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' FINAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for appellants Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health-USA ("ANH-USA") presents the following certificate as to parties and *amici curiae*, rulings, and related cases.

A. Parties and *Amici*

The parties and *amici curiae* are as follows:

1. AAPS and ANH-USA were the only plaintiffs before the District Court and are the only appellants in this Court;
2. The Secretaries of the Treasury and of Health & Human Services and the Social Security Administrator in their official capacities and the United States were the only defendants in District Court and the only appellees; and
3. No entity has appeared as an intervener or *amicus curiae.*

B. Rulings under Review

AAPS and ANH-USA appeal (1) the dismissal of each count of the operative complaint by the District Court's Memorandum Opinion and Order (docket items #59 and #58, respectively) filed October 31, 2012; (2) the transfer of the case from Judge Collyer to Judge Leon by the Order (docket item #13) filed June 11, 2010; and (3) the subsequent transfer of the case from Judge Leon to Judge Jackson by the Minute Order (no docket number) filed March 30, 2011,

which Minute Order would mooted by the reversal of the transfer from Judge Collyer to Judge Leon (*i.e.*, if this matter were not before Judge Leon to transfer).

C. Related Cases

This issues presented here are related to the issues raised in *Hall v. Sebelius*, 667 F.3d 1293 (D.C. Cir. 2012), *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012), but this appeal also presents additional jurisdictional and merits issues not resolved by those cases. In *Sissel v. U.S. Dep't of Health & Human Services,* No. 13-5202 (D.C. Cir.) and *Liberty Univ., Inc. v. Lew*, No. 10-2347 (4th Cir.), the plaintiffs seek to raise a variant of one of the merits issues – namely, whether the Patient Protection and Affordable Care Act violated the Origination Clause of the U.S. Constitution – that AAPS and ANH-USA ask this Court to address in this appeal.

Dated: August 30, 2013 Respectfully submitted,

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GLOSSARY

AAPS	Association of American Physicians & Surgeons
AMC	*Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1993)
ANH-USA	Alliance for Natural Health USA
APA	Administrative Procedure Act, 5 U.S.C. §§551-706
CR6417/6421	Change Requests 6417 and 6421
FAIR	*Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.,* 547 U.S. 47 (2006)
HHS	Department of Health & Human Services
JA	Joint Appendix
Medicare	Medicare Act, 42 U.S.C. §§1395-1395kkk-l
NFIB	*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012)
NPI	National Provider Identifier
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)
SMHOTA	Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009)

JURISDICTION

On October 31, 2012, pursuant to Rules 12(b(1) and (b)(6), the District Court (JA118-153) dismissed this action by the Association of American Physicians & Surgeons, Inc. ("AAPS") and the Alliance for Natural Health-USA (collectively, with AAPS, "Physicians"). The District Court had federal-question jurisdiction under 28 U.S.C. §1331 and its own equity jurisdiction. Physicians noticed this appeal on December 28, 2012 (JA154). Under 28 U.S.C. §1291, this Court has jurisdiction over the District Court's opinion and order dismissing the litigation and this litigation's transfer between judges.

STATUTES AND REGULATIONS

Appellants' Addendum contains the pertinent statutes and regulations.

STATEMENT OF ISSUES

This appeal raises the following issues for review:

1. Whether AAPS and ANH-USA have standing for each count of their complaint?

2. Whether 42 U.S.C. §§405(g)-(h), 1395ii displaced the District Court's jurisdiction for Count I?

3. Whether the District Court's alternate holding based on *Hall v. Sebelius*, 667 F.3d 1293 (D.C. Cir. 2012), should stand, notwithstanding merits arguments that *Hall* did not resolve?

4. Whether the Patient Protection and Affordable Care Act ("PPACA"),

as construed by the Supreme Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*"), violated the Origination Clause?

5. Whether PPACA's "tax penalties" violate the Fifth Amendment?

6. Whether the Department of Health & Human Services ("HHS") violated the Administrative Procedure Act ("APA") in several agency actions requiring enrollment in the Provider Enrollment, Chain and Ownership System ("PECOS") and in requiring providers to obtain a National Provider Identifier ("NPI") absent another NPI-triggering event?

7. Whether claims for an accounting of the Medicare and Social Security trust funds are justiciable?

8. Whether, in the event of a remand, this action should be remanded to Judge Collyer or Judge Jackson?

STATEMENT OF THE CASE

Physicians challenge several interrelated actions by defendants-appellees Kathleen Sebelius, the HHS Secretary, the Treasury Secretary, and the Social Security Administrator, and the United States (collectively, the "Administration") in the fields of medicine and health insurance:

- Count I seeks to invalidate on procedural and substantive grounds several amendments to the Social Security Program Operations Manual System

("POMS") that require returning past Social Security benefits to opt out of Medicare Part A.

- Counts II-III seek to invalidate the individual- and employer-based penalties, which *NFIB* held (with respect to individuals) could qualify as taxes even though outside the Commerce Power.[1]
- Count IV seeks to invalidate agency actions that require enrolling in PECOS to refer patients for Medicare services and that require using an NPI.
- Counts V-VI seek accountings of the Medicare and Social Security trust funds based on PPACA's impairment of those programs.

The following sections outline the relevant legal and factual background.

Constitutional Background

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

[1] Although *NFIB* binds this Court, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), three points bear emphasis: (1) issue preclusion cannot bind on those who did not participate in the prior litigation, *Baker v. Gen'l Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998); (2) *stare decisis* does not extend to issues that were not conclusively settled, *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004); *Waters v. Churchill*, 511 U.S. 661, 678 (1994); and (3) *stare decisis* should not – and lawfully cannot – apply so conclusively that it violates due process, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999).

and Constitution. Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 433 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803). Thus, notwithstanding defendant United States' sovereignty, Physicians can enforce the sovereign rights retained to the People and the States. U.S. CONST. amend. IX.

Under U.S. CONST. art. I, §8, Congress has the authority "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the … general welfare," provided that "all duties, imposts and excises shall be uniform throughout the United States." That section also authorizes Congress to "regulate commerce … among the several states" and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Id.* Under the Origination Clause, "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, §7, cl. 1.

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

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

PPACA's Legislative Background

PPACA represents a massive expansion of the federal role in healthcare and health insurance, passed on party-line votes and unusually explicit state-by-state deal-making in the Senate to secure the last votes for cloture and thereby avoid a filibuster. In opposing the Administration's motion to dismiss, Physicians focused on only a few PPACA provisions:

- PPACA §1501 requires individuals to obtain PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §5000A;
- PPACA §1513 requires employers with fifty or more "fulltime" (as defined) employees to provide PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §4980H;
- PPACA's insurance reforms elevate insurance costs by prohibiting the exclusion of those with pre-existing conditions, prohibiting insurers from setting lifetime limits, requiring insurers to cover preventive health services

and to allow children to remain on a parent's plan through age 26, and restricting insurers' use of annual limits on coverage, 42 U.S.C. §§300gg-300gg-4, 300gg-11(a), 300gg-14(a);

- PPACA §6402 and §6405 amended Medicare to require that providers include NPIs and to authorize HHS to require referrers to include NPIs on Medicare orders, 42 U.S.C. §1320a-7k(e); 124 Stat. at 768-69;
- PPACA §9003 excludes drugs not prescribed by a physician from reimbursement through health savings accounts and flexible spending accounts, effective January 1, 2011, 124 Stat. at 854.

In addition, Physicians also rely on PPACA's *not containing* a severability clause, signaling congressional intent to have the entire PPACA rendered invalid if courts invalidate its key provisions.

APA's Legislative Background

Although the Constitution vests "[a]ll legislative Powers" in Congress, U.S. CONST. art. I, §1, the APA delegates rulemaking authority to federal agencies, 5 U.S.C. §§551-706. Under APA's familiar provisions for notice-and-comment rulemaking, agencies generally must propose so-called legislative rules in the *Federal Register* and accept comments and respond to them in the final rule, 5 U.S.C. §553(b)-(c), subject to a good-cause exception, 5 U.S.C. §553(b)(B). Notice-and-comment requirements do not apply to "interpretative rules, general

statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(A).

Notice-and-comment procedures serve the important goal of "protect[ing] the [public] from arbitrary action on the part of [agencies], however unintended." *Oceanair of Florida, Inc. v. N.T.S.B.*, 888 F.2d 767, 770 (11th Cir. 1989). The right to comment enables the public to convince agencies to change an unwise ("arbitrary or capricious") or unlawful ("not in accordance with the law") course. 5 U.S.C. §706.

This Circuit recognizes four general criteria that trigger the notice-and-comment procedure: (1) whether the rules provide adequate legislative authority, absent the rule, for the same result; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general legislative authority; and (4) whether the rule effectively amends prior legislative rules. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("*AMC*"). Similarly, purported "guidance" that narrows an agency's discretion also requires notice-and-comment procedures. *General Elec. Co. v. E.P.A.*, 290 F.3d 377, 383-84 (D.C. Cir. 2002). Where the APA requires notice-and-comment procedures, failure to follow those procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94-95 (D.C. Cir. 1997); *cf.*

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

Regulatory Background

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

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

When district courts review administrative agencies' actions, they provide appellate review of those actions on the administrative record. *Marshall County Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 (D.C. Cir. 1993). Here, the record consists of the actions themselves.

Relevant Local Rules

Under the local rules, "[e]xcept as otherwise provided by these Rules, civil

… cases shall be assigned to judges of this court selected at random." LCvR 40.3(a). Local Rule 40.5 requires plaintiffs filing in a civil action to indicate the existence of "related cases," LCvR 40.5(b)(2), which the court assigns to the judge hearing the oldest related case. LCvR 40.5(c)(1). In pertinent part, Local Rule 40.5 defines relatedness as either "involv[ing] common issues of fact" or "grow[ing] out of the same event or transaction." LCvR 40.5(a)(3)(ii)-(iii). Where a new case involves the same parties and same subject matter as a dismissed case, the newly-filed case relates to the dismissed case, LCvR 40.5(a)(4), which is "perhaps stronger" for cases with the same parties than the analogous LCvR 40.5(a)(3) criteria for cases with different parties. *Collins v. Pension Benefit Guaranty Corp.*, 126 F.R.D. 3, 8 (D.D.C. 1989). Defendants may object to related-case designations, LCvR 40.5(b)(2), and judges may transfer cases to the Calendar Committee upon determining that the cases are not related. LCvR 40.5(c)(1).

Factual Background

For dismissals under Rule 12(b), the relevant facts consist of the complaint and any permissible inferences, declarations filed in opposing the motion to dismiss, and any judicially noticeable materials.

STANDARD OF REVIEW

This Court reviews Rule 12(b) dismissals *de novo*. *Barr v. Clinton*, 370 F.3d 1196, 1201 (D.C. Cir. 2004). With motions to dismiss, plaintiffs can rely on their

pleadings to establish jurisdiction and viable causes of action. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To assess jurisdiction under Rule 12(b)(1), a "court … must … assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Catholic Social Service v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994). Taken together, Rules 12(b)(6) and 8(a)(2) require "only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and interior quotations omitted). Because the property rights protected by the Takings Clause are "fundamental," *McCoy v. Union Elevated R. Co.*, 247 U.S. 354, 365 (1918); *Hendler v. U.S.*, 175 F.3d 1374, 1376 (Fed. Cir. 1999), strict scrutiny applies to Physicians' Fifth Amendment claims. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

SUMMARY OF ARGUMENT

With respect to Counts II-III, PPACA's "tax penalties" – which *NFIB* held to fall outside the federal Commerce Power but constructively within the Taxing Power – violate the Fifth Amendment as a compelled private subsidy from the healthy to those with preexisting conditions. Although penalizing the exercise of constitutional rights to refrain from voluntarily subsidizing private third parties

triggers strict scrutiny, PPACA's discrimination cannot survive any level of scrutiny. Moreover, because the *NFIB* saving construction converted the penalties to taxes, the Senate amendment inserting PPACA into H.R. 3590 qualifies as a revenue-raising bill that originated in the Senate, in violation of the Origination Clause. *See* Section II, *infra*.

Physicians have standing to bring all of Count IV against the requirements to enroll in PECOS and to obtain an NPI because; the District Court erred by ignoring Physicians' requested relief to declare that 42 U.S.C. §1395a(b)'s safe harbor does not require physicians to comply with §1395a(b)'s procedures in order to treat Medicare-eligible patients wholly outside of Medicare. As Spending-Clause legislation, Medicare cannot restrict those who decline the federal funds. No APA exception – which all are exceedingly narrow – applies to the Administration's using its PPACA-granted authority to address these issues. Moreover, because these agency actions rely on PPACA, they are substantively *ultra vires* to the extent that PPACA is void under the Origination Clause. *See* Section III, *infra.*

With respect to challenging the POMS amendments in Count I, the District Court's equity jurisdiction provides alternate jurisdiction, notwithstanding the claims-channeling provisions of 42 U.S.C. §§405(g)-(h), 1395ii; Physicians' members include *facilities* that compete with Medicare Part A facilities, which provides competitive standing. On the procedural merits, the POMS amendments

required rulemaking to add the new facet of beneficiaries' retroactively reimbursing Social Security to escape Medicare Part A. *See* Section IV, *infra*.

Counts V-VI concern accountings for the Medicare and Social Security trust funds to address PPACA's negative impacts on those programs' solvency. Physicians' members have economic and third-party standing, both as retirees and as physicians who work under Medicare, making it immaterial that the public shares the same injury. *See* Section V, *infra*.

Finally, because the POMS claims involved the same facts and grew out of the same transactions and events as *Hall*, the District Court was wrong to reject Physicians' related-case designation, which complied with the local rules. Courts must follow until their rules until they amend those rules. *See* Section VI, *infra*.

ARGUMENT

I. THIS COURT HAS ARTICLE III JURISDICTION ON ALL COUNTS

This section establishes jurisdiction over Physicians' claims generally. Where the District Court found jurisdiction lacking for a claim, Physicians rebut those findings in the corresponding substantive section, *infra*.

A. Physicians Have Standing

To establish standing, a plaintiff must show an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent

invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-62. Statutes can confer rights, the denial of which constitutes injury redressable by a court. *Warth v. Seldin*, 422 U.S. 490, 514 (1975). For injuries directly caused by agency action, a plaintiff can show an injury in fact with "little question" of causation or redressability, but when an agency causes third parties to inflict injury, the plaintiff must show more to establish causation and redressability. *Defenders of Wildlife*, 504 U.S. at 561-62. Membership organizations may establish standing either in their own right or on behalf of their members. *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977).

1. Physicians Suffer Injuries in Fact

Injury includes both actual and threatened injury, *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), which "need not be to economic or … comparably tangible" interests: an "identifiable trifle" suffices. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989). Although an abstract or generalized interest (*e.g.*, proper government operation, general compliance with the law) cannot *establish* standing, the mere fact that many people share an injury cannot *defeat* standing. *FEC v. Akins*, 524 U.S. 11, 23 (1998). Moreover, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all

grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Thus, Physicians can challenge the Administration's action for any unlawfulness, once Physicians establish their standing to challenge that action. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing).

a. Statutory Freedom of Choice

In response to PPACA, many states – including Virginia, Idaho, Arizona, Georgia, Missouri, Oklahoma, and Louisiana – adopted "Freedom of Choice in Health Care Acts" to prohibit compelling their residents to purchase health insurance. *See* Compl. ¶81; OKLA. CONST. art. II, §37(B)(1); Smith Decl. ¶8 (Oklahoman physician suffering from PPACA's coercion of Oklahomans in his personal capacity and through patients); Orient Decl. ¶14 (Arizona physician). Although PPACA and the Supremacy Clause, U.S. CONST. art. VI, cl. 2, plainly would preempt these laws *if PPACA were lawful*, an unconstitutional federal statute cannot preempt state law. Accordingly, if PPACA is unlawful, these state-law rights establish standing against PPACA. *Warth*, 422 U.S. at 514; *Am. Trucking Ass'ns v. Dep't of Transp.*, 166 F.3d 374, 385 (D.C. Cir. 1999). These injuries provide standing for Counts II and III.

b. Competitive Injuries and Unequal Footing

Under the competitor-standing doctrine, the "injury claimed … is not lost sales, *per se;*… [r]ather the injury claimed is exposure to competition." *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996); *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994) ("[i]ncreased competition represents a cognizable Article III injury"). Moreover, "there is no need to wait for injury from specific transactions to claim standing" when the challenged action "will almost surely cause [Physicians] to lose business. *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995); *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (physicians have standing to challenge state actions that financially affect their practices). Excluding Physicians' physician members from the relevant PPACA and Medicare markets and advantaging their competitors constitute an "invasion of a legally protected interest…. in a manner that is 'particularized'" to Physicians' members, which is an injury *per se*, whether or not the member would secure the benefit with the injury removed.[2] *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 211 (1995). Physicians' members suffer competitive and unequal-footing injuries with respect to Counts I, II, III, and IV.

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

See Compl. ¶8; Orient Decl. ¶¶24-25; Smith Decl. ¶¶7-8, 10.

c. Economic Injury and Regulatory Burden

Physicians have standing to challenge actions that negatively impact their members with direct economic costs and administrative burdens. *Diamond,* 476 U.S. at 66; *Indep. Bankers Ass'n of Am. v. Heimann,* 613 F.2d 1164, 1167 (D.C. Cir. 1979). Similarly, unlawful administrative burdens "[c]learly… me[e]t the constitutional requirements, and… [Physicians] therefore ha[ve] standing to assert [their] own rights," the "[f]oremost" of which is the "right to be free of arbitrary or irrational [agency] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 263 (1977). Even if they or their members must seek future review in specific benefits proceedings, Physicians have standing to challenge federal guidelines on *how* government programs work. *Int'l Union v. Brock,* 477 U.S. 274, 284 (1986). In all of the foregoing analysis, "courts routinely credit" "basic economic logic" for standing. *United Transp. Union v. I.C.C.,* 891 F.2d 908, 912 n.7 (D.C. Cir. 1989); *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 94 (D.C. Cir. 2002).

Distinct from the third-party injuries discussed in Section I.A.1.e, *infra,* Physicians' members (both as physicians and as patients) also suffer from unlawful restrictions on the terms under which they interact with third parties. Significantly, "a litigant asserts his own rights (not those of a third person) when he seeks to void

restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction." Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984); *FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan); *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.13 (D.C. Cir. 1987).

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

d. Equal-Protection Injury

PPACA purportedly seeks to protect the federal fisc from uninsured patients' imposing costs on the health system, arguing circularly that the government's decision to require emergency rooms to treat the public regardless of any ability to pay justifies acting against private citizens – who have not and will not contribute to any burden on the federal fisc, Christman Decl. ¶5; Smith Decl. ¶11 – to make up for the voluntary expenditure of federal funds.[3] At least with

[3] Even defendants must have standing to proceed, and the Administration's argument here reflects a self-inflicted injury. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989). While defendant United States may have the authority to tax the public generally and to provide benefits to some or all of the public, *Charles C. Steward*

respect to individuals who prefer and choose to maintain high-deductible, catastrophic-risk insurance and can make their deductible payments, Smith Decl. ¶11, the decision to impose burdens on these "self-paying" citizens, greater than the burdens imposed on citizens who hold PPACA-approved insurance, discriminates against those with high-deductible plans who do not burden the federal fisc. Clearly "tax schemes with exemptions may be discriminatory," *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1109 (2011), and in such equal-protection contexts, "the appropriate remedy is a mandate of *equal* treatment, [which] can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original). Physicians therefore have equal-protection rights to enforce against PPACA's insurance mandates.

Precisely to avoid equal-protection violations, states that condition the *privilege* of a driver's license on maintaining minimum insurance *for third-party liability* allow alternatives like self-insurance, bonds, and certificates of deposit for the required coverage. *See, e.g.*, CAL. VEH. CODE §16053; OHIO REV. CODE ANN. §4509.45; LA. REV. STAT. ANN. §32:104. Failure to provide these alternatives on

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Mach. Co. v. Davis, 301 U.S. 548, 585 (1937), the authority to proceed discretely under the Taxing Power and under the Spending Clause (as the government argued in *Steward Machine*) differs completely from PPACA's cobbled-together mandates of private actions, private subsidies, and penalties that violate the Fifth Amendment under *any* level of scrutiny. *See* Section II.B, *infra*.

equal terms with the insurance option constitutes an equal-protection violation. *Hebard v. Dillon*, 699 So.2d 497, 503 (La. App. 1997); *Jitney Bus Ass'n v. City of Wilkes-Barre*, 256 Pa. 462, 469, 100 A. 954, 956 (Pa. 1917); *People v. Kastings*, 307 Ill. 92, 108-09, 138 N.E. 269, 275 (Ill. 1923). The foregoing automobile-insurance decisions demonstrate that mandates – when lawful at all – must comply with equal-protection principles.

e. Third-Party Standing

Following *Powers v. Ohio*, 499 U.S. 400, 411 (1991), this Circuit allows third-party standing *inter alia* where the first-party suffers a constitutional injury in fact, has a close relationship with the third party, and "some hindrance" prevents the third party's asserting its own rights. *Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1361-62 (D.C. 2000) ("*AILA*").[4] Moreover, associations like Physicians can assert third-party standing based on the relationships between members and third parties. *Fraternal Order of Police v. U.S.*, 152 F.3d 998, 1001-02 (D.C. Cir. 1998); *Nat'l Cottonseed Prod. Ass'n v. Brock,* 825 F.2d 482, 490 (D.C. Cir. 1987). Indeed, under this Circuit's vendor-standing decisions and analogous Supreme Court decisions, plaintiffs need not identify a *specific* third party (*i.e.*, *potential* customers suffice). *Nat'l Cottonseed Prod. Ass'n,* 825 F.2d at

[4] The hindrance prong is not mandatory. *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 624 n.3 (1989).

490); *Craig v. Boren*, 429 U.S. 190, 194-95 (1976); *Carey v. Population Serv., Int'l,* 431 U.S. 678, 683 (1977). Once a plaintiff has established *constitutional* standing, that plaintiff may rely on third-party standing to satisfy the merely *prudential* zone-of-interest test. *FAIC Securities*, 768 F.2d at 357-61; *Carey*, 431 U.S. at 682-86. Under these third-party principles, *if Physicians have standing* (which Physicians contend that they have, Sections I.A.1.a-d, *supra,* I.A.1.f-I.A.2, *infra*), Physicians must show a close relationship with, and some hindrance to, their patients in order to assert the patients' rights.

Significantly, "unawareness of the injury" qualifies as a sufficient hindrance, *AILA*, 199 F.3d at 1363. Thus, unlike the aliens in *AILA*, the patients and prospective patients of Physicians' physician members will not know of the risks they face. Because the Administration famously promised that PPACA allows those who liked their insurance to keep it, Joseph Decl. ¶5, many patients and prospective patients are simply unaware of the changes that PPACA will wreak on private insurance. Joseph Decl. ¶8. As in *Powers*, 499 U.S. at 415, individual patients will have little incentive to sue because the cost of such litigation would outweigh the near-term savings. As such, physicians can "by default [become] the right's best available proponent." *AILA*, 199 F.3d at 1362 (quotations omitted). Waiting for patients to sue will be too late.

Third-party standing applies to Counts I, II, III, V, and VI and the parts of

Count IV that concern Medicare-eligible patients' abilities to see Physicians' physician members wholly outside of Medicare and Physicians' physician members to refer Medicare services for Medicare-eligible patients outside of PECOS. Smith Decl.¶ ¶6, 10; Orient Decl. ¶¶24-25; Hammons Decl. ¶7; Compl. ¶30.

f. Procedural Injury

"The history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Counts I-IV challenge failures to observe such safeguards, for which "those adversely affected… generally have standing to complain." *Akins*, 524 U.S. at 25. Rescission and remand may produce the same result, *id.*, but until that happens, the initial injury remains "fairly traceable" to the agency's initial action, and redressable by an order striking the initial agency action. *id.; Animal Legal Defense Fund v. Glickman,* 154 F.3d 426, 444 (D.C. Cir. 1998) (*en banc*) ("*ALDF*"). Physicians need not show that following the required procedures will provide the desired result: "If a party claiming the deprivation of a right to notice-and-comment rulemaking ... had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers*, , 289 F.3d at 94-95.

Because Physicians also allege several concrete injuries, *see* Sections

I.A.1.a-e, *supra*, they have standing to challenge these procedural violations. *Florida Audubon Soc'y v. Bentsen,* 94 F.3d 658, 664-65 (D.C. Cir. 1996) (*en banc*); *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7. Given these concrete injuries, redressability and immediacy apply to the *present procedural violation*, which may someday injure the concrete interest, rather than to the concrete (but less certain) future injury. *Nat'l Treasury Employees Union v. U.S.,* 101 F.3d 1423, 1428-29 (D.C. Cir. 1996).

2. Physicians' Injuries Fall Within the Zones of Interests

Standing's "zone-of-interest" test is a prudential doctrine that asks whether the interests to be protected *arguably* fall within those protected by the relevant statute. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998). This generous and undemanding test focuses not on Congress' intended beneficiary, but on those who in practice can be expected to police the interests that the statute protects. *ALDF*, 154 F.3d at 444; *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 52 (D.C. Cir. 1983). To show that they are *arguably* "protected" by a statute, plaintiffs may demonstrate that they are either the statute's intended beneficiaries or "suitable challengers" to enforce the statute.

For intended beneficiaries, "'slight beneficiary indicia' are sufficient to sustain standing." *Am. Friends Serv. Comm.*, 720 F.2d at 50 & n.37. Even if not intended beneficiaries, plaintiffs satisfy the zone of interests as "suitable

challengers" if they have "interests … sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." *First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993).

Even competitors who would be unsuitable challengers for open-ended statutory questions are suitable enough to challenge clear statutory or constitutional demarcations: "the *Hazardous Waste Treatment Council* line of cases is inapposite when a competitor sues to enforce a *statutory demarcation, such as an entry restriction*, because the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation." *Honeywell Int'l, Inc. v. EPA,* 374 F.3d 1363, 1370 (D.C. Cir. 2004) (emphasis added, alteration in original), *withdrawn in part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005); *N.C.U.A.*, 988 F.2d at 1278; *Scheduled Airlines Traffic Offices, Inc. v. D.O.D.*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996). In any event, with *ultra vires* conduct, the zone-of-interest test either does not apply or applies to the Due Process Clause's wider zone. *Haitian Refugee Ctr.*, 809 F.2d at 811-12 & nn.13-14; *Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989). Accordingly, the zone-of-interest test poses no obstacle to Physicians' standing.

B. Physicians' Claims Are Ripe

Like standing, ripeness has a constitutional and a prudential component, with the constitutional component essentially mirroring the constitutional standing component of a case or controversy. U.S. CONST. art. III, §2; *DKT Memorial Fund Ltd. v. A.I.D.*, 887 F.2d 275, 298 (D.C. Cir. 1989). If Physicians currently have constitutional standing, their claims are constitutionally ripe, and vice versa.

The timing of future impacts – even if years off – provides no barrier to justiciability: "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 130 S. Ct. 1758, 1767 n.2 (2010). Here, Physicians will hit this wall, circa 2014 or 2015, Christman Decl. ¶6; Smith Decl. ¶12, and Physicians allege that they already are facing burdens from the impending wall. Compl. ¶21.

Working under a "presumption of reviewability," prudential ripeness requires "pragmatic balancing" of the fitness for review (*i.e.*, "the interests of the court and agency in postponing review") versus the hardship of postponing review (*i.e.*, petitioner's "countervailing interest in securing immediate judicial review"). *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Purely legal issues – like those

at issue here – are presumptively fit for review. *AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003). The hardship prong comes into play when a claim is not fit for review, such that the plaintiff "must demonstrate that postponing review will cause [it] 'hardship' in order to overcome a claim of lack of ripeness and obtain review of the challenged rule at this time." *Florida Power & Light Co. v. E.P.A.*, 145 F.3d 1414, 1420-21 (D.C. Cir. 1998). Indeed, when no institutional issues counsel to for postponing review, the hardship prong is "unnecessary." *Public Service Elec. & Gas Co. v. F.E.R.C.*, 485 F.3d 1164, 1168 (D.C. Cir. 2007); *Sabre, Inc. v. DOT*, 429 F.3d 1113, 1120 (D.C. Cir. 2005).

Significantly, the foregoing analysis relates only to *substantive* injuries because procedural injuries are extant today and can never get more ripe. *Ohio Forestry Ass'n, Inc., v. Sierra Club,* 523 U.S. 726, 737 (1998). Insofar as all their claims include a procedural element, Physicians' claims are prudentially ripe.

C. The District Court Has Statutory Subject-Matter Jurisdiction

In addition to jurisdiction under Article III and related prudential doctrines, Physicians also must have statutory subject-matter jurisdiction. As explained in this section, nothing bars jurisdiction here.

1. The District Court Has Federal-Question Jurisdiction

In 1976, Congress expanded the federal-question statute to include all challenges to federal administrative agencies and officers by removing the then-

applicable amount-in-controversy requirement. *Califano v. Sanders,* 430 U.S. 99, 105 (1977) (*citing* S. REP. NO. 94-996 at 12 (1976)). "The obvious effect of [eliminating §1331's amount-in-controversy requirement against federal agencies and officers], subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." *Sanders,* 430 U.S. at 107. Unless expressly excluded, the federal-question statute provides jurisdiction.

2. The District Court Has Equity Jurisdiction

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

court." The "laws" expressly conferring this Court with "general jurisdiction in law and equity" dates back to 1801. Act of February 27, 1801, 2 Stat. 103; Act of March 3, 1863, 12 Stat. 762; Act of June 25, 1936, 49 Stat. 1921.

The District of Columbia Court Reorganization Act of 1970 did not impliedly repeal the prior jurisdiction. *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) ("'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available"); *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). Indeed, the legislative history of the 1976 APA amendments to waive sovereign immunity notes that, under the then-current law, plaintiffs could escape the §1331's then-applicable $10,000 amount-in-controversy requirement by seeking to enjoin federal officers in the District of Columbia. H.R. REP. NO. 94-1656, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6136. In other words, Congress itself recognized in 1976 that its 1970 Reorganization Act had left intact the District Court's unique equity jurisdiction over federal actors.

3. No Tax-Related Restrictions Bar Review

The Anti-Injunction Act, 26 U.S.C. §7421(a), and 28 U.S.C. §2201(a) pose no barrier to judicial review because – while PPACA's penalties qualify as taxes for *constitutional purposes* under the *NFIB* "saving construction" – those penalties

are not taxes for *statutory purposes*. *NFIB*, 132 S.Ct. at 2584. No statute denies jurisdiction here.

II. PPACA'S PENALTIES ARE UNCONSTITUTIONAL

Physicians argue that PPACA exceeds the Commerce Power and violates the Fifth Amendment and that its enactment violated the Origination Clause. The following subsections address these three bases to invalidate PPACA.

A. PPACA's Mandates Violate the Commerce Power and All Other Enumerated Powers Except Potentially the Taxing Power

Although they press Origination-Clause and Fifth-Amendment claims that *NFIB* did not reach, Physicians also rely on *NFIB* for the lack of federal authority to enact PPACA's insurance mandate, outside the Taxing Power. Under *Agostini*, 521 U.S. at 237, *NFIB* binds this Court.

B. PPACA's Tax Penalties Violate the Fifth Amendment

As a facial challenge under the Commerce Clause, *NFIB* did not consider the Fifth Amendment issues that Physicians raise here and *a fortiori* did not consider them *as applied* to Physicians.[5] Thus, Physicians could prevail against PPACA, *as*

[5] As argued before the Supreme Court, *NFIB* did not present any Fifth Amendment claims, and the case never addressed takings at all. *See NFIB*, 132 S.Ct. at 2623 (Opinion of Ginsburg, J.); *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Serv.*, 648 F.3d 1235, 1292 n.93 (11th Cir. 2011) (plaintiffs did not appeal dismissal of substantive due-process claim for fundamental contract rights). The District Court's suggestion (JA138 n.6) that Physicians have not brought an as-applied challenge is puzzling, given that the Fifth Amendment claim

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); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2665 (2011). Moreover, the *NFIB* Court 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 the Fifth Amendment.[6]

Given "the substantial conceptual overlap between takings and taxes, legal scholars … have long puzzled over the apparently inconsistent treatment the two topics receive under the applicable constitutional law." Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185 (2004). Taken back to first

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relies on PPACA's compelled subsidies of those with preexisting conditions and equal-protection violations, which both entail groups' differential treatment.

[6] 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 v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). 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.

principles, the two concepts are distinct enough. Takings concerned eminent domain for real property, which was distinct from taxation. The advent of regulatory takings and regulatory taxation, however, has blurred the two concepts and requires resolution. *Id.* at 2188-89 ("reconciling takings with taxation has come into sharper relief"). Notwithstanding this recently "sharper relief," courts have long recognized a connection 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); *cf. Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992). Physicians respectfully submit that this is just such an "extreme case" and that the *Norwood* principle requires declaring PPACA invalid under the Fifth Amendment.

1. The Government Cannot Avoid the Constitution By Indirectly Compelling What the Government Lacks Authority to Require

Assuming *arguendo* that its insurance requirements would be unconstitutional as a public program, *see* Section II.B.2, *infra*, PPACA cannot escape review by coercing – under the threat of a penalty – the public's "voluntary" participation:

> 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"). As applied here, the government cannot tax the public's declining to consent voluntarily to a taking without just compensation (*i.e.*, declining to consent to confiscation). But that is precisely what PPACA does: present the "choice" of either (a) purchasing PPACA-sanctioned insurance – which the Administration has absolutely 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. PPACA is no different than a hypothetical "Good Neighbor Act" that gives property owners with lots greater than an acre the "choice" between giving a half acre to house the homeless or else paying a "Bad Neighbor Tax." Insofar as excluding others is "traditionally … one of the most treasured strands in an owner's bundle of property rights," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982), the Good Neighbor Act's

Bad Neighbor Tax indirectly nullifies property rights in violation of *Harman*, *Frost*, *Rust*, and the Fifth Amendment. So too does PPACA's tax penalty.

2. Viewed as a Government Program, the PPACA Insurance Requirements Violate the Fifth Amendment

If it were a government program in its own right, PPACA's insurance regime would "take" that portion of Physicians' premiums that subsidizes lower premiums for those with pre-existing conditions and other premium-elevating circumstances.[7] That 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, PPACA asks healthy private individuals to support unhealthy private individuals. That plainly violates the Takings Clause: "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even

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[7] If Physicians' members maintain PPACA-noncompliant high-deductible insurance and thereby elect to pay PPACA's tax penalties, they get *nothing* valuable from PPACA. But even if they go with PPACA-compliant insurance to avoid the tax penalties, they would pay higher premiums to subsidize PPACA's favorable treatment of those with pre-existing conditions, which means that Physicians' members still would not get "significant, concrete, and disproportionate benefits" for that portion of their insurance premiums that insurers take to subsidize the low premiums that PPACA makes available for those with pre-existing conditions. *Colo. Springs Prod. Credit Ass'n,* 967 F.2d at 654. Under actuarial principles, this 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).

though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (emphasis in original). 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. *Pacific Gas & Electric Co. v. Hay*, 68 Cal.App.3d 905, 910-11 (Cal. App. 1977). Thus, when private insurers apply Physicians' funds to subsidize third parties' insurance premiums, the insurers' private nature cannot protect PPACA from the Fifth Amendment. Acting through such private relationships "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." *Pennell v. San Jose*, 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring in part and dissenting in part). Unless such a regime provides a remedy for the return of money wrongfully taken – under threat of fines – the "statute is unconstitutional … because it does not provide indemnity for what it requires." *Missouri P. R. Co. v. Nebraska*, 217 U.S. 196, 208 (1910). Insurers' private nature cannot shelter PPACA from the Fifth Amendment.

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). 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 Physicians' premiums that subsidizes artificially low premiums for those with preexisting conditions is taken – for private use, no less – and requires compensation and indemnity.

C. PPACA's Enactment Violated the Origination Clause

By decentralizing power among the three branches and by placing the taxing power in the hands of the legislative branch closest to the People, the Founders intended Separation of Powers generally and the Origination Clause specifically to protect liberty. *U.S. v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990). Given the constructive tax in the Chief Justice's saving construction, PPACA would be void if the Senate's PPACA amendments to SMHOTA violated the Origination Clause.

This Nation dissolved its ties with England largely because of unfair taxation, with England's "imposing taxes on us without our consent" among the grievances laid out in the Declaration of Independence. Having waged war to escape such taxes, the Founders carefully designed the Constitution so that the People could control their new government:

> "The consideration which weighed ... was, that the [House] would be the immediate representatives of the people; the [Senate] would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it."

5 J. Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 283 (1881) (George Mason of Virginia). Alternatively, the Origination Clause "will oblige some member in the lower branch to move, and people can then mark him." *Id.* at 189 (Hugh Williamson of North Carolina). As explained in the next three subsections, PPACA violated this central tenet of our Democracy.[8]

1. As a Tax Under the *NFIB* Saving Construction, PPACA Raises Revenue Within the Meaning of the Origination Clause

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)). Justice Story's treatise

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[8] Significantly, federal courts have the ultimate duty to interpret the Origination Clause (*e.g.*, "whether a bill is 'for raising Revenue' or where a bill 'originates'"). *Munoz-Flores*, 495 U.S. at 396; *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("power to interpret the Constitution … remains in the Judiciary"). This is particularly appropriate here, where the Legislative Branch's two houses have divergent interests in the Clause's breadth. *See, e.g.*, VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §317 (1935) (Senate and House in the 68th Congress reached opposite conclusions on whether the Origination Clause applied to S. 3674). In administrative law, courts deny deference more than one agency interprets a statute. *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993).

identified several examples of non-revenue bills that might "incidentally create revenue": (1) "bills for establishing the post office and the mint, and regulating the value of foreign coin;" (2) "a bill to sell any of the public lands, or to sell public stock;" and (3) "a bill [that] regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency." Story, COMMENTARIES §880. Here, PPACA raises taxes.

The Origination Clause applies not only to whole bills but also to discrete sections and amendments, asking 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." *Nebecker,* 167 U.S. at 202-03 (emphasis added). Under *NFIB,* to the extent that they could be constitutional at all, PPACA's taxes qualify as income taxes.[9] As income taxes, PPACA's taxes therefore supply revenue to the Treasury and "levy taxes in the strict sense of the word," rather than

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[9] *NFIB* held that the PPACA taxes are not direct taxes that must be apportioned to the census. *NFIB*, 132 S.Ct. at 2599. Although *NFIB* did not go further and hold what type of tax PPACA *actually is,* the only other choices are duties, imposts and excises (which the Constitution requires to be uniform), U.S. CONST. art. I, §8, and income taxes. U.S. CONST. amend. XVI. Plaintiffs submit that, because PPACA's taxes are not uniform, 26 U.S.C. §5000A(e)(1)(B)(ii), (f)(1)(C), (f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) ("individual" tax); 26 U.S.C. §4980H(a)(1) ("employer" tax incorporates criteria from 26 U.S.C. §5000A(f)(2)); *see also* 26 U.S.C. §5000A(f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) (criteria incorporated into "employer" tax), PPACA's taxes must be income taxes.

"incidentally create revenue." *Nebeker*, 167 U.S. at 202. Thus, even if PPACA as a whole has some other purposes, the PPACA provisions at issue – namely, the tax penalties – have no other constitutional purpose but the raising of revenue under the Chief Justice's saving construction.

Significantly, PPACA's tax penalties cannot qualify as special assessments under the "general rule" that statutes that create a regulatory program may simultaneously raise funds to support that program. *Munoz-Flores*, 495 U.S. at 397-98 ("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"). Under that "general rule," revenue raised via targeted provisions such as the "special assessment provision at issue in th[at] case" fall outside the Origination Clause. *Id.* at 398; *Nebeker*, 167 U.S. at 202-03; *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906). By contrast, §5000A can avoid other constitutional tax-related infirmities – *see* note 9, *supra* – only as income tax under the Sixteenth Amendment, and PPACA's regulatory program is wholly outside of the federal power except taxation.

Unlike special assessments, PPACA's taxes are collected in connection with the income tax, with annual revenue approximating $4 billion by 2017, *NFIB*, 132 S. Ct. at 2594, going 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)). If funds "go into the Treasury … just exactly as do the moneys which arise from tariff taxes or internal revenue taxes or any other taxes [where they] would be mingled with and become a part of all the revenues of this Government," the statute "is as completely a revenue bill as it is possible to make it." VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §316 (1935) (argument supporting successful point of order to table a Senate-originated bill) (Rep. McKellar). Moreover, as justified by *NFIB* under the Taxing Power, §5000A's tax penalty is not part of PPACA's governmental program. It survives solely as a tax. Thus unlike in *Munoz-Flores* and in "*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 taxes here *solely* for their revenue-raising purpose of providing tax revenue to the general Treasury.

Finally, the lack of relationship between costs assessed against Physicians' members to subsidize third parties' insurance premiums would doom PPACA, even if it could otherwise qualify as a special assessment. Even while deeming

special assessments levied on criminals to compensate victims as falling outside the Origination Clause's reach, *Munoz-Flores* acknowledged that "[a] different case might be presented if the program funded were entirely unrelated to the persons paying for the program." *Munoz-Flores*, 495 U.S. at 401 n.7. As applied to Physicians' members with adequate – but PPACA-noncompliant – insurance, PPACA's taxes 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. Even if some hypothetical tax could qualify as a special assessment, therefore, PPACA's taxes cannot.

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

The Senate's authority to attach revenue-raising amendments to House bills applies only to House *revenue* bills. James Saturno, Section Research Manager, Congressional Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, at 6 (Mar. 15, 2011) (*citing* 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907)); *Sperry Corp. v. U.S.*, 12 Cl. Ct. 736, 742 (1987), *rev'd on other grounds,* 853 F.2d 904 (Fed. Cir. 1988); *Armstrong v. U.S.*, 759 F.2d 1378, 1382 (9th Cir. 1985); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 688 (1986). If the Senate PPACA amendments raise revenue – as opposed to establishing a regulatory program – this Court must determine

whether SMHOTA was a "bill[] for raising revenue" into which the Senate could import its PPACA amendments.[10]

a. Bills that Close Revenue Streams Do Not "Raise" Revenue

To analyze whether SMHOTA "raises revenue," a court must define that phrase. Although this Circuit has not decided the issue, competing extra-circuit interpretations have focused on whether bills must *increase* revenues or merely *levy* revenues (*i.e.*, without increasing revenues).[11] Physicians respectfully submit that this increase-levy dichotomy obscures a third category of bill relevant here. Specifically, bills that *close* a particular revenue stream do not raise revenue.

The extra-circuit decisions holding "raise" to mean "levy" arise under the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324

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[10] In adopting the Senate amendments, the House did not acquiesce to an Origination-Clause violation, given that §5000A (as passed by Congress) was not even a tax as far as Congress was concerned. *NFIB*, 132 S.Ct. at 2582-84. The Senate cannot avoid the Origination Clause merely by "enact[ing] revenue-raising bills so long as it merely describes such bills as 'user fees'" or (here) penalties. *Sperry Corp. v. U.S.*, 925 F.2d 399, 402 (Fed. Cir. 1991). Only now that §5000A is unambiguously a tax, and *only a tax*, is the Origination Clause violation clear. In any event, the House *cannot* acquiesce to a violation of the Constitution. *Munoz-Flores*, 495 U.S. at 391. Origination-Clause claims thus presents justiciable separation-of-powers questions on which courts have the final word. *Id.* at 393.

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

(1982) ("TEFRA"), and focus primarily on whether the Senate's tax-increasing amendment was "germane" to the House's tax-cutting bill under *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). *See Wardell*, 757 F.2d at 204-05 (collecting cases). Because the House bill there *levied* revenues without *increasing* revenues, the TEFRA cases are inapposite to bills like SMHOTA that do not levy any revenue, but instead close various revenue streams.

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

> Suppose the existing law lays a duty of 50 per cent[.] upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent[.], is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally

[12] Plaintiffs address germaneness separately in Section II.C.3, *infra*.

> originate in the Senate, nor could such provisions be ingrafted, by way of amendment, in the Senate upon any House bill which did not provide for raising – the that is, collecting – revenue. This bill did not provide that the duty on tea and coffee should be laid at a less rate than formerly, but it provided simply that hereafter no revenue should be raised or collected upon tea or coffee. To say that a bill which provides that no revenue shall be raised is a bill "for raising revenue" is simply a contradiction of terms.

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

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

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

b. SMHOTA Did Not Raise Revenue

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

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

2. SMHOTA §§2-3 modified the first-time homebuyers' tax credit by waiving recapture of the credit for members of the armed forces ordered to extended duty service overseas. In the absence of this waiver, first-time homebuyers who sold their homes soon after claiming the credit would lose the credit. *See* 26 U.S.C. §36(a), (f). These provisions not only *lowered* revenues but also zeroed out taxes for the affected sources of income. As such, these sections did not raise revenue.

3. SMHOTA §4 expanded exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" under 26 U.S.C. §132, which does not raise revenue for the same reason that SMHOTA §§2-3 do not raise revenue.

4. SMHOTA §5 increased filing penalties by $21 (from $89 to $110) for failing to file certain returns. Such penalties do not "levy taxes in the strict sense of

the word" required to trigger the Origination Clause. *Nebeker*, 167 U.S. at 202; *U.S. v. Herrada*, 887 F.2d 524, 527 (5th Cir. 1989). If this minor penalty enhancement qualifies as "raising revenues" under the Origination Clause, that would invalidate numerous Senate-initiated bills that assess penalties.

5. SMHOTA §6 amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to increase the amount of *estimated* tax that certain corporations pay. But "[w]ithholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax." *Baral v. U.S.*, 528 U.S. 431, 436 (2000). Because estimated-tax payments are not "revenue," §6 cannot make H.R. 3590 a revenue bill.

In summary, as it passed the House, H.R. 3590 was not a revenue bill. "Any and all violations of constitutional requirements vitiate a statute," even if they represent merely "this kind of careless journey work" in originating a revenue bill in the wrong body. *Hubbard v. Lowe*, 226 F. 135, 140 (S.D.N.Y. 1915), *appeal dismissed* 242 U.S. 654 (1916). The Origination Clause thus prohibited substituting the Senate's revenue-raising PPACA for SMHOTA.

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

As indicated, the Origination Clause applies not only to whole bills but also

to discrete sections and amendments, *Nebecker*, 167 U.S. at 202-03, subject to a test for germaneness. *Flint*, 220 U.S. at 142-43 (Origination Clause allows Senate "amendment … germane to the subject-matter of the [House] bill and not beyond the power of the Senate to propose"), *abrogated in part on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540-43 (1985). Under *Flint*, the "Senate may propose any amendment 'germane to the subject-matter of the [House] 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). Unlike PPACA and the House and Senate bills in *Flint*, SMHOTA was in no way a "general bill for the collection of revenue." *Flint*, 220 U.S. at 142-43. In any event, no part of SMHOTA raised revenue within the meaning of the Origination Clause, *see* Section II.C.2.b, *supra*, which obviates this Court's reviewing PPACA's germaneness to SMHOTA.[13]

III. THE PECOS CHANGES ARE UNLAWFUL

Although the APA exempts matters "relating to … grants, benefits, or contracts," 5 U.S.C. §553(a)(2), HHS committed itself to following notice-and-comment rulemaking for such matters. *Nat'l Welfare Rights Org'n v. Mathews,*

[13] To the extent that the Administration argues any specific SMHOTA section "raised revenue," Physicians reserve the right to demonstrate that PPACA's broad regulation of one sixth of the national economy was not germane to that narrow SMHOTA section.

533 F.2d 637, 646 (D.C. Cir. 1976) (*citing* 36 Fed. Reg. 2532 (1971)). Thus, to the extent that the challenged actions qualify as substantive rules and do not qualify for any APA exemptions, the failure to follow notice-and-comment rulemaking renders the challenged actions null and void. Moreover, as explained in Section III.A, *supra*, the District Court and HHS are simply wrong about §1395a(b)'s requiring compliance with §1395a(b)'s opt-out process, and that error undercuts the District Court's and HHS's analysis of the APA procedural requirements.

A. Physicians Have Standing for Count IV

The District Court found Physicians to lack standing because certain HHS actions that Physicians did not challenge allegedly cause the same injuries that the challenged HHS actions cause, so the requested relief against CR6417/6421 and the IFC would be insufficient to redress Physicians' injuries. JA146. At a surface level, the District Court's reasoning is flawed. Absent the challenged actions, the PECOS changes would never take effect, which is the status-quo redress that Physicians seek. Beneath the surface, the District Court's reasoning is even more misguided.

Most basically, the District Court's analysis improperly viewed standing from HHS's merits views, not (as required) *from Physicians' merits views*. *Waukesha*, 320 F.3d at 235. In ignoring Physicians' requested relief that "[n]on-Medicare providers lawfully may see Medicare-eligible patients and charge those

patients a fee that is lawful under applicable state laws, without complying with [§1395a(b)'s] safe harbor, and Medicare imposes no obligations on such providers beyond any applicable requirements of state law," Compl. ¶118.A(xi), the District Court erred in concluding that Physicians sought relief against only the IFC and CR6417/6421. This overlooked extra relief cures any redressability problem.

In any event, the District Court (like the Administration) is substantively wrong about §1395a(b). Medicare does not require state-licensed physicians to subject themselves to §1395a(b)'s opt-out provisions before treating Medicare-eligible patients. Spending Clause legislation like Medicare operates as a contract, in which recipients and beneficiaries agree to the federal terms as conditions of federal funds or benefits. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.,* 547 U.S. 47, 59 (2006) ("*FAIR*"). But recipients and beneficiaries remain free to forgo the federal funds and the federal conditions. *Id.* Indeed, plaintiff AAPS preclusively established that principle in *Ass'n of Am. Physicians & Surgeons v. Weinberger,* 395 F.Supp. 125, 140 (N.D. Ill.), *aff'd* 423 U.S. 975 (1975).[14] Preclusion aside, this principle – reaffirmed in *FAIR* – is incontrovertible. While physicians who follow §1395a(b)'s opt-out procedures have the valuable benefit of

[14] This prior AAPS litigation upheld the Medicare program as "a voluntary one in which a physician may freely choose whether or not to participate," such that physicians "must then comply with [Medicare] requirements in order to be compensated for [their] services" "should a physician choose to participate." *Weinberger,* 395 F.Supp. at 140.

HHS's recognizing that those physicians may treat Medicare-eligible patients outside Medicare (albeit in accordance with §1395a(b)), Medicare does not and cannot require state-licensed physicians who decline to participate to file *anything* under Medicare.

To the contrary, courts apply a presumption against preemption in fields like medicine traditionally occupied by the states. *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009). "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," *U.S. v. Bass*, 404 U.S. 336, 349 (1971), and "absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985). Nothing in Medicare requires those who want nothing to do with Medicare to comply with §1395a(b).

B. Count IV Is Not Moot

Relying on a 2012 rulemaking issued six months before the District Court ruled on their motion to dismiss – that they failed to bring to that court's attention – the Administration belatedly suggests that Count IV is moot. While new rules – if themselves valid – can moot procedural defects in prior agency actions, Physicians respectfully submit that Count IV is not moot for three reasons. First, mootness based on APA-compliant rulemakings is inapposite to *substantive*

defects common to the interim and final rules. Second, all incarnations of the PECOS-NPI changes are *ultra vires* without PPACA. Third, the 2012 rule failed to respond to AAPS comments and relies on PPACA elements rendered void by the Origination Clause violation outlined in Section II.C, *supra*. For these reasons, once the 2012 rule is invalidated, the Administration will need to retreat to the procedurally defective actions challenged here.

C. The PECOS Changes Are Substantive Rules

Together, CR6417/6421 and the IFC trigger the first three *AMC* criteria and narrow HHS discretion under *General Elec. Co.* In addition, interpretations that change prior interpretations require notice-and-comment rulemaking, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), which even the District Court acknowledges CR6417/6421 to have done in rescinding HHS's prior allowance for these referrals under change request 6093. JA147 n.11. For the foregoing reasons, HHS's changes required a rulemaking.

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

Contrary to the District Court (JA151), the APA exception where "the agency for good cause finds" that APA procedures "[would be] impracticable, unnecessary, or contrary to the public interest" does not apply. 5 U.S.C. §553(b)(B). First, "it should be clear beyond contradiction or cavil that Congress

expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dep't of Envtl. Prot. v. U.S. E.P.A.*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same); *see also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)). Second, HHS's purportedly good cause (JA151) fails because HHS vastly understates the rule's impact on physicians and patients due to HHS's misunderstanding §1395a(b), as outlined in Section III.A, *supra.* Finally, the challenged aspects of the IFC and CR6417/6421 are not the type of "exigent circumstances" that fit within the "narrow 'good cause' exception of section 553(b)(B)," such as "emergency situations" or instances where "the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare." *Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006). In short, the good-cause exception does not apply.

E. APA's "Housekeeping" Exception Does Not Apply

Similarly, HHS cannot resort to the APA exception for "rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(A). When (as here) the agency action determines the availability of a benefit, that exception – which is merely a "housekeeping" measure, *Chrysler Corp.*, 441 U.S. at 310 – does not

apply. *AMC*, 995 F.2d at 1112; *Chamber of Commerce of U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (exception does not cover rules that alter rights or interests). Moreover, the exception "must be narrowly construed," *U.S. v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989), and its "distinctive purpose ... is to ensure that agencies retain latitude in organizing their *internal* operations." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (emphasis added, interior quotations omitted). Indeed, "regardless whether [a rule presents] a new substantive burden," a "change [that] substantively affects the public to a [sufficient] degree" will "implicate the policy interests animating notice-and-comment rulemaking." *Electronic Privacy Info. Ctr v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5-6 (D.C. Cir. 2011). Here again, HHS's misunderstanding of §1395a(b), *see* Section III.A, *supra*, explains the misplaced reliance on this exception. Far from a mere internal procedure, the changes proposed here would impact the rights and privileges of countless physicians and patients.

F. PECOS Changes Would Be *Ultra Vires* without PPACA

The PECOS merits question hinges on PPACA's validity because – without PPACA §§6402, 6405(c) – HHS would lack the authority to require referrers to register with HHS. Thus, if Physicians succeed in invaliding PPACA in its entirety, they will at the same time invalidate the PECOS changes substantively because HHS will no longer have authority for the changes.

Specifically, PPACA §6405(c) gave HHS discretionary authority over various services ordered, prescribed, or referred under Medicare. If this Court invalidates PPACA in its entirety, HHS would lack substantive authority for the relevant actions that PPACA authorized. Accordingly, Section II.C, *supra*, argues that PPACA is facially invalid as a tax. Significantly, even if PPACA survives (and HHS thus retains whatever substantive authority PPACA provides), HHS still must comply with the APA's procedural requirements.

IV. THE POMS CHANGES ARE UNLAWFUL

The District Court made three primary errors on Count I: (1) Physicians have standing to challenge facility-based Medicare provisions because the AAPS membership includes eligible *facilities*, not merely competing *physicians*, Smith Decl. ¶¶3-8; Section I.A.1.b, *supra;* (2) the Administration's jurisdictional §405 argument requires an answer before reaching the merits; and (3) the POMS clearly required a rulemaking, which *Hall* did not resolve. Only the second and third issues require elaboration.

A. <u>This Court Has Statutory Subject-Jurisdiction for POMS Issues</u>

The Administration argued that the channeling provisions of 42 U.S.C. §405(g)-(h) deny jurisdiction over claims related to Social Security and Medicare. By their terms, those sections deny federal district courts jurisdiction only under 28 U.S.C. §1331 and §1346 for claims related to Social Security and certain

provisions of Medicare. 42 U.S.C. §§405(g)-(h), 1395ii. Physicians offer two responses to these exhaustion barriers: (1) Physicians do not seek resort to §1331 or §1346, and (2) Physicians have no alternate remedy to this action.

First, unlike the plaintiffs in the §405 cases cited by the Administration, Physicians here resort to equity jurisdiction that has been an alternative to §1331 since 1801. Because they did not consider the issue, these other cases did not rule out resorting alternate forms of jurisdiction. *Cooper Indus.,* 543 U.S. at 170; *Waters,* 511 U.S. at 678 ("cases cannot be read as foreclosing an argument that they never dealt with"). Indeed,"[t]he Supreme Court has four times explicitly reserved judgment on th[e] question" of whether 28 U.S.C. §1361 provides a jurisdictional alternative to §1331, *Ganem,* 746 F.2d at 850, and this Circuit has found this equity jurisdiction an available alternative to §1331. *Id.* Accordingly, Physicians respectfully submit that 42 U.S.C. §§405(g)-(h), 1395ii are simply inapposite to the District Court's alternate equity jurisdiction.

Second, Physicians allege that the challenged actions put their members on an unlawfully unequal footing vis-à-vis PPACA-favored competitors. Smith Decl. ¶¶7-8, 10; Compl. ¶20. For that reason, Physicians will never get the customers they seek, so they cannot avail themselves of the indirect path through Medicare's channeling provisions envisioned by *Am. Chiropractic Ass'n v. Leavitt,* 431 F.3d 812, 816-18 (D.C. Cir. 2005). Under *Shalala v. Illinois Council on Long Term*

Care, 529 U.S. 1, 19 (2000), Physicians can challenge these Medicare policies because the alternative is "no review at all."

Where it applies, prudential exhaustion serves three functions: (1) allowing agencies the opportunity to correct their errors, (2) affording parties and courts the benefits of the agency's expertise, and (3) compiling an administrative record adequate for judicial review. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Physicians respectfully submit that (1) far from conceding possible error, the Administration opposes Physicians' position on the merits, making exhaustion futile, *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (quoting *Houghton v. Shafer*, 392 U.S. 639, 640 (1968)); (2) the Administration has no expertise on the scope of constitutional limits over the reach of Spending-Clause legislation like Medicare and the need to engage in notice-and-comment rulemaking under the APA; and (3) the agency actions themselves constitute the entire administrative record, given that the Administration failed to convene the required rulemakings and deny that they needed to convene them. Under the circumstances, prudential exhaustion would serve no purpose.

B. This Court Should Reverse the POMS Merits

While implausible, the Administration's argument that the POMS merely interpret the statute would be more plausible if HHS issued a free-standing interpretation, rather than amending prior interpretations. Amending interpretations

requires a rulemaking, which means the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. §551(5); *see* section III.C, *supra.*

Significantly, the Social Security Act provides several mechanisms for terminating Social Security benefits, 42 U.S.C. §402(n), (t), (u)-(v), (x)-(y), none of which include (as the POMS do) the requirement *to repay* past benefits received. Significantly, the *AMC* test for substantive rules includes the inquiry "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *AMC,* 995 F.2d at 1112. Here, it seems clear that the POMS invented a duty where none existed in the statute or the prior POMS. As a matter of *procedural* law, that act of invention requires notice-and-comment rulemaking to sustain it. (As a matter of *substantive* law, the obligation to pay back past benefits appears wholly *ultra vires.*)

The Administration suggested below that Medicare Part A eligibility is "harmless," but as indicated in Section III.A, *supra,* it appears that Part A eligibility seriously erodes the freedom of choice available to the Medicare-eligible patient, given the Medicare strings attached to mere eligibility. Dr. Smith's non-Medicare facility in Oklahoma draws patients – actually, escapees – from Canada's national health service. Smith Decl. ¶5. If Part A eligibility indeed were harmless, Physicians and the Administration may have no dispute. *Moore v. Charlotte-*

Mecklenburg Bd. of Educ., 402 U.S. 47, 47-48 (1971). But Physicians do not understand the Administration to share their position – namely, that a patient's Medicare Part A eligibility does not prevent non-Medicare physicians or facilities seeing that patient, wholly outside of Medicare. In its misguided effort to help, the Administration appears to have a more harmful definition of "harmless" in mind.

V. THE ACCOUNTINGS FOR SOCIAL SECURITY AND MEDICARE ARE JUSTICIABLE

Physicians allege that the Administration – and particularly the trustees of the Medicare and Social Security trust funds – have misrepresented PPACA's economic impacts and affordability at the same time that they have violated their fiduciary duties with respect to the Medicare (Count V) and Social Security (Count VI) trust funds. Compl. ¶¶106-117. Although the District Court dismissed these as generalized grievances insufficient to support standing, JA152, Physicians have standing for three reasons: (1) Physicians' members obviously have a financial interest in the solvency of the programs that provide benefits to them. *See* Section I.A.1.c, *supra;* (2) Plaintiffs' physician members have an interest in the solvency of Medicare on behalf of Medicare-eligible patients, *e.g.*, Hammons Decl. ¶5-7, even if those physicians do not themselves use Medicare; and (3) the fact that grievances fall on the public widely does not deny standing to the entire public. *Akins*, 524 U.S. at 23. Dismissal of the accounting Counts must be reversed.

VI. THIS ACTION SHOULD BE REMANDED TO JUDGE COLLYER

When they filed their complaint, Physicians designated this case as related to *Hall* because the two cases "share common issues of fact" and "grow out of the same event or transaction" under LCvR 40.5(a)(3)(ii)-(iii). The Administration disputed the only second criterion, arguing that (1) administrative-record cases and procedural claims are purely legal, and (2) the phrase "issue of fact" means "a point supported by one party's evidence and controverted by another's." JA24-31. Without opinion, the case was transferred from Judge Collyer to Judge Leon, who later transferred the case to Judge Jackson.

This case relates to *Hall* for two reasons and should not have been transferred to Judge Leon for later transfer to Judge Jackson:

- First, the cases are clearly related under LCvR 40.5(a)(3)(ii)-(iii); indeed, the Administration waived opposition the third criterion by not even disputing it. *Stephenson v. Cox*, 223 F. Supp. 2d 119, 121 (D.D.C. 2002); *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997).
- Second, the District Court's preference for random assignment lives in nonbinding District Court decisions that cannot amend the unambiguous rules: "Federal law … requires a district court to follow certain procedures to adopt or amend a local rule." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (interior citations and quotations omitted).

If there is a remand, this Court should reverse the case-transfer orders and remand to Judge Collyer. 28 U.S.C. §2106. The District Court remains free to change its rules, but it cannot change them *sub silentio* or by interpretation.

A. Nothing Requires or Commends Random Assignment

When a case qualifies as "related" under Rule 40.5, the random-assignment provisions simply do not apply: "*[e]xcept as otherwise provided by these Rules*, civil … cases shall be assigned to judges of this court selected at random." LCvR 40.3(a) (emphasis added). Accordingly, random assignment is irrelevant to cases that meet Rule 40.5's criteria. There is no free-floating, due-process preference for random assignment. *Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004); *U.S. v. Simmons*, 476 F.2d 33, 35 (9th Cir. 1973).[15] If the District Court prefers random assignment in cases like this, *Hollingsworth* requires amending the rules.

B. This Case and *Hall* Share Common Issues of Fact

The Administration's three arguments against factual relatedness lack merit. As interesting as that may be, the Court need not resolve it because this action and *Hall* grew out of the same event or transaction. *See* Section VI.C, *infra.*

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[15] In any event, the Fifth Amendment does not protect federal defendants. *U.S. v. United Mine Workers of America*, 330 U.S. 258, 275 (1947) ("common usage [of] th[e] term ["person"] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so"); *cf.* FED. R. CIV. P. 25(d) (allowing automatic substitution of official-capacity officer defendants). There is no "person" on the other side.

First, an administrative record plainly contains facts. *DSE, Inc. v. U.S.*, 169 F.3d 21, 30 (D.C. Cir 1999) (discussing "material facts contained in the administrative record"); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("these facts are usually established by the administrative record"); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989).

Second, the purely legal nature of applying law to uncontested record facts has nothing to do with whether the record contains facts. *Better Government Ass'n v. Department of State*, 780 F.2d 86, 92 (D.C. Cir 1986) (uncontested record facts "present[] purely legal questions, the understanding of which neither requires nor is facilitated by *further* factual development") (emphasis added).

Third, "issues of fact" does not mean "*disputed* factual issues;" it means "factual issues" or just "facts." The "full name is merely … a form of redundancy in which lawyers delight, as in 'cease and desist' and 'free and clear'" that "adds nothing" to the phrase's meaning. *In re Ocwen Loan Serv., LLC Mortg. Servicing Litig.*, 491 F.3d 638, 646 (7th Cir. 2007). Any contrary reading would create redundancy whenever courts or rules address "disputed issues of fact." *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997); *Irizarry v. U.S.*, 553 U.S. 708, 711 (2008); 6A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE Civ. §1529 (2d ed. 1990 & Supp. 2013); LCrR 32.2(d).

C. This Case and *Hall* Grow Out of the Same Event or Transaction

This action and *Hall* grow out of the Administration's issuance of the POMS without following the APA. Moreover, the POMS-based claims and *Hall* do not merely grow out of the same event or transaction; they address the *same subject matter*. By meeting Rule 40.5(a)(4)'s more rigorous subject-matter criterion, this case and *Hall* are even more related than Rule 40.5(a)(3) requires. *Collins*, 126 F.R.D. at 8. That undeniable relationship explains the Administration's ignoring this dispositive issue.

Had Physicians challenged only the POMS, the Administration could not credibly have challenged relatedness with *Hall*. Adding the PPACA claims does not change the analysis because (1) the addition of PPACA claims is not germane to Rule 40.5, and (2) Physicians did not need to *consolidate* the PPACA and POMS claims, which Physicians permissibly filed together. FED. R. CIV. P. 18(a).

CONCLUSION

This Court should reverse the dismissal of each count and remand to Judge Collyer for further proceedings.

Dated: August 30, 2013

Respectfully submitted,

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BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the attached Appellants' Opening Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 13,990 words, including footnotes, but excluding this Brief Form Certificate, the Statement with Respect to Parties and *Amici,* the Table of Authorities, the Table of Contents, the Glossary, the Addendum, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

Dated: August 30, 2013

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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

ADDENDUM TO
APPELLANTS' OPENING BRIEF

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U.S. CONST. art. 1, §7, cl. 1

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

U.S. CONST. art. I, §8

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
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> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, §9

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.
>
> * * *
>
> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

> No Tax or Duty shall be laid on Articles exported from any State.
>
> * * *

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XVI

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

U.S.C. §553(b)-(c)

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

26 U.S.C. §4980H

(a) Large employers not offering health coverage. If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2) [26 USCS § 5000A(f)(2)]) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act [42 USCS § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or

cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.

(1) In general. If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2) [26 USCS § 5000A(f)(2)]) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act [42 USCS § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $ 3,000.

(2) Overall limitation. The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(c) Definitions and special rules. For purposes of this section—

(1) Applicable payment amount. The term "applicable payment amount" means, with respect to any month, 1/12 of $ 2,000.

(2) Applicable large employer.

(A) In general. The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.

(i) In general. An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers. The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size. For purposes of this paragraph—

(i) Application of aggregation rule for employers. All persons treated as a single employer

under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 [26 USCS § 414] shall be treated as 1 employer.

(ii) Employers not in existence in preceding year. In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors. Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.

(i) In general. The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation. In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees. Solely for purposes of determining whether an employer is an applicable large employer under this

paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction. The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B [26 USCS § 36B],

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act [42 USCS § 18071], and

(C) any advance payment of such credit or reduction under section 1412 of such Act [42 USCS § 18082].

(4) Full-time employee.

(A) In general. The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service. The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.

(A) In general. In the case of any calendar year after 2014, each of the dollar amounts in subsection

(b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act [42 USCS § 18022(c)(4)]) for the calendar year.

(B) Rounding. If the amount of any increase under subparagraph (A) is not a multiple of $ 10, such increase shall be rounded to the next lowest multiple of $ 10.

(6) Other definitions. Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible. For denial of deduction for the tax imposed by this section, see section 275(a)(6) [26 USCS § 275(a)(6)].

(d) Administration and procedure.

(1) In general. Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 [26 USCS §§ 6671 et seq.].

(2) Time for payment. The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc. The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing

reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 U.S.C. §5000A

(a) Requirement to maintain minimum essential coverage. An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.

(1) In general. If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return. Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty. If an individual with respect to whom a penalty is imposed by this section for any month--

(A) is a dependent (as defined in section 152 [26 USCS § 152]) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.

(1) In general. The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of--

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts. For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount. An amount equal to the lesser of--

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income. An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section

6012(a)(1) [26 USCS § 6012(a)(1)] with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount. For purposes of paragraph (1)--

(A) In general. Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $ 695.

(B) Phase in. The applicable dollar amount is $ 95 for 2014 and $ 325 for 2015.

(C) Special rule for individuals under age 18. If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount. In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $ 695, increased by an amount equal to--

(i) $ 695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting 'calendar year 2015' for 'calendar year 1992' in subparagraph (B) thereof. If the amount of any increase under clause (i) is not a multiple

of $50, such increase shall be rounded to the next lowest multiple of $ 50.

(4) Terms relating to income and families. For purposes of this section--

(A) Family size. The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 [26 USCS § 151] (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income. The term "household income' means, with respect to any taxpayer for any taxable year, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 [26 USCS § 1] for the taxable year.

(C) Modified adjusted gross income. The term 'modified adjusted gross income' means adjusted gross income increased by--

(i) any amount excluded from gross income under section 911 [26 USCS § 911], and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(d) Applicable individual. For purposes of this section--

(1) In general. The term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.

(A) Religious conscience exemption. Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act [42 USCS § 18031(d)(4)(H)] which certifies that such individual is--

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1) [26 USCS § 1402(g)(1)], and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.

(i) In general. Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry. The term 'health care sharing ministry' means an organization--

(I) which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and is exempt from taxation under section 501(a) [26 USCS § 501(a)],

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present. Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals. Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions. No penalty shall be imposed under subsection (a) with respect to--

(1) Individuals who cannot afford coverage.

(A) In general. Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 USCS § 18082(b)(1)(B)]. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any

portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution. For purposes of this paragraph, the term 'required contribution' means--

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B [26 USCS § 36B] for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees. For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing. In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold. Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act [42 USCS § 18082(b)(1)(B)] is less than the amount of gross income specified in section 6012(a)(1) [26 USCS § 6012(a)(1)] with respect to the taxpayer.

(3) Members of Indian tribes. Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6) [26 USCS § 45A(c)(6)]).

(4) Months during short coverage gaps.

(A) In general. Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules. For purposes of applying this paragraph--

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods. The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships. Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) [26 USCS § 1311(d)(4)(H)] to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage. For purposes of this section--

(1) In general. The term 'minimum essential coverage' means any of the following:

(A) Government sponsored programs. Coverage under--

(i) the Medicare program under part A of title XVIII of the Social Security Act [26 USCS §§ 1395c et seq.],

(ii) the Medicaid program under title XIX of the Social Security Act [26 USCS §§ 1396 et seq.],

(iii) the CHIP program under title XXI of the Social Security Act [26 USCS §§ 1397aa et seq.],

(iv) medical coverage under chapter 55 of title 10, United States Code [10 USCS §§ 1071 et seq.], including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code [38 USCS §§ 1701 et seq. or 1801 et seq.], as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan. Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market. Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan. Coverage under a grandfathered health plan.

(E) Other coverage. Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan. The term 'eligible employer-sponsored plan' means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is--

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act [42 USCS § 300gg-91(d)(8)]), or

(B) any other plan or coverage offered in the small or large group market within a State. Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage. The term 'minimum essential coverage' shall not include health insurance coverage which consists of coverage of excepted benefits--

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act [42 USCS § 300gg-91]; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories. Any applicable individual shall be treated as having minimum essential coverage for any month--

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) [26 USCS § 911(d)(1)] which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a) [26 USCS § 937(a)]) for such month.

(5) Insurance-related terms. Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.

(1) In general. The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 [26 USCS §§ 6671 et seq.].

(2) Special rules. Notwithstanding any other provision of law--

(A) Waiver of criminal penalties. In the case of any failure by a taxpayer to timely pay any penalty

imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies. The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

42 U.S.C. §405(g)-(h)

(g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia [United States District Court for the District of Columbia]. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive,

and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision. The findings and decisions of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28, United States Code [28 USCS § 1331 or 1346], to recover on any claim arising under this title [42 USCS §§ 401 et seq.]

42 U.S.C. §1395a(a)-(b)

(a) Basic freedom of choice. Any individual entitled to insurance benefits under this title [42 USCS §§ 1395 et seq.] may obtain health services from any institution, agency, or person qualified to participate under this title [42 USCS §§ 1395 et seq.] if such institution, agency, or person undertakes to provide him such services.

(b) Use of private contracts by medicare beneficiaries.

(1) In general. Subject to the provisions of this subsection, nothing in this title [42 USCS §§ 1395 et seq.] shall prohibit a physician or practitioner from entering into a private contract with a medicare beneficiary for any item or service—

(A) for which no claim for payment is to be submitted under this title [42 USCS §§ 1395 et seq.] and

(B) for which the physician or practitioner receives—

(i) no reimbursement under this title [42 USCS §§ 1395 et seq.] directly or on a capitated basis, and

(ii) receives no amount for such item or service from an organization which receives

reimbursement for such item or service under this title [42 USCS §§ 1395 et seq.] directly or on a capitated basis.

42 U.S.C. §1395ii

The provisions of sections 206 and 216(j), and of subsections (a), (d), (e), (h), (i), (j), (k), and (l) of section 205 [42 USCS §§ 406, 416(j), and 405(a), (d), (e), (h), (i), (j), (k), and (l)], shall also apply with respect to this title [42 USCS §§ 1395 et seq.] to the same extent as they are applicable with respect to title II [42 USCS §§ 401 et seq.], except that, in applying such provisions with respect to this title [42 USCS §§ 1395 et seq.], any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

D.C. Code §11-501

In addition to its jurisdiction as a United States district court and any other jurisdiction conferred on it by law, the United States District Court for the District of Columbia has jurisdiction of the following:

* * *

OKLA. CONST. art. II, §37(B)

To preserve the freedom of Oklahomans to provide for their health care:

1. A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system; and.

2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services. A health care provider may accept direct payment for lawful health care services and shall not be

required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.

LCvR 40.3

(a) RANDOM ASSIGNMENT.

Except as otherwise provided by these Rules, civil, criminal and miscellaneous cases shall be assigned to judges of this court selected at random in the following manner:

* * *

LCvR 45.5

(a) DEFINITION.

A related case for the purpose of this Rule means as follows:

* * *

(3) Civil, including miscellaneous, cases are deemed related when the earliest is still pending on the merits in the District Court and they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction or (iv) involve the validity or infringement of the same patent. Notwithstanding the foregoing, a case filed by a pro se litigant with a prior case pending shall be deemed related and assigned to the judge having the earliest case. However, if a judge in the interest of judicial economy, consolidates a significant number of similar pro se prisoner complaints, or has a single case with a significant number of pro se prisoner plaintiffs, and any of those prisoners later files a new complaint which is unrelated to the subject matter of the consolidated cases or the multiple plaintiffs' case, the judge who receives the new case as related may, if he or she chooses, refer the

new case to the Calendar and Case Management Committee for random assignment.

(4) Additionally, cases whether criminal or civil, including miscellaneous, shall be deemed related where a case is dismissed, with prejudice or without, and a second case is filed involving the same parties and relating to the same subject matter.

(b) NOTIFICATION OF RELATED CASES.

The parties shall notify the Clerk of the existence of related cases as follows:

* * *

(2) At the time of filing any civil, including miscellaneous, action, the plaintiff or his attorney shall indicate, on a form to be provided by the Clerk, the name, docket number and relationship of any related case pending in this court or in any other United States Court. The plaintiff shall serve this form on the defendant with the complaint. Any objection by the defendant to the related case designation shall be filed and served with the defendant's first responsive pleading or motion.

* * *

(c) ASSIGNMENT OF RELATED CASES.

Related cases noted at or after the time of filing shall be assigned in the following manner:

(1) Where the existence of a related case in this court is noted at the time the indictment is returned or the complaint is filed, the Clerk shall assign the new case to the judge to whom the oldest related case is assigned. If a judge who is assigned a case under this procedure determines that the cases in question are not related, the judge may transfer the new case to the Calendar and Case Management Committee. If the Calendar and Case Management Committee finds that good cause exists for

the transfer, it shall cause the case to be reassigned at random. If the Calendar and Case Management Committee finds that good cause for the transfer does not exist, it may return the case to the transferring judge.

(2) Where the existence of related cases in this court is revealed after the cases are assigned, the judge having the later-numbered case may transfer that case to the Calendar and Case Management Committee for reassignment to the judge having the earlier case. If the Calendar and Case Management Committee finds that good cause exists for the transfer, it shall assign the case to the judge having the earlier case. If the Calendar and Case Management Committee finds that good cause for the transfer does not exist, it may return the case to the transferring judge.

(3) Where a party objects to a designation that cases are related pursuant to subparagraphs (b)(1) or (b)(2) of this Rule, the matter shall be determined by the judge to whom the case is assigned.

111TH CONGRESS
1ST SESSION

H. R. 3590

AN ACT

To amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Service Members Home Ownership Tax Act of 2009".

SEC. 2. WAIVER OF RECAPTURE OF FIRST-TIME HOMEBUYER CREDIT FOR INDIVIDUALS ON QUALIFIED OFFICIAL EXTENDED DUTY.

(a) IN GENERAL.—Paragraph (4) of section 36(f) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:

"(E) SPECIAL RULE FOR MEMBERS OF THE ARMED FORCES, ETC.—

"(i) IN GENERAL.—In the case of the disposition of a principal residence by an individual (or a cessation referred to in paragraph (2)) after December 31, 2008, in connection with Government orders received by such individual, or such individual's spouse, for qualified official extended duty service—

"(I) paragraph (2) and subsection (d)(2) shall not apply to such disposition (or cessation), and

"(II) if such residence was acquired before January 1, 2009, paragraph (1) shall not apply to the taxable year in which such disposition (or

cessation) occurs or any subsequent taxable year.

"(ii) QUALIFIED OFFICIAL EXTENDED DUTY SERVICE.—For purposes of this section, the term 'qualified official extended duty service' means service on qualified official extended duty as—

"(I) a member of the uniformed services,

"(II) a member of the Foreign Service of the United States, or

"(III) as an employee of the intelligence community.

"(iii) DEFINITIONS.—Any term used in this subparagraph which is also used in paragraph (9) of section 121(d) shall have the same meaning as when used in such paragraph.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to dispositions and cessations after December 31, 2008.

SEC. 3. EXTENSION OF FIRST-TIME HOMEBUYER CREDIT FOR INDIVIDUALS ON QUALIFIED OFFICIAL EXTENDED DUTY OUTSIDE THE UNITED STATES.

(a) IN GENERAL.—Subsection (h) of section 36 of the Internal Revenue Code of 1986 is amended—

(1) by striking "This section" and inserting the following:

"(1) IN GENERAL.—This section", and

(2) by adding at the end the following:

"(2) SPECIAL RULES FOR INDIVIDUALS ON QUALIFIED OFFICIAL EXTENDED DUTY OUTSIDE THE UNITED STATES.—In the case of any individual who serves on qualified official extended duty service outside the United States for at least 90 days in calendar year 2009 and, if married, such individual's spouse—

"(A) paragraph (1) shall be applied by substituting 'December 1, 2010' for 'December 1, 2009',

"(B) subsection (f)(4)(D) shall be applied by substituting 'December 1, 2010' for 'December 1, 2009', and

"(C) in lieu of subsection (g), in the case of a purchase of a principal residence after December 31, 2009, and before July 1, 2010, the

taxpayer may elect to treat such purchase as made on December 31, 2009, for purposes of this section (other than subsections (e) and (f)(4)(D)).".

(b) COORDINATION WITH FIRST-TIME HOMEBUYER CREDIT FOR DISTRICT OF COLUMBIA.—Paragraph (4) of section 1400C(e) of such Code is amended by inserting "(December 1, 2010, in the case of a purchase subject to section 36(h)(2))" after "December 1, 2009".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to residences purchased after November 30, 2009.

SEC. 4. EXCLUSION FROM GROSS INCOME OF QUALIFIED MILITARY BASE REALIGNMENT AND CLOSURE FRINGE.

(a) IN GENERAL.—Subsection (n) of section 132 of the Internal Revenue Code of 1986 is amended—

(1) in subparagraph (1) by striking "this subsection) to offset the adverse effects on housing values as a result of a military base realignment or closure" and inserting "the American Recovery and Reinvestment Tax Act of 2009)", and

(2) in subparagraph (2) by striking "clause (1) of".

(b) EFFECTIVE DATE.—The amendments made by this act shall apply to payments made after February 17, 2009.

SEC. 5. INCREASE IN PENALTY FOR FAILURE TO FILE A PARTNERSHIP OR S CORPORATION RETURN.

(a) IN GENERAL.—Sections 6698(b)(1) and 6699(b)(1) of the Internal Revenue Code of 1986 are each amended by striking "$89" and inserting "$110".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to returns for taxable years beginning after December 31, 2009.

SEC. 6. TIME FOR PAYMENT OF CORPORATE ESTIMATED TAXES.

The percentage under paragraph (1) of section 202(b) of the Corporate Estimated Tax Shift Act of 2009 in effect on the date of the enactment of this Act is increased by 0.5 percentage points.

Passed the House of Representatives October 8, 2009.

Attest:

Clerk.

42D CONGRESS, 2d Session. SENATE. REPORT No. 146.

IN THE SENATE OF THE UNITED STATES.

APRIL 24, 1872.—Ordered to be printed.

Mr. CARPENTER, from the Committee on Privileges and Elections, submitted the following

REPORT:

The Committee on Privileges and Elections, to whom were referred the resolutions of the House of Representatives of April 2, 1872, as follows:

Resolved, That the substitution by the Senate, under the form of an amendment, for the bill of the House (H. R. 1537) entitled "An act to repeal existing duties on tea and coffee," of a bill entitled "An act to reduce existing taxes," containing a general revision, reduction, and repeal of laws imposing import duties and internal taxes, is in conflict with the true intent and purpose of that clause of the Constitution which requires that all bills for raising revenue shall originate in the House of Representatives; and that, therefore, said substitute for House bill No. 1537 do lie upon the table.

And be it further resolved, That the Clerk of the House be, and he is hereby, directed to notify the Senate of the passage of the foregoing resolution.

respectfully report:

That they have maturely considered the unhappy difference between the Senate and House of Representatives, with a sincere desire to arrive at a conclusion which shall maintain the constitutional jurisdiction of the Senate and fully respect the exclusive prerogative of the House of Representatives to originate bills for raising revenue.

To consider this matter properly, it becomes necessary to advert to the attitude of the two Houses in relation to it.

At the last session of Congress the Senate passed a bill to repeal the tax upon incomes. The House of Representatives laid the bill upon the table, and sent a resolution to the Senate declaring that the Senate had no constitutional power to originate the bill, and that its attempt to do so was in violation of the first clause of the seventh section of the first article of the Constitution, which is as follows:

> All bills for *raising revenue* shall originate in the House of Representatives, but the Senate may propose or concur with amendments *as on other bills.*

This was a distinct declaration on the part of the House of Representatives that a bill to abolish a tax or duty was a bill for raising revenue within the meaning of this clause of the Constitution.

During the present session the House of Representatives passed, and sent to the Senate for its concurrence, a bill to abolish all duties upon tea and coffee. This bill was a bill for raising revenue, if the House of Representatives was right in deciding that the bill passed by the Senate to abolish the tax upon incomes was a bill for raising revenue. The Senate so treated this bill to abolish all duties upon tea and coffee, and concurred, with amendments, adding some articles to the free list, reducing the duties upon other articles, and abolishing other taxes altogether. The bill thus passed with amendments was returned to the House of Representatives; whereupon the House laid it upon the table,

and sent to the Senate the resolutions which have been referred to the committee, and form the subject of this report.

Assuming that a bill to abolish a certain duty or tax is a bill for raising revenue, within the meaning of the Constitution, as the House of Representatives determined in regard to the bill abolishing the tax upon incomes, the power of the Senate in regard to it is regulated by the provision of the Constitution—

> The Senate may propose or concur with amendments *as on other bills*;

and the right of the Senate to put upon it the amendments with which it was returned to the House is, in the opinion of your committee, clearly conferred by this provision.

Without the provision of the Constitution under consideration, it will be conceded that such a bill might have originated in either House of Congress, and originating, as in this case, in the House of Representatives, the Senate might amend it in any particular or to any extent. But this provision of the Constitution is a limitation upon the power of the Senate which must be obeyed by the Senate to its full extent, but should not be extended beyond the fair scope and plain import of the phraseology employed. What, then, is the restriction laid upon the Senate? Simply and only this: The Senate shall not "*originate*" a bill for raising revenue, that being the exclusive prerogative of the House of Representatives. But, excepting only the origination of the bill, the Senate possesses the same power in regard to bills for raising revenue as in regard to any other bills; or, to quote the language of the Constitution, it may amend a bill for raising revenue as it may amend "*any other bill.*"

To understand the full import of this provision of the Constitution, empowering the Senate "to propose or concur with amendments as on other bills," it is necessary to consider the parliamentary law of England, which was perfectly understood by the authors of our Constitution, and which must be presumed to have been in mind when they framed this provision.

By the parliamentary law of England, at the time our Constitution was adopted, it was well settled that the House of Lords could not change a bill for raising revenue. The House of Lords could propose only formal amendments. They might change expressions, but not substance. Anciently the House of Lords exercised the power of amending supply bills, "but in 1671 the Commons advanced their claim by resolving, *nem. con.*, 'That in all aids given to the King by the Commons, the rate or tax ought not to be altered;' and in 1678 their claim was urged so far as to exclude the Lords from all power of amending bills of supply." On the 3d of July in that year they resolved—

> That all aids and supplies, and aids to His Majesty in Parliament, are the *sole* gift of the Commons; and all bills for the granting of any such aids and supplies ought to *begin* with the Commons; and that it is the undoubted and *sole* right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, limitations, and qualifications of such grants; *which ought not to be changed or altered by the House of Lords.*

This resolution settled the principle upon which the English Parliament were proceeding when our Constitution was adopted; and it was well understood that the Lords could make only verbal amendments; "and even in regard to these, when the Commons had accepted them, they had made special entries in their journal, recording the character and object of the amendments, and their reasons for adhering to them."—*May's Parliamentary Practice, chap.* 21.

But the practice in Parliament went even beyond this.

> In bills not confined to matters of aid, or taxation, but in which pecuniary burdens

are imposed upon the people, the Lords may make any amendments, provided they do not alter the intention of the Commons with regard to the amount of the rate or charge, whether by *increase* or *reduction;* its duration, its mode of assessment, levy, collection, appropriation, or management; or the persons who shall pay, receive, manage, or control it; or the limits within which it is proposed to be levied. As illustrative of the strictness of this exclusion, it may be mentioned that the Lords have not been permitted to make provision for the payment of salaries or compensation to officers of the court of chancery, out of the suitors' fund; nor to amend a clause prescribing the order in which charges on the revenues of a colony should be paid. But all bills of this class must originate in the Commons; as that house will not agree to any provisions which impose a charge of any description upon the people, if sent down from the Lords, but will order the bills containing them to be laid aside.—*Ibid.*

With this strictness of parliamentary law, which denied to the Lords the right to propose other than mere verbal amendments, "not changing the sense," our fathers provided in the Constitution that the Senate might amend bills for raising revenue, not only as to matters of form, but that the Senate might amend the same *as they might amend other bills.* In other words, when a bill for raising revenue has originated in the House, no limitation is placed by the Constitution upon the power of the Senate to amend it on account of its being a bill for raising revenue. The exclusive prerogative of the House of Representatives in relation to such bills is simply to *originate* them.

Your committee are at a loss to know how this matter can be made plainer than the express words of the Constitution make it. The provision in relation to such bills that "the Senate may propose or concur with amendments as on other bills," declares this power of the Senate as clearly as language can declare it. The Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose; and the House of Representatives cannot regulate or limit a power which the Constitution has, in express words, so broadly conferred upon the Senate.

What amendments, then, may be proposed by either House to bills received from the other, in the usual course of legislation?

The second clause of section five of Article I of the Constitution provides:

Each House may determine the rules of its proceedings.

This gives the Senate full power to establish such rules, including a regulation of the subject of amendments to bills, as it may deem proper; and so far as the other House is concerned, it is the province of either House to adopt rules authorizing an amendment of a bill in any respect or particular, except that the Senate could not, by amendment to a bill not raising revenue, add provisions which would raise revenue, because this would be a violation of the provision requiring bills for raising revenue to originate in the House of Representatives.

This latitude of amendment is in practice in all the State legislatures, has always been practiced in both Houses of Congress, and, with the exception of what are called "money bills," has always been practiced in Parliament.

Cushing's Parliamentary Law, section 1, chapter 5, part 6, speaking of amendments, says:

According to the etymology of the word, it might be supposed that nothing could be considered as an amendment which did not relate to and purport to improve the original proposition. But this would be far from conveying an adequate idea of what is meant by the term amendment. A proposition may be amended, in parliamentary phraseology, not only by an alteration which comes out and effects the purpose of the mover, but also by one which entirely destroys that purpose, or which even makes the proposition express a sense the very reverse of that intended by the mover; and, in like manner, a motion which proposes *one kind of proceeding* may be turned into a motion for another of a *wholly different kind*, by means of an amendment; so that, in point of

fact, an amendment is equally effectual, and is often used to defeat a proposition, as well as to promote the object which the mover of that proposition has in view.

Considering this general principle authorizing amendments, considering also the rigid strictness of parliamentary law in relation to amendments which, in England, could be proposed, to money bills by the House of Lords, there is no escape from the conclusion that the framers of the Constitution intended a rule different from the English rule in relation to amendment of bills for raising revenue, when they provided that "the Senate may propose, or concur with, amendments as on other bills." What other meaning can be assigned to this provision, in light of the then existing and well-known parliamentary law of England, than that it was intended to give the Senate a power to amend such bills not possessed by the House of Lords? The Lords could not amend revenue bills as they could other bills, but were confined to mere *formal amendments, not changing the sense;* but the Constitution prescribes a different rule, and subjects such bills to the same latitude of amendment to which other bills, in the ordinary course of legislation, are subjected; that is, to amendment as the Senate may deem expedient.

In opposition to this conclusion it has been urged that to permit the Senate to ingraft, by way of amendment, a general tariff bill upon a bill of the House laying a duty on pea-nuts, is entirely to disregard the spirit of the clause of the Constitution before quoted. In reply it may be said, however, that any other construction of this constitutional provision would deny to the Senate the power to amend a House bill laying a duty upon pea-nuts so as to lay a duty upon English walnuts; that is, would deny to the Senate the power of making to the bill anything more than mere formal amendments. What, then, was the object intended to be secured by this provision of the Constitution?

There is reason to believe that the authors of the Constitution anticipated a continuous session of the Senate. Colonel Mason, speaking of this provision of the Constitution, in the Virginia convention, said:

> If the Senate can originate, they will, in the recess of the legislative sessions, hatch their mischievous projects for their own purposes, and have their money bills cut and dried, (to use a common phrase,) for the meeting of the House of Representatives.—*Elliot's Debates*, vol. 5, p. 415.

That the continuous session of the Senate was anticipated may also be inferred from the absence of any provision of the Constitution to remove officers of the United States in the recess of the Senate. As it was expected that the Senate would generally be in session, removals could easily be effected by nomination of a sussessor. Consequently, the only provision in the Constitution relating to the exercise of the appointing power in the recess of the Senate is not that the President may remove from office during the recess, but that he may "fill up all vacancies that may happen during the recess of the Senate;" this being regarded as sufficient provision upon this subject for an occasional brief recess of the Senate.

The object, then, of this provision was to prevent the Senate from maturing plans for raising revenue in the recess of the legislative sessions, and to commit the power to originate such measures to the immediate representatives of the people. Unless the House of Representatives move in the matter of raising revenue the Senate is commanded to be silent on the subject. But when the House of Representatives, by sending us a bill for raising revenue, present the subject for our consideration, the power of the two Houses is commensurate. If the House propose to levy a tax upon tea, the Senate may amend the bill by adding coffee, or by striking out tea and substituting coffee, or any

other article or articles. In other words, a bill from the House is necessary to give the Senate any jurisdiction over the subject of raising revenue; but when such bill is received from the House, the Senate may amend it in any respect or to any extent; or, to quote the Constitution, to such a bill the Senate may "propose or concur with amendments, as on other bills."

But it is evident that the Senate cannot propose an amendment raising revenue to any bill coming from the House, except a bill for raising revenue. For instance, if the House should send us a bill granting lands in aid of a railroad company, the Senate could not put upon it an amendment for raising revenue, because in such case the bill, so far as it was a bill for raising revenue, would be originated in the Senate, which the Constitution forbids. This brings us to inquire whether the House bill, abolishing all duties upon tea and coffee, was a bill "*for raising revenue*" within the meaning of the Constitution.

In the British Parliament, as we have seen, the House of Lords is precluded from originating what are called money bills; and this is understood to include, not only bills for raising revenue, but all general appropriations supplying to the government the means of administration. The clause of the Constitution under consideration was carefully considered, and is expressed in plain and guarded language: "All bills *for raising* revenue shall originate in the House of Representatives." The whole subject having been fully considered, it must be assumed that when the provisions only forbade the Senate to originate bills for *raising* revenue, it was not intended to restrict the Senate in regard to appropriation bills, which are of a different character and have a different end in view. The language of the Constitution is not that all bills *affecting* revenue shall originate in the House, but that all bills "for *raising* revenue" shall so originate. What, then, is the meaning of the phrase, "all bills *for raising revenue?*" What is a bill *for raising revenue?*

The Constitution provides that Congress shall have power "*to raise* and support armies." In parliamentary language, it is common to say a committee *was raised* for a certain purpose. In these instances it is evident that "raising" is not used in the sense of *increasing*. Under the provision of the Constitution empowering Congress to raise armies, it may diminish as well as increase the Army. To raise an army is to establish or create an army; so a bill for raising revenue may be a bill to increase or diminish existing rates. Suppose the existing law lays a duty of 50 per cent. upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent., is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law; still, it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment, in the Senate, upon any House bill which did not provide for raising, that is collecting, revenue.

This bill did not provide that the duty on tea and coffee should be laid at a less rate than formerly, but it provided, simply, that hereafter no revenue whatever should be raised or collected upon tea and coffee. To say that a bill which provides that no revenue shall be raised is a bill "for raising revenue," is simply a contradiction of terms. Had the bill merely reduced the rates of duty upon these articles, or had it abolished the duty on these articles and laid a duty upon other articles, at a rate higher or lower than that provided by existing laws, it would have been a bill "for raising revenue," because revenue would be raised, or

collected, under the provisions of the bill. But this bill proposed no such thing. It did not provide for raising *any* revenue; and it is therefore incorrect to call it a bill "for raising revenue."

To say that a bill which does not provide for raising any revenue must originate in the House, because its operation may *affect* the revenue, is not only to say what the Constitution does not say, but is to strip the Senate of jurisdiction it is conceded to possess, and which it has exercised at every session of Congress since the Constitution was adopted. A bill creating an office and fixing the salary of the officer affects the Treasury to the extent of such salary, but is not a bill for raising revenue. A thousand illustrations will occur to every mind.

Two subjects were in the contemplation of the framers of the Constitution. One was how to raise revenue, and the other how to apply it to the uses of the Government. The power to do both was confided to Congress. The power to raise revenue was regulated, as between the two Houses, by the provision "all bills for raising revenue" shall originate in the House of Representatives. The power of applying the revenue to the uses of the Government is not regulated as between the two Houses, but is controlled only by the seventh clause of the ninth section of Article I of the Constitution, as follows:

> No money shall be drawn from the Treasury, but in consequence of appropriations *made by law*.

How the law making appropriations shall be passed, or in which House it shall originate, is not provided for by the Constitution.

The fact that the Constitution so carefully provides that "bills for raising revenue" shall originate in the House of Representatives, and made no such provision in regard to bills appropriating money, is conclusive that it was intended to restrict the Senate in one case and not in the other.

Your committee are therefore of opinion that the House bill under consideration was not a bill for raising revenue within the meaning of the Constitution; and, therefore, while the Senate might have amended it so as to abolish duties altogether upon other articles, the Senate had no right to ingraft upon it, as it did in substance, an amendment providing that revenue should be collected upon other articles, though at a less rate than previously fixed by law. That amendment would have become a provision in the act for raising revenue, because revenue at a certain rate would have been collected by the operation of the act.

It is due, however, to the Senate to say that its departure from the true principle in this case was owing to a desire to conform to the views of the House of Representatives, as expressed by the House, in relation to the Senate bill abolishing the tax upon incomes, and thus to preserve harmony between the two Houses. But since the House of Representatives, exalting its prerogative, asserts upon one occasion what it denies upon another, it has become necessary to review the question in the light of principle, and seek for a solution of the difficulty in conformity with the Constitution; to which, it is hoped, the House will assent, and to which it is the duty of the Senate to adhere whether the House shall assent or dissent.

Your committee recommend that the Senate adopt the following resolution:

Resolved, That the Secretary of the Senate be, and he hereby is, directed to deliver a copy of this report to the House of Representatives.

DISTRICT OF COLUMBIA CODE

ANNOTATED

1967 EDITION

CONTAINING THE LAWS, GENERAL AND PERMANENT IN THEIR NATURE, RELATING TO OR IN FORCE IN THE DISTRICT OF COLUMBIA (EXCEPT SUCH LAWS AS ARE OF APPLICATION IN THE DISTRICT OF COLUMBIA BY REASON OF BEING GENERAL AND PERMANENT LAWS OF THE UNITED STATES), IN FORCE ON JANUARY 9, 1967

NOTES TO DECISIONS THROUGH DECEMBER 1966

VOLUME ONE

TITLE 1—ADMINISTRATION
TO
TITLE 17—REVIEW

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1967

935; Mar. 3, 1901, ch. 854, § 121, 31 Stat. 1209; June 30, 1902, ch. 1329, 32 Stat. 525; Mar. 4, 1923, ch. 265, 42 Stat. 1488; Apr. 24, 1926, ch. 176, 44 Stat. 322; Aug. 7, 1946, ch. 792, 60 Stat. 889; Aug. 2, 1949, ch. 383, § 5, 63 Stat. 491).

Section consolidates part of section 19–403 of D.C. Code, 1961 ed., with sections 19–404a, 19–406, 19–407, 19–408, 19–410 and 19–411 thereof. For remainder of section 19–403, see section 11–506 herein.

Sections 19–410 and 19–411 of D.C. Code, 1961 ed., which were derived from the old Maryland statutes and the Act of Congress Apr. 2, 1792, ch. 16, § 9, 1 Stat. 248, cited above, provided:

Section 19–410:

"No person, being register of wills shall plead as an attorney at law in any court in the District of Columbia for any person or persons, on any pretence whatsoever; and no register of wills as aforesaid shall exact, extort, demand, take, accept, or receive, from any person whatsoever, any fee or fees, gratuity, gift, or reward, for giving his advice in any matter or thing that will be transacted in the courts of the District of Columbia, under the penalty of $80, current money for every such offense".

Section 19–411:

"The register of wills shall not demand, take, or receive, from any person whatever any fee, gratuity, gift or reward, for giving his advice in any matter or thing relative to his office, under the penalty of $133.33, for every offense.".

The restrictions imposed in the two sections quoted above are consolidated and preserved in subsec. (c) of this revised section but the penalties are omitted as inconsistent with each other, obsolete, or in any event unnecessary. The Register of Wills is now an officer of the District Court, and subject not only to its direction and control, but also to removal by the court, in its discretion, for misconduct or any other reason. See section 11–504 herein. See, also, section 401(2) of Title 18, United States Code, under which courts of the United States may punish such contempt of their authority as misbehavior of any of their officers in their official transactions.

Words "exact", "extort", "take", and "accept" are omitted from clause (2) of subsec. (c) of this section as covered by "demand" and "receive", as the case may be; and, in subsec. (e) reference to "forfeit" is omitted as covered by "pay".

Changes are made in phraseology.

§ 11–506. Deputies and other employees under Register of Wills; duties

(a) The Register of Wills, with the approval of the court, may appoint necessary deputies, clerical assistants and other employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. With the approval of the court, the Register of Wills may remove any of the personnel so appointed.

(b) The personnel appointed pursuant to this section shall be under the supervision and control of the Register of Wills, and shall perform such duties as he or the court directs. The deputies may perform acts necessary in the administration of the office of the Register of Wills and the certification of the records of the court which the Register may perform. (Dec. 23, 1963, 77 Stat. 482, Pub. L. 88–241, § 1, eff. Jan. 1, 1964.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 19–403 (Mar. 3, 1901, ch. 854, § 121, 31 Stat. 1209; June 30, 1902, ch. 1329, 32 Stat. 525; Mar. 4, 1923, ch. 265, 42 Stat. 1488; Apr. 24, 1926, ch. 176, 44 Stat. 322; Aug. 7, 1946, ch. 792, 60 Stat. 889).

Section is derived from that part of section 19–403 of D.C. Code, 1961 ed., which related to the appointment of deputies and other personnel in the office of the Register of Wills.

Section 19–403 of D.C. Code, 1961 ed., authorized the Register of Wills to appoint five deputies, and to appoint and fix the number of compensation of the employees of the "said probate court" (which was the designation of a former statutory special term of the District Court) and the office of the Register, and contained a proviso that "the employees of said office shall not be in excess of the number actually necessary for the proper conduct of the office of said register of wills". However, the Register of Wills is now an officer of the District Court, is appointed by that court, and the provisions of chapter 41 (section 601 et seq.) of Title 28, United States Code, apply to his office (see section 11–504 herein, and revision note thereunder). Chapter 41 of Title 28, United States Code, relates to the Administrative Office of the United States Courts, and section 601(a)(5) thereof provides that the Director of the Administrative Office shall fix the compensation of "clerks of court, deputies * * * [etc.] and other employees of the courts whose compensation is not otherwise fixed by law". Further, under section 751 of Title 28, United States Code, the regular clerk of the District Court appoints, with the approval of the court, necessary deputies (with no statutory restriction on the number, presumably because of the necessity for the court's approval), clerical assistants, "and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts". Section 751 of that title also provides that the clerk may remove such deputies and other employees, with the approval of the court. That section, as stated, relates to the regular clerks of the district courts, and it does not apply to the Register of Wills, but, in view of the changed status of the office of the Register of Wills (since 1949), and the functions, under section 601 of Title 28, United States Code, of the Director of the Administrative Office, with respect to the office of the Register, it would seem that provisions similar to those of section 751 of Title 28, United States Code, relating to regular district court clerks, should apply to the Register and the deputies and other employees in his office. Therefore, the provisions of section 19–403 as herein revised, place no restriction on the number of deputies to be appointed, but make the appointments subject to approval of the court; omit the proviso prohibiting the appointment of other employees in a number in excess of the number actually necessary, and provide for approval of the number by the Director of the Administrative Office; omit the provisions which related to the fixing, by the Register, of the compensation of the employees; and provide, for the purpose of completeness, that the personnel appointed under this section shall be under the supervision and control of the Register of Wills, and shall perform such duties as he or the court directs. The section also inserts the provision that, with the approval of the court, the Register may remove any of the personnel so appointed.

Changes are made in phraseology.

For remainder of section 19–403 of D.C. Code, 1961 ed., see section 11–505 herein.

SUBCHAPTER II.—JURISDICTION

§ 11–521. Civil and criminal jurisdiction

(a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District; and

(2) offenses committed within the District.

(b) Except as otherwise specially provided, an action may not be brought in the District Court by original process against a person who is not resident or found within the District. (Dec. 23, 1963, 77 Stat. 482, Pub. L. 88–241, § 1, eff. Jan. 1, 1964.)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August 2013, I have caused the foregoing document, together with its addendum, to be served on the following counsel via the Court's CM/ECF System:

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/s/ Lawrence J. Joseph

Lawrence J. Joseph