No. __-____

In the Supreme Court of the United States

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

PETITIONERS,

v.

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

RESPONDENTS.

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

The court of appeals upheld dismissal of the six-count complaint on various jurisdictional and merits rationales; petitioners seek review for three counts.

Count I challenges a policy under Social Security and Medicare, without satisfying 42 U.S.C. §405's claims-channeling provisions that displace federal-question jurisdiction. The district court entered a merits judgment against petitioners based on a prior non-party (divided) appellate decision, and D.C. Circuit affirmed on the jurisdictional ground that the prior non-party decision rendered Count I so insubstantial a federal question as to deny jurisdiction. That dismissal splits with the uniform decisions of the Circuits and this Court that require an adverse *Supreme Court* decision to make a question insubstantial enough to deny jurisdiction, but an alternate jurisdictional basis for review lies in the U.S. District Court for the District of Columbia's historic and unique equity jurisdiction, which provides a basis for review – notwithstanding §405 – to parties without an adequate remedy under §405.

Count III challenges 26 U.S.C. §5000A, which the saving construction in *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), upheld by interpreting its unconstitutional penalty for not having health insurance as an optional tax, where Congress lacked Commerce-Clause authority to mandate insurance. Other parts of the same statute flatten insurance premiums to benefit favored classes – *e.g.,* those with pre-existing conditions – by lowering their premiums below actuarial risks while increasing premiums for others (*e.g.,* the young or healthy). Compelling or coercing a subsidy of private third parties' premiums violates the Takings and

Due Process Clauses or, if §5000A is deemed a tax, imposes an unconstitutional condition on refusing voluntarily to subsidize private third parties.

Count IV challenges the procedural and substantive validity of an "interim rule" and a series of "change requests" that together require physicians to enroll in or formally opt out of Medicare in order to refer Medicare-eligible patients for Medicare-covered services (*e.g.,* x-rays, bloodwork). Six months before the district court ruled, respondents issued a new final rule that supersedes some of the interim rule (but not the change requests) and suffers from the same substantive defects as the change requests and interim rule. Without raising it in district court, respondents argue on appeal that the final rule moots Count IV. In district court, petitioners argued without objection that *NFIB* caused the healthcare reform bill (which includes the substantive authority for Count IV's Medicare-referral policy) to violate the Origination Clause as a Senate-initiated, revenue-raising bill. Splitting with other Circuits, the court of appeals affirmed dismissing *the case* without leave to amend *the complaint* to address the final rule and without regard to Rule 15(b)(2)'s incorporating the Origination-Clause claim into the pleadings.

The questions presented are:

1. Whether there is jurisdiction to reach the merits on Count I.

2. Whether the Individual Mandate violates the Takings Clause or, imposes an unconstitutional condition on those who decline to subsidize third parties.

3. Whether the final rule moots Count IV and, if so, whether the courts must allow petitioners to cure the mootness via amended pleadings or Rule 15.

PARTIES TO THE PROCEEDING

Petitioners are the Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA ("ANH-USA"). AAPS is a membership group primarily of physicians. ANH-USA is a nonprofit membership-based organization that conducts educational activities and represents the collective interests of medical professionals and patients interested in an "integrative" approach incorporating food, dietary supplements, and lifestyle changes into medical care and practice. Respondents are the Secretary of Health & Human Services, the Secretary of the Treasury, and the Social Security Administrator in their official capacities and the United States.

Pursuant to this Court's Rule 29.6, petitioners state that AAPS and ANH-USA are non-profit organizations, and no publicly held company owns any interest in AAPS or ANH-USA.

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PETITION FOR WRIT OF *CERTIORARI*

The Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA (collectively, "Plaintiffs") respectfully petition this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit, which affirmed the District Court's dismissal of this action for lack of jurisdiction and failure to state a claim on which relief could be granted under FED. R. CIV. P. 12(b)(1) and (b)(6).

OPINIONS BELOW

The Court of Appeals' decision is reported at 746 F.3d 468 and reprinted in the Appendix ("App.") at 1a. The District Court's decision is reported at 901 F. Supp. 2d 19 and reprinted at 12a.

JURISDICTION

The Court of Appeals issued its decision on March 7, 2014, and denied a timely filed petition for rehearing on April 28, 2014 (order reprinted at App. 57a). (In Application No. 14A67, the Chief Justice extended the time within which to petition for a writ of *certiorari* through September 25, 2014.) The District Court had jurisdiction under 28 U.S.C. §1331 and its unique jurisdiction for review of federal agency action, *Stark v. Wickard,* 321 U.S. 288, 290 n.1 (1944); D.C. CODE §11-501, and the Court of Appeals had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

The pertinent constitutional, statutory, and regulatory provisions are reprinted in the Appendix to this petition. App. 58a-83a.

STATEMENT OF THE CASE

Plaintiffs challenge several interrelated actions by the federal respondents (collectively, the "Administration") regarding medical care and related insurance programs:

(a) Count I seeks to invalidate on procedural and substantive grounds several amendments to the Social Security Program Operations Manual System ("POMS") that require repaying Social Security benefits previously received in order to opt out of Medicare Part A prospectively.

(b) Count III seeks to invalidate the individual-based penalty in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"), which *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), held could qualify as an optional tax even though outside the Commerce Power. Plaintiffs claim that this "Individual Mandate[1]" violates the Takings and Due Process Clauses by compelling private insureds either to pay more than their actuarial risk – in order to subsidize lower rates for other private insureds favored by PPACA – or to pay a penalty (or tax) for declining to do so.

(c) Count IV seeks to invalidate on substantive and procedural grounds two strands of agency

[1] Plaintiffs continue to refer to this provision – 26 U.S.C. §5000A – as the "Individual Mandate," consistent with the intent of the Congress that enacted it, notwithstanding that *NFIB* converted it into an optional tax on not having PPACA-approved health insurance.

> action – an interim rule and "change requests" – that require physicians to submit themselves to certain Medicare requirements and to enroll in the Provider Enrollment, Chain and Ownership System ("PECOS") as a condition to refer (*i.e.,* to prescribe) Medicare-covered services such as x-rays and bloodwork for their Medicare-eligible patients. In large part, the question that divides the parties here relates to the intended effect of 1997 amendments to Medicare, 42 U.S.C. §1395a(b), which provided a safe harbor for physicians to opt out of Medicare without (according to Plaintiffs) making it unlawful for state-licensed physicians to treat Medicare-eligible patients in their state for a fee under state law without opting out of Medicare.[2]

After staying Plaintiffs' ability to move for summary judgment until it decided the Administration's motion to dismiss and then staying its resolution of the motion to dismiss while the D.C. Circuit and this Court decided third-party litigation on similar issues, the District Court invited supplemental briefing on the effect of *NFIB* on the pending motion to dismiss.

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[2] The Administration interprets §1395a(b) to prohibit non-Medicare physicians' charging Medicare-eligible patients for medical care, whereas Plaintiffs claim that the safe harbor is just that: a safe harbor. As a Spending-Clause program, Medicare neither regulates non-participating physicians nor preempts state law. *Ass'n of Am. Physicians & Surgeons v. Weinberger,* 395 F.Supp. 125, 140 (N.D. Ill.), *aff'd* 423 U.S. 975 (1975).

Plaintiffs argued that this Court's conversion of the Individual Mandate into a tax implicated the requirement that all revenue-raising bills originate in the House of Representatives, U.S. CONST. art. I, §7, cl. 1, thereby rendering PPACA void in its entirety (*i.e.,* the House bill did not raise revenue, but the Senate amendment per *NFIB* now did). Plaintiffs argued that the Origination Clause required the court to rule for Plaintiffs not only on Count III's direct challenge to the Individual Mandate itself, but also on Count IV's PECOS-related claims because the challenged agency actions relied on authority granted by PPACA §6405(c), Pub. L. No. 111-148, §6405(c), 124 Stat. at 768-69. The Administration neither responded nor objected to Plaintiffs' Origination-Clause arguments.

Prior to *NFIB,* in District Court the parties had agreed that PPACA's insurance mandates – if taxes at all – were excise taxes, which Plaintiffs challenged as impermissibly non-uniform. Pls.' Opp'n to Mot. to Dismiss at 42, 46, 55. Once the *NFIB* decision rewrote the mandate from a statutory non-tax into a tax for constitutional purposes, it became possible for the first time that the Sixteenth Amendment *might* rescue the mandate as an income tax. The changed law would have warranted leave to file a supplemental complaint, if the Administration had objected to the new arguments that Plaintiffs made in response to *NFIB.* But the Administration did not put Plaintiffs on notice that it objected to Plaintiffs' asserting the Origination Clause.

Several months later, without oral argument, the District Court granted the Administration's motion to dismiss and dismissed the case. App. 12a-56a. With respect to the Origination Clause challenge to

the Individual Mandate, the Court held that Plaintiffs had waived the argument for failing to raise the argument in its opposition to the motion to dismiss (which had been briefed, but stayed when *NFIB* came down). Because it dismissed Count IV on jurisdictional grounds, the District Court did not address whether Plaintiffs waived the Origination Clause with respect to Count IV.

The panel decision upholds the dismissal on slightly different grounds (App. 1a-11a). Specifically, the panel decision upholds the dismissal of Count I on the basis of an earlier D.C. Circuit panel's decision in *Hall v. Sebelius,* 667 F.3d 1293 (D.C. Cir. 2012), without first assessing statutory subject-matter jurisdiction to reach the merits under the claims-channeling provisions of 42 U.S.C. §405(g)-(h). While plaintiffs may challenge adverse merits rulings by attacking their own jurisdiction on appeal, Plaintiffs here take a different tack by asking (reasonably) only that all jurisdictional questions be resolved before a federal court saddles them with the *Hall* merits decision. Plaintiffs' goal is to clarify that the unique equity jurisdiction[3] of the District Court for the District of Columbia provides a jurisdictional alternative to the federal-question and Tucker Act jurisdiction that §405 displaces. The appellate panel sidestepped Plaintiffs' jurisdiction-first argument by holding that the split *Hall* decision rendered Count I

[3] *Kendall v. U.S. ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 580-81 (1838); *Stark,* 321 U.S. at 290 n.1; *Peoples v. Dep't of Agriculture,* 427 F.2d 561, 564 (D.C. Cir. 1970); *Ganem v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984).

so insubstantial a federal question as to qualify as a jurisdictional basis for dismissal. App. 7a.

As pertinent to Count III, the panel upheld the District Court's declining to consider Plaintiffs' arguments under the Origination Clause, App. 4a-5a, and affirmed that the Individual Mandate's tax did not violate the Takings Clause. App. 3a-4a. In doing so, the panel regarded the Individual Mandate *as a tax,* not as a penalty that could be *construed* as a tax.[4]

Finally, with respect to Count IV, the panel dismissed Plaintiffs' substantive and procedural claims as mooted by a 2012 final rule that the Administration promulgated with respect to the 2010 interim rule. App. 8a. The panel did not respond to Plaintiffs' argument that their substantive challenge in Count IV applies equally to the 2010 interim rule and the 2012 rule that the Administration raised belatedly on appeal or that the 2012 rule did not apply to the separate strand of "change requests" that Plaintiffs challenge.

STATEMENT OF FACTS

As alleged in Plaintiffs' complaint, subsidization refers not to insurance's usual "spread-the-risk" component (*i.e.,* everyone pays a relatively small,

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[4] *NFIB* did not consider, much less resolve, these two new issues. The Due Process Clause prohibits both applying issue preclusion to non-parties like Plaintiffs and applying *stare decisis* so conclusively that it operates as *res judicata. S. Cent. Bell Tel. Co. v. Alabama,* 526 U.S. 160, 167-68 (1999). New arguments deserve their day in court because courts that did not consider an issue did not decide it. *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004).

actuarially determined premium to cover their share of expected costs of those in the insurance pool). Instead, it refers to PPACA's favoring various groups (*e.g.,* those with pre-existing conditions) by lowering their premiums below their actuarial risk. Sec. Am. Compl. ¶¶66-68. An article in CONTINGENCIES, the peer-reviewed journal of the American Academy of Actuaries, estimates this "spread-the-wealth" component of PPACA premiums at 17 to 20 percent of a healthy person's premium:

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

Kurt Giesa & Chris Carlson, *My Generation: Age Band Compression Under Health Care Reform,* 25-1 CONTINGENCIES 30, 33 (Jan.-Feb. 2013) (hereinafter, "*My Generation*"). So, for example, an annual family premium of $12,000 would include approximately $2,000 to subsidize lower rates for others. This is the "spread-the-wealth" payment, as distinct from the typical risk-spreading aspect of health insurance.

REASONS TO GRANT THE WRIT

The writ of *certiorari* should be granted because the panel's resolution of the questions presented conflicts in several ways with the decisions of other Circuits and of this Court; in the remaining respects,

the questions presented are important issues of federal law that this Court should settle:

(1) Applying a split appellate panel decision – instead of a decision of *this Court* – to remove the issue raised by Count I from federal-question jurisdiction is contrary the holdings not only of this Court, *Hagans v. Lavine,* 415 U.S. 528, 537 (1974); *Goosby v. Osser,* 409 U.S. 512, 518 (1973), but also of other Circuits, *Molina-Crespo v. Califano,* 583 F.2d 572, 574 (1st Cir. 1978); *Page v. Bartels,* 248 F.3d 175, 192 (3d Cir. 2001); *Holy Cross College, Inc. v. Louisiana High Sch. Athletic Ass'n,* 632 F.2d 1287, 1289 (5th Cir. 1980); *Knight v. Alsop,* 535 F.2d 466, 470 (8th Cir. 1976). Moreover, even if a split appellate decision could render a question so insubstantial as not to present a federal question – and thus fall outside 28 U.S.C. §1331 – that still would not resolve whether this District Court's unique equity jurisdiction provided an *alternate* basis for jurisdiction. The availability of an alternative to federal-question jurisdiction poses an important question not only of whether that the equity jurisdiction survived the District of Columbia Court Reorganization Act, Pub. L. No. 91-358, 84 Stat. 605 (1970) ("DCCRA"), but also whether the District Court's unique jurisdiction provides an alternate basis for the jurisdiction that §405 withdraws from *all* district courts.

(2) By finding Plaintiffs' substantive and procedural challenges to two distinct lines of agency action – an interim rule and "change requests" – moot when a subsequent final rule *arguably* moots procedural challenges to the interim rule, but not (a) the substantive challenges to the interim rule

and the change requests, nor (b) the procedural challenge to the change requests, the panel decision splits with authorities not only on mootness, *Am. Maritime Ass'n v. U.S.,* 766 F.2d 545, 554 n.14 (D.C. Cir. 1985); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n,* 711 F.2d 370, 377 (D.C. Cir. 1983), but also on the availability of curative amendments before dismissal. 28 U.S.C. §1653; *Hahn v. U.S.,* 757 F.2d 581, 586-87 (3d Cir. 1985); *Chancery Clerk of Chickasaw County v. Wallace,* 646 F.2d 151, 160 (5th Cir. 1981). Moreover, by deeming Plaintiffs to have waived the argument that the Origination Clause invalidates the PPACA authority for the PECOS changes, when Plaintiffs plainly raised the issue in District Court without objection by the Administration, and when Rule 15(b) deems such arguments incorporated into the pleadings (whether or not Plaintiffs moved to do so), the panel further split with the decisions of this Court and the Circuits. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 445-48 (1993); *Banks v. Dretke,* 540 U.S. 668, 704 (2004); *In re Morrison,* 555 F.3d 473, 480-81 (5th Cir. 2009); *Clark v. Martinez,* 295 F.3d 809, 815 (8th Cir. 2002); *D. Federico Co. v. New Bedford Redev. Auth.,* 723 F.2d 122, 126 (1st Cir.1983). Finally, under *South Ottawa v. Perkins,* 94 (4 Otto) U.S. 260, 266-67 (1877), questions – like those presented by the Origination Clause – that go to a statute's existence are not waivable.

(3) Plaintiffs argue not only that the Individual Mandate effects a taking without compensation, but also that the taking is for the private use of

lowering private third-parties' premiums: "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation." *Kelo v. City of New London,* 545 U.S. 469, 477 (2005) (emphasis in original). The panel noted that the *Kelo* sentence is not a holding and deemed it "impossible to read that sentence … as suggesting that any redistributive purpose sweeps an otherwise valid tax into the narrow group of measures" invalid under *Brushaber v. Union Pac. R. Co.,* 240 U.S. 1 (1916). App. 4a. Plaintiffs respectfully submit that the panel's answer is a *non sequitur,* as Plaintiffs are unaware of any other "redistributive" federal law that requires private parties to subsidize other private parties *directly.* Indeed, such "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" and help establish "improper … purpose." *U.S. v. Windsor,* 133 S.Ct. 2675, 2693 (2013) (*quoting Romer v. Evans,* 517 U.S. 620, 633 (1996), *quoting Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37-38 (1928)). The unprecedented nature of this form of federal power requires this Court's resolution.

In addition, Plaintiffs' claims raise important issues that justify review *now,* rather than review of *future* claims for recovery of taxes and premiums. Deferring review will only exacerbate damage to the Nation's medical and insurance infrastructure.

I. JURISDICTION EXISTS FOR THE POMS COUNT

Although *Hall* still was pending in the District Court when Plaintiffs filed this action, the District Court's serial stays of this action allowed *Hall* to complete before this action began. Count I of Plaintiffs' complaint reprises the *Hall* merits claims, and the panel decision holds that *Hall* thus relieved the panel here of its obligation to resolve the Parties' jurisdictional dispute. App. 7a (*citing Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 98-101 (1998)). Specifically, while federal courts must resolve jurisdiction before reaching the merits, *Steel Co.,* 523 U.S. at 93-94, a prior merits decision can, in a sense, go to jurisdiction if the "disposition [of a related case] renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense." *Id.* at 98. The panel erred in relying on this strand of decisions for two reasons.

First, the decisions of this Court and the Circuits are uniform in requiring a prior decision of *this Court* to render a question so decided as to not raise a substantial federal question. In addition to being flat wrong, the panel's contrary holding – if allowed to stand – would raise serious Due Process concerns by allowing non-parties' prior litigation to oust the right of new parties to present their claims in court. *South Cent. Bell Tel. Co.,* 526 U.S. at 167-68.

Second, even if it were correct, the panel's no-federal-question holding would be nonresponsive to Plaintiffs' argument that the District Court's equity jurisdiction provides an *alternate* jurisdictional basis to federal-question jurisdiction. The availability of equity jurisdiction for Medicare-related claims would not defeat the claims-channeling intent of §405. Any

plaintiff with claims to channel would have alternate remedies that typically would defeat equity actions, but third parties (such as physicians) with no claim to channel could sue to enjoin *ultra vires* actions that injure them indirectly, assuming that those third parties can establish a current case or controversy.

A. The Panel's Citing an Appellate Panel Decision to Render Plaintiffs' Issue Insubstantial as a Federal Question Splits with the Circuits and this Court's Precedents

Plaintiffs respectfully submit that the panel read *Steel Co.* out of context because the cited exception concerns only *Supreme Court* merits decisions, which *Hall* is not: "federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit," where a claim is "plainly unsubstantial … either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of *this court* as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans,* 415 U.S. at 537 (interior quotations omitted, emphasis added); *Goosby,* 409 U.S. at 518 ("[a] claim is insubstantial *only* if its unsoundness so clearly results from the previous decisions of *this court* as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy") (interior quotations omitted, emphasis added). Where this Court has conclusively resolved an issue, relitigating it amounts to beating a dead horse, outside federal-question jurisdiction.

Consistent with this Court's plain language, the Circuits have uniformly required that this "dead-horse" exception to federal-question jurisdiction requires a controlling *Supreme Court* decision, not merely a Circuit decision. *See, e.g., Molina-Crespo,* 583 F.2d at 574; *Bartels,* 248 F.3d at 192; *Holy Cross College,* 632 F.2d at 1289; *Knight,* 535 F.2d at 470. As indicated, allowing this error to stand would raise serious Due Process concerns for binding non-parties to prior litigation outcomes. *South Cent. Bell Tel. Co.,* 526 U.S. at 167-68. For that reason, this Court should reverse the panel decision and proceed to the *Steel Co.* requirement of ensuring that jurisdiction exists before courts address the merits.

B. The District Court for the District of Columbia Has Jurisdiction over Suits in Equity against Federal Officers, and §405 Did Not Displace that Jurisdiction

Although some plaintiffs attack their jurisdiction on appeal after losing below, Plaintiffs here seek to ensure that jurisdiction exists before the *Hall* merits are counted against Plaintiffs. App. 7a-8a. Moreover, Plaintiffs argue that the District Court *had* jurisdiction under its unique equity jurisdiction because 42 U.S.C. §405(h) displaces federal-question jurisdiction, but not other forms of jurisdiction not expressly included within §405(h). Before outlining why jurisdiction exists, Plaintiffs first explain their interest in the jurisdictional question.

As groups of physicians, Plaintiffs obviously have an interest in ensuring that the Administration and its successors stay within their authority when regulating medical issues. The jurisdictional issue presented here has important consequences, not only for judicial review of federal policy generally but also

for the merits here. The general issue is self-evident; less obvious is the way that Plaintiffs' requested relief would help overturn *a portion* of the challenged federal policies in the future. Specifically, Plaintiffs intend to petition the Administration to repeal the regulatory requirement to repay *past* Social Security benefits received as a condition of opting out of Medicare *prospectively*. 20 C.F.R. §404.640(b)(3). While that pay-back requirement is *ultra vires,* it concededly did not originate in the POMS challenged here, and a challenge *may* not be timely against §404.640(b)(3) itself.[5] If this Court were to confirm that the District Court's equity jurisdiction provides jurisdiction, notwithstanding §405's foreclosing review under federal-question jurisdiction, Plaintiffs will have their future day in court, thus eliminating *a portion* of the burdensome opt-out regime that *Hall* upheld – *i.e.,* not the opt-out requirement itself, but the pay-back requirement – on grounds not considered by *Hall*. Although they provide this context to the Court, Plaintiffs respectfully submit that their future plans are jurisdictionally irrelevant; they make it neither more nor less pressing that the Court resolve the jurisdictional issue. Instead, the nature of federal courts requires resolving all jurisdictional issues first.

As is plain from the face of the statute, §405's claims-channeling provisions are irrelevant to the question whether the District Court's unique equity

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[5] The six-year statute of limitations does not run against those abroad when the action accrues, providing instead that an "action … may be commenced within three years after the disability ceases." 28 U.S.C. §2401(a).

jurisdiction applies, notwithstanding that §405 precludes resort to federal-question jurisdiction. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("*NAHB*") (implied repeals require "clear and manifest" legislative intent). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) (internal quotations omitted). Simply put, the express terms of §405 displace federal-question jurisdiction and the Tucker Act, but not other forms of jurisdiction. *See, e.g., Heckler v. Ringer,* 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under §1331* leaves jurisdiction *under 28 U.S.C. §1361* in place). This Court has absolutely no reason to assume that Congress intended to deny a suitable plaintiff resort to the District Court's unique equity jurisdiction, assuming (as equity requires) that the plaintiff had no other adequate remedy.

In the District Court, the Administration argued that DCCRA repealed the District Court's equity jurisdiction:

> At one time, D.D.C. did have state-court-like general jurisdiction, but that ended about *40 years* ago, with the passage of the District of Columbia Court Reorganization Act of 1970[.]

Defs.' Mot. to Dismiss, at 6 (emphasis in original). In transferring local authority to the new local courts that it created, DCCRA left unchanged the District Court's jurisdiction over *federal* officers, as both the D.C. Circuit and Congress have recognized. *Ganem,* 746 F.2d at 851; H.R. REP. NO. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136 (under

then-current law, plaintiffs could avoid §1331's then-applicable amount-in-controversy requirement by suing federal officers in the District of Columbia). As with §405, there is no evidence – much less "clear and manifest" evidence – that Congress intended to displace the District Court's equity jurisdiction. *See NAHB,* 551 U.S. at 662; *Schlesinger,* 420 U.S. at 752. For the foregoing reasons, this Court should find that the District Court had jurisdiction over Count I.

II. THE PECOS COUNT IS NOT MOOT

More than a year after briefing completed on the Administration's motion to dismiss, but six months before the District Court ruled on that motion, the Administration promulgated the final rule, 77 Fed. Reg. 25,284 (2012), that the panel deemed to moot Count IV. Had the Administration filed a notice of supplemental authority on the new rule in District Court, Plaintiffs could have (and obviously would have) moved to supplement their complaint to challenge the new rule, which has the same substantive defects as the interim rule. But the Administration did not raise the issue until this appeal had been filed, which thus far has worked to its advantage. Similarly, without either of the lower courts ever explaining how they avoid Rule 15(b)'s constructively supplementing the pleadings with the Origination Clause arguments that Plaintiffs made without objection, the Administration and the lower courts would allow parties to believe – under Rule 15(b) – that they had raised an argument, only to sandbag them with an unsupported waiver theory.

A. Plaintiffs Timely Asserted that PPACA's Enactment Violated the Origination Clause, Depriving the Administration of Authority for Its New PECOS Policies

As explained *infra,* Congress enacted PPACA in violation of the Origination Clause, which Plaintiffs timely raised in opposition to the Administration's motion to dismiss. Even if the District Court were correct about waiver, however, that would not excuse the dismissal of Plaintiffs' case without leave to amend the complaint. Finally, and contrary to the lower courts' waiver theory, the very existence of a supposedly enacted law is not subject to waiver:

> There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.

South Ottawa, 94 (4 Otto) U.S. at 266-67. Unlike its claims based on procedure and agency arbitrariness, Plaintiffs' substantive challenge to the PECOS issues in Count IV stands or falls with the existence of PPACA §6405(c). The existence of that section – and

of PPACA itself – therefore remain an issue in this litigation, notwithstanding claims of waiver.

1. PPACA Raises Revenue

Although not itself fatal to PPACA's existence, *NFIB* unquestionably converted a non-tax penalty into a tax, which qualifies as raising revenue for purposes of the Origination Clause, given that Congress lacked Commerce-Clause authority for the Individual Mandate. To be sure, the Administration would argue that a regulatory purpose can render some revenue incidental (*i.e.,* outside the Origination Clause): "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (*citing* 1 J. Story, COMMENTARIES ON THE CONSTITUTION §880, at 610-11 (3d ed. 1858)). But all of the instances where this Court has found revenues incidental to a regulatory purpose involved measures within a non-taxing Article I power of Congress. *See, e.g., U.S. v. Sanchez*, 340 U.S. 42, 43 (1950) (tax on marijuana); *Sonzinsky v. U.S.*, 300 U.S. 506, 511 (1937) (tax on firearms). This Court has never found a regulatory purpose outside Article I's regulatory authority to excuse Origination-Clause compliance.

To the contrary, when Congress taxes outside its regulatory authority, this Court has assumed that the act raises revenue as its "primary object":

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

McCray v. U.S., 195 U.S. 27, 50-51 (1904) (internal quotations omitted). Under the circumstances, the Individual Mandate plainly raises revenue, and does so as its "primary object" for legal purposes.

2. SMHOTA Did Not Raise Revenue

Although the question of whether the House bill raised revenue is less clear cut, the answer is fatal to PPACA. Focusing on alternate definitions of "raise," the circuits are split on whether bills must *increase* revenues or merely *levy* revenues without necessarily increasing them. *Compare Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (bill that "diminishes the revenue of the government" "is not a bill to raise revenue"); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978) ("the [Origination Clause's] mandate that 'all Bills for raising Revenue shall originate in the House of Representatives' appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes") (citations omitted) *with Armstrong v. U.S.*, 759 F.2d 1378, 1381-82 (9th Cir. 1985); *Wardell v. U.S.*, 757 F.2d 203, 204-05 (8th Cir. 1985); *Heitman v. U.S.*, 753 F.2d 33, 35 (6th Cir. 1984). The *Bertelsen-Carter* reading conforms with the motivation for having the House initiate revenue bills: to protect the People from oppressive taxation. Where taxes are not increased, and especially where they are decreased, that protection is unnecessary. Under either reading, however, the House bill did not raise revenue.

In contrast to the unwieldy and controversial PPACA, the six-page, six-section Service Members Home Ownership Tax Act of 2009 ("SMHOTA"), passed the House by a 416-0 vote. 155 Cong. Rec. H11,126 (2009).

- SMHOTA §1 provided the bill's short title.
- SMHOTA §§2-3 waived recapture of the first-time homebuyers' tax credit for members of the armed forces, foreign service, and intelligence community ordered to extended duty service overseas; without that, first-time homebuyers would lose the credit for selling too soon after taking the credit. *See* 26 U.S.C. §36(a), (f).
- SMHOTA §4 added new exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" under 26 U.S.C. §132.
- SMHOTA §5 increased civil penalties by $21 (from $89 to $110) for failing to file certain returns for partnerships and S corporations under 26 U.S.C. §6698(b)(1) and §6699(b)(1).
- SMHOTA §6 amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to shift 0.5% of *estimated* tax payments for certain corporations from the fourth quarter to the third quarter, with an offsetting reduction to fourth-quarter payments.

H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009).

Under the raise-means-increase reading, only SMHOTA §5 and §6 could even arguably raise revenue, given that the other provisions were either the innocuous short title (§1) or tax *cuts* (§§2-4). By imposing penalties for failure to comply with laws duly enacted under Article I, SMHOTA §5 has a regulatory purpose of encouraging compliance with the law. Such penalties produce only "incidental" revenue and do not "levy taxes in the strict sense of the word" required to trigger the Origination Clause. *Nebeker*, 167 U.S. at 202. Similarly, by shifting the

timing of estimated-tax payments without increasing them in total, SMHOTA §6 does not raise revenue because its *estimated-tax* payments are not revenue: "Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax," *Baral v. U.S.*, 528 U.S. 431, 436 (2000), and in any event the net effect of its offsetting shifts is zero.

Under the raise-means-levy reading, SMHOTA §§2-4 arguably might *levy* revenue even if they do not *increase* it. For example, a bill that lowers a tax rate from 50 percent to 40 percent arguably still levies revenue at the new, lower 40-percent rate. For two reasons, however, SMHOTA §§2-4 did not raise revenue. First, they provided targeted exemptions to benefit military, intelligence, and foreign-service personnel to encourage national service, a form of tax expenditure that is not indicative of a "bill for raising revenue," *U.S. v. Norton*, 91 U.S. (1 Otto) 566, 567-68 (1875), and indeed does not "*create* revenue." *Nebeker*, 167 U.S. at 202 (emphasis added); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 859 (1995) (Thomas, J., concurring); 2 U.S.C. §639(c)(2)-(3) (distinguishing revenues from tax expenditures). Second, SMHOTA §§2-4 closed revenue streams; they did not "raise" or "levy" them. "To say that a bill which provides that no revenue shall be raised is a bill 'for raising revenue' is simply a contradiction of terms." S. REP. NO. 42-146, at 5 (1872). In other words, closing a tax stream, without taking any steps to levy revenue or to continue a tax, does not raise revenue under the Origination Clause.

Because it consists of a Senate revenue-raising amendment to a House non-revenue bill, PPACA is void. *Rainey v. U.S.*, 232 U.S. 310, 317 (1914).

3. The Panel's Conclusion that Plaintiffs Failed to Raise the Origination Clause as a Basis for Invalidating PPACA Splits with Decisions from this Court and Other Circuits

The lower courts' conclusion that Plaintiffs failed to raise the Origination Clause conflicts not only with the holdings of this Court and other Circuits but also with the Federal Rules of Civil Procedure. Specifically, under Rule 15(b), "an issue not raised by the pleadings [that] is tried by the parties' … implied consent … must be treated in all respects as if raised in the pleadings." FED. R. CIV. P. 15(b)(2). Whatever the scope of the District Court's request for further briefing, Plaintiffs had the right to introduce the issue in light of the changes wrought by the *NFIB* decision, and the Administration's only recourse was to object to Plaintiffs' introducing the issue. *Dretke,* 540 U.S. at 704; *accord Morrison,* 555 F.3d at 480-81; *Clark,* 295 F.3d at 815; *Federico,* 723 F.2d at 126. The panel decision does not explain how it circumvents Rule 15(b), and Plaintiffs were not on notice that the rules would not apply to them.

Clearly, a court *could* accept an argument as not waived when introduced far later in the proceedings than here. *U.S. Nat. Bank of Oregon,* 508 U.S. at 445-48 (allowing argument not made in district court or opening appellate brief). In order to dismiss for failure to state a claim on which relief could be granted, the District Court needed to consider the claims that Plaintiffs actually raised. Although *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007), and its progeny have made it easier to grant motions to dismiss under Rule 12(b)(6), this Court has not held

that courts should dismiss actions without leave to amend the complaint. *See Ashcroft v. Iqbal,* 556 U.S. 662, 687 (2009). Because cases should be resolved on the merits and not strained technicalities, the District Court erred in dismissing Plaintiffs' case without considering the Origination Clause.

B. The Court of Appeals' Low Threshold for Mootness Conflicts with Precedents of this Court and Other Circuits

The lower courts here set too low a bar for mootness, without considering that most – if not all – of Count IV survived the 2012 rule. "[I]f an event occurs while a case is pending on appeal that makes it *impossible* for the court to grant *any* effectual relief whatever …, the appeal must be dismissed." *Church of Scientology of California v. U.S.,* 506 U.S. 9, 11 (1992) (internal quotations omitted, emphasis added). As the emphasized terms signal, moot cases are gone *altogether,* not *partially* gone. Thus, while "not … fully satisfactory" to plaintiffs, "even the availability of a partial remedy is sufficient to prevent … case[s] from being moot." *Chafin v. Chafin,* 133 S.Ct. 1017, 1026 (2013) (interior quotations omitted); *U.S. v. Hahn,* 359 F.3d 1315, 1323 (10th Cir. 2004); *Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys.,* 173 F.3d 46, 57 (1st Cir. 1999); *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 287 (6th Cir. 2009). Here, this Court could award ample partial relief on Count IV.

First, the final rule concerns only the interim rule, not the change requests. Indeed, the parallel change-request process kept the PECOS provisions from taking effect until long after the final rule's issuance and effective date, and the final rule itself

repeatedly promised "advance notice" to the public via the change-request process before the PECOS changes would take effect. 77 Fed. Reg. at 25,292-95, 25,298, 25,300-02, 25,308-09 (App. 81a-83a). As such, the final rule itself did not begin the PECOS changes that Plaintiffs oppose, and enjoining the change requests would suspend indefinitely the final rule, even if Plaintiffs did not challenge the final rule.

Second, where a prior, less-formal agency action "has continuing vitality which has in no way been superseded by promulgation of the final rule," the promulgation of a final rule does not moot challenges to the prior informal action. *Concerned Scientists,* 711 F.2d at 377. Because Plaintiffs' challenge to the change requests continues, even after promulgation of the final rule, Count IV is not moot.

Third, even if a subsequent final action would moot *procedural* challenges to a prior interim action, the existence of an ongoing merits dispute would not be moot: "[an agency's] issuance of that rule does not moot [Plaintiffs'] challenges, which are equally applicable to the final rule and the interim rule." *Am. Maritime Ass'n.,* 766 F.2d at 554 n.14 (*citing Concerned Scientists,* 711 F.2d at 377-79). The merits dispute between Plaintiffs and the Administration continues in both the final rule and the change requests.

Fourth, any perceived mootness could be cured by the Court's directing Plaintiffs to submit amended allegations of jurisdiction pursuant to 28 U.S.C. §1653. Significantly, Plaintiffs have two types of allegations of jurisdiction that they could make: (1) including a claim against the 2012 final rule as invalid not only for the same merits reasons that the interim rule and change requests are invalid, but

also for failing to consider the AAPS comments that the Administration lacks authority under the Spending Clause to compel private physicians to comply with the Medicare safe-harbor opt-out provisions, 42 U.S.C. §1395a(b), which renders the revised PECOS policies arbitrary and capricious; and (2) a supplemental pleading pursuant to Rule 15(b) that sets forth that the Origination-Clause claims that Plaintiffs made without objection in the District Court. Either of these would independently cure any jurisdictional defects in the current complaint.

Fifth, the 2012 rule did not wholly replace the interim rule, likely because the Administration wanted that rule to remain at least partially in effect with its 2010 effective date. 77 Fed. Reg. at 25,291, 25,317 (App. 80a-81a, 83a). Under these circumstances, it is not even true that the 2012 final rule mooted the challenges to the 2010 interim rule.

C. If the Pre-Judgment, Post-Complaint 2012 Rule that the Administration Raised Belatedly on Appeal Mooted the PECOS Count, the Lower Courts Split with Other Circuits by Dismissing the *Action* without Leave to Amend Plaintiffs' *Complaint*

Even if it affirms the District Court's reasoning for dismissing each count *in the complaint,* this Court should reverse the dismissal *of the case* on the merits without providing Plaintiffs leave to amend the complaint to address the sea change that *NFIB* wrought on PPACA. *See Lira v. Herrera,* 427 F.3d 1164, 1169-70 (9th Cir. 2005) (discussing the "crucial distinction between dismissing an action and dismissing a complaint"). Indeed, in the absence of futility, many circuits always require leave to amend

a complaint before the dismissal of a complaint converts into the dismissal of a case. *See, e.g., Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305, 329 (5th Cir. 2002); *Hall v. Bellmon,* 935 F.2d 1106, 1109-10 (10th Cir. 1991); *Phillips v. County of Allegheny,* 515 F.3d 224, 236 (3d Cir. 2008).[6] By failing to provide that opportunity, the lower courts here deviated from the other Circuits in a manner under this Court's supervisory jurisdiction. Particularly in light of Fed. R. Civ. P. 15(b) and 28 U.S.C. §1653, this Court should not allow the belated invocation of waiver – whether by parties or courts – to blindside and unfairly prejudice parties.

Allowing a plaintiff to cure defects by amendment "is peculiarly proper in this case, in view of the failure of the [Administration] to make, in the court below, the precise question of jurisdiction which he urges upon our consideration." *Robertson v. Cease,* 97 U.S. (7 Otto) 646, 651 (1878); *accord Hahn,* 757 F.2d at 587 (allowing amendment "particularly appropriate where … jurisdiction was not challenged

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[6] Indeed, "a motion to dismiss is like the old demurrer" under which "the sustaining of a demurrer [would do] no more than give the complaining party an opportunity to amend" unless the "party cannot possibly state a cause of action," thereby making the "final disposition is an inevitable concomitant of the sustaining of the demurrer." *U.S. v. Arizona,* 206 F.2d 159, 161 (9th Cir.), *rev'd on other grounds,* 346 U.S. 907 (1953); *accord Hubbard v. Manhattan Trust Co.,* 87 F. 51, 57 (2d Cir. 1898); *Self v. Sinclair Refining Co.,* 69 F.2d 948, 951 (5th Cir. 1934); *United Kansas Portland Cement Co. v. Harvey,* 216 F. 316, 318 (8th Cir. 1914); *Lewis v. Darling,* 57 U.S. (16 How.) 1, 8-9 (1853).

prior to appeal"); *Wallace,* 646 F.2d at 160. Under the circumstances, if it finds mootness under the 2012 rule or waiver of the Origination Clause, this Court should either accept amendments here or remand with instructions to allow amendment. Given the exigency of resolving PPACA's lawfulness, Plaintiffs respectfully submit that the Court should allow them to amend their pleadings in this Court.

III. THE INDIVIDUAL MANDATE VIOLATES THE TAKINGS CLAUSE BY TAKING MONEY FROM YOUNG AND HEALTHY INSUREDS FOR THE PRIVATE USE OF SUBSIDIZING LOWER PREMIUMS FOR OLD AND SICK INSUREDS

Plaintiffs respectfully submit that the Individual Mandate – as a taking – is ineligible to be deemed a tax for constitutional purposes under *NFIB.* If a tax, however, the Individual Mandate violates the prohibition against unconstitutional conditions. Whether directly as the command Congress intended or indirectly as a tax under *NFIB,* the Individual Mandate's "spread-the-wealth" component seeks to coerce private insureds to subsidize lower premiums for PPACA's favored classes by paying premiums higher than actuarially required under insurance's "spread-the-risk" framework. Directly or indirectly, the Fifth Amendment prohibits that.

A. The Individual Mandate's Taking Violation Negates the *NFIB* Savings Construction

In recasting the Individual Mandate as a tax – notwithstanding that Congress *intended* it as a penalty for violating a command – the *NFIB* saving construction relied on the canon of construction to

choose constitutional interpretations over unconstitutional ones:

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

NFIB, 132 S.Ct. at 2593 (interior quotations omitted, alteration in *NFIB,* emphasis added). "[U]nless the terms of an act rendered it unavoidable," courts interpreting a statute must not "give a construction to it which should involve a violation, however unintentional, of the constitution." *NFIB,* 132 S.Ct. at 2593 (interior quotations omitted). When an unconstitutional dead end and a constitutional path diverge, reviewing courts must take the only viable path.

Unfortunately for PPACA, this holding on which the Administration relies – basically, the law exceeds the Commerce Power but *could* fall within the Taxing Power – derives from the nature of the federal government as one of "enumerated powers." *U.S. v. Lopez,* 514 U.S. 549, 566 (1995) (*quoting McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819)) (alterations in *Lopez*). In essence, this canon allows reviewing courts to seek an enumerated power that *allows* the challenged law, in the event that the enumerated power that Congress intended does not do so. But *McCulloch* recognized two distinct types of unconstitutionality: "laws for the accomplishment of objects not entrusted to the government" and those "which are prohibited by the constitution." *McCulloch,* 17 U.S. (4 Wheat.) at 423. Put another way, "a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be]*

prohibited' by the Constitution." *U.S. v. Comstock,* 560 U.S. 126, 135 (U.S. 2010) (*quoting McCulloch,* 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock,* emphasis added). Neither the Administration nor *NFIB* cite a single decision in which a court interpreted a federal statute contrary to the clear legislative intent when the statute *violated* an express constitutional *prohibition,* rather than merely failing to fall within an enumerated power of the federal government.

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

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

Thomas Jefferson, "Addition to Note for Destutt de Tracy's TREATISE ON POLITICAL ECONOMY" [ca. 18 May 1816], *reprinted in* THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES: VOLUME 10: 1 MAY 1816 TO 18 JANUARY 1817, at 65 (Princeton Univ.

Press. 2014 J. Jefferson Looney ed.).[7] The "spread-the-wealth" aspect of PPACA premiums violates the Takings Clause in several respects.

First, under the Takings Clause, "public burdens … should be borne by the public as a whole." *Armstrong v. U.S.,* 364 U.S. 40, 49 (1960). But, in an attempt to avoid the appearance of taxation and welfare spending,[8] PPACA asks healthy private individuals to support unhealthy private individuals. That plainly violates the Takings Clause: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 245 (1984); *accord Kelo,* 545 U.S. at 477 (quoted, *supra*). Our Constitution does not allow the federal government to use indirection to short circuit accountability for taxing and spending.

Second, even private entities with the power of eminent domain must comply with constitutional limits on takings. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,* 363 S.W.3d 192, 197, 55 Tex. Sup. J. 380 (Tex. 2012) (pipeline); *Pacific Gas & Electric Co. v. Hay,* 68 Cal.App.3d 905,

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

[8] Congress could have achieved the same *aggregate* result with constitutional taxation and spending, but sought avoid the political fallout from taxes and welfare spending. Sec. Am. Compl. ¶¶66-67.

910-11 (Cal. App. 1977) (utility). Thus, when private insurers apply healthy people's funds to subsidize third parties' insurance premiums, the insurers' private nature cannot protect PPACA from the Fifth Amendment. *Pennell v. San Jose,* 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring in part and dissenting in part) (the private relationship "does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionately burden particular individuals"). Without the procedural and substantive protections required by the Fifth Amendment, any such public-private regime is as fully unconstitutional as it would be if only the government attempted to impose the restrictions.

Third and finally, the Takings Clause can apply to money paid into an account like insurance. *R.R. Retirement Bd. v. Alton R.R. Co.,* 295 U.S. 330, 357 (1935); *cf. Koontz v. St. Johns River Water Management Dist.,* 133 S.Ct. 2586, 2600 (2013) (Takings Clause and the "unconstitutional conditions" doctrine to apply to coerced takings of money). Clearly, laws that require part of a money account to be "transferred to a different owner for a legitimate public use … could be a *per se* taking requiring the payment of 'just compensation' to the" money's original owner. *Brown v. Legal Found.,* 538 U.S. 216, 240 (2003). The part of Plaintiffs' members' premiums that subsidizes artificially low premiums for those with preexisting conditions is taken – for

private use, no less – and requires compensation and indemnity.[9]

Accordingly, the *NFIB* savings construction is unavailable to PPACA, given that the Individual Mandate violates the Takings Clause. Governments cannot mask takings by calling them taxes.

B. Under the *NFIB* Savings Construction, the Individual Mandate "Tax" Imposes Unconstitutional Conditions

Even under *NFIB,* the Individual Mandate violates the Fifth Amendment by offering the choice between (1) buying PPACA-compliant insurance to subsidize private third parties (which the Takings Clause would prohibit if imposed directly) and (2) paying a tax penalty for the privilege of declining to subsidize others voluntarily. The Constitution does not allow this use of coercion to surrender constitutional rights, which is particularly important if Congress otherwise lacks authority to order the behavior that selective taxes seek to coerce.

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

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

the Fifth Amendment. Clearly, "the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber,* 240 U.S. at 24. In other words, the Takings Clause does not swallow the Taxing Power. By the same token, "any tax must still comply with other requirements in the Constitution," *NFIB,* 132 S.Ct. at 2598 (Roberts, C.J., for the Court), which means that the Taxing Power does not swallow any other provision of the Constitution, either.

Exercise of the Taxing Power can amount to a taking if the tax is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber,* 240 U.S. at 24; *accord Steward Machine Co. v. Davis,* 301 U.S. 548, 585 (1937) ("discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment"). Like *Windsor* and *Coleman* on which *Windsor* relies, this case applies equal-protection principles to taxation:

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

Coleman, 277 U.S. at 37; *CSX Transportation, Inc. v. Alabama Dept. of Revenue,* 131 S.Ct. 1101, 1108-09 (2011) (selective taxation can be unlawfully discriminatory). As the majorities in *Coleman, Romer,* and *Windsor* held, the challenged statutes' unprecedented distinctions were relevant: "The

absence of precedent for [the statute] is itself instructive." *Romer,* 517 U.S. at 633 (*citing Coleman*). Similarly here, it is wholly unprecedented to impose monetary exactions for private failures to purchase a private product, coupled with that private product's requiring – under federal statute – that some private purchasers subsidize other private purchasers. *Coleman,* 277 U.S. at 37 ("the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act … and can never be made arbitrarily and without any such basis") (interior quotations omitted).

This court has long recognized a connection between taxes and takings in extreme cases:

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

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

In the alternative, PPACA falls under the "unconstitutional conditions" doctrine for indirectly violating the Takings Clause. If it would violate the Takings Clause for directly compelling private subsidies, PPACA cannot evade that result by coercing the public's "voluntary" participation under the threat of a coerced payment:

> It has long been established that a State may not impose a penalty upon those who exercise

> a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be … indirectly denied or manipulated out of existence.

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

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

preexisting conditions, or (b) paying PPACA's penalty for exercising the right to say "no, thanks" to PPACA's request to subsidize others. By bringing the Taxing Power selectively to bear on those who decline to pay PPACA's coerced private subsidies, the Individual Mandate violates the Fifth Amendment and thus exceeds the Taxing Power.

CONCLUSION

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

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