No. 13-5003

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

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

vs.

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

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

APPELLANTS' PETITION FOR PANEL REHEARING

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

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GLOSSARY

NFIB	*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012)
PECOS	Provider Enrollment, Chain and Ownership System
POMS	Social Security Program Operations Manual System
PPACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010)

INTRODUCTION

Pursuant to FED. R. APP. P. 40, appellants Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health-USA (collectively, "Plaintiffs") petition for panel rehearing. The panel decision conflicts with binding Circuit and Supreme Court precedent, including the following three respects:

(1) Applying a merits decision of this Court – instead of one of the U.S. Supreme Court – to remove the federal issue in Count I from federal-question jurisdiction, contrary to *Hagans v. Lavine*, 415 U.S. 528, 537 (1974); *Goosby v. Osser*, 409 U.S. 512, 518 (1973); and *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 n.3 (D.C. Cir. 1981);

(2) Declaring moot the substantive and procedural challenges in Count IV to two distinct forms of agency action – an interim rule and "change requests" – when a subsequent final rule moots the procedural challenge to the interim rule, but moots neither the substantive challenges to the interim rule and the change requests nor the procedural challenge to the change requests, contrary to *Am. Maritime Ass'n v. U.S.*, 766 F.2d 545, 554 n.14 (D.C. Cir. 1985), and *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 377 (D.C. Cir. 1983), particularly given that any perceived mootness is curable under 28 U.S.C. §1653; and

(3) Deeming Plaintiffs' argument in Counts II, III, and IV under the Origination Clause as waived when such claims are not subject to waiver, *South Ottawa v. Perkins*, 94 (4 Otto) U.S. 260, 266-67 (1877), and when Plaintiffs plainly raised the issue in District Court, the Administration failed to object there, and Rule 15(b) thus deems the arguments incorporated into the pleadings, whether or not Plaintiffs moved to do so, making the panel decision contrary to *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445-48 (1993), and *Banks v. Dretke*, 540 U.S. 668, 704 (2004).

Rehearing is needed to ensure uniformity of decisions and to address the significant justiciability and merits issues presented here.

STATEMENT OF THE CASE

Plaintiffs challenge several interrelated actions by the federal defendants-appellees (collectively, the "Administration") in the fields of medicine and health insurance, including *inter alia* the following:

(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 past Social Security benefits received in order to opt out of Medicare Part A.

(b) Counts II-III seek to invalidate the individual- and employer-based penalties 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 taxes even though outside the Commerce Power.

(c) Count IV seeks to invalidate on substantive and procedural grounds two strands of agency action – an interim rule and "change requests" – that require physicians to submit themselves to certain Medicare requirements and to enroll into the Provider Enrollment, Chain and Ownership System ("PECOS") as a condition to refer (*i.e.,* to prescribe) Medicare-eligible patients for Medicare-covered services such as x-rays, oxygen, and bloodwork.

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 this Court and the Supreme Court decided third-party litigation on the same issues, the District Court invited supplemental briefing on *NFIB* and then dismissed the case (Add. 4-39). The panel decision upholds the dismissal on slightly different grounds (Add. 41-50).

Specifically, the panel decision upholds the dismissal of Count I on the basis of this Court'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). As pertinent to this

petition, the decision upholds the District Court's declining to consider Plaintiffs' arguments under the Origination Clause, U.S. CONST. art. I, §1, cl. 1, which Plaintiffs raised for the first time in the post-*NFIB* supplemental briefing on the Administration's motion to dismiss. 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 2012 interim rule.

I. THIS COURT MUST RESOLVE JURISDICTIONAL ISSUES BEFORE REACHING THE MERITS OF THE "*HALL*" COUNT

Count I of Plaintiffs' complaint reprises merits claims that this Court later rejected in *Hall*, and the panel decision (Add. 47) holds that the *Hall* merits thus relieve this Court of its otherwise-extant obligation to resolve jurisdiction before reaching the merits. Plaintiffs argue that the Court *has* jurisdiction on the merits because the claims-channeling requirements of 42 U.S.C. §§405(g)-(h) displace federal-question jurisdiction, but do not remove the District Court's historic and unique equity jurisdiction. *See 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); *Ganem v. Heckler*, 746 F.2d 844, 851 (D.C. Cir. 1984). Thus, Plaintiffs merely seek to ensure that jurisdiction exists.

A. *Hall* Does Not Bar Jurisdiction. Generally, federal courts must resolve jurisdiction before reaching the merits, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998), but the panel decision perceives an exception to that

command when a third party's merits decision forecloses the relief that plaintiffs seek. Add. 47 (*citing Steel Co.*, 523 U.S. at 98-101); *see also Steel Co.*, 523 U.S. at 98 (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"). Plaintiffs respectfully submit that the panel reads *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 the Supreme Court has conclusively resolved an issue, relitigating it amounts to beating a dead horse, outside federal-question jurisdiction.

Consistent with the Supreme Court's plain language, this Circuit already has

resolved that this "dead-horse" exception requires a controlling *Supreme Court* decision, not merely a Circuit decision. *Tuck*, 668 F.2d at 549 n.3; *cf. LaRouche v. Fowler*, 152 F.3d 974, 982 (D.C. Cir. 1998) (*Goosby* "made clear just how minimal a showing is required to establish substantiality"). A three-judge panel cannot overturn Circuit precedent, and Due Process would preclude even the *en banc* court from binding non-parties like Plaintiffs with *stare decisis* from *Hall. South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). Before reaching the merits, this Court must resolve the issue of whether §405 bars jurisdiction.

B. §405 Does Not Bar the District Court's Equity Jurisdiction. As Plaintiffs explained and the Administration did not seriously contest, §405's claims-channeling provisions are irrelevant on their face to the question whether this District Court's unique equity jurisdiction applies, notwithstanding that §405 precludes resort to federal-question jurisdiction. *Compare* Opening Br. at 25-27 *with* Appellees' Br. at 20-21; *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (implied repeals require "clear and manifest" legislative intent). Because the panel's application of the "dead-horse" exception to federal-question jurisdiction was improper, Plaintiffs respectfully submit that the

Court must resolve the jurisdictional issue presented here.[1]

II. THE 2012 FINAL RULE DOES NOT MOOT COUNT IV

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. Add. 48. 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, as well as being

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[1] 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 policy in a future action. 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). As Plaintiffs explained, that requirement is *ultra vires*. Opening Br. at 55. But the requirement concededly did not originate in the POMS challenged here, and a challenge to it may be neither timely against §404.640(b)(3) nor redressable unless Plaintiffs also challenge §404.640(b)(3). If this Court confirms that the District Court's equity jurisdiction provides jurisdiction, notwithstanding §405's foreclosing review under federal-question jurisdiction, Plaintiffs' plans 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 jurisdictional issues first.

arbitrary and capricious for ignoring AAPS comments. But the Administration did not raise the issue until this appeal had been filed, which thus far has worked to its advantage. For three independent reasons, however, the 2012 final rule does not moot 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 was issued, and the final rule repeatedly promised "advance notice" to the public via the change-request process before the PECOS changes would take effect. *See* 77 Fed. Reg. at 25,292-93, 25,295, 25,300, 25,309. As such, the final rule itself did not trigger the commencement of the PECOS changes that Plaintiffs oppose and this Court's enjoining the change requests would operate to suspend indefinitely the final rule, even if Plaintiffs do not challenge the final rule. Insofar as mootness occurs when there is "no relief that could be granted by [a] court," *U.S. v. Garde*, 848 F.2d 1307, 1309 (D.C. Cir. 1988), Count IV is not moot. Indeed, where a prior, less-formal 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 that prior 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.

Second, even if a subsequent final action would moot procedural challenge 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.

Third, any perceived mootness could be cured by the Court's directing Plaintiffs "submit amended allegations of jurisdiction pursuant to 28 U.S.C. § 1653, if any." *Jones v. U-Haul Co.*, 2005 U.S. App. LEXIS 19629, 1 (D.C. Cir. Sept. 9, 2005). Significantly, Plaintiffs have two types of allegations of jurisdiction that they could make: (1) including a claim against the 2012 final rule as invalid for the same merits reasons that the interim rule and change requests are invalid, as well as 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 changes the impact of the revised PECOS policies, Opening Br. at 47-48; and (2) the allegation pursuant to Rule 15(b) that Plaintiffs raised the Origination Clause in the District Court without the Administration's objecting, *see* Section III, *infra*. Either of these would independently cure any jurisdictional defects in the current

complaint. Significantly, both of these allegations could have been made at the time that the District Court ruled, which §1653 requires.

III. PLAINTIFFS DID NOT WAIVE – MUCH LESS *IRRETRIEVABLY* WAIVE – THEIR CLAIMS UNDER THE ORIGINATION CLAUSE

This Court should not deem Plaintiffs' claims under the Origination Clause waived for three independent reasons. First, Plaintiffs in fact raised the argument in District Court without the Administration's objecting; second, under *South Ottawa*, claims that go to the very existence of the challenged law cannot be waived; and third, Plaintiffs deserve the opportunity to amend their complaint. Standing alone, each of these reasons warrants reversal of the dismissal of the PPACA claims in Counts II, III, and IV.

A. Plaintiffs Adequately Raised the Origination Clause. 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 introducing the issue. *Dretke*, 540 U.S. at 704. 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 v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445-48 (1993) (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), the Supreme 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). Under the judicial policy for resolving cases on the merits, *see, e.g.*, *Ciralsky v. CIA*, 355 F.3d 661, 674 (D.C. Cir. 2004); *Alley v. R.T.C.*, 984 F.2d 1202, 1208 (D.C. Cir. 1993), the District Court erred in dismissing Plaintiffs' case without considering the Origination Clause.

B. Origination-Clause Claims Are Not Waiveable. Plaintiffs challenge various aspects of PPACA in Counts II, III, and IV, and particularly with respect to Count IV, the invalidity of PPACA under the Origination Clause would invalidate the challenged agency actions, which depend on the existence of the PPACA section on which they relied: "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). If the arguments under the Origination Clause prevail, the PPACA sections on which the

Administration relied will be void, *Hubbard v. Lowe*, 226 F. 135, 140 (S.D.N.Y. 1915), *appeal dismissed* 242 U.S. 654 (1916), and Plaintiffs will prevail.

Contrary to the District Court's waiver theory, the very existence of a duly 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. Pub. L. No. 111-148, §6405(c), 124 Stat. at 768-69. The existence of that section and of PPACA itself would therefore remain an issue in this litigation, even if Plaintiffs had failed adequately to raise the Origination Clause.

C. Plaintiffs Deserved Leave to Amend before Dismissal. Circuit precedent holds that parties that do not seek leave to amend a complaint in district court, before or after dismissal, generally cannot ask this Court to remand for leave to

amend. *Government of Guam v. Am. President Lines*, 28 F.3d 142, 150-51 (D.C. Cir. 1994). That general rule is "not … inflexible," however, "allowing amendment after appeal where justice requires further proceedings." *Id.* at 150 & n.15 (interior citations and alterations omitted). Plaintiffs respectfully submit that two additional circumstances here combine to make justice require remand with the opportunity for leave to amend or supplement that complaint.

First, as indicated in Section III.A, *supra*, Plaintiffs reasonably believed that they adequately raised the Origination Clause under Rule 15(b), given the Administration's failure to object. Indeed, Plaintiffs continue to believe that they adequately raised the Origination Clause.

Second, the *NFIB* decision's converting what PPACA did not intend as a tax into a tax for constitutional purpose wrought a significant change to PPACA's validity as a tax. Specifically, in District Court the parties agreed that PPACA's insurance mandates – if taxes at all – were excise taxes, which Plaintiffs challenged as impermissibly non-uniform. *See* Pls.' Opp'n to Mot. to Dismiss at 42, 46, 55 (docket #38). Once the Chief Justice's *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 adopted in response to *NFIB*. But the Administration did not put Plaintiffs on notice that it objected to Plaintiffs' asserting the Origination Clause.

Even if it affirms the District Court's reasoning for dismissing each count *in the complaint,* this Court should reverse the District Court's dismissal *of the case* (Add. 40) 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). This Court need not adopt the generous standards of other circuits in order to recognize that the Administration's belated invocation of waiver in this action has blindsided and unfairly prejudiced Plaintiffs.

CONCLUSION

The significant justiciability and merits issues presented here compel rehearing. If the Court reverses the dismissal of Count IV, then – provided that Plaintiffs have leave to supplement or amend their complaint to press their Origination-Clause

claims against PPACA in its entirety – there would be no need to press the Origination Clause separately with respect to Counts II and III regarding the PPACA insurance mandates.

Dated: April 21, 2014

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Av., NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Appellants

BRIEF FORM CERTIFICATE

Pursuant to Rules 32(a) and 40(b) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the attached "Appellants' Petition for Panel Rehearing" is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 15 pages, excluding this Brief Form Certificate, the Table of Contents, the Table of Authorities, the Table of Exhibits and Addendum, the Glossary, the Addendum, and the Certificate of Service. I have relied on Microsoft Word 2010's pagination feature for the calculation.

Dated: April 21, 2014

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Av., NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2014, I have caused the foregoing document, together with its addendum, to be served on the following counsel via the Court's CM/ECF System:

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

/s/ Lawrence J. Joseph

Lawrence J. Joseph