIO REV. CODE ANN. §4509.45; LA. REV. STAT. ANN. §32:104. Failure to provide these alternatives on equal terms with the insurance option constitutes an equal-protection violation. *See, e.g., Hebard v. Dillon,* 699 So.2d 497, 503 (La. App. 1997) ("[a]nother reason against having separate penalty rules for insurers and self-insurers dealing with claimants is the potential violation of the constitutional concepts of equal protection and fundamental fairness" because "[a]ll persons in the same class, including insurers and self-insurers, should have similar legal obligations under similar circumstances"); *Jitney Bus*

Ass'n v. City of Wilkes-Barre, 256 Pa. 462, 469, 100 A. 954, 956 (Pa. 1917) ("municipality is entitled to require good and sufficient security, but beyond that it should not go"); *People v. Kastings,* 307 Ill. 92, 108-09, 138 N.E. 269, 275 (Ill. 1923) (reversing conviction and invaliding statute for impermissibly discriminating between taxis giving bonds and taxis with insurance). Although the automobile-insurance analogy is a canard that PPACA supporters rely upon to support PPACA's insurance mandates,[6] the foregoing automobile-insurance decisions demonstrate that mandates – when lawful at all – must comply with equal-protection principles.

e. Third-Party Standing

Following *Powers v. Ohio,* 499 U.S. 400, 411 (1991), this Circuit allows third-party standing *inter alia* where the first-party has suffered a constitutional injury in fact, has a close relationship with the third party, and "some hindrance" prevents the third party's asserting its own rights. *American Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1361-62 (D.C. 2000). Moreover, associations like Plaintiffs can assert third-party standing based on the relationships between members and third parties. *Fraternal Order of Police v. U.S.,* 152 F.3d 998, 1001-02 (D.C. Cir. 1998); *Nat'l Cottonseed Prod. Ass'n v. Brock,* 825 F.2d 482, 490 (D.C. Cir. 1987). Indeed, under this Circuit's vendor-standing decisions and analogous Supreme Court decisions, plaintiffs need not identify a *specific* third party: unspecified third parties such as *potential* customers suffice. *Nat'l Cottonseed Prod. Ass'n,* 825 F.2d at 490 (*citing FAIC Securities, Inc. v. U.S.,* 768 F.2d 352, 358 (D.C. Cir. 1985)); *Craig v. Boren,* 429 U.S. 190, 194-95 (1976); *Carey v. Population Serv., Int'l,* 431 U.S. 678, 683 (1977). Once a plaintiff has established *constitutional* standing, that plaintiff may rely on third-party standing to satisfy the merely

[6] Unlike PPACA's regulating for *inactivity* (*i.e.,* simply for being alive), automobile insurance requirements cover liability to third parties and attach to the privilege of a license.

prudential zone-of-interest test. *FAIC Securities,* 768 F.2d at 357-61; *Carey,* 431 U.S. at 682-86. Under these third-party principles, *if Plaintiffs have standing* (which Plaintiffs contend that they have, Sections I.A.1.a-d, *supra,* I.A.1.f-I.A.2, *infra*), Plaintiffs must show a close relationship with, and some hindrance for, their patients in order to assert the patients' rights.

Defendants cite *Kowalski v. Tesmer,* 543 U.S. 125 (2004), for the proposition that "a 'hypothetical' doctor-patient relationship is insufficient to establish the requisite 'close' relationship." Defs.' Memo. at 12-13 n.8, Although it rejected third-party standing on its facts, *Tesmer* cannot bear the weight that Defendants place on it. In *Tesmer,* the Court assumed the constitutional injury of lost income from future work, but rejected lawyers' federal-court attempt to assert the rights of prospective clients – as opposed to existing clients – where the prospective clients appeared able to assert their own rights in state-court actions and, "more fundemenal[ly]" the attempt to assert those rights in federal court would "short circuit the State's adjudication of this constitutional question," in violation of *Younger v. Harris* abstention principles. *Tesmer,* 543 U.S. at 130-32.

Nowhere does *Tesmer* signal any one factor (*e.g.,* prospective versus existing clients, hindrance, or abstention) as dispositive. Because *Carey* and *FAIC Securities* found third-party standing from the constitutional injury and asserting the third-party rights of prospective patients and customers, *Carey,* 431 U.S. at 683; *FAIC,* 768 F.2d at 356-59, neither this Court nor even a three-judge panel of this Circuit can read *Tesmer* to overturn those controlling decisions: "[lower courts] should follow the case which directly controls" but "appears to rest on reasons rejected in some other line of decisions," "leaving to [the higher court] the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237-38 (1997). Moreover, the "zone of interests adequate to sustain judicial review is particularly broad in suits to compel federal agency

compliance with law, since Congress itself has pared back traditional prudential limitations." *FAIC,* 768 F.2d at 357. That "particular breadth" in challenging *federal* action here (as in *FAIC*) further distinguishes *Tesmer,* which found it "fundamental" that that federal litigation to challenge *state* action would frustrate federalism and abstention principles.

Defendants cite *Hall v. Sebelius,* 689 F.Supp.2d 10 (D.D.C. 2009), and *Florida v. HHS,* 716 F.Supp.2d 1120 (N.D. Fla. 2010), as evidence that patients can challenge the POMS and PPACA, Defs.' Memo. at 12-13 n.8, notwithstanding that Defendants question the ability of plaintiffs in those cases to bring those challenges. *Hall v. Sebelius,* 689 F.Supp.2d at 18 (POMS); *Florida v. HHS,* 716 F.Supp.2d at 1130 (PPACA). While somewhat disingenuous in both instances, Defendants' position is hopelessly circular for PPACA. Either patients have standing and ripe claims (in which case Plaintiffs here can proceed based on their members' status *as patients*) or patients cannot proceed (in which case plaintiffs there face a hindrance that allows Plaintiffs here to proceed based on their members' status *as physicians*).[7]

Significantly, "unawareness of the injury" qualifies as a sufficient hindrance, *American Immigration Lawyers Ass'n,* 199 F.3d at 1363 (*citing Lepelletier v. FDIC,* 164 F.3d 37, 43 (D.C. Cir. 1999)). Thus, unlike the aliens in *American Immigration Lawyers Ass'n,* the patients and prospective patients of Plaintiffs' physician members will not know of the risks they face. Because the Defendants and their representatives famously promised that PPACA allows those with private insurance that they liked would be able to keep their insurance, Joseph Decl. ¶5, many patients and prospective patients are simply unaware of the changes that PPACA will

[7] The same rationale applies to POMS, except that Defendants also assert a jurisdictional bar to Plaintiffs' proceeding here, Defs.' Memo. 14-16, which is not present with PPACA. Plaintiffs address this jurisdictional issue in Section I.C.3, *infra.*

wreak on private insurance. Joseph Decl. ¶8. Similarly, in *Powers,* the third party had "little incentive" to bring suit because "of the small financial stake involved and the economic burdens of litigation." 499 U.S. at 415. As in *Powers,* individual patients will have little incentive to sue because the cost of such litigation would outweigh the near-term savings. As such, physicians can "by default [become] the right's best available proponent." *American Immigration Lawyers Ass'n,* 199 F.3d at 1362 (quotations omitted). Waiting for patients to sue will be too late.

Third-party standing applies to Counts I, II, III, V, and VI and the parts of Count IV that concern Medicare-eligible patients' abilities to see Plaintiffs' physician members wholly outside of Medicare and Plaintiffs' physician members to refer Medicare services for Medicare-eligible patients outside of PECOS. Smith Decl.¶ ¶6, 10; Orient Decl. ¶¶24-25; Hammons Decl. ¶7; Compl. ¶30.

f. Procedural Injury

"The history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.,* 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.,* 318 U.S. 332, 347 (1943)). Counts I and IV challenge HHS failures to observe such safeguards, for which "those adversely affected… generally have standing to complain." *FEC v. Akins,* 524 U.S. 11, 25 (1998) (citing cases). Rescission and remand may produce the same result, *id.,* but until that happens, the initial injury remains "fairly traceable" to the agency's initial action, and redressable by an order striking the initial agency action, *id.* Although *FEC v. Akins* did not involve a rulemaking violation, this Circuit has extended its causation and redressability rationale to such violations. *Animal Legal Defense Fund v. Glickman,* 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*) ("*ALDF*"). Plaintiffs need not show that a rulemaking will provide the desired result: "If a party claiming the deprivation of a right to notice-and-comment rulemaking . . . had to show that its comment would have altered the agency's rule, section 553

would be a dead letter." *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 94-95 (D.C. Cir. 2002).

Because Plaintiffs also allege several concrete injuries, *see* Sections I.A.1.a-e, *supra,* they have standing to challenge these procedural violations. *Florida Audubon Soc'y v. Bentsen,* 94 F.3d 658, 664-65 (D.C. Cir. 1996) ("procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest") (*en banc*); *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7 (only parties with an underlying *concrete* interest – *e.g.,* those living next to a proposed dam – can base standing on *abstract* procedural rights). Given these concrete injuries, redressability and immediacy apply to the *present procedural violation,* which may someday injure the concrete interest, rather than to the concrete (but less certain) future injury. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996).

2. Zone of Interests

Standing's "zone-of-interest" test is a prudential doctrine that asks whether the interests to be protected *arguably* fall within those protected by the relevant statute. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.,* 522 U.S. 479, 492 (1998). This generous and undemanding test focuses not on Congress' intended beneficiary, but on those who in practice can be expected to police the interests that the statute protects. *ALDF,* 154 F.3d at 444; *Am. Friends Serv. Comm. v. Webster,* 720 F.2d 29, 52 (D.C. Cir. 1983) ("the relatively rigorous requirements for establishing congressional intent to create a private right of action should not be equated with the 'slight' indicia standard under the 'zone' test") (footnote omitted). To show that

they are *arguably* "protected" by a statute, plaintiffs may demonstrate that they are either the statute's intended beneficiaries or "suitable challengers" to enforce the statute.[8]

For intended beneficiaries, "'slight beneficiary indicia' are sufficient to sustain standing." *Am. Friends Serv. Comm.,* 720 F.2d at 50 & n.37. Even if not intended beneficiaries, plaintiffs satisfy the zone of interests as "suitable challengers" if they have "interests… sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." *First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin.,* 988 F.2d 1272, 1275 (D.C. Cir. 1993); *Reytblatt v. Nuclear Regulatory Comm'n,* 105 F.3d 715, 721 (D.C. Cir. 1997) (same); *MD Pharm., Inc. v. D.E.A.,* 133 F.3d 8, 13 (D.C. Cir. 1998) (same).

Even competitors who would be unsuitable challengers for open-ended statutory questions qualify as suitable to challengers for clear statutory or constitutional demarcations: "the *Hazardous Waste Treatment Council* line of cases is inapposite when a competitor sues to enforce a *statutory demarcation, such as an entry restriction,* because the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation." *Honeywell Int'l, Inc. v. EPA,* 374 F.3d 1363, 1370 (D.C. Cir. 2004) (citing cases) (emphasis added, alteration in original), *withdrawn on part on other grounds,* 393 F.3d 1315 (D.C. Cir. 2005); *N.C.U.A.,* 988 F.2d at 1278; *Scheduled Airlines Traffic Offices, Inc. v. D.O.D.,* 87 F.3d 1356, 1360-61 (D.C. Cir. 1996) ("Sato's interests cannot

[8] The zone of interests can limit procedural standing, *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7 (only a party with an underlying concrete interest can enforce an agency's obligation to create an environmental impact statement); *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883 (1990) (court reporter lacks prudential standing to challenge failure to comply with a statutory mandate to conduct hearings on the record), but Plaintiffs fall within the procedural zones for the same reasons that they fall within the concrete zones. In other words, Plaintiffs' members live near this particular dam. *Defenders of Wildlife,* 504 U.S. at 571-72 & n.7.

diverge from the… statute[:…] Either the funds at issue in this case are covered by the statute or they are not"). Accordingly, the zone-of-interest test poses no obstacle to Plaintiffs' standing.

But even if Plaintiffs were not intended beneficiaries or suitable challengers under PPACA, Medicare, and Social Security, they could challenge *ultra vires* agency action, to which the zone-of-interest test essentially does not apply. *Haitian Refugee Ctr. v. Gracey,* 809 F.2d 794, 811-12 & nn.13-14 (D.C. Cir. 1987).

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr., 809 F.2d at 812 n.14; *accord Chiles v. Thornburgh,* 865 F.2d 1197, 1210-11 (11th Cir. 1989). By acting outside their authority, Defendants make law without the constitutional process for making law, violating "the separation-of-powers principle, the aim of which is to protect… the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise,* 501 U.S. 252, 271 (1991); *Ass'n of Data Processing Serv. Org'ns v. Camp,* 397 U.S. 150, 153 (1970) (test asks whether plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). Because Defendants have acted outside their authority (*i.e., ultra vires*), the zone of interest test would not limit Plaintiffs standing, even if Plaintiffs fall outside the relevant statutory zones and fail as suitable challengers.

B. Ripeness

Like standing, ripeness has a constitutional and a prudential component, with the constitutional component essentially mirroring the constitutional standing component of a case

or controversy. U.S. CONST. art. III, §2; *DKT Memorial Fund Ltd. v. A.I.D.,* 887 F.2d 275, 298 (D.C. Cir. 1989). If Plaintiffs currently have constitutional standing, their claims are constitutionally ripe, and vice versa.

Defendants' primary objection to ripeness is that the imposition of PPACA's mandates is years off, coming to a head perhaps in January 2014 in the form of insurance premiums or April 2015 in the form of penalties for failure to have PPACA-compliant insurance. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 130 S. Ct. 1758, 1767 n.2 (2010) (*quoting Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974)); *accord Blanchette v. Conn. Gen. Ins. Corp.,* 419 U.S. 102, 143 (1974). Here, Plaintiffs' will hit this wall, circa 2014 or 2015, Christman Decl. ¶6; Smith Decl. ¶12, and Plaintiffs allege that they already are facing burdens from the impending wall. Compl. ¶21.

Working under a "presumption of reviewability," prudential ripeness requires "pragmatic balancing" of two independent, but related, factors: fitness for review (*i.e.,* "the interests of the court and agency in postponing review") versus the hardship of postponing review (*i.e.,* petitioner's "countervailing interest in securing immediate judicial review"). *Ciba Geigy,* 801 F.2d at 434; *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967). Significantly, this analysis relates to substantive injuries because procedural injuries are extant today and can never get more ripe. *Ohio Forestry Ass'n, Inc., v. Sierra Club,* 523 U.S. 726, 737 (1998) (plaintiff "may complain at the time… that failure… takes place, for the claim can never get riper"). As shown below, Plaintiffs' substantive claims are prudentially ripe.

Purely legal issues are presumptively fit for review, *AT&T Corp. v. FCC,* 349 F.3d 692, 699 (D.C. Cir. 2003); *Her Majesty the Queen ex rel. Ontario v. EPA,* 912 F.2d 1525, 1533 (D.C. Cir. 1990), particularly where they "would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 479 (2001) (interior quotations omitted); *Public Service Elec. & Gas Co. v. F.E.R.C.,* 485 F.3d 1164, 1168 (D.C. Cir. 2007) (same). Here, the issues in question are purely legal and depend only on Defendants' constitutional powers and statutory interpretation. Thus, no facts remain to develop, and neither Defendants nor the courts have an interest in delaying review that, through this case or another, will almost certainly reach the Supreme Court on the PPACA issues.

The hardship prong comes into play when a claim is not fit for review, such that the plaintiff "must demonstrate that postponing review will cause [it] 'hardship' in order to overcome a claim of lack of ripeness and obtain review of the challenged rule at this time." *Florida Power & Light Co. v. E.P.A.,* 145 F.3d 1414, 1420-21 (D.C. Cir. 1998). Indeed, when no institutional issues counsel to for postponing review, the hardship prong is "unnecessary." *Public Service Elec. & Gas,* 485 F.3d at 1168; *Sabre, Inc. v. DOT,* 429 F.3d 1113, 1120 (D.C. Cir. 2005) ("absent institutional interests favoring the postponement of review, a petitioner need not show that delay would impose individual hardship to show ripeness"). Thus, "[s]ettled principles of ripeness require that [a court] postpone review of administrative decisions where (1) delay would permit better review of the issues while (2) causing no significant hardship to the parties." *Northern Indiana Public Service Co. v. FERC,* 954 F.2d 736, 738 (D.C. Cir. 1992) ("*NIPSCO"*). Here, neither *NIPSCO* factor applies: delay *would not* benefit review, but it *would* cause hardship. *See* Section II.C, *infra* (listing irreparable harm). Defendants' ripeness arguments are doubly misplaced.

It would be inequitable – even Kafkaesque – to deny review to Plaintiffs injured now by third-party patients acting under government coercion that was unripe for direct review *by the third-party patients.* Under those circumstances, the third parties would lack a justiciable claim to stop the coercion but nonetheless would injure Plaintiffs, who lack a claim to recover against the third parties and could not recover damages against the government. Accordingly, while indirect-injury plaintiffs have a *heightened* showing for causation and redressability, *Defenders of Wildlife,* 504 U.S. at 561-62, they have a *relaxed* showing for prudential ripeness:

> Our decision that the Union's claims are now nonjusticiable does not mean that employees must wait until after they are to be disciplined under the policy to challenge it in federal court. As *Solomon* and *Eaves* demonstrate, indirect injury, in the absence of enforcement, may be sufficient to establish a justiciable controversy, as long as that indirect injury is specific. For example, if an employee has a concrete and plausible desire to say something in particular and refrains from doing so because the statement arguably violates the policy, he may have the ingredients for a ripe, justiciable dispute.

Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 764 (11th Cir. 1991) (*citing Solomon v. City of Gainesville,* 763 F.2d 1212 (11th Cir. 1985) *and Int'l Society for Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979)). As noted in *Hallandale,* this Court should not turn away those injured indirectly injury from government action, even if the patients that injured them (like the union in *Hallandale*) lack a ripe claim against Defendants.

C. Statutory Subject-Matter Jurisdiction

In addition to requiring constitutional subject-matter jurisdiction under Article III, Plaintiffs also must have statutory subject-matter jurisdiction. Significantly, the "right of access to the courts is indeed but one aspect of the right of petition" under the First Amendment. *Cal. Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). While Plaintiffs do not doubt that Congress can place limits on accessing federal courts in appropriate circumstances,

Int'l Union v. Nat'l Right to Work Legal Def. & Ed. Found., Inc., 590 F.2d 1139, 1147 (D.C. Cir. 1978), Congress has not done so here. Specifically, this Court has not only the familiar federal-question jurisdiction of the federal district courts but also unique equity jurisdiction dating back to 1801. Although Defendants point to two instances where Congress precluded *some* forms of jurisdiction or relief, those instances do not preclude *all* forms of jurisdiction or relief.

1. Federal-Question Jurisdiction

In 1976, Congress expanded the federal-question statute to include all challenges to federal administrative agencies and officers by removing the then-applicable amount-in-controversy requirement:

> An anomaly in Federal jurisdiction prevents an otherwise competent United States district court from hearing certain cases seeking 'nonstatutory' review of Federal administrative action, absent the jurisdictional amount in controversy required by [§1331], the general 'Federal question' provision. These cases 'arise under' the Federal Constitution or Federal statutes, and the committee believes they are appropriate matters for the exercise of Federal judicial power regardless of the monetary amount[.]

Califano v. Sanders, 430 U.S. 99, 105 (1977) (*quoting* S. REP. NO. 94-996 at 12 (1976)) (Court's emphasis). "The obvious effect of [eliminating §1331's amount-in-controversy requirement against federal agencies and officers], subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." *Sanders,* 430 U.S. at 107. Unless expressly excluded, the federal-question statute provides jurisdiction. Although defendants cite certain exclusions of jurisdiction or relief, those exclusions to not, by their terms, reach all of the bases that Plaintiff cite. *See* Sections I.C.3-4, *infra.*

2. This Court's Equity Jurisdiction

This Court long has had equity jurisdiction over federal officers that exceeds that of other district courts. *Kendall v. U.S. ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 580-81 (1838); *Stark v. Wickard,* 321 U.S. 288, 290 n.1 (1944); *Peoples v. Dep't of Agriculture,* 427 F.2d 561, 564 (D.C. Cir. 1970). Neither the APA nor the Mandamus Act displaced or limited this historic jurisdiction, which derives both from the court's enabling legislation and Maryland's ceding the District's territory to form the District as a federal enclave. *Peoples,* 427 F.2d at 565; *Ganem v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984). The current statute confers the same jurisdiction as that on which the *Peoples* court relied. *Compare* D.C. Code §11-501 *with* D.C. Code §11-521 (1967) (Ex. 7). Both versions grant this Court "any other jurisdiction conferred *by law*" in addition to "jurisdiction as a United States district court." The "laws" expressly conferring this Court with "general jurisdiction in law and equity" dates back to 1801. Act of March 3, 1863, 12 Stat. 762; Act of June 25, 1936, 49 Stat. 1921; Act of February 27, 1801, 2 Stat. 103.

The District of Columbia Court Reorganization Act of 1970 did not repeal this jurisdiction, but instead retained the jurisdiction granted to this Court "by law," D.C. Code §11-501, which cannot impliedly repeal the prior jurisdiction. *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) ("'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available"). Indeed, the legislative history of the 1976 APA amendments to waive sovereign immunity notes that, under the then-current law, plaintiffs could escape the §1331's then-applicable $10,000 amount-in-controversy requirement by seeking to enjoin federal officers in the District of Columbia. H.R. Rep. No. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136. In

other words, Congress itself recognized in 1976 that its 1970 Reorganization Act had left intact this Court's unique equitable jurisdiction over federal actors.[9]

Significantly, declaratory relief is available under this Court's equity jurisdiction to the extent that that relief is not available under federal-question jurisdiction. *See Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 17-18 (1983); FED. R. CIV. P. 57. Moreover, "the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." *Am. Life Ins. Co. v. Stewart,* 300 U.S. 203, 215 (1937). Thus, if Plaintiffs can establish an equitable action now, the fact that a legal action will materialize in the future does not – and will not later – bar this action.

3. Social Security's Exclusion-of-Review and Exhaustion Clauses

Defendants argue that the channeling provisions of 42 U.S.C. §405(g)-(h) deny this Court jurisdiction over claims related to Social Security and Medicare. Defs.' Memo. at 14-16. By their terms, those sections deny federal district courts jurisdiction only under 28 U.S.C. §1331 and §1346 for claims related to Social Security and certain provisions of Medicare. *See* 42 U.S.C. §§405(g)-(h), 1395ii. Plaintiffs offer two responses to the waiveable and non-waiveable exhaustion barriers that Defendants would erect: (1) Plaintiffs do not seek resort to the forbidden jurisdiction sections (§§1331, 1346), and (2) Plaintiffs have no alternate remedy to this action.

First, as indicated, unlike the plaintiffs in the cases cited by Defendants, Plaintiffs here resort to this Court's equity jurisdiction, which has always been an alternative to §1331. Because

[9] Because it concerned "purely local matters," *Shutack v. Shutack,* 516 F.Supp. 219, 221 (D.D.C. 1981), could not terminate this Court's equity jurisdiction over federal matters not transferred to the District's court system. Any suggestion otherwise is *dicta,* even assuming *arguendo* that *Shutack* could overturn Circuit precedent. *Ganem,* 746 F.2d at 851.

they did not consider the issue, the cases that Defendants cite did not rule out a plaintiff's resort to an alternate form of jurisdiction:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Webster v. Fall, 266 U.S. 507, 511 (1925); *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with"). By way of example, "[t]he Supreme Court has four times explicitly reserved judgment on th[e] question" of whether 28 U.S.C. §1361 provides a jurisdictional alternative to §1331, *Ganem v. Heckler,* 746 F.2d 844, 850 (D.C. Cir. 1984), and this Circuit has found this Court's equity jurisdiction an available alternative to §1331. *Id.* Accordingly, Plaintiffs respectfully submit that 42 U.S.C. §§405(g)-(h), 1395ii are simply inapposite to this Court's alternate equitable jurisdiction.

Second, Plaintiffs allege that Defendants' policies put their members on an unlawfully unequal footing vis-à-vis their competitors favored by Defendants' policies. Smith Decl. ¶¶7-8, 10; Compl. ¶20. For that reason, they will never get the customers they seek, so they cannot avail themselves of the indirect path through Medicare's channeling provisions envisioned by *Am. Chiropractic Ass'n v. Leavitt,* 431 F.3d 812, 816-18 (D.C. Cir. 2005). Under *Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 19 (2000), Plaintiffs can challenge Defendants' Medicare policies because the alternative is "no review at all."

Where it applies, prudential exhaustion serves three functions: (1) allowing agencies the opportunity to correct their errors, (2) affording parties and courts the benefits of the agency's expertise, and (3) compiling an administrative record adequate for judicial review. *Avocados Plus Inc. v. Veneman,* 370 F.3d 1243, 1247 (D.C. Cir. 2004). Plaintiffs respectfully submit that (1) Defendants do not concede any errors and oppose Plaintiffs' position on the merits, making exhaustion futile, *McCarthy v. Madigan,* 503 U.S. 140, 148 (1992) (quoting *Houghton v. Shafer,*

392 U.S. 639, 640 (1968)); (2) Defendants have no expertise on the scope of their jurisdiction under the Constitution over the reach of Spending-Clause legislation like Medicare and the need to engage in notice-and-comment rulemaking under the APA; and (3) Defendants' policies themselves constitute the entire administrative record, given that the Defendants failed to convene the required rulemakings and deny that they needed to convene one. Under the circumstances, prudential exhaustion would serve no purpose.

4. Anti-Injunction Act

Defendants cite the Anti-Injunction Act ("AIA"), which prevents certain pre-enforcement claims for injunctive relief relating to "the assessment or collection of any tax." 26 U.S.C. §7421(a); *cf.* 28 U.S.C. §2201(a) (concerning relief under the Declaratory Judgment Act). Although Defendants initially denied that their insurance mandates were taxes, Compl. ¶67; Section III.A.1.b, *infra,* they now claim otherwise. Assuming *arguendo* that it even applies, AIA does not preclude review for three reasons.

First, the AIA does not apply where the plaintiff has no "alternative legal way to challenge the validity of a tax." *South Carolina v. Regan,* 465 U.S. 367, 373 (1984). Here, the Plaintiffs seek to enjoin unlawful "taxes" (again, assuming *arguendo* that the insurance mandates indeed are taxes) levied against member physicians' patients, which negatively affect member physicians. Compl. ¶¶45-46; Smith Decl. ¶8. Unlike patients themselves, member physicians clearly lack an alternate legal remedy to enjoin this unlawful "taxation." Compl. ¶46.

Second, the AIA does not apply if "it is clear that under no circumstances could the Government ultimately prevail, ... and ... equity jurisdiction otherwise exists." *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1, 7 (1962). As explained in Section III.A.1, *infra,* this action is purely legal and presents no circumstances under which Defendants will prevail. Moreover, as explained in Section I.C.2, *supra,* and Section II.C, *infra,* equity jurisdiction and

irreparable harm exist. Even where Plaintiffs' members cannot satisfy the *Regan* exception (*e.g.,* for their own payment of PPACA's penalties), the AIA nonetheless poses no barrier to this suit.

Third, AIA by its terms applies only to *injunctive* relief, and its DJA counterpart applies by its terms only to the DJA. Neither AIA nor its DJA counterpart precludes this Court's exercising its unique equity jurisdiction to provide declaratory relief under Rule 57. *See* Section I.C.2, *supra;* FED. R. CIV. P. 57 (authorizing declaratory relief without regard to DJA). Nothing in AIA precludes declaratory relief under this Court's equity jurisdiction and Rule 57.

Thus, *even if PPACA's insurance mandates were taxes,* this Court could enter declaratory relief against those mandates. As indicated in Section III.A.1.b, *infra,* the mandates are not taxes. AIA either does not apply by its terms or does not preclude judicial review, even if it does apply.

II. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST DEFENDANTS

Although none of the challenged statutes provide a statutory cause of action, all fall under various forms of *nonstatutory* review, including the APA, the Declaratory Judgment Act ("DJA"), and officer suits under *Ex parte Young.* As explained in Section II.C, *infra,* equitable and declaratory relief are available under all of these causes of action.

A. Administrative Procedure Act

Under the APA, persons aggrieved within the meaning of a relevant statute are entitled to judicial review of *inter alia* final agency action for which the plaintiff lacks an adequate legal remedy. 5 U.S.C. §§702-704. Significantly, §702 was the predicate for the Supreme Court's initial invocation of the "zone of interests" test. *Camp,* 397 U.S. at 153-54. If Plaintiffs fail this test and lack standing, it would not matter whether the APA applies. The opposite also is true: "[w]ant of right and want of remedy are justly said to be reciprocal" so that "[w]here… there has been a violation of a right, the person injured is entitled to an action." *Alabama Power Co. v.*

Ickes, 302 U.S. 464, 479 (1938).[10] Because Plaintiffs are in the zone of interests, *see* Section I.A.2, *supra,* they also satisfy §702.

Under the APA, "final agency action for which there is no other adequate remedy *in a court* [is] subject to judicial review." 5 U.S.C. §704 (emphasis added).[11] In almost all instances, Defendants cannot even suggest that Plaintiffs have an alternate – much less adequate – remedy. In the case of seeking refunds of taxes paid, however, the Defendants contend that the Anti-Injunction Act applies because of the alternate remedy that Plaintiffs purportedly have. Defs.' Memo. at 28-29. Plaintiffs address this argument in Section I.C.4, *supra.*

Under the APA, courts "shall… compel agency action unlawfully withheld," "set aside agency action… found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory… authority," or "without observance of procedure required by law." 5 U.S.C. §706. Absent clear and convincing evidence of legislative intent *to preclude* review, agency action is reviewable. *Block v. Community Nutrition Inst.,* 467 U.S. 340, 345 (1984); *Abbott Labs., Inc., v. Gardner,* 387 U.S. 136, 141 (1967).

---

[10] The Attorney General cited *Ickes* as the leading case on the existing law codified in what is now §702. Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., at 230 (1946) (hereinafter "APA Leg. Hist.").

[11] Agency action is final if (1) it "must mark the 'consummation' of the agency's decision making process" and not "merely tentative or interlocutory" in nature; and (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997). Even where future agency action is required to apply an agency policy to a plaintiff, the APA allows programmatic challenge to final agency actions on the means through which agencies will act. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 890 n.2 (1990); *Brock,* 477 U.S. at 285 ("although review of individual eligibility determinations in certain benefit programs may be confined [to other venues], claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (collecting cases); *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51-52 (1955) (APA provides judicial review of agency's final order, even if plaintiff has subsequent judicial remedies).

Significantly, the 1972 amendments to §702 "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 94-996, 8 (1976)) (emphasis added); *Reich,* 74 F.3d at 1328 (1976 "waiver of sovereign immunity applies to any suit *whether under the APA or not*") (emphasis added); *Transohio Savings Bank v. Director, Office of Thrift Supervision,* 967 F.2d 598, 607 (D.C. Cir. 1992). Thus, even without officer defendants and equity jurisdiction, sovereign immunity would pose no barrier to suit.

B. Non-APA Nonstatutory Review

In addition to the APA, Plaintiffs assert two non-APA forms of nonstatutory review, which the APA does not limit: "[n]othing in the subsequent enactment of the APA altered [or] repeal[ed] the review of *ultra vires* actions recognized long before." *Dart v. U.S.,* 848 F.2d 217, 224 (D.C. Cir. 1988); *Nat'l Treasury Employees Union v. Campbell,* 589 F.2d 669, 673 n.7 (D.C. Cir. 1978) (Mandamus Act, APA, and other nonstatutory review are distinct, alternate causes of action) ("*NTEU*"); *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1328 (D.C. Cir. 1996) (APA did not alter the pre-APA nonstatutory judicial review doctrines). Significantly, "inquiry into whether suit lies under *Ex parte Young* does not include [merits] analysis," *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 636-37 (2002).[12]

[12] By contrast, as signaled by the *NTEU, Reich,* and *Dart* decisions cited above, there are numerous (and controlling) instances where a plaintiff who lacked an APA cause of action nonetheless could sue under the alternate, pre-APA modes of judicial review. *See also, e.g., Indep. Broker-Dealers' Trade Ass'n v. SEC,* 442 F.2d 132, 143 & n.18 (D.C. Cir. 1971) ("[if APA] should be given narrow reading, the action is sustainable by reference to the general equity jurisdiction of the District Court"); *Franklin v. Massachusetts,* 505 U.S. 788, 801 (1992) (equitable review of agency action that did not qualify for APA review); *Pickus v. U.S.,* 543 F.2d 240, 243-44 & n.10 (D.C. Cir. 1976) (*citing* cases); *Webster v. Doe,* 486 U.S. 592, 601-03

(Footnote cont'd on next page)

1. Officer Suits under *Ex parte Young*

The constitutional "judicial power shall extend to all cases, in law and *equity.*" U.S. CONST. art. III, §2 (emphasis added). In equity, an officer acting without valid authority is "stripped of his official or representative capacity and is *subjected in his person* to the consequences of his *individual conduct,*" and suit is "against [him] *personally as a wrongdoer* and not against the State." *Ex Parte Young,* 209 U.S. 123, 160 (1908) (emphasis added); *Georgia R.R. & Banking Co. v. Redwine,* 342 U.S. 299, 305 (1952) ("this action against appellee *as an individual* is not barred as an unconsented suit against the State") (emphasis added); *U.S. v. Lee,* 106 U.S. 196, 210 (1882) (Robert E. Lee's family's suit to eject federal officers from Arlington National Cemetery was "against [officers], *as individuals,* to recover possession" notwithstanding that "the officers who are sued assert no personal possession, but are holding as the mere agents of the United States") (emphasis added); *U.S. v. Boutwell,* 84 U.S. (17 Wall.) 604, 607 (1873) ("[i]f he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience…. It is, therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty"). This officer-suit exception to sovereign immunity is foundational and pre-dates the Constitution.[13]

(Footnote cont'd from previous page.)

(1988); *cf. Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.,* 940 F.2d 685, 696-97 (D.C. Cir. 1991) (non-APA agency's decisions remain "subject to the pre-APA requirement that administrative decisions be rationally based – a standard that courts have held is equivalent to the APA's requirement that agency action not be arbitrary or capricious").

[13] *See* THE FEDERALIST NO. 78, at 464-66 (Alexander Hamilton) (Clinton Rossiter ed., Signet 2003) (1961) (discussing judicial review); Robert Yates, Brutus Essay XI (1788), *reprinted in* THE ESSENTIAL ANTIFEDERALIST, at 187-90 (W.B. Allen & Gordon Lloyd, ed.,

(Footnote cont'd on next page)

Defendants do not address – much less credibly dispute – the historical fact that the officer-suit exception to the judge-made sovereign-immunity doctrine was a founding principle of this democracy and its judiciary. Section of Administrative Law & Regulatory Practice of the American Bar Association, *"A Blackletter Statement of Federal Administrative Law,"* 54 ADMIN. L. REV. 1, 46 (2002) ("Under the longstanding officer suit fiction recognized in *Ex Parte Young,* suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity") (citations omitted). Nor could they.[14]

Under the "*Larson-Dugan* exception," an equitable action lies against a federal officer's actions beyond the officer's constitutional or statutory authority, on the grounds that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949); *Dugan v. Rank,* 372 U.S. 609, 621-23 (1963); *accord Clark v. Library of*

(Footnote cont'd from previous page.)

2002) (same); Judiciary Act of 1789, ch. 20, §16, 1 Stat. 72, 82 (establishing equity jurisdiction); *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 459 n.14 (1977) (Judiciary Act's §16 was "declaratory of *existing law*" of equity in 1789) (emphasis added); Louis L. Jaffe, *Suits against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 5-18 (1963) (describing centuries of development of various petitions and writs against the Crown's actions *with its consent* and against the Crown's officers' unlawful actions *without consent*); *Osborn v. Bank of U.S.,* 22 U.S. (9 Wheat.) 738, 843 (1824) ("it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit"); Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. at 433 (*quoted supra*).

[14] Defendants do, however, confuse the doctrine of *Leedom v. Kyne,* 358 U.S. 184 (1958), with the more straightforward doctrine of officer suits as an exception to sovereign immunity for *ultra vires* conduct. Defs.' Memo. at 18 n.13. *Kyne* is a special type of *ultra vires* challenge, which proceed, *notwithstanding* a congressional preclusion-of-review statute. Although *Kyne* is indeed "extraordinary" relief, Defs.' Memo. at 18 n.13, run-of-the-mill officer suits are not.

Congress, 750 F.2d 89, 102 (D.C. Cir. 1984) (citing cases). "[Agencies are] creature[s] of statute," that have "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA,* 268 F.3d 1075, 1081 (D.C. Cir. 2001). Without valid statutory authority, the agency has none. *Id; Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act… unless and until Congress confers power upon it").

2. Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), authorizes declaratory relief "whether or not further relief… could be sought." *Id.* §2201(a); *Duke Power Co.,* 438 U.S. at 70-71 n.15 ("While the [DJA] does not expand our jurisdiction, it expands the scope of available remedies" where plaintiffs sought declaratory relief that a statute was invalid, as an alternate remedy to seeking compensation for a taking). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *See* Section I.C.1, *supra; Sanders,* 430 U.S. at 105 (§1331's 1976 amendment authorizes DJA action against federal officers) (*citing* Pub. L. 94-574, 90 Stat. 2721 (1976)); *see also* H.R. Rep. No. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065 (§1331's 1980 amendment did not repeal its 1976 amendment). Thus, the combination of a court with jurisdiction and the DJA constitutes a cause of action for review of allegedly *ultra vires* government action.

C. <u>Equitable and Declaratory Relief Are Available</u>

Injunctive relief requires irreparable harm and inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07 (1959). By contrast, those two prerequisites do not apply to requests for declaratory relief. 28 U.S.C. §2201; FED. R. CIV. P. 57. Plaintiffs can obtain both equitable and declaratory relief here.

In most – if not all – respects, Plaintiffs lack an alternate, much less an adequate remedy, to this action. *See* Section I.C.3-4, *supra.* Even where Plaintiffs ostensibly have an *alternate* remedy, that remedy is not *adequate.* Christman Decl. ¶¶10-11; Smith Decl. ¶¶16-17. Plaintiffs and their members suffer irreparable harm in several respects. First, to the extent that they lose the business of third parties, *See* Smith Decl. ¶8; Orient Decl. ¶¶24-25, Plaintiffs' members cannot recover those losses in future litigation. Second, regulatory uncertainty negatively affects members' ability to make future plans, Compl. ¶21, which also constitutes irreparable injury. *Potomac Elec. Power Co. v. ICC,* 702 F.2d 1026, 1034-35 (D.C. Cir. 1983).

Third, without proceeding for all members in advance, the Plaintiffs or their members will not have a final answer in time to order their affairs, Christman Decl. ¶11; Smith Decl. ¶17, and would face a multiplicity of suits. *See, e.g.,* 11A WRIGHT & MILLER, FED. PRAC. & PROC. Civ.2d §2944 ("legal remedy may be deemed inadequate if [*inter alia*] effective legal relief can be secured only by a multiplicity of actions"); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 273-74 (1997) ("federal court's equitable jurisdiction [can be] necessary to avoid … [the] possibility of [a] multiplicity of suits causing irreparable damage") (interior quotations omitted, textual alterations in original, ellipsis added, citing Charles Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345, 377-78 (1930)); *Reed Enterprises v. Corcoran,* 354 F.2d 519, 523 (D.C. Cir. 1965) (finding multiplicity of legal proceedings to constitute irreparable harm). In addition to the irreparable injury from a multiplicity of suits, this Court can, of course, also consider judicial economy, *Independent Bankers Ass'n of Am. v. Smith,* 534 F.2d 921, 928 (D.C. Cir. 1976), which counsels for resolving these issues now. For all of the foregoing reasons, Plaintiffs are entitled to equitable relief now.

As indicated above, the fact that another remedy would be equally effective affords no basis for declining *declaratory* relief, 28 U.S.C. §2201; *Hurley v. Reed,* 288 F.2d 844, 848 (D.C. Cir. 1961) ("fact that another remedy would be equally effective affords no ground for declining declaratory relief" against federal officers); *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983) (same); APA Leg. Hist., at 37, 212, 276 (APA no barrier to DJA actions against federal officers). Showing "irreparable injury… is not necessary for the issuance of a declaratory judgment." *Tierney,* 718 F.2d at 457 (*citing Steffel v. Thompson,* 415 U.S. 452, 471-72 (1974)); 10B WRIGHT & MILLER, FED. PRAC. & PROC. Civ.3d §2766 ("[i]f the normal requirements of federal jurisdiction are present…, the court has jurisdiction" for declaratory relief). Thus, declaratory relief is available not only in conjunction with injunctive relief and but even if an adequate alternate remedy displaces injunctive relief. *Nat'l Treasury Employees Union v. Nixon,* 492 F.2d 587, 616 (D.C. Cir. 1974).

III. DEFENDANTS' DISPOSITIVE MOTION LACKS MERIT

In addition to challenging this Court's jurisdiction for the entire complaint, Defendants seek merits dismissal of the entire complaint for failure to state a claim on which this Court can grant relief. FED. R. CIV. P. 12(b)(6). "FED. R. CIV. P. 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1964 (2007) (citations and interior quotations omitted). "[A] complaint attacked by a Rule 12(b)(6) motion … does not need detailed factual allegations," *id.,* provided that the plaintiff alleges "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." 127 S.Ct. at 1965.

"Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*

(citations, interior quotations, and footnote omitted). With "other things … equal," courts "prefer[] adjudication of cases on their merits rather than on the basis of formalities." *Ciralsky v. CIA,* 355 F.3d 661, 674 (D.C. Cir. 2004). Under that judicial preference, such dismissals are appropriate where a "plaintiff has no claim to state," but inappropriate where the "plaintiff has imperfectly stated what *may* be an *arguable* claim." *Alley v. R.T.C.,* 984 F.2d 1202, 1208 (D.C. Cir. 1993) (emphasis added). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly,* 127 S.Ct. at 1969. As shown in the following three subsections, Plaintiffs' complaint meets this test.

A. Counts II and III: PPACA's Insurance Mandates

Counts II and III challenge the constitutionality of PPACA's mandates for employers to provide and individuals to procure PPACA-compliant health insurance or pay penalties. In addition to their jurisdictional arguments addressed in Section I.A-I.C, *supra,* Compl. ¶¶90-96. Defendants argue that these mandates fall within both the Commerce Clause and the Taxing Power. Defs.' Memo. at 30-55. Sections III.A.1.a to III.A.1.e, *infra,* address Defendants' substantive arguments under the Commerce Clause, Taxing Power, Necessary and Proper Clause, Takings Clause, and Due Process Clause for the Individual Mandate. Section III.A.2 addresses Defendants' substantive arguments in defense of the Individual Mandate.

1. The Individual Mandate Is Unconstitutional

The most fundamental question presented by PPACA's Individual Mandate is whether the federal government has authority to direct Americans to purchase products or pay corresponding penalties for failing to purchase them, basing the government's jurisdiction – under whatever enumerated power – solely on an individual's living in the United States, devoid of his or her engagement in any activity that the government could regulate or tax. While Defendants claim PPACA's mandates fall comfortably with their jurisdiction under Supreme

Court precedents, their claims are unprecedented both in their scope and in where they lead. Essentially, Defendants claim the power to do whatever they wish.

a. Commerce Clause

The Commerce Clause authorizes Congress to "regulate Commerce … among the several States." U.S. CONST. art. I, §8. "Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 189-90 (1824). Although the word "commerce" certainly had a narrower definition then than it does today, even today's definition requires "[t]he exchange of goods and services, especially on a large scale involving transportation between cities, states and nations." BLACK'S LAW DICTIONARY at 304 (West 9th ed. 2008). Commerce entails voluntary activity and purposeful exchange, not mere inactivity.

In defending their attempt to regulate the mere *inactivity* of not purchasing PPACA-compliant health insurance, Defendants appear to deny PPACA's unprecedented nature. As an unprecedented act of Commerce-Clause power, Defendants naturally lack legal precedent that directly supports their actions under the Commerce Clause. Instead, PPACA falls between two opposing strands of precedent: the *Filburn-Raich* strand that supports Commerce-Clause regulation of purposeful activity and the *Morrison-Lopez* stand the denies Commerce-Clause regulation of purposeful non-economic activity. *Compare Wickard v. Filburn,* 317 U.S. 111 (1942) *and Gonzales v. Raich*, 545 U.S. 1 (2005) *with U.S. v. Morrison,* 529 U.S. 598 (2000) *and U.S. v. Lopez,* 514 U.S. 549 (1995). Neither the Supreme Court nor this Circuit have addressed the question of whether the Commerce Clause allows regulation of mere inactivity. Although Plaintiffs assume that the Supreme Court eventually will address the constitutionality of

PPACA's insurance mandates, this Court must decide this litigation on the implications of related precedent, not on direct precedent.[15]

As Defendants explain, the Commerce Clause power encompasses three categories of regulation: (1) "the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, and persons or things in interstate commerce," and (3) "*activities* that *substantially* affect interstate commerce." Defs.' Memo. at 30 (*quoting Raich,* 545 U.S. at 16-17) (emphasis added). PPACA's insurance mandates concern only the third category, which neither the Supreme Court nor this Circuit has ever applied to mere *inactivity.*

In addition to this affirmative, tripartite framework for the commerce power, the Supreme Court also has adopted a negative framework that defines the commerce power's outer limits by allowing facial challenges when Congress seeks to regulate non-economic activities, particularly where the claimed power has no principled limits, requiring the Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local." *Lopez,* 514 U.S. at 566-68. (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas)

[15] With respect to defining the "commerce … power's outer bounds," the Supreme "Court [holds] the authority to define that boundary." *Morrison,* 529 U.S. at 616, n.7. "[T]he Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for" for courts not "to intervene when one or the other level of Government has tipped the scales too far." *Lopez,* Id. at 578 (Kennedy, J., concurring) (citations omitted). "The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)." *Raich,* 545 U.S. at 47-48 (O'Connor, J., dissenting).

(citations omitted). If Defendants have the power claimed here, they will have succeeded in obliterating any distinction between the national and the local.[16]

Even when someone cultivates an agricultural product (*e.g.,* wheat or marijuana) for home consumption, their purposeful activity nonetheless contributes to the national stock in that commodity, which in the aggregate determines price through principles of supply and demand. *Raich,* 545 U.S. at 18; *Filburn,* 317 U.S. at 118-19. Although *Filburn* and now *Raich* are "perhaps the most far reaching example[s] of Commerce Clause authority over intrastate *activity,*" *Lopez,* 514 U.S. at 560 (emphasis added), they involved the voluntary, purposeful activities of raising commodities for which there was a national market. "[E]ven if [an] *activity* be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Filburn,* 317 U.S. at 125 (emphasis added). This marks the affirmative outer limits of the Commerce Clause, and it simply does not reach *inactivity* at all.[17] On inactivity, Defendants set a false dilemma that without the mandate, individuals could "wait … until they needed care … at which

---

[16] Defendants' suggestion that the insurance and healthcare industries constitute interstate markets (Defs.' Memo. 33) is entirely beside the point. The ability to regulate or tax those economic activities is simply inapposite to whether Defendants may compel individuals to purchase PPACA-compliant insurance. None of the decisions that Defendants cite suggest otherwise. *See U.S. v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 553 (1944); *Summit Health Ltd. v. Pinhas,* 500 U.S. 322, 328-29 (1991); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.,* 425 U.S. 738, 743-44 (1976). Indeed, *Pinhas* suggests that local health care services are not interstate commerce. *Pinhas,* 500 U.S. 322, 329 (1991) ("although Midway's primary activity is the provision of health care services in a local market, it also engages in interstate commerce"). Similarly, with respect to *South-Eastern Underwriters,* regulating the insurance industry and requiring the public to purchase insurance are entirely different undertakings.

[17] Defendants' attempted reliance on decisions addressing purposeful economic activity are simply irrelevant to this analysis. *See* Des.' Memo. 42 (*citing Heart of Atlanta Motel v. U.S.,* 379 U.S. 241 (1964); *Daniel v. Paul,* 395 U.S. 298 (1969)).

point [PPACA] would obligate insurers to provide them with health insurance." Defs.' Memo. at 36. The obvious solution would deny such market timers their belated access to PPACA's benefits, without requiring the public – including Plaintiffs' members who are financially sound and adequately insured – to participate in PPACA.

Defendants' claimed authority is untenable for another reason: it would undermine our constitutional structure by creating an unlimited power indistinguishable from a national police power. *Morrison,* 529 U.S. at 618-19 ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"). Indeed, given the obvious economic value of education and of women in the workforce, the claimed power coupled with findings far less distorted that PPACA's reliance on "fantasy in/fantasy out" economic reasoning would allow Congress to resurrect the statutes struck down in *Lopez* and *Morrison.* Compl. ¶84-86; Joseph Decl. ¶¶2-3.[18]

Based on the foregoing, the Individual Mandate plainly cannot survive as a direct exercise of the commerce power, which raises the question whether either the Taxing Power or the Necessary and Proper Clause can support it. The following two sections demonstrate that neither the Taxing Power nor the Necessary and Proper Clause save the Individual Mandate.

b. Taxing Power

Plaintiffs allege both that the Individual Mandate is not a tax and that it fails to qualify as a lawful tax, Compl. ¶¶67, 69, which Defendants dispute. Defs.' Memo. at 44-52. Plaintiffs take Defendants' tax-related arguments in turn.

---

[18] The prior Congressional Budget Office ("CBO") Director characterized PPACA's economic underpinnings as "fantasy in,fantasy out," Joseph Decl. ¶2, because of the assumptions that the bill's proponents required CBO to assume in scoring the bill. Compl. ¶84-86.

At the outset, in order to enact PPACA, Defendants and their representatives insisted that the Individual Mandate was not a tax. Compl. ¶67. Moreover, PPACA expressly denominates the mandate as a "penalty," 26 U.S.C. §5000A(b)(1), enacted pursuant to the Commerce Clause, PPACA §1501(a)(1), while denominating other PPACA provisions as "taxes." PPACA §§9001, 9004, 9015, 9017, 10907. Congress clearly knew how to distinguish between taxes and penalties.

Defendants also seek to rely on a report by the staff of the Joint Committee on Taxation to transform the Individual Mandate "penalty" into a "tax." Defs.' Memo. at 45. Written months after PPACA passed the Senate, the report cannot qualify as legislative history, which must come from the chamber that drafted PPACA (*i.e.,* the Senate). *Begier v. Internal Revenue Service,* 496 U.S. 53, 66 n.6 (1990). Absent "clearly expressed" congressional intent, even *recodification* (which did not occur) would not modify any unchanged text's prior meaning. *Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957); *Waterman S.S. Corp. v. U.S.,* 381 U.S. 252, 269 (1965). Here, the staff report was drafted after the fact, when the House could not amend PPACA without the Senate defeating those amendments. Joseph Decl. ¶4. As such, the report blatantly seeks to influence judicial review, while evading the constitutional requirements of bicameralism. U.S. CONST. art. I, §7. This Court should disregard the staff report.[19]

Some individual legislators suggested that the mandate was a tax, *see* Defs.' Memo. at 45 (citing floor statements), but their views did not carry the required majorities. *Clean Air v. Southern Cal. Edison Co.,* 971 F.2d 219, 227-28 (9th Cir. 1992) (individual legislators' floor statements warrant little if any deference). Indeed, earlier versions expressly showed the

[19] Although the report uses "excise tax" in its headings, it labels the mandate a "penalty" in the text. Report at 31-34. Excise taxes must be uniform across the nation, U.S. CONST. art. I, §8, which the Individual Mandate fails. *See, e.g.,* 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).

Individual Mandate as a tax. *See* America's Affordable Health Choices Act of 2009, H.R. 3200, §401, at 1450-65, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962, §501, at 296-308, 111th Cong. (2009); America's Healthy Future Act, S. 1796, §1301, at 194-216, 111th Cong. (2009). But the Senate Majority Leader needed to ensure cloture to avoid a filibuster and thus made concessions to moderate and conservative members of his own then-60-member caucus to pass the bill, changing "tax" to "penalty" in the bill.

That change triggers two powerful canons of statutory construction. First, where such "language was clearly the result of a compromise" to avoid a filibuster (or otherwise), courts must "give effect to the statute as enacted." *Mohasco Corp. v. Silver,* 447 U.S. 807, 819-20 (1980). Second, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). Under the circumstances, this Court should take Congress and the President at their word, Compl. ¶67, that the Individual Mandate is not a tax.[20]

Assuming *arguendo* that the Individual Mandate qualifies as a tax, Defendants make several arguments to support that tax, other than the jurisdictional arguments that Plaintiffs address in Sections I.A, I.B, I.C.4, *supra.* Each of Defendants' arguments fails.

---

[20] Citing *Woods v. Cloyd W. Miller Co.,* 333 U.S. 138, 144 (1948), Defendants argue that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Defs.' Memo. 45. "But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power." *Bd. of Trustees of the Univ. of Ill. v. U.S.,* 289 U.S. 48, 58 (1933). As indicated, this Court should take Congress and the President at their word.

First, Defendants argue that a statute's regulatory effect cannot remove the statute from the Taxing Power, such that courts will not "second-guess" Congress. Defs.' Memo. at 46. In particular, Defendants rely on *Sonzinsky v. U.S.,* 300 U.S. 506, 514 (1937), for the proposition that courts "will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution." Defendants' selective quotation omits the limitation to "an Act of Congress *which on its face purports to be an exercise of the taxing power* is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Sonzinsky,* 300 U.S. at 513 (emphasis added). PPACA's Individual Mandate is not a tax *on its face,* and this Court would need to second-guess Congress to hold that *it is a tax.*[21] *Bd. of Trustees,* 289 U.S. at 58 (*quoted supra*). Even the authorities that Defendants suggest that the mandate is not a tax.

Second, Defendants argue that the Individual Mandate does not qualify as a "direct tax" requiring apportionment among the states. Defs.' Memo. at 47-51.[22] If Defendants use the term "direct tax" to mean a direct tax *other than a capitation,* Plaintiffs do not disagree. *Murphy v. I.R.S.,* 493 F.3d 170, 184-85 (D.C. Cir. 2007) (limiting direct taxes to "capitation[s] or … tax[es]

---

[21] Defendants' quotation from *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 363 (1941), on the courts' concern for "practical operation" over "descriptive words" (Defs.' Memo. 46 n.28) is misplaced: *Nelson* involved *state* taxes and their potential discriminatory impact on interstate commerce, 312 U.S. at 364-65, which do not even relate to the federal Taxing Power. *Simmons v. U.S.,* 308 F.2d 160, 166 n.21 (4th Cir. 1962), also cited by Defendants, simply eschews tax labels – *e.g.,* income or direct – for items within the Taxing Power.

[22] In part, Defendants' direct-tax argument relies upon the Individual Mandates' purported authorization under the Commerce Clause, Defs.' Memo. 48-49, which Plaintiffs address in Section III.A.1.a, *supra.* Strictly speaking, a capitation a form of direct tax: "[n]o capitation, *or other direct, tax* shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." U.S. CONST. art. I, §9. Presumably, Defendants deal here with direct taxes other than capitations, reserving capitations for their next argument.

upon one's ownership of property"). Used in this way, a "direct tax" is "not a tax upon a transfer or other taxable event but is, instead, a tax upon property." *U.S. v. Mfrs. Nat'l Bank of Detroit,* 363 U.S. 194, 197-98 (1960). Plainly, the Individual Mandate is not such a "direct tax."[23]

Third, and finally, Defendants argue that the Individual Mandate does not qualify as a "capitation." Defs.' Memo. at 51-52. Here, Plaintiff agree that the Individual Mandate is no *lawful* capitation, although it may qualify as an *unlawful* one. In *Crandall v. Nevada,* 73 U.S. (6 Wall.) 35, 39 (1867), for example, the Court invalidated "a capitation tax upon every person leaving the State by any railroad or stage coach." *See also Colgate v. Harvey,* 296 U.S. 404, 430 (1935), *overruled on other grounds, Madden v. Kentucky,* 309 U.S. 83 (1940) (discussing the same "capitation tax imposed by the state of Nevada upon persons leaving the state by railroad or stagecoach"). Contrary to Defendants' suggestion, the Supreme Court does not appear to have defined a capitation tax to mean "one imposed 'simply, without regard to property, profession, or any other circumstance.'" Defs.' Memo. at 51 (*quoting Hylton v. U.S.,* 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.)). Indeed, Justice Chase's statement on capitations is plainly *dicta,* both in how he phrased it ("I am inclined to think, but of this I do not give a judicial opinion") and in its irrelevance to the carriage tax at issue. *Hylton,* 3 U.S. (3 Dall.) at 175. Nor, contrary to Defendants' suggestion, did *Soule* "adopt[] Justice Chase's definition." *Compare* Defs.' Memo. at 51 with *Soule,* 74 U.S. (7 Wall.) at 444 (*dicta* recounting Justice Chase's *dicta*). To the extent

[23] Indeed, if Defendants had elected to tax the insurers rather than the insureds, the resulting tax would plainly not be direct: "If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a *tax upon the business of an insurance company* can be held to belong to that class of revenue charges." *Pacific Ins. Co. v. Soule,* 74 U.S. (7 Wall.) 433, 444-46 (1868) (emphasis added). Defendants make an in-the-alternative argument that the Individual Mandate is a valid income tax, if it is a direct tax, Defs.' Memo. 51 n.32. But the parties agree that the Individual Mandate is not a direct tax, which nullifies Defendants' alternate argument. *See also* Defs.' Memo. 47 (characterizing Individual Mandate as an excise).

that the Individual Mandate is a capitation on everyone who fails to procure PPACA-compliant insurance, it is invalid for failure to apportion it among the states. U.S. CONST. art. I, §2.

Significantly, Defendants do not argue that the Individual Mandate is not an excise tax, and indeed the staff report that they cite suggests that the mandate is an excise. Defs.' Memo. at 47. "A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax," *Tyler v. U.S.,* 281 U.S. 497, 502 (1930), which describes "taxes, such as duties of impost and excises and every other description of the same," subject to Article I, §8's uniformity requirement. *Scholey v. Rew,* 90 U.S. (23 Wall.) 331, 347 (1874). Here, imposts and duties are synonymous or nearly so and relate to customs on imported goods, *Soule,* 74 U.S. (7 Wall.) at 445; *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 290-93 (1976), and excises means "an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor." *Soule,* 74 U.S. (7 Wall.) at 445. As with Plaintiffs' inactivity-based argument under the Commerce Clause, Defendants here face the absence of any product on which to slap an excise tax. Although they perhaps could have imposed an excise tax on PPACA-noncompliant insurance policies or on medical treatments, Defendants elected to impose an excise on inactivity, which they plainly cannot do. Significantly, the penalty for the Individual Mandate varies among the states, sensibly based on the varying health-related costs and other factors across the nation. *See, e.g.,* 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). As such, the Individual Mandate is not uniform and therefore cannot stand as an excise tax or any other type of indirect tax. U.S. CONST. art. I, §8.

c. The Necessary and Proper Clause

In addition to the specific provisions of the Commerce Clause and the Taxing Power, Defendants also rely on the Necessary and Proper Clause, Defs.' Memo. at 38, which provides

authority "[t]o make all laws which shall be necessary and proper for carrying into execution the [Constitution's enumerated] powers." U.S. CONST. art. I, §8. Although Defendants freely admit that the Individual Mandate is "essential" to PPACA, Defs.' Memo. at 23, 38 (*quoting* PPACA §1501(a)(2)(G)), they also implicitly admit that the Necessary and Proper Clause requires (as its plain text states) a permissible exercise of an enumerated power. Defs.' Memo. at 38. Their second, implicit admission is as fatal to their necessary-and-proper argument as it is uncontestable:

> "Let the end be legitimate, *let it be within the scope of the constitution,* and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution,* are constitutional."

U.S. v. Comstock, 130 S.Ct. 1949, 1956 (2010) (*quoting M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819)) (emphasis added). As explained in the preceding sections, the Individual Mandate is not "within the scope" of either the Commerce Clause or the Taxing Power (if, indeed, it is a tax). As is equally plain, "a federal statute, in addition to being authorized by Art. I, §8, must also 'not [be] prohibited' by the Constitution." *Comstock,* 130 S.Ct. at 1957 (*quoting McCulloch,* 17 U.S. (4 Wheat.) at 421). As explained in the next two sections, the Individual Mandate violates the Fifth Amendment, in both its Takings-Clause (Section III.A.1.d) and equal-protection (Section III.A.1.e) capacities. Although the foregoing is dispositive of Defendants' attempt to rely on the Necessary and Proper Clause, their attempt would fail even if the Clause applied.

The *Comstock* majority outlines a five-part test for applying the Necessary and Proper Clause: (1) the means-ends rationality between the enumerated power and the means chosen; (2) the activity's status as one of longstanding federal involvement, (3) if the act extends longstanding involvement, the reasonableness of the extension; (4) the act's proper account for

state interests; and (5) the degree of attenuation between the act's means and an enumerated power. *Comstock,* 130 S.Ct. at 1956-65. The Court applies these five tests together, *Comstock,* 130 S.Ct. at 1965, and doing so here plainly demonstrates that the Necessary and Proper Clause cannot support the Individual Mandate:

- The rationality of the ends-means fit is weak because compelled private transactions are disfavored in our political and legal tradition. For example, *Darnel's Case,* 3 How. St. Tr. 1 (K.B. 1627), arose from King Charles' compelled loans, and the "immediate outcry of protest" of the Crown's prevailing in that case led to Parliament to adopt the Petition of Right. *See Boumediene v. Bush,* 553 U.S. 723, 741-42 (2008); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts,* 107 YALE L.J. 2509, 2523 (1998). Moreover, the Supreme Court has struck taxation schemes that would represent takings. *U.S. v. Butler,* 297 U.S. 1, 58-59, 61-63 (1936).
- The federal government has no history of involvement – outside of Spending-Clause programs for which the government itself pays – in health insurance. PPACA differs from near analogs – such as Medicare or Social Security – adopted as straightforward applications of the Spending Clause and the Taxing Power. *See* note 5, *supra.*
- The Individual Mandate does not reasonably extend the federal government's pre-existing practices with respect to public health.
- The "protection of the lives, limbs, health, comfort and quiet of all persons" falls within the *state* police power, *Gonzales v. Oregon,* 546 U.S. 243, 270 (2006), and the asserted federal power competes directly with that states police power and, worse, *trammels* that power in states that have adopted "Freedom of Choice in Health Care Acts." *See* Section I.A.1.a, *supra;* Compl. ¶81; OKLA. CONST. art. II, §37**.**

- Notwithstanding "that the powers of the government are limited," *McCulloch,* 17 U.S. (4 Wheat.) at 421, and that "[e]very law enacted by Congress must be based on one or more of" its "enumerated powers," *Morrison,* 529 U.S. at 607, the federal power asserted here lacks any limiting principle. If the government can compel this, it can compel anything.

The Necessary and Proper Clause simply cannot save the PPACA's overreach in commanding individuals to purchase a good or service from another under threat of a civil penalty.

d. Takings Clause

Plaintiffs argue that the Individual Mandate is an unconstitutional taking, Compl. ¶68, which Defendants dispute on four grounds: (1) Plaintiffs have not sought compensation in the Court of Federal Claims, Defs.' Memo. at 52-53, (2) PPACA does not *require* insurance-premium increases, *id.* 53-54, (3) requiring payment of money is not a taking, *id.* 54-55, and (4) PPACA confers benefits on those it compels to pay increased premiums, *id.* 55 n.37. Because none of Defendants claims have merit, PPACA clearly constitutes a taking of that portion of the PPACA-mandated premium or penalty that subsidizes PPACA's lowered premiums for those with pre-existing conditions and other conditions that previously elevated their insurance rates. *Kelo v. City of New London,* 545 U.S. 469, 477 (2005) ("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") (emphasis in original).[24] Certainly, Defendants cannot accomplish indirectly through their directives on insurers – with whom Defendants compel the public to deal – what Defendants could not accomplish directly: "It

[24] To the extent that the private benefits conferred upon those whom PPACA subsidizes constitutes a *public* benefit, the taking nonetheless requires compensation. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241-42 (1984).

would be a palpable incongruity to strike down … legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost v. Railroad Comm'n of State of California,* 271 U.S. 583, 593-94 (1926). Plaintiffs now rebut Defendants' four defenses.

First, provided that the court otherwise has jurisdiction, federal courts can hear claims that future – even speculative – takings would render a statute unconstitutional:

> Mr. Justice REHNQUIST suggests that appellees' "taking" claim will not support jurisdiction under § 1331(a), but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act. We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases,* which were brought under § 1331 as well as the Declaratory Judgment Act. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71 n.15 (1978) (citations omitted). The *Duke* plaintiffs satisfied constitutional thresholds with aesthetic standing based on nuclear power plants' environmental impacts, but sought declaratory relief that the Price-Anderson Act's damage caps for future catastrophic nuclear accidents were an unconstitutional taking. *Id.* Similarly, Plaintiffs can challenge PPACA's *future* unconstitutional takings by seeking declaratory relief.

Second, contrary to their suggesting mere *encouragement* or *awareness* of changes in the private insurance market, Defs.' Memo. at 54, Defendants *commanded* those changes in their capacity as federal sovereign. Specifically, Defendants cite *Nat'l Bd. of YMCA v. U.S.,* 395 U.S. 85, 93 (1969), and its progeny to suggest that they lack "direct and substantial enough government involvement to warrant compensation under the Fifth Amendment." *YMCA* involved the military's "temporary, unplanned occupation" of a private building in the Canal Zone to protect that building from rioters, which is not a taking just as "entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises." *YMCA,* 395 U.S. at 93. Here, by contrast, Defendants' actions are permanent, planned, and unwelcome.[25] Insurers' essentially serve as public utilities that implement federal policy. Significantly, private-entity public utilities can have the power of eminent domain because they serve a public purpose, *Pacific Gas & Electric Co. v. Hay,* 68 Cal.App.3d 905, 910-11 (Cal. App. 1977), but must satisfy the Fifth Amendment when they take private property for public use. *Id.* Even if insurance premiums *go down* as a result of PPACA, *but see* Compl. ¶24; Joseph Decl. ¶7, PPACA nonetheless effects a taking for the quantifiable portion of insurance premiums for the young and

[25] None of Defendants' other cited decisions involve government compulsion. *See Casa de Cambio Comdiv S.A. v. U.S.,* 291 F.3d 1356, 1362 (Fed. Cir. 2002) (private bank debited plaintiff's account for amount of fraudulent U.S. Treasury check after Federal Reserve debited private bank's Treasury account upon discovery of the fraud); *Shewfelt v. U.S.,* 104 F.3d 1333, 1337 (Fed. Cir. 1997) (mere awareness of private conduct); *B&G Enters., Ltd. v. U.S.,* 220 F.3d 1318, 1321 (Fed. Cir. 2000) (mere encouragement of state conduct through federal funding). In *Turney v. U.S.,* 126 Ct.Cl. 202, 115 F.Supp. 457 (1953), the Federal Circuit's predecessor found a taking based on the fact that "[t]he relations, at the time, between our Government and the Philippine Government, were close" and that the Philippine Government "naturally, readily complied" when the federal government "requested that [the Philippine] Government … place an embargo upon the exportation of any of the property," thereby "put[ting] irresistible pressure upon the corporation to come to terms with" the federal government. *Turney,* 115 F.Supp. at 463.

the healthy that subsidize lower insurance premiums for those with pre-existing and other high-premium conditions (*i.e.,* the young and healthy should have *still-lower* premiums).

Third, Defendants cite various lower-court authority and a cobbled-together "majority" of Supreme Court dissents and concurrences in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), for the proposition that obliging payment of money is not a taking. Defs.' Memo. at 55. Such cobbling is meaningless because, for "fragmented [decisions in which] no single rationale explaining the result enjoys the *assent* of five Justices, the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments* on the narrowest grounds." *Marks v. U.S.,* 430 U.S. 188, 193 (1977) (emphasis added, interior quotations omitted). Indeed, this Circuit has held as much for the very *Eastern Enterprises* decision that Defendants cite. *Ass'n of Bituminous Contractors, Inc. v. Apfel,* 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Contrary to Defendants' cobbled-together majority, the Supreme Court has held that "[t]here is no warrant for taking the property *or money* of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees." *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330, 357 (1935). With respect to the taking of money (*i.e.,* the issue here), the Supreme Court has not overturned that proposition. "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini,* 521 U.S. at 237 (interior quotations omitted); *accord U.S. Air Tour Ass'n v. FAA,* 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002). While it may be permissible to tax the public honestly through the Taxing Power and to spend the money thus raised for the uninsured honestly through the Spending Clause, *see* note 5, *supra,* that does

not permit Defendants to compel Plaintiffs' members to pay for the uninsured through inflated insurance premiums or related penalties.[26]

Fourth, the notion that Defendants have provided Plaintiffs' members something valuable (Defs.' Memo. at 55 n.37) is simply false for the self-insured or those with PPACA-noncompliant catastrophic-risk insurance who must pay a penalty. Christman Decl. ¶9; Smith Decl. ¶15. Those members get *nothing* valuable from PPACA. Even members with "traditional" employer-provided health insurance who must pay higher premiums to subsidize PPACA's favorable treatment of those with pre-existing conditions do not obtain "significant, concrete, and disproportionate benefits" for that portion of their insurance premiums that insurers take to subsidize the low premiums that PPACA makes available for those with pre-existing conditions. Compl. ¶¶23, 65-66. Overcharging A to subsidize B constitutes a quantifiable taking within the insurance premium of every young or healthy person.

Because all of Defendants' objections lack merit, PPACA's Individual Mandate violates the Takings Clause and thus is invalid, even if within the commerce power.

e. Equal Protection

Plaintiffs argue that PPACA violates the Fifth Amendment's equal-protection component, Compl. ¶¶53, 68 ("PPACA's insurance mandates violate the Due Process Clause as compelled contracts, undue burdens on privacy and liberty, and denials of equal protection"), which the Defendants do not address in detail because "[Plaintiffs] do not appear to attempt to

[26] Significantly, a quantifiable portion of every PPACA-compliant health insurance policy covers PPACA's subsidy of those with pre-existing conditions and other conditions that elevated their pre-PPACA insurance rates. As such, PPACA "takes" that portion of the insured's premium (*i.e.,* PPACA takes a "specific, separately identifiable fund of money"). *See* Defs.' Memo. 54 (*quoting* Justice Breyer's *Eastern Enterprises* dissent).

state a claim for relief based on" "due process and equal protection"). Defs.' Memo. at 55 n.38. Even if the complaint was *silent* on equal protection (and it is not), Plaintiffs nonetheless could prevail on their equal-protection theory. *Lockhart v. Leeds,* 195 U.S. 427, 436-37 (1904) (equity pleading allows relief under the general prayer for relief, Compl. ¶118.E, even if not requested via specific prayer for relief); *People for the Ethical Treatment of Animals, Inc., v. Gittens,* 396 F.3d 416, 421 (D.C. Cir. 2005) ("the complaint requested 'such other and further relief as the Court may deem just and proper[,' which] permits a district court to award damages for breach of contract even when the plaintiff has not pled a contract claim"). For the reasons set forth in outlining Plaintiffs' standing on equal-protection grounds, Defendants' differential regulation of those having no insurance, PPACA-noncompliant insurance, and PPACA-compliant insurance violates equal-protection principles. *See* Section I.A.1.d, *supra* (collecting cases). Because PPACA's Individual Mandate violates the Fifth Amendments' equal-protection component, *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976), the Individual Mandate is invalid, even if within the Commerce Clause or Taxing Power.

2. The Employer Mandate Is Unconstitutional

Plaintiffs submit that the Employer Mandate is unconstitutional for substantially the same reasons as the Individual Mandate. *See* Section III.A.1, *supra.* To support the Employer Mandate, Defendants claim the authority to regulate the terms of employment in the national labor market, Defs.' Memo. at 34, 42-43, as well as to tax, *id.* 44-47. Even accepting these arguments *arguendo,* Defendants' defense of the Individual Mandate nonetheless would fail upon the Court's invalidating PPACA's *Individual* Mandate. Specifically, because the Individual Mandate is essential to PPACA, Defs.' Memo. at 23, 38; PPACA §1501(a)(2)(G), invalidation of the Individual Mandate would undermine PPACA *in its entirety,* not only logically but also because PPACA lacks a severability clause.

Significantly, even the Employer Mandate is not uniform across the states. *See* 26 U.S.C. §4980H(a)(1) (incorporating criteria from 26 U.S.C. §5000A(f)(2)); *see also* 26 U.S.C. §5000A(f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) (adopting varying criteria across the states). As such, Defendants (who do not even attempt to defend the Individual Mandate's uniformity), are wrong to defend the Employer Mandate's uniformity. Defs.' Memo. at 52 n.33. Because it is non-uniform, the Employer Mandate cannot stand as an excise tax or any other type of indirect tax. U.S. CONST. art. I, §8.

But even if the Employer Mandate survives Plaintiffs' direct challenge, this Court still would need to invalidate the Employer Mandate after holding the *Individual* Mandate invalid. Specifically, at that point, this Court will need to decide on the remedy for PPACA's balance, recognizing the Individual Mandate's essential role in the larger statute and deciding whether "Congress still would have passed" the balance of the bill, "had it known about the constitutional invalidity of the" Individual Mandate. *U.S. v. Booker,* 543 U.S. 220, 244 (2005) (interior quotations omitted). For "separation-of-powers concerns, … a severability clause is an aid merely; not an inexorable command" to a court that finds a statute to violate the Constitution. *Reno v. ACLU,* 521 U.S. 844, 885 n.24 (1997) (interior quotations omitted). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible [activity] and leave it to the courts to step inside" for the specific resolution, which "would, to some extent, substitute the judicial for the legislative department of the government." *Id.* (*citing U.S. v. Reese,* 92 U.S. 214, 221 (1875)). With an incredibly broad and interrelated statute like PPACA, those separation-of-power concerns should guide this Court. Rather than fashion a remedy that keeps some, but not all, of PPACA, the Court should send the entire statute back to Congress. In any

event, at the pleading stage, this Court must accept the Plaintiffs' view that Congress intended the invalidation of the entire statute.

B. Counts I and IV: Required Rulemakings and Freedom from Medicare

Although Counts I and IV differ in many respects – *e.g.,* Medicare Part A versus Part B, requirements applicable to patients versus providers – these two counts overlap in several respects, including the alleged need for notice-and-comment rulemaking to adopt the challenged agency rules, Medicare's status as Spending-Clause legislation, and the ability of the patients and providers to avoid Medicare's requirements by declining to participate. For that reason, Plaintiffs address these two counts together in this section.

Count I alleges that POMS HI 00801.002, POMS HI 00801.034, and POMS GN 00206.020 required notice-and-comment rulemaking (rendering them void *ab initio*) and exceeded Defendants' authority because they condition receipt of Social Security benefits on participation in Medicare Part A. Compl. ¶90-93. Aside from Defendants' general arguments about standing addressed in Section I.A, *supra,* Defendants respond that Plaintiffs have suffered no harm from the POMS amendments because they merely restate the applicable statutes, Defs.' Memo. at 10-11, 18-20, and qualify as interpretive rules. *Id.* at 16-17. More fundamentally, Defendants argue that the POMS merely address Medicare Part A *eligibility,* not any requirement to participate in Medicare Part A, which cannot injure anyone. *Id.* at 17-18.

Count IV alleges that Defendants' IFC and CR6417/6421 required notice-and-comment rulemaking (rendering them void *ab initio*), that HHS lacks authority to condition referring Medicare items and services on enrollment or opt-out records in PECOS, that HHS lacks the authority to require obtaining or using NPIs – outside of specific actions that require NPIs, such as e-prescribing – for physicians outside of Medicare who merely refer Medicare items or services for Medicare-eligible patients, and that Medicare's opt-out safe harbor, 42 U.S.C.

§1395a(b), does not restrict the ability of non-Medicare providers and Medicare-eligible patients to contract for medical services wholly outside of Medicare. Compl. ¶¶100-105. On jurisdictional issues, aside from Defendants' general standing arguments addressed in Section I.A, *supra,* Defendants respond that Plaintiffs have failed to identify members without the required enrollments or numbers, that Plaintiffs' members' injuries are self-inflicted, that referring physicians must either enroll in Medicare or opt-out under 42 U.S.C. §1395a(b), and that provisions of PPACA not challenged by Plaintiffs provide the relevant authority.[27] Defs. Memo. 65-66. Plaintiffs now satisfy the trivial objection, Smith Decl. ¶9; Hammons Decl. ¶5; Orient Decl. ¶23. Defendants are simply wrong that failure to invest effort to satisfy an *ultra vires* administrative burden constitutes a self-inflicted injury. *See* Section I.A.1.c, *supra.* Further, Sections III.B.3-III.B.4, *infra,* respond to Defendants' suggestion that Medicare's requirements *for Medicare providers* apply equally to non-Medicare providers who refer services for Medicare-eligible patients.

Substantively, Defendants argue that Medicare provides authority for their PECOS and NPI actions and *appear* to argue that 42 U.S.C. §1395a(b) provides the only course for opting out of Medicare. Defs.' Memo. at 66-69. With respect to the notice-and-comment issues, Defendants seek refuge in 5 U.S.C. §553(b)(A)-(B)'s exceptions for "rules of agency organization, procedure, or practice" and "good cause." Defs.' Memo. at 70-73.[28] As explained in the following sections, Defendants' substantive defenses lack merit.

---

[27] Defendants cannot rely on their claimed authority under other PPACA sections because invaliding PPACA in its entirety would nullify the claimed authority. *See* Section III.A.2, *supra.*

[28] Defendants also argue that CR6417/6421 was not final action with respect to NPIs or Medicare enrollment requirements, Defs.' Memo. 74, without disputing that (until the IFC) the pre-IFC CR6417/6421 represented their final action to require PECOS enrollment as a condition

(Footnote cont'd on next page)

1. APA Criteria for Required Rulemakings

For so-called "legislative" or "substantive" rules that require notice-and-comment rulemaking, the APA provides an exception to the Constitution's vesting all law-making power in the Congress. U.S. CONST. art. I, §1. Thus, when notice-and-comment procedures are required, failure to follow those procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303 (1979); *Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94-95 (D.C. Cir. 1997); *cf. Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act … unless and until Congress confers power upon it"). Moreover, these procedures serve the important goal of "protect[ing] the [public] from arbitrary action on the part of [agencies], however unintended." *Oceanair of Florida, Inc. v. N.T.S.B.,* 888 F.2d 767, 770 (11th Cir. 1989) (*citing McNabb*, quoted in Section I.A.1.f, *supra*).

The right to comment enables the public to convince agencies to change an unwise ("arbitrary or capricious") or unlawful ("not in accordance with the law") course. 5 U.S.C. §706. To counteract unintended consequences and agency overreaching, courts "must be strict in reviewing an agency's compliance with procedural rules" and, "in reviewing an agency's procedural integrity, the court[s] rel[y] on [their] own independent judgment." *Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1103 (4th Cir. 1985) (citing cases). "The notice-and-comment procedure encourages public participation in the administrative process and educates the agency,

---

(Footnote cont'd from previous page.)

to refer for Medicare items or services. Compl. ¶¶77-79. Even with respect to durable medical equipment and home health services that fall temporally within 42 U.S.C. § 1395hh(b)'s 150-day exemption to notice-and-comment requirements, invalidation of PPACA in its entirety would nullify the exemption. *See* Section III.A.2, *supra.*

thereby helping to ensure informed agency decisionmaking." *Id.* By acting summarily on the POMS, IFC, and CR6417/6421, Defendants denied the public and thus HHS the benefit to this exchange.

This Circuit recognizes four general criteria that trigger the notice-and-comment procedure: (1) whether the rules provide adequate legislative authority, absent the rule, for the same result; (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. *American Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("*AMC*"). Similarly, purported "guidance" that narrows 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). Finally, any agency document can qualify as one that should have been issued via notice-and-comment procedures, even something as informal as a statement in a press release. *CropLife America v. EPA,* 329 F.3d 876, 883 (D.C. Cir. 2003).

2. POMS Rulemaking

Defendants' argument that the POMS merely interpret the statute would have been more plausible if HHS issued the same text as a free-standing promulgation, interpreting the Social Security and Medicare statutes. But Defendants amended the POMS, a prior interpretation, which requires "rulemaking," which APA defines as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. §551(5). Amending a prior interpretive rule requires notice-and-comment rulemaking. *General Elec.,* 290 F.3d at 383-84; *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). Significantly, the Social Security Act provides several mechanisms for terminating Social Security benefits, 42 U.S.C. §402(n), (t), (u)-(v), (x)-(y), none of which include (as the POMS do) the requirement *to repay* past benefits received.

Significantly, the *AMC* test for substantive rules includes the inquiry "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *AMC,* 995 F.2d at 1112. Here, it seems clear that the POMS invented a duty where none existed in the statute or the prior POMS. As a matter of *procedural* law, that act of invention requires notice-and-comment rulemaking to sustain it. (As a matter of *substantive* law, the obligation to pay back past benefits appears wholly *ultra vires.*)

Defendants suggest that Medicare Part A eligibility is "harmless," Defs.' Memo. at 20, but as indicated in Section III.B.4, *infra,* it appears that Part A eligibility seriously erodes the freedom of choice available to the Medicare-eligible patient, given Defendants' attaching Medicare strings to mere eligibility. Dr. Smith's non-Medicare facility in Oklahoma draws patients – actually, escapees – from Canada's national health service. Smith Decl. ¶5. If Part A eligibility indeed were harmless, Plaintiffs may have no dispute with Defendants. *Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47, 47-48 (1971). But Plaintiffs do not understand Defendants to share Plaintiffs position – namely, that a patient's Medicare Part A eligibility does not prevent a non-Medicare physician or facility seeing that patient, wholly outside of Medicare, without complying with 42 U.S.C. §1395a(b). But, in their effort to help, Defendants appear to have a more harmful definition of "harmless" in mind.

For the foregoing reasons, and those outlined in Section III.B.4, *infra,* the POMS required notice-and-comment rulemaking and are *ultra vires.*

3. PECOS-NPI-Related Rulemaking

As Plaintiffs explain, Medicare gives HHS authority to require NPIs only in certain situations, but not across the board, Compl. ¶60, so that Defendants' adoption of its PECOS and NPI requirements exceeds both the procedural and substantive authority conferred upon HHS.

Compl. ¶¶100-105. Defendants reject these arguments on several procedural and substantive grounds. Defs.' Memo. at 65-74.

Although the Medicare statute exempts some aspects of the IFC from notice-and-comment rulemaking, those exemptions do not apply with respect to the PECOS and NPI issues. Compl. ¶80. Similarly, Defendants' attempt to fit within the "good-cause" exemption from notice-and-comment rulemaking, Defs.' Memo. at 71-73, must be rejected. The PECOS-NPI 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). Had HHS proceeded under notice-and-comment rulemaking instead of its CR6417/6421 process, it could have completed a rulemaking even before it found the convenient expedient of the IFC. Of course, Plaintiffs do not challenge the IFC's portions that PPACA directed the agency to issue on short timelines. Compl. 80. More importantly, Plaintiffs dispute Defendants' suggestion that Medicare already required physicians to enroll or opt out. *See* Section III.B.4, *infra.* Finding HHS without an enforceable rule today is a situation of its own making, but not an emergency.

Defendants claim the PECOS-NPI requirements qualify as interpretive rules, which do not require notice-and-comment procedures. Defs.' Memo. at 74. Because the interpretation narrowed HHS discretion, the interpretive-rule or guidance exceptions cannot apply. *General Elec.,* 290 F.3d at 383-84. Prior to the process that culminated first in the CR6417/6421 and then in the IFC, HHS accepted referrers without PECOS enrollment or NPIs. In any event, even if the IFC and CR6417/6421 were merely interpretive, they nonetheless can present reviewable final

action which "result[s] from a series of agency pronouncements rather than a single edict." *Ciba-Geigy Corp. v. EPA,* 801 F.2d 430, 436 n.7 (D.C. Cir. 1986); *Barrick Goldstrike Mines, Inc. v. Browner,* 215 F.3d 45, 48 (D.C. Cir. 2000).[29] Thus, Defendants' actions would be substantively reviewable even if they satisfy the relevant procedures.

Finally, on the substantive merits, Defendants' cited authority require PECOS and NPIs only for Medicare providers. Defs.' Memo. at 66 (collecting authorities). That is simply inapposite to non-Medicare physicians who, in seeing Medicare-eligible patients, refer those patients for Medicare orders and services to which Medicare entitles them. Although a Medicare-referring physician cannot make the same claim to being *wholly* outside Medicare as a physician who neither accepts Medicare reimbursement nor refers Medicare-eligible patients for Medicare orders and services, both such physicians can claim that Medicare's Spending-Clause provisions do not reach them. *See* Section III.B.4, *infra.* Certainly, Defendants have pointed to nothing to demonstrate otherwise for mere referrers, as distinct from physicians who accept Medicare reimbursement. That cannot provide the "adequate notice" that the Spending Clause requires.

[29] Because Defendants' actions determine the availability of, or entitlement to, a benefit, Defendants cannot seek resort in 5 U.S.C. §553(b)(A)'s exemption for in-house "rules of agency organization, procedure, or practice." *AMC,* 995 F.2d at 1112. Defendants' claim that Plaintiffs' failing to participate in Defendants' after-the-fact consideration of comments warrants dismissal for failure to exhaust administrative remedies misstates the law of this Circuit. First, non-exhaustion by a non-participating plaintiff is excused if the agency, in fact, considered a plaintiff's issue. *NRDC v. EPA,* 824 F.2d 1146, 1150-1152 (D.C. Cir. 1987) (*en banc*). Second, non-exhaustion is an affirmative defense, which Defendants bear the burden of proving. *Jones v. Bock,* 549 U.S. 199, 212 (2007). Third, because HHS produced a final rule before accepting comments, it cannot use non-participation in the optional comment period to preclude challenges to its decision to promulgate the final rule without notice-and-comment procedures. *Texaco, Inc. v. F.P.C.,* 412 F.2d 740, 744 (3rd Cir. 1969) (agency cannot "replace the statutory scheme with a rule-making procedure of its own invention"). Fourth, and finally, plaintiff AAPS did participate in the IFC comment period. Joseph Decl. ¶6.

See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181-82 (2005). As such, Defendants' PECOS and NPI requirements are substantively, as well as procedurally invalid.[30]

4. Voluntariness under Medicare

With Spending-Clause legislation such as Medicare, congressional conditions operate as contract terms, in which the recipient or beneficiary of the federal funds agrees to the federal terms as a condition of accepting the funds or benefit. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.,* 547 U.S. 47, 59 (2006) ("*FAIR*"). Recipients and beneficiaries remain free to forego the federal funds and the federal conditions. *Id.* (*citing Grove City College v. Bell,* 465 U.S. 555, 575-76 (1984)).[31] Indeed, plaintiff AAPS preclusively established that with respect to Medicare in *Ass'n of Am. Physicians & Surgeons v. Weinberger,* 395 F.Supp. 125, 140 (N.D. Ill.), *aff'd* 423 U.S. 975 (1975).[32] This earlier AAPS litigation upheld Medicare as Spending-Clause conditions on a government spending program that "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." *Ass'n of Am. Physicians & Surgeons v. Weinberger,* 395 F.Supp. at 140. Preclusion aside, this principle, recently reaffirmed in *FAIR,* is incontrovertible.

---

[30] To the extent that PPACA confers authority that HHS did not previously have, invalidation of PPACA in its entirety would nullify that authority. *See* Section III.A.2, *supra.*

[31] PUB. L. NO. 100-259, 102 Stat. 28 (1988), abrogated *Grove City* on other grounds.

[32] Although the Supreme Court affirmed the three-judge district court decision summarily, such dispositions are preclusive as to "'the precise issues presented and necessarily decided.'" *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 499 (1981) (*quoting Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (per curiam)).

Applying this principle to Medicare Part A and Part B is relatively straightforward in its simplest terms, but complicated by two factors: (1) the safe-harbor provisions of 42 U.S.C. §1395a(b), and (2) the status of physicians who refer Medicare-eligible patients for orders and services – such as bloodwork, x-rays, oxygen – without themselves seeking reimbursement for Medicare services. Plaintiffs respectfully submit that the first factor (the safe harbor) simply does not reach providers who do not seek to participate in Medicare reimbursement.

Prior to the 1997 enactment of 42 U.S.C. §1395a(b)'s safe-harbor for opting out of Medicare Part B, both Part A and Part B operated under the statutory assurance of "freedom of choice." 42 U.S.C. §1395a(a). By adding the safe harbor for physicians and practitioners (*i.e.,* Part B entities), but not for medical facilities (*i.e.,* Part A entities), Congress introduced uncertainty as to the "freedom of choice" that remained inherent in Medicare. *See* 42 U.S.C. §1395a(b)(5)(B)-(C). Significantly, however, the safe harbor applies to "Medicare beneficiaries" entitled to both Part A and Part B Medicare benefits. 42 U.S.C. §1395a(b)(5)(A).

The question that Plaintiffs ask this Court to answer – in connection with both the Part A (POMS) rules and the Part B (PECOS-NPI) rules is whether Medicare somehow went from voluntary to mandatory through 42 U.S.C. §1395a(b)'s enactment.[33] If it remains voluntary, "[n]othing in [Medicare] shall be construed to authorize any Federal officer or employee to exercise any supervision or control over … the manner in which medical services are provided." 42 U.S.C. §1395. Moreover, because beneficiaries do not become wards of the Medicare system, they also may seek health services outside the Medicare system entirely, and (as long as a physician does not seek Medicare reimbursements – not within "two years" but ever –

[33] Plaintiffs submit both that the Spending Clause does not give Congress this authority and that the 1997 amendments do not expressly overturn Medicare's prior, voluntary nature.

Defendants simply lack the authority under Medicare to compel the physician to conform to Medicare's dictates. 42 U.S.C. §1395a(b)(3)(C).

Defendants suggest that this flies in the fact of Medicare and Circuit precedent. As indicated, Medicare is a voluntary Spending-Clause program that does not (and cannot) compel participation by physicians. Instead, physicians who do not seek or accept Medicare reimbursement remain bound only by the laws of their state. Compl. ¶28. With respect to Circuit precedent, the cited decision is simply inapposite: "A doctor who enters into a … private contract with even a single patient is barred from submitting a claim to Medicare on behalf of any patient for a two-year period." *United Seniors Ass'n v. Shalala,* 182 F.3d 965, 968 (D.C. Cir. 1999). Plaintiffs do not dispute that. Instead, unlike the patient-plaintiffs in *United Seniors Ass'n,* the physician-Plaintiffs here seek to resolve what *United Seniors Ass'n* expressly did not address: a constitutional right to ignore Medicare altogether. Although the patient-plaintiffs "may disenroll at any time from Part B," the "private market" offered "no meaningful equivalent to Medicare," so "opting out is hardly a viable way *for patients* to bypass" 42 U.S.C. §1395a(b). *Id.* at 969 (interior quotations omitted, emphasis added). Further, the patients "disavow[ed] any claim to a constitutional right to pay their doctors more than the Medicare fee limits for services they can obtain through Medicare." *Id.* Plaintiffs represent different facets of the equation in two respects. First, unlike *United Seniors Ass'n,* Plaintiffs' members include physicians. Second, again unlike *United Seniors Ass'n,* Plaintiffs' physician members serve groups of Medicare-eligible patients who, for various reasons, Smith Decl. ¶8, wish to operate wholly outside Medicare for Medicare-covered items.

Although Plaintiffs submit that Defendants have no Medicare-based authority over physicians who wish to operate wholly outside Medicare, non-Medicare physicians who

nonetheless wish to refer Medicare-eligible patients for out-of-office orders and services present a slightly different issue. Although they do not themselves seek reimbursement from Medicare, they refer patients for Medicare orders and services by third-party providers. At least in their motion to dismiss and accompanying memorandum, Defendants have not identified a rationale to compel these physicians – who are only nominally connected with the Medicare system – to file a formal opt-out pursuant to 42 U.S.C. §1395a(b), to enroll in PECOS, or to obtain an NPI.

C. Counts V and VI: Accountings for Trust Funds

Plaintiffs allege that Defendants – and particularly the officer defendants who are trustees of the Medicare and Social Security trust funds – have misrepresented PPACA's economic impacts and affordability at the same time that have violated their fiduciary duties with respect to the Medicare (Count V) and Social Security (Count VI) trust funds. Compl. ¶¶106-117. Defendants respond that plaintiffs lack standing because this represents a "generalized grievance" and that the officer defendants' reports to Congress obviate the need for an equitable accounting. Defs.' Memo. 56-57. Defendants' objections lack merit.[34]

The adequacy that Defendants see in the trustees' reports to Congress is not the type of adequate remedy contemplated by 5 U.S.C. §704 and related rules of equity. It seems clear that Plaintiffs and their members lack any remedy whatsoever with respect to the adequacy of those reports to Congress. *NRDC v. Hodel,* 865 F.2d 288, 318 & n.32 (D.C. Cir. 1988). The question,

[34] Plaintiffs' members obviously have a financial interest in the solvency of the programs that provide benefits to them. *See* Section I.A.1.c, *supra.* Moreover, Plaintiffs' physician members have an interest in the solvency of Medicare on behalf of Medicare-eligible patients, *e.g.,* Hammons Decl. ¶5-7, even if those physicians do not themselves use Medicare. Finally, the fact that grievances fall on the public widely does not deny standing to the entire public. All that standing requires is that the grievance fall concretely on the particular plaintiff. *Akins,* 524 U.S. at 23 (fact that grievance is widely felt cannot defeat standing).

then, is whether the alleged violations of fiduciary duty enable Plaintiffs or their members to seek an equitable accounting as the only way to protect their interests in Social Security and Medicare. Clearly, the government trustees cannot deny a fiduciary duty, and Plaintiffs credibly allege breach of that duty. Compl. ¶¶83-89, 107-110, 113-116. Under those circumstances, Counts V and VI easily survive a Rule 12(b)(6) motion.

CONCLUSION

WHEREFORE, Plaintiffs respectfully ask this Court to deny the motions to dismiss.

Dated: January 10, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2011, I electronically filed the foregoing "Plaintiffs' Opposition to Motion to Dismiss" and the accompanying exhibits with the Clerk of the Court using the CM/ECF system, which I understand to have caused the service of Justin M. Sandberg and Eric B. Beckenhauer of the U.S. Department of Justice ("DOJ"), and their DOJ colleagues, on behalf of all defendants.

/s/ Lawrence J. Joseph

Lawrence J. Joseph