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' REPLY BRIEF

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GLOSSARY

AAPS	Association of American Physicians & Surgeons
CR6417/6421	Change Requests 6417 and 6421
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)

INTRODUCTION

Plaintiffs-appellants Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health-USA (collectively with AAPS, "Plaintiffs") respectively file this reply to the brief filed by the Secretary of the Department of Health & Human Services ("HHS") and the other defendants-appellees (collectively, the "Administration"). The Administration rests primarily on jurisdictional challenges and claims that Plaintiffs waived various merits arguments in their challenge to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). Assuming *arguendo* that it is not intentionally trying to lose this litigation (*e.g.*, to escape PPACA's economic train wreck while avoiding blame for repealing it), the Administration's tenuous claims of waiver, *see* HHS Br. at 10, 14, 12 n.3, 13 & nn.4-5, ironically waive several critical merits defenses. Because the Administration relies so heavily on waiver and – in the process – waives so many arguments, Plaintiffs reprise the standard of review with respect to waiver.

STANDARD OF REVIEW

The Administration concurs that review is *de novo*, HHS Br. at 11, and does not dispute that the fundamental nature of property rights requires strict scrutiny for Plaintiffs' Fifth Amendment claims. *Compare id. with* Pls.' Br. at 10.

As the Administration notes, parties generally must raise arguments in their

briefs or be deemed to have waived them. HHS Br. at 13. The Administration's cited authorities rely in large part on FED. R. APP. P. 28(a)(9)(A). *See id.* Taken together, Rules 28(a)(9)(A) and 28(b) require appellants *and appellees* to argue their "contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y]." FED. R. APP. P. 29(a)(9)(A), (b); *Rollins Envtl. Servs., Inc. v. U.S. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) (party's brief must "include an argument, with citations to authorities in its favor"). Thus, a party who "omits the issue entirely from the argument section, never gives a standard of review, … never cites any authorities [and] … omits the matter from his statement of issues" has waived an argument. *U.S. v. Baugham*, 449 F.3d 167, 178 n.3 (D.C. Cir. 2006). Similarly, parties "fail[] this standard" when "[t]hey state no reasons for their contention that [the agency] has violated the [law] and cite no authorities that would support such a claim." *Duncan's Point Lot Owners Ass'n v. FERC*, 522 F.3d 371, 377 (D.C. Cir. 2008). While courts remain free in principle to supplement the parties' arguments, "appellate courts do not sit as self-directed boards of legal inquiry and research," and – "where counsel has made no attempt to address [an] issue" – "will not remedy the defect, especially where, as here, 'important questions of far-reaching significance' are involved." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

Significantly, "[e]ven appellees waive arguments by failing to brief them."

U.S. v. Ford, 184 F.3d 566, 578 n.3 (6th Cir. 1999); *Consumers Union of U.S., Inc. v. Federal Power Comm'n*, 510 F.2d 656, 662 n.9 (D.C. Cir. 1975) ("Rule 28 has been read generally as foreclosing consideration of issues not raised in briefs filed by appellants *and appellees*") (emphasis added); *Mironescu v. Costner*, 480 F.3d 664, 677 (4th Cir. 2007) ("Rule 28(b) … requires that appellees state their contentions and the reasons for them at the risk of abandonment of an argument not presented"). In short, waiver is a two-way street.

SUMMARY OF ARGUMENT

The Administration's various "waiver" arguments are specious because Plaintiffs' brief and its supplemental briefing in opposition to the Administration's motion to dismiss raised all of the arguments on which Plaintiffs seek to rely. In particular, the saving construction adopted in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*") sufficiently altered PPACA as to entitle Plaintiffs to supplement their opposition to the motion to dismiss, given that penalties that were not taxes under PPACA had become taxes with no other basis in the Administration's constitutional powers.

Plaintiffs may challenge the Social Security Program Operations Manual System ("POMS") because their members include facilities that compete with hospitals regulated under Medicare Part A, and the Social Security claims-channeling provisions do not displace the district court's unique jurisdiction.

Even assuming *arguendo* that the Administration's 2012 rulemaking mooted Plaintiffs' procedural challenges to new HHS requirements for the Provider Enrollment, Chain and Ownership System ("PECOS") and National Provider Identifiers ("NPIs"), that would not moot Plaintiffs' substantive challenges to those requirements. If PPACA is invalidated in its entirety under the Origination Clause, that would eliminate PPACA §6405(c), which was the basis on which HHS acted.

The public's suffering similar injuries to Plaintiffs' particularized injuries cannot defeat standing to seek the accountings requested in Counts V and VI.

Plaintiffs have substantive rights both to participate in courts' efforts to change their rules and to notice of the rules. Since the district court's implicit, unwritten policy to favor random assignment, contrary to the written rules, the transfer away from Judge Collyer violated the local rules and must be vacated.

ARGUMENT

I. PPACA'S EMPLOER AND INDIVIDUAL "MANDATES" ARE UNCONSTITUTIONAL

In Counts II and III of their complaint (JA__), Plaintiffs challenge 26 U.S.C. §§4980H, 5000A under the Commerce Clause, the Fifth Amendment, and the Origination Clause. *See* Pls.' Br. at 28-45. Presumably in light of *NFIB*, the Administration does not contest Plaintiffs' arguments under the Commerce Clause, although the Administration does claim that Plaintiffs waived their challenge to §4980H, as well as their arguments under the Fifth Amendment's Equal Protection

component and the Origination Clause. This section addresses these Administration arguments.

A. Plaintiffs Did Not Waive Their Equal-Protection Challenge, But The Administration Waived Its Defenses

The Administration argues that Plaintiffs' opening brief failed to raise their Equal Protection argument because Plaintiffs discussed equal-protection injuries only with respect to standing and not with respect to the merits. HHS Br. at 13 & n.4. While Plaintiffs respectfully submit that the Administration misunderstands Plaintiffs' brief,[1] the authority that they cite for their waiver argument does not support waiver here.

In *Baugham*, 449 F.3d at 178 & n.3, a defendant sought to raise an argument against the sufficiency of evidence when he had merely discussed the evidentiary record in his Statement of Facts, without addressing the sufficiency of evidence in

[1] Given the interplay between the takings argument that *would* apply to PPACA's tax penalties in the absence of the *NFIB* saving construction and the selective and discriminatory taxation for those who decline to consent voluntarily to subsidize private third parties, Plaintiffs argue that the post-*NFIB* PPACA violates the "Fifth Amendment," which includes more than one strand of constitutional requirements: the Takings Clause itself and the Equal Protection component of the Due Process Clause. The *Frost* case relied on by Plaintiffs is instructive: "The specific challenge is that, as so construed and applied, it takes their property for public use without just compensation, deprives them of their property without due process of law, and denies them the equal protection of the laws, in violation of the Fourteenth Amendment to the federal Constitution." *Frost v. R.R. Comm'n of State of California*, 271 U.S. 583, 589 (1926). With respect to federal action, an Equal Protection violation lies within the Fifth Amendment's Due Process Clause. *U.S. v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

the Argument, Standard of Review, or Statement of Issues sections of his brief and had failed to cite any authorities. By contrast with the *Baugham* defendant, Plaintiffs here met each of those deficiencies. *See* Pls.' Br. at 2 (Statement of Issues), 10 (Standard of Review[2]), 17-19, 28-31 (Argument). The Argument and Standard of Review sections include citations to controlling authority. *Id.* The Administration feigns particular confusion by the fact that Plaintiffs used the term "Equal Protection" to discuss standing, but not the merits. HHS Br. at 13. This argument has two defects.

First, the Administration concedes that Plaintiffs allege that PPACA inflicts Equal Protection injuries, and the Administration makes no effort to rebut those allegations. That alone would be enough to allow Plaintiffs to press their Equal Protection claims: "[w]ant of right and want of remedy are justly said to be reciprocal" so that "[w]here… there has been a violation of a right, the person injured is entitled to an action." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Under the circumstances, Plaintiffs could seek to redress their Equal Protection injuries even if that were all that they had said.

Second, the Administration is simply wrong. As explained, the numerous references to the "Fifth Amendment" violations in the merits section of Plaintiffs

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[2] The use of strict scrutiny is an Equal Protection issue, and *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992), is an Equal Protection case.

brief incorporate not only the Takings Clause violation of PPACA as Congress enacted it, but also the indirect attempt to coerce compliance with an otherwise-unlawful taking via the selective tax penalties. *See* note 1, *supra;* Pls.' Br. at 28-31. Moreover, if the Administration were genuinely confused – as opposed, say, to trying a desperate procedural gambit to evade review – even the merits section of Plaintiffs' brief makes clear that Plaintiffs press Equal Protection: "the Fifth Amendment claim relies on PPACA's compelled subsidies of those with preexisting conditions and equal-protection violations, which both entail groups' differential treatment." Pls.' Br. at 28 n.5. Plaintiffs did not waive their Equal Protection arguments, although the Administration waived its defenses. *See* FED. R. APP. P. 29(a)(9)(A), (b).[3]

B. Plaintiffs Did Not Waive Their Challenge to the Employer Mandate, But The Administration Waived Its Defense

Count II of Plaintiffs' complaint challenges PPACA's "employer mandate," 26 U.S.C. §4980H, and Plaintiffs' opening brief addressed that together with the "individual mandate," 26 U.S.C. §5000A, as PPACA's "tax penalties." *See* Pls.' Br. at 2-3, 5, 10, 14, 15, 17, 20, 27, 28-34. Based on these arguments, Plaintiffs sought reversal of the district court's dismissal of each count of their complaint. *Id.*

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[3] *See also Rollins Envtl. Servs.,* 937 F.2d at 652 n.2; *Baugham,* 449 F.3d at 178 n.3; *Duncan's Point Lot Owners Ass'n,* 522 F.3d at 377; *Carducci,* 714 F.2d at 177.

at 60; *see also* Pls.' Rule 28(j) Letter re: *Liberty University*, at 1 (July 15, 2013) (indicating that Plaintiffs challenge employer mandate). Nonetheless, the Administration argues that Plaintiffs waived their challenge to the dismissal of the employer-mandate count. HHS Br. at 13 & n.5. Plaintiffs respectfully submit that the Administration is wrong and has, therefore, waived its defense of the employer mandate. *See* FED. R. APP. P. 29(a)(9)(A), (b); *see also* cases cited note 3, *supra*.

C. PPACA Violates The Fifth Amendment

Plaintiffs argue that PPACA's tax penalties – as interpreted by *NFIB* – violate the Fifth Amendment by offering the choice between buying PPACA-compliant insurance that subsidizes private third parties (which the Takings Clause would prohibit if imposed directly) and paying a tax penalty for the privilege of declining to subsidize others voluntarily. Plaintiffs argue that using the Taxing Power indirectly to coerce surrender to otherwise unlawful takings violates the Fifth Amendment.

1. Plaintiffs Raise An As-Applied Fifth Amendment Challenge Under *Salerno*

Plaintiffs distinguish *NFIB* both as not having even addressed issues under the Fifth Amendment and as having been a purely facial challenge, whereas this action challenges PPACA under the Fifth Amendment as applied to Plaintiffs' members. Pls.' Br at 28 & n.5. The Administration responds both that the district court correctly held that Plaintiffs waived an as-applied challenge by failing to

raise it below and that the as-applied argument is meritless in any event. HHS Br. at 12 n.3. The Administration's second response may obviate the need to resolve whether the district court correctly deemed Plaintiffs to have waived an as-applied challenge, insofar as this Court has the Fifth-Amendment arguments before it.[4]

In their opening brief, Plaintiffs reasoned that a Fifth Amendment claim – whether under the Takings Clause or under the Equal Protection component of the Due Process Clause – presupposes some differential treatment, which implicates an as-applied challenge. In contrast, a facial challenge – such as the Origination Clause argument discussed in Section I.D, *infra*, and the Commerce Clause argument resolved in *NFIB* – "must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). In other words, facial challenges mean that a statute is invalid *as applied to everyone.* The *Salerno* framework has been questioned as possibly *dictum* by *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality), and this Court sitting *en banc* adopted a different framework in *Sanjour v. EPA*, 56 F.3d 85, 91-92 & n.10 (D.C. Cir. 1995) (*en banc*):

> The usual distinction between "as-applied" and "facial" challenges is that the former ask only that the reviewing court declare the challenged statute or regulation

[4] The parties dispute the *contours* of the Fifth Amendment argument before this Court, *see* Sections I.A-I.B, *supra*, but even the Administration does not appear to dispute that there *is* a Fifth Amendment argument before the Court.

> unconstitutional on the facts of the particular case; the latter, in contrast, request that the court go beyond the facts before it to consider whether, given all of the challenged provision's potential applications, the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable "on its face."

Id. at 92 n.10. Under *Salerno*, Plaintiffs' Fifth Amendment arguments are "as applied" because the arguments do not apply to everyone (*e.g.*, those *with* pre-existing conditions whom PPACA subsidizes). Under *Sanjour*, Plaintiffs' Fifth Amendment arguments are "facial" because the arguments reach beyond the specific facts alleged to cover broad categories of people (*e.g.*, those *without* pre-existing conditions whom PPACA compels either to subsidize third parties or to pay taxes for declining to do so). In any event, the central point that Plaintiffs sought to raise – that *NFIB* did not *sub silentio* resolve Plaintiffs' Fifth Amendment arguments – is indisputable. *See* Pls.' Br. at 28-29; *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004); *Waters v. Churchill*, 511 U.S. 661, 678 (1994).

2. If It Remained A "Mandate," §5000A Would Violate The Fifth Amendment

Prior to the Chief Justice's saving construction in *NFIB*, §5000A provided a mandate to purchase government-compliant health insurance with a penalty imposed for failing to purchase that insurance. As Plaintiffs explained, this requirement would violate the Takings Clause because it takes private property in

form of an ascertainable portion of a health-insurance premium and uses it to subsidize lower rates for other private, government-favored third parties. *See* Pls.' Br. at 31-34. The Administration does not directly dispute this characterization. That said, however, *NFIB* changed §5000A by making it an either-or proposition: either purchase the government-compliant insurance or pay the alternative tax. As Plaintiffs explained, Pls. Br. at 28-31, the federal government cannot use its taxing powers selectively to coerce the voluntary surrender of other constitutional rights.

3. The Fifth Amendment Prohibits Selectively Taxing Those Who Decline To Subsidize Third Parties

The Administration's defense of PPACA under the Fifth Amendment focuses entirely on the takings aspect of Plaintiffs' arguments and makes two affirmative points in two sentences. *See* HHS Br. at 12-13. First, exercises of the taxing power are examples of laws that affect economic value without running afoul of the Takings Clause. Second, taxes and user fees are not takings. *Id.* (*citing Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2600 (2013)). Plaintiffs respectfully submit that these general points are simply not responsive to Plaintiffs' argument that the Fifth Amendment prohibits selective taxation of those who decline to consent to a taking.

With respect to *Penn Central*, the Supreme Court's uncontroversial notion – namely, that "Government hardly could go on if to some extent values incident to

property could not be diminished without paying for every such change" such as with "[e]xercises of the taxing power" – does not help the Administration. *See Penn Cent.*, 438 U.S. at 124 (interior quotations omitted). First, this argument simply disregards both PPACA's unusual cobbled-together combination of public and private subsidies, which departs from the more-obvious, traditional solution of separate taxing and spending programs that the federal government adopted in Social Security. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 585 (1937). No one is arguing that government cannot "go on" or even that a national health-insurance program cannot "go on." The point is that the Administration's means of mandating or coercing its implementation violates the Constitution. Second, Plaintiffs have no quarrel with the proposition that *some* tax could meet constitutional muster, which is all that *NFIB* held; Plaintiffs' quarrel is with *this* tax. The Administration's generalizations do not respond to Plaintiffs' challenge, and neither does *NFIB*, which did not consider these issues.

With respect to *Koontz*, the *general* statement that taxes are not takings does not respond to Plaintiffs' argument that taxation can violate the Fifth Amendment in *unusual* circumstances: "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" and helps establish "improper … purpose." *Windsor*, 133 S. Ct. at 2692-93 (*citing Romer v. Evans*, 517 U. S. 620, 633 (1996) and *Louisville*

Gas & Elec. Co. v. Coleman, 277 U. S. 32, 37-38 (1928)) (interior quotations omitted); *Coleman*, 277 U.S. at 37; *see also CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1108-09 (2011) (selective taxation can constitute unlawful discrimination). Here, PPACA seeks to subsidize private third parties to lower their insurance rates without imposing a lawful tax. To do so, PPACA singles out healthy people who decline to purchase into PPACA's over-priced, over-regulated insurance regime. The Fifth Amendment prohibits that.

D. Plaintiffs Raised Their Origination Clause Challenge In District Court, And The Administration Waived Its Defenses

In support of its argument that Plaintiffs waived their Origination Clause argument, the Administration somewhat disingenuously argues "Plaintiffs … made no reference to this claim in opposing the government's motion to dismiss," and "[i]nstead … raised this contention for the first time in supplemental briefing *more than two years after the suit was filed*." HHS Br. at 14 (emphasis added). As explained in this section, Plaintiffs timely raised their arguments under the Origination Clause, and the Administration has elected to waive its opposition.

What the Administration fails to acknowledge is that the passage of two years resulted from the Administration's procedural successes – each time opposed by Plaintiffs – first to stay Plaintiffs' ability to move for summary judgment while the district court resolved the Administration's motion to dismiss (JA__) and then to stay the consideration of their own motion to dismiss while the Supreme Court

and this Court resolved related cases (JA__). The supplemental briefing about which the Administration complains was part of briefing the Administration's motion to dismiss, notwithstanding the passage of two years. After having succeeded in achieving that delay over Plaintiffs' objections, the Administration cannot seriously blame Plaintiffs for delay.

The argument that Plaintiffs failed to include the Origination Clause in their complaint lacks merit. JA__ (district court). Like Plaintiffs' complaint, virtually every complaint filed in federal court requests "such other relief as the Court deems proper" or words to that effect. JA__. This ubiquitous line is known as the "general pleading," and it entitles the pleader to relief on theories not contained in a complaint's specific pleadings. *Scheduled Airlines Traffic Offices, Inc., v. Dep't of Defense*, 87 F.3d 1356, 1358-59 (D.C. Cir. 1996); *People for the Ethical Treatment of Animals, Inc., v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 455 (1997); *Lockhart v. Leeds*, 195 U.S. 427, 436-37 (1904). As soon as *NFIB* declared §5000A a tax, Plaintiffs argued against PPACA and the PECOS changes under the Origination Clause. JA__. They could not have done so sooner, and neither the Administration nor the district court protested (or could protest) when Plaintiffs did so. FED. R. CIV. P. 15(b).

Significantly, the pre-*NFIB* PPACA arguably would not have implicated the

Origination Clause in the same way as the post-*NFIB* PPACA. Congress did not intend to enact a tax and believed that it was acting under its Commerce Power. Under that scenario, the penalties might not qualify as revenue-raising measures for purposes of the Origination Clause, on the theory that the revenue raised might have been incidental to a regulatory purpose. *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897). Under *NFIB*, however, PPACA has no such lawful regulatory purposes because PPACA's penalties fall outside the Commerce Power. Under the circumstances, the penalties' *only* valid constitutional purpose is their tax-related function of raising revenue. Further, while it would have been inconceivable for Congress to have enacted PPACA as a sizable income-tax increase on middle-income families, JA__ (¶67), NFIB makes the individual mandate a tax for constitutional purposes, even though it was not a tax for statutory purposes. That sea change would have justified amending or supplementing the complaint under Rule 15(a) or (c) if the supplemental briefing had not taken place.

For the foregoing reason (*i.e.*, that *NFIB* changed PPACA), the Fourth Circuit arguably was wrong to find that the plaintiffs there waived the Origination Clause on remand. *Liberty Univ., Inc. v. Lew*, __ F.3d __, __ n.3 (4th Cir. 2013). But Plaintiffs here are in a very different procedural posture than the *Liberty University* plaintiffs. Whereas those plaintiffs sought to raise their Origination Clause arguments *on remand* from the Supreme Court after litigating up the chain

from district court through the Fourth Circuit, Plaintiffs here were in the district court the whole time and thus able to raise their Origination Clause arguments within the original briefing of the Administration's motion to dismiss. Unlike the *Liberty University* plaintiffs, Plaintiffs here do not face the charge that they "had the opportunity to raise these arguments in the district court and in the original briefing in this case but did not do so," which the Fourth Circuit held "thus … waived" those arguments. *Id.* Plaintiffs here deserve a first opportunity to be heard, even if the *Liberty University* plaintiffs did not on remand back to the Fourth Circuit.

Precisely to avoid the unfair and inaccurate comparison between Plaintiffs here and the *Liberty University* plaintiffs, Plaintiffs filed a notice with this Court under Rule 28(j) a week before the Administration filed its brief. In that notice, Plaintiffs distinguished *Liberty University* argued as follows:

> Although the district court in this action held that Plaintiffs waived these arguments, JA__, the district court erred because Plaintiffs raised the issue in response to the district court's request for supplemental briefing – without the government's objection – which suffices as implied consent under FED. R. CIV. P. 15(b). *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965); *Strategic Outsourcing, Inc. v. Continental Cas. Co.*, 274 Fed.Appx. 228, 233 (4th Cir. 2008). To avoid Rule 15(b), the government needed to object. *Banks v. Dretke*, 540 U.S. 668, 704 (2004). Had the government objected, Plaintiffs could have resolved the issue by moving to amend and supplement their complaint. FED. R. CIV. P. 15(a), (c).

> Consistent with the Fourth Circuit's tying waiver to failure to raise issues in the district court and those plaintiffs' initial appeal, waiver is inappropriate here, where Plaintiffs raised these issues in district court and their opening appellate brief (at 34-45). *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445-48 (1993).

Significantly, the Supreme Court has rejected requiring waiver on facts far less sympathetic to plaintiffs than the facts here:

> Respondents did not challenge the validity of section 92 before the District Court; they did not do so in their opening brief in the Court of Appeals or, despite the court's invitation, at oral argument. Not until the Court of Appeals ordered supplemental briefing on the status of section 92 did respondents even urge the court to resolve the issue, while still taking no position on the merits.

. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445 (1993). Even under those circumstances, the Supreme Court allowed the plaintiff to challenge section 92 as part of the plaintiff's overall case. *Id.* at 446-47. Here, by contrast, Plaintiffs raised the issue during the briefing of the Administration's motion to dismiss via supplemental briefing requested by the district court.[5]

The waiver argument is particularly inappropriate because the district court *invited* supplemental briefing on the impact of the Supreme Court's decision on

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[5] Significantly, the district court did not hold that Plaintiffs waived the right to rely on the Origination Clause to invalidate the PECOS provisions; the district court held that Plaintiffs waived the Origination Clause only with respect to PPACA's individual insurance mandate. JA __.

PPACA, and Plaintiffs' supplemental brief qualifies as raising the issue sufficiently for purposes of establishing the Administration's implied consent under FED. R. CIV. P. 15(b). *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965); *Strategic Outsourcing, Inc. v. Continental Cas. Co.*, 274 Fed.Appx. 228, 233 (4th Cir. 2008). The Administration notes that the parties filed their supplemental briefs simultaneously, depriving the Administration of an opportunity to respond. HHS Br. at 14 n.6. To avoid Rule 15(b), however, the Administration needed to object. *Banks v. Dretke*, 540 U.S. 668, 704 (2004). Had the Administration done so, Plaintiffs could have moved to amend and supplement their complaint, and the district court would have had to grant leave. *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1083-85 (D.C. Cir. 1998). The Administration's waiver argument is specious.

The Administration's failure to respond not only to Plaintiffs' Origination Clause arguments but also to these arguments against waiver – which Plaintiffs pressed in a Rule 28(j) letter on *Liberty University* – demonstrates the willfulness of the Administration's refusal to brief these issues. As a consequence, the Administration has waived its opportunity to oppose Plaintiffs' Origination Clause arguments. FED. R. APP. P. 29(a)(9)(A), (b); *see also* cases cited note 3, *supra*. This Court should therefore hold PPACA void in its entirety.

II. THIS COURT HAS JURISDICTION TO RESOLVE THE POMS DISPUTE

Although it agrees that this Court must resolve jurisdiction before reaching the merits, HHS Br. at 17-21, the Administration incorrectly analyzes Plaintiffs' standing and the district court's statutory subject-matter jurisdiction.

A. AAPS Has Standing To Challenge The POMS

The district court rejected Plaintiffs' standing on Medicare Part A issues based on its understanding that Plaintiffs' members consist solely of physicians, with no facilities that might compete with the hospitals covered by Part A. JA__. As Plaintiffs explained, however, the AAPS membership includes facilities, Pls. Br. at 52, which the Administration counters – without citation – as qualifying as "ambulatory surgery centers" regulated under Medicare Part B. HHS Br. at 19. Although the Administration's no-citation argument is insufficient under Rule 28, FED. R. APP. P. 29(a)(9)(A), (b); *see also* cases cited note 3, *supra*, that is not the only fatal problem.

Assuming *arguendo* that not only the identified AAPS facility member but also all other AAPS facility members were "ambulatory surgery centers" and that such facilities fell under Medicare Part B, not Part A, that still would not defeat the competitive-standing doctrine that AAPS argues. *See* Pls. Br. at 14-15 (collecting cases for the proposition that advantaging competitors is a form of Article III injury). Regardless of whether Medicare Part A or Part B applies, ambulatory

surgery centers plainly *compete* with hospitals. *See, e.g.*, Lawrence P. Casalino, *et al.*, *Hospital-Physician Relations: Two Tracks And The Decline Of The Voluntary Medical Staff Model*, 27 HEALTH AFFAIRS 1305, 1310-11 (2008). As such, ambulatory surgery centers can suffer competitive injury, regardless of whether their services are regulated under the same provisions as hospital services. *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) ("[w]hen national banks begin to provide travel services for their customers, they compete with travel agents no less than they compete with data processors when they provide data-processing services to their customers"); *Alton R. Co. v. U.S.*, 315 U.S. 15, 18-20 (1942) (railroads versus trucks). The Administration's argument against standing is no argument at all.

B. The District Court Has Statutory Subject-Matter Jurisdiction Beyond the Federal-Question Statute

Even if Plaintiffs have standing, both Plaintiffs and the Administration also agree that this Court must address the jurisdictional bar presented by the Social Security and Medicare claims-channeling provisions before reaching the merits. *Compare* Pls.' Br. at 52-54 *with* HHS Br. at 20-21. Despite that initial agreement, the parties' analyses of the issue quickly diverge. Plaintiffs argue that the claims-channeling provisions preclude resort only to federal-question jurisdiction and the "Little Tucker Act," *see* 42 U.S.C. §§405(h), 1395ii, which is wholly inapposite to statutory subject-matter jurisdiction under the district court's equity jurisdiction.

As Plaintiffs explain and the Administration does not dispute, the district court has had this unique jurisdiction since 1801, and the reorganization of the local court system in 1970 did not displace it. Pls.' Br. at 26-27. Before district courts generally were granted mandamus jurisdiction (1961) and until federal-question jurisdiction lost its amount-in-controversy requirement for administrative issues (1976), this equity jurisdiction served as the only basis for challenging certain federal actions. *Id.* For its part, the Administration gets caught up on the word "equity" and loses sight of the word "jurisdiction," arguing that "Plaintiffs cannot avoid [§§405(h), 1395ii] by invoking the Court's equitable jurisdiction … [because the] type of relief sought is irrelevant." HHS Br. at 20. The point, however, is that this jurisdiction is a statutory *alternative* to federal-question jurisdiction. By invoking jurisdiction under neither the federal-question statute nor the Little Tucker Act, Plaintiffs are fully compliant with §§405(h), 1395ii.

Plaintiffs respectfully submit that there are three types of decisions that one could cite to address this issue: (1) cases from other circuits, where the district court's unique jurisdiction would be irrelevant; (2) cases from this Circuit that are silent on the district court's unique jurisdiction; and (3) cases from this Circuit that discuss the district court's unique jurisdiction. Although neither of the first two types of decisions has any bearing here, *Cooper Indus.*, 543 U.S. at 170; *Waters*,

511 U.S. at 678, that is all that the Administration cites at pages 20-21 of its brief.[6]

The Administration also cites three cases from this Circuit – dated 1992, 2007, and 2011, *see* HHS Br. at 20-21 – but those decisions suffer from two defects. First, they are "type 2" cases that simply do not address the jurisdictional argument that Plaintiffs raise; second, they post-date the on-point "type 3" case that Plaintiffs cite, *Ganem v. Heckler*, 746 F.2d 844, 850-51 (D.C. Cir. 1984). *See* Pls.' Br. at 26, 53. Because subsequent three-judge panels lack the authority to change Circuit law, *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*), the Circuit decisions that the Administration cites could not control, even if they were relevant. *Ganem* recognizes that the district court's unique equity jurisdiction is fully consistent with Congress' selection elimination of federal-question jurisdiction and the Little Tucker Act, and that is dispositive on the question of jurisdiction.[7]

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[6] *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 752-53 (1975) (Northern District of California); *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13 (2000) (Seventh Circuit).

[7] As Plaintiffs explain, the question is whether subsequent enactments repealed the pre-existing jurisdiction by implication, which requires "clear and manifest" congressional intent. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). Even if the statutes could be read to support repeal by implication, they just as easily – indeed, more easily – can be read to preserve the pre-existing jurisdiction. Under the clear-and-manifest standard, that requires adopting the interpretation against legislative displacement. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (addressing the same clear-and-manifest standard in a preemption context).

III. THE PECOS CHANGES ARE UNLAWFUL AND NOT MOOT

Count IV of Plaintiffs' complaint presses procedural and substantive challenges to the Administration's requiring, as a condition for referring Medicare-eligible patients for Medicare services, that physicians enroll in the Medicare system (via various means that Plaintiffs' members oppose and wish to avoid) and obtain a particular form of unique identifier (which Plaintiffs' members oppose and wish to avoid). Pls.' Br. at 45-52. In a work still in progress, the Administration has implemented its changes via the Center for Medicare and Medicaid Services Manual System's Charge Request 6417 and Charge Request 6421 (collectively, "CR6417/6421"), an HHS Interim Final Rule with Comment Period ("IFC"), 75 Fed. Reg. 24,437 (2010), and an HHS final rule, 77 Fed. Reg. 25,284 (2012). The Administration contends that promulgation of its final rule moots the procedural challenges that Plaintiffs brought against the IFC. *See* HHS Br. at 15-17. Whether in a new suit or (preferably) a supplemented pleading here, Plaintiffs will challenge the 2012 final rule as both arbitrary and capricious and *ultra vires*, but Plaintiffs first require this Court's resolution of at least some of the issues in this appeal.

A. Plaintiffs Have Standing For Count IV

The Administration does not dispute that the district court evaluated standing under the Administration's merits views and not, as required, under the Plaintiffs' merits views. *Compare* Pls.' Br. at 46-48 *with* HHS Br. at 15-17. Under

the additional relief that Plaintiffs' complaint requests – and that the district court improperly ignored – Plaintiffs have standing to challenge the Administration's actions under Count IV. *See* Pls.' Br. at 46-47.

B. Count IV's Procedural Claims Are Not Moot

Although a concededly lawful final rule would moot any ongoing procedural challenge to an underlying interim action, Plaintiffs' procedural challenge to the IFC and CR6417/6421 is not moot for two reasons.

First, courts are particularly wary of finding issues moot when there remains "a public interest in having the legality of the practices settled," *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953), and when the party seeking to moot the issue is the party who prevailed in the lower court. *City of Erie v Pap's AM*, 529 U.S. 277, 287-88 (2000). In *City of Erie*, the Court cautioned that appellate courts have an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *Id.* at 288.

Here, if the Administration would have presented the April 2012 final rule (and any claimed mootness arguments) to the district court before that court's October 2012 decision labored through Plaintiffs' procedural challenges, Plaintiffs could have moved to supplement their complaint to include the 2012 rule. Indeed, were it not for the contested issue of the appropriate judge on remand and the meaning of "related cases" under the district court's rules, *see* Section V, *infra*,

Plaintiffs already would have either sought reconsideration in district court or filed a new lawsuit challenging the 2012 rules not only for arbitrarily failing to respond to AAPS comments, but also on the same merits issues discussed in Section III.C, *infra*. Given the potential for this Court to reach the Origination Clause merits, moreover, it is not clear that that would efficiently use the courts' or the parties' resources: invalidation of PPACA would invalidate the PECOS changes, including the 2012 rule. *See* Section III.C, *infra*.

Second, while it may not be appropriate (or efficient) for the Court to resolve procedural challenges that *might become moot*, that does mean that the Court must dismiss these Count IV's procedural challenges *as moot*. Instead, the Court could either (a) remand the resolution of those issues to the district court to allow Plaintiffs to supplement their complaint to address the subsequent rule, *see, e.g.*, *Bell v. Maryland*, 378 U.S. 226, 238-39 (1964); *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam), or (b) hold those issues in abeyance, pending the resolution of the other issues raised here, given that the resolution of certain issues could resolve the PECOS issue (*e.g.*, if PPACA in invalid in its entirety, all of the Administration's PECOS rules premised on PPACA §6405(c) would be invalid). To the extent that more is needed to hold in abeyance these claims that the Administration contends to be moot, Plaintiffs could file an appropriate document or pleading under 28 U.S.C. §1653 to establish the ongoing case or controversy.

C. Count IV's Substantive Claims Are Not Moot

Separate from their arguments against the procedures used to adopt the IFC and CR6417/6421, Plaintiffs also allege that the Administration's efforts to require enrolling in (or formally opting out of) Medicare and obtaining NPIs are *ultra vires* the Administration's lawful authority. JA__ (¶¶102-104). Simply put, Spending Clause legislation like Medicare does not preempt the practice of medicine for those declining to accept the federal terms, and – because PPACA is void in its entirety under the Origination Clause, *see* Section I.D, *supra* – the Administration lacks the authority to compel submission of NPIs.

Plaintiffs also argue that – prior to enactment of PPACA and the changes challenged in Count IV – nothing prevented non-Medicare referring physicians from using other unique identifiers (*e.g.*, a state license number) when referring for Medicare services. JA__; Pls.' Br at 51-52. Moreover, insofar as PPACA §6405(c) is what purportedly authorizes the Administration to promulgate new requirements for referring physicians, the invalidation of PPACA in its entirety under the Origination Clause would eliminate the Administration's substantive authority to promulgate these changes. Pls.' Br at 51-52. The Administration argues – without any citation – that the PECOS changes do not depend on PPACA §6405(c)'s authorization. HHS Br. at 17. Even if that were true (and it is not), it would be irrelevant. Both the IFC and the 2012 final rule acted pursuant to PPACA

§6405(c), *see* 75 Fed. Reg. at 24,441-42; 77 Fed. Reg. at 25,290, 25,297, not some other unidentified authority: "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

IV. THE ACCOUNTINGS FOR SOCIAL SECURITY AND MEDICARE ARE JUSTICIABLE

Counts V and VI seek an accounting of the Social Security and Medicare trust funds based on the Administration's misrepresentations about PPACA's economic impacts and affordability at the same time that the trustee office defendants have violated their fiduciary duties. Compl. ¶¶106-117. Without even acknowledging that Plaintiffs allege a person benefit in these programs, as well as a right to protect the rights of patients who also receive personal benefits from these programs, Pls.' Br. at 56, the Administration stands pat on the district court's findings that these claims are "generalized grievance about the unforeseeable future." HHS Br. at 23 (*quoting* JA__). That is insufficient to deny standing.

As Plaintiffs explained, the fact that a particularized individual injury falls on the public widely does not deny standing to the entire public. *FEC v Akins*, 524 U.S. 11, 23 (1998). The Administration compels the working public to pay into the Social Security and Medicare systems on the pretense that those programs operate as trust funds (*i.e.*, that the money that person A pays into the system will finance the benefits that person A receives). In fact, however, these programs are

structured like "Ponzi schemes," which pay off early "investors" handsomely with the funds of new entrants until the system collapses. *See U.S. v. Hall*, 610 F.3d 727, 747 n.1 (D.C. Cir. 2010). Unfortunately, as the recent bankruptcy of the City of Detroit demonstrates, the post-World War II entitlement state and deficit spending have so captured the political branches as to render them institutionally unable to acknowledge the scope of unfunded entitlement commitments. Under *Akins*, the widespread nature of this injury is no basis to deny the relief, here the equitable remedy of an accounting to avert insolvency.

V. THIS ACTION SHOULD BE REMANDED TO JUDGE COLLYER

In their opening brief, Plaintiffs argued (1) that they correctly filed a related-case notice with their initial complaint because this litigation relates to *Hall v. Sebelius*, 667 F.3d 1293 (D.C. Cir. 2012), within the meaning of the district court's local rules, and (2) that the case was improperly transferred away from the *Hall* judge—Judge Collyer – under those rules, based on third-party district-court decisions that declined to follow the rules in service of an interest in random assignment of cases. *See* Pls.' Br. at 57-60. The Administration's entire response is that "the related case rule does not give litigants a substantive right to have their case heard by a particular judge," without citing any authority for that proposition. That response suffers two fatal flaws.

First, the Administration fails to cite authority for its proposition of law, thus

failing to meet the requirements of Rule 28. *See* FED. R. APP. P. 29(a)(9)(A), (b); *see also* cases cited note 3, *supra.* That waives the point, making Plaintiffs' second argument below unnecessary.

Second, the Administration's argument – assuming *arguendo* that it qualified as an argument – would be beside the point. "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). Plaintiffs had two substantive rights at issue: (a) the opportunity to comment on the proposed changes to the local rules, and (b) notice of the rule change (*i.e.*, the district court's implicit adoption of its unwritten rules. 28 U.S.C. §2071(b); *Hollingsworth,* 558 U.S. at 191. As Plaintiffs explain, when cases qualify as "related" cases – as this case and *Hall* concededly do qualify – the local rules do not require random assignment: "*[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). Thus, notwithstanding the Administration's unsupported "substantive right" argument, the transfer away from Judge Collyer was unlawful, and the unwritten amendments that supported that transfer *did violate* Plaintiffs' substantive rights. For that reason, this Court must reverse the transfer from Judge Collyer to Judge Leon, which then moots the subsequent transfer from Judge Leon to Judge Jackson.

CONCLUSION

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

Dated: August 9, 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 6,995 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 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th 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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