IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' SUPPLEMENTAL BRIEF ON *HALL V. SEBELIUS* AND *NAT'L FED'N OF INDEP. BUS. V. SEBELIUS*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

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 federal officers – associated with the Social Security Administration and the Departments of Health & Human Services ("HHS") and of the Treasury – who implement the 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) ("PPACA"), the Medicare statute, 42 USC §§1395-1395kkk-l ("Medicare"), and the Medicare and the Social Security trust funds. The Court has allowed each side ten pages to brief the impact of *Hall v. Sebelius*, 667 F.3d 1293 (D.C. Cir. 2012), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*").

Before outlining how *Hall* and *NFIB* affect this litigation, Plaintiffs first emphasize three key points: (1) issue preclusion is not binding on those who did not participate in the litigation in question, *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) ("[i]n no event… can issue preclusion be invoked against one who did not participate in the prior adjudication"); (2) *stare decicis* does not extend to issues that were not conclusively settled:

> 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.

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 170 (2004) (interior quotations omitted); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with"); and (3) even *stare decisis* can be applied so conclusively that it violates due process, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). Given their incontrovertible due-process right to distinguish their claims from third parties' claims, Plaintiffs submit that *Hall* and *NFIB* (a) do not resolve Count I; (b) require judgment for Plaintiffs on Counts II, III, and IV; and (c) have no impact on the accounting requested by Counts V and VI.

I. *HALL* DOES NOT RESOLVE COUNT I

Count I challenges Defendants' action to condition receipt of Social Security benefits on acceptance of Medicare Part A as *ultra vires* Medicare, Social Security, and the implementing regulations, which allow participating in Social Security without participating in Medicare Part A. In *Hall*, a split panel resolved similar *substantive* claims raised by third parties, without addressing the alternative procedural claims that Plaintiffs have raised. Nothing in *Hall* would preclude a different (or even the same) administrator from exercising discretion differently, even if *Hall* correctly decided that Medicare does not *require* the substantive relief sought in *Hall.* At the outset, therefore, *Hall* does not foreclose Count I's procedural claims, which could strike the agency action, leaving a future administrator free to reach a different regulatory conclusion. In addition, a future panel in the D.C. Circuit may well agree with Judge Henderson's vigorous dissent that the majority failed to address the key issue that the *Hall* plaintiffs raised, *Hall*, 667 F.3d at 1297 (Henderson, J., dissenting), thereby reaching a different result for Plaintiffs here.

But even if *Hall* resolved all of Plaintiffs' claims, this Court would still need to find its jurisdiction before entering a merits judgment against Plaintiffs based on *Hall.* In this litigation but not in *Hall*, the federal defendants have argued that 42 U.S.C. §405(g)-(h) bars litigation under federal-question jurisdiction, Defs.' Reply Br. at 5-8 [Doc. 45], which – if true – would preclude this Court's reaching the merits of Count I. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998) (federal courts may not rely on hypothetical jurisdiction to reach merits). Accordingly, Plaintiffs make two alternative arguments. First, if 42 U.S.C. §405(g)-(h) denies subject-matter jurisdiction, this Court must dismiss for lack of jurisdiction, without reaching the substantive or procedural merits. Second, Defendants are wrong about 42 U.S.C. §405(g)-(h), and this Court can reach the substantive and procedural merits of Count I under this Court's unique equity jurisdiction for suits over federal actors, *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), without resort to the federal-question jurisdiction statute, 28 U.S.C. §1331, that Defendants argue is barred by 42 U.S.C. §405(g)-(h).

Defendants proffer an alternate jurisdictional flaw, based on the D.C. Circuit's reaching the substantive merits in *Hall* contrary to Plaintiffs' merits position. Joint Status Rpt. at 8-9 [Doc. 53]. Under Defendants' argument, *Hall* renders Plaintiffs' merits position so insubstantial as to deny federal jurisdiction, even without 42 U.S.C. §405(g)-(h)'s bar to federal-question jurisdiction.

Of course, the Supreme Court has long held that "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 v. Lavine,* 415 U.S. 528, 537 (1974) (interior quotations omitted, emphasis added); *Goosby v. Osser,* 409 U.S. 512, 518 (1973) ("[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). *Hall,* of course, is not a decision *of the Supreme Court,* and this Court cannot hold now that the Supreme Court will both grant a writ of *certiorari* and rule against the *Hall* plaintiffs.

Although counsel typically would research issues in *this* Circuit first, Defendants rely on extra-circuit decisions (primarily from the Fourth Circuit) to argue that even a *circuit court's* contrary ruling will render an argument insubstantial. Joint Status Rpt. at 8-9 [Doc. 53]. This

argument has two flaws. First, even the Fourth Circuit would counsel other circuits to resolve such issues for themselves: *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). Second, this Circuit indeed has resolved the issue, consistent with the Supreme Court's plain language, to require a controlling *Supreme Court* decision, not merely a Circuit decision. *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 n.3 (D.C. Cir. 1981); *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"). Defendants' contrary argument is wholly unfounded in this Circuit.

II. *NFIB* AND THE ORIGINATION CLAUSE NOT ONLY FURTHER ESTABLISH THIS COURT'S JURISDICTION OVER THIS LITIGATION BUT ALSO REQUIRE JUDGMENT FOR THE PLAINTIFFS ON COUNTS II, III, AND IV

NFIB rejected most of Defendants' jurisdictional and merits arguments, but upheld the individual mandate as a tax vis-à-vis the *NFIB* plaintiffs' facial challenge. Specifically, different five-justice majorities rejected PPACA's "individual mandate" as a valid exercise of the Commerce Clause or the Necessary and Proper Clause, but upheld it as an unspecified form of taxation (albeit not a direct tax). Notwithstanding the Taxing Power's breadth, "any tax must still comply with other requirements in the Constitution." *NFIB*, 132 S.Ct. at 2598. This section addresses the relevance of *NFIB* to Counts II, III, and IV under two constitutional doctrines.

First, *NFIB* did not consider the Fifth Amendment issues that Plaintiffs raise here and *a fortiori* did not consider them *as applied* to Plaintiff members who suffer Fifth Amendment injuries. Second Am. Compl. ¶¶23-24, 53, 65-66, 68 [Doc. 26]; Christman Decl. ¶¶5, 9; Smith Decl. ¶¶11, 15 [Doc. 38-1]. Thus, Plaintiffs could prevail against PPACA, *as applied to them*, even if *NFIB* had facially raised issues under the Fifth Amendment: "That the regulation may be invalid as applied … does not mean that the regulation is facially invalid," and vice versa. *I.N.S. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 188 (1991).

Second, *NFIB* did not consider – and thus did not decide – whether the *NFIB* tax originating in a Senate amendment is invalid under the Origination Clause: "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with amendments as on other bills." U.S. CONST. art. 1, §7, cl. 1. PPACA's mandate taxes originated *as taxes* in a Supreme Court decision interpreting PPACA contrary to the legislative intent that those mandates *were not taxes;* as such, institutional and separation-of-powers concerns that otherwise might counsel against looking past PPACA's enrolled bill number (H.R. 3590), *see, e.g., U.S. v. Munoz-Flores*, 495 U.S. 385, 408-10 (1990) (Scalia, J., concurring), simply do not apply. Instead, this Court should recognize that PPACA (as rewritten by *NFIB*) would not have passed either legislative body. If the House wishes to re-enact PPACA with its tax mandates, the House remains free to do so. Until then, this Court should hold that PPACA's employer and individual mandates violated the Origination Clause by originating in the Senate.

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

Although the Supreme Court has declined definitively to outline the contours of what qualifies as a revenue-raising bill under the Origination Clause, *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), the Court's decisions have outlined the key terms sufficiently for this purpose. First, "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Id.* (*citing* 1 J. Story, COMMENTARIES ON THE CONSTITUTION §880, pp. 610-611 (3d ed. 1858)). Under "this general rule … a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495

U.S. at 397-98. As justified by *NFIB* under the Taxing Power, however, the individual mandate does not qualify as part of PPACA's governmental program. It survives solely as a tax.

The "general rule" in *Munoz-Flores* applies to governmental programs that raise revenue via targeted provisions such as the "special assessment provision at issue in th[at] case." *Id.* at 398; *accord Nebeker*, 167 U.S. at 202-03; *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906). Here, however, the individual mandate can avoid other constitutional infirmities (*e.g.*, non-uniform excise taxation), *see* Section II.C.1, *infra*, only as an income tax under the Sixteenth Amendment. Unlike special-purpose taxes, income taxes go to the general funds of the U.S. Treasury. 44 Cong. Rec. 4420 (1909) (Mr. Heflin); *Haskin v. Secretary of the Dep't of Health & Human Serv.*, 565 F.Supp. 984, 986-87 (E.D.N.Y. 1983) (*citing* 2 H. McCormick, SOCIAL SECURITY CLAIMS AND PROCEDURES 418 (3d ed. 1983)).

Thus unlike *Munoz-Flores*, "*Nebeker* and *Millard* [where] the special assessment provision was passed as part of a particular program to provide money for that program" and where "[a]ny revenue for the general Treasury … create[d] is thus 'incidenta[l]' to that provision's primary purpose," *Munoz-Flores*, 495 U.S. at 399, *NFIB* justifies the tax here solely for its revenue-raising purpose by providing funds into the general Treasury. Indeed, while PPACA as a whole included a governmental program for health insurance, it also focused on deficit reduction. Second Am. Compl. ¶¶84, 86 [Doc. 26]. For the PPACA components at issue here – the employer and individual mandates – *NFIB* justifies them solely as taxes to raise revenue.

Significantly, the Origination Clause applies not only to whole bills but also to discrete sections and amendments, *Nebecker*, 167 U.S. at 202-03 (looking to whether the "act, or by *any of its provisions"* had the purpose of "rais[ing] revenue to be applied in meeting the expenses or

obligations of the government") (emphasis added), subject to a germaneness test. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 142-43 (1911), *abrogated in part on other grounds, Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540-43 (1985). The D.C. Circuit has cited *Flint* for the proposition that the "Senate may propose any amendment 'germane to the subject-matter of the bill.'" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 949 n.8 (D.C. Cir. 1984), *abrogated in part on other grounds, Raines v. Byrd*, 521 U.S. 811 (1997). In *Flint*, the Senate substituted a corporation tax for a House-originated inheritance tax in a "general bill for the collection of revenue." *Flint*, 220 U.S. at 142-43. Here, by contrast, the House-originated version of H.R. 3590 concerned minor amendments related to members of the Armed Forces and other federal employees,[1] *See* Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009) (Ex. 1) ("SMHOTA"), not a "general bill for the collection of revenue" as in *Flint.* As such, the Senate Majority Leader's wholesale substitution of PPACA for SMHOTA was in no way "germane" to SMHOTA's limited scope.

In summary, to the extent that they could be constitutional at all, PPACA's mandates qualify as income taxes that supply revenue to the Treasury. As income taxes, PPACA's mandates therefore "levy taxes in the strict sense of the word," rather than "incidentally create revenue." *Nebeker*, 167 U.S. at 202. Even while deeming special assessments levied against

[1] The Senate's authority to attach revenue-raising amendments to House bills applies only to House revenue bills. 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907); *cf. Armstrong v. U.S.*, 759 F.2d 1378, 1382 (9th Cir. 1985) ("once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments"). In addition to the inquiry into whether the Senate PPACA amendments constitute a revenue bill – as distinct from a regulatory program – this Court also must determine whether H.R. 3590 qualifies as a "revenue bill" into which the Senate Majority Leader could import his PPACA amendments by stripping all of H.R. 3590's text after the enacting clause (*i.e.*, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled") and inserting PPACA into the gutted shell.

criminals to compensate victims to fall outside the Origination Clause's reach, *Munoz-Flores* acknowledged that "[a] different case might be presented if the program funded were entirely unrelated to the persons paying for the program." *Munoz-Flores*, 495 U.S. at 401 n.7. As applied to individuals like Dr. Smith with adequate – but PPACA-noncompliant – insurance, PPACA's mandates are "entirely unrelated to the persons paying for the program," *id.*, with no "element of contract" to justify the exchange. *Roberts,* 202 U.S. at 437. For all of the foregoing reasons, the PPACA mandates challenged in Counts II and III fall within the Origination Clause's scope and thus are void because they did not originate in the House.

B. *NFIB* Reinforces this Court's Jurisdiction

NFIB rejects the jurisdictional bar (if any) in the Anti-Injunction Act, *NFIB,* 132 S.Ct. at 2584, thereby removing one of Defendants' jurisdictional arguments. Defs.' Memo at 28-29 [Doc. 32]. In addition, *NFIB* reinforces Plaintiffs' standing for Counts II and III in two ways.

First, Plaintiffs' members' allegations here are similar to the members' allegations that sufficed in *NFIB. Compare* Ex. 2 (*NFIB* plaintiffs'exhibits Ex. 25-31 on standing) *with* Pls.' Memo Ex. 1-3, 5-6 (Plaintiffs' exhibits on standing) [Doc. 38-1]. Under *NFIB,* Defendants' arguments on standing are baseless.

Second, by violating the Origination Clause of the Constitution – which the Founders intended to protect the People from over-reaching taxation by placing the Taxing Power initially in the hands of those most directly subject to removal via the ballot box, *Munoz-Flores,* 495 U.S. at 395 (*citing* THE FEDERALIST No. 58)[2] – the combination of PPACA and *NFIB* inflict

[2] *See also* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional,* 5 N.Y.U. J.L. & LIBERTY 581, 632–33 (2010) ("The public is acutely aware of tax increases").

procedural injury on Plaintiffs' members, thereby reducing Plaintiffs' required showings to establish redressability and immediacy. *Nat'l Treasury Employees Union v. U.S.*, 101 F.3d 1423, 1428-29 (D.C. Cir. 1996); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (*en banc*); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 & n.7 (1992). These injuries fall in the dead center of the interests that the Origination Clause protects, posing no prudential obstacles to Plaintiffs' standing. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998). By undermining Defendants' arguments on immediacy, this procedural injury defeats Defendants' primary arguments against Plaintiffs' standing for Counts II and III.

C. *NFIB* Requires Judgment for the Plaintiffs on All PPACA-Related Counts

The following two sections explain the merits impact of *NFIB* on Counts II, III, and IV. For the first two, nullifying PPACA's two tax mandates flows directly from nullifying PPACA. For the third, PPACA's nullification denies Defendants' authority to adopt the rules in question.

1. *NFIB* Requires Judgment for the Plaintiffs on the PPACA Mandates

Whatever taxing power Congress may have, Congress cannot tax the failure voluntarily to surrender the Fifth Amendment rights that Plaintiffs claim here. Pls.' Memo. at 49-54 [Doc. 38]. Further, to the extent that PPACA's mandates are excise taxes, the excise is not uniform across the country and thus unconstitutional. Pls.' Memo. at 46 (individual mandate), 55 (employer mandate) [Doc. 38]. *NFIB* expressly rejected direct taxation, *NFIB*, 132 S.Ct. at 2599, the only other form of non-income taxation available under the Taxing Power. Thus, PPACA's mandates can fall within the Taxing Power only as income taxation, which falls squarely within the Origination Clause, rendering PPACA void in its entirety because PPACA's mandates originated in the Senate. *See* Section II.A, *supra.*

2. *NFIB* Requires Judgment for the Plaintiffs on Count IV Because PPACA

Supplies the Substantive Authority on Which HHS Replies for the Challenged Agency Actions

If the Origination Clause or the Fifth Amendment renders PPACA a nullity, the defendants lack authority for the agency actions challenged in Count IV. *See* Pls.' Memo. at 62-63 [Doc. 38]. But even if PPACA could survive and provide *substantive* authority, Count IV's *procedural* claims would remain unsettled. *See id.* at 60-62. Thus, *NFIB* does not dispose of Count IV, even if this Court rejects Plaintiffs' arguments against PPACA.

III. NEITHER *HALL* NOR *NFIB* AFFECTS COUNTS V AND VI

Counts V and VI seek an accounting from federal officers responsible for the Medicare and Social Security trust funds. Neither *Hall* nor *NFIB* relate to the issues in Counts V or VI.

CONCLUSION

WHEREFORE, this Court should deny the Defendants' motion to dismiss.

Dated: July 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2012, I electronically filed the foregoing document, together with its 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