IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

STEVEN F. HOTZE, M.D. and BRAIDWOOD MANAGEMENT, INC., Plaintiffs, v. KATHLEEN SEBELIUS, U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, and JACOB J. LEW, U.S. SECRETARY OF THE TREASURY, in their official capacities, Defendants.	Case No. 4:13-cv-01318

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Dated: September 24, 2013.

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INTRODUCTION

Plaintiffs Steven F. Hotze, M.D. and Braidwood Management, Inc. bring this case to challenge two provisions of the Patient Protection and Affordable Care Act ("Affordable Care Act," or "ACA"). But as Defendants' motion to dismiss explains, Plaintiffs cannot present their challenges to this Court at this time because they have failed to demonstrate that the Court has jurisdiction. Plaintiffs' opposition brief does nothing to upset this conclusion. Plaintiffs do not identify specific factual allegations in their complaint that show that they suffer any injury-in-fact from the operation of the minimum coverage provision (Section 5000A) or the employer responsibility provision (Section 4980H), and thus they lack standing to bring this case. Moreover, Braidwood's challenge to the latter provision is barred by the Anti-Injunction Act, and is not ripe for review. Even if the Court reaches the merits of their challenges, though, Plaintiffs' complaint fails to state a claim upon which relief can be granted. Plaintiffs' opposition brief ignores clear Supreme Court precedent and otherwise fails to rebut Defendants' arguments, and their complaint should thus be dismissed.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Challenges

Defendants' motion explains that Plaintiffs have failed to demonstrate that the Court has jurisdiction to hear their claims. In particular, neither Plaintiff has alleged facts that would show that the statutory provisions they challenge would actually cause them

any injury, and thus they lack standing to present their challenges. Moreover, Braidwood's attempt to preclude the assessment or collection of a tax assessment under the employer responsibility provision is barred by the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, and is not ripe for review. Each of these arguments provides an independent basis to dismiss Plaintiffs' claims for lack of jurisdiction, and Plaintiffs' opposition brief fails to overcome any of them.

A. Hotze Lacks Standing

As Defendants' motion explains, Hotze's complaint fails to allege facts under which he would actually be subject to the minimum coverage provision when it takes effect, and thus he has failed to allege an injury-in-fact.

In response, Hotze contends that he will be compelled to "switch to a more expensive government-approved insurance plan." Pls.' Opp'n 4 (quoting Compl. ¶ 31). But that simply assumes, among other things, that he will be subject to, *and* not in compliance with, the minimum coverage provision. That will only be true if, in 2014 or later years, he does not already have minimum essential coverage or qualify for an exemption.[1] *See* Defs.' Mot. 3, 8-9 (explaining the requirements of minimum essential coverage). The facts alleged in the complaint do not indicate that that will be the case.

Rather than identify sufficient factual allegations, Hotze attempts to shift the burden on this issue. He argues that "Defendants provide no scenario whereby it is even

[1] Hotze is incorrect in arguing that, if his existing insurance satisfies the requirements of the minimum coverage provision, he would still have standing to challenge the law. *See* Pls.' Opp'n 6. An individual is not injured by a statute that requires him to do something he is already doing.

possible for Hotze to avoid being injured by ACA." Pls.' Opp'n 7. It is Hotze, as the plaintiff, who must identify specific allegations in the complaint showing that he has standing. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) ("[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.") (internal quotations omitted). Moreover, Hotze's argument is factually incorrect because Defendants *have* explained that, based on the allegations in the complaint, it appears likely that Hotze's current insurance would satisfy the requirements of Section 5000A based on his participation in his employer's health plan. *See* Defs.' Mot. 8-10. Not only does the complaint fail to allege that Hotze will be uninsured or that he will lack minimum essential coverage in 2014 or later years, the complaint alleges that Hotze currently participates in his employer's health plan. *See* Compl. ¶ 11. As Defendants' motion explains, employer-provided coverage will generally, by definition, satisfy the minimum coverage provision. *See* Defs.' Mot. 8; 26 U.S.C. § 5000A(a). Hotze's complaint makes no factual allegations as to the insufficiency of his employer-provided coverage, and it is thus impossible to determine from the complaint that he will actually be subject to the tax penalty.

Hotze completely ignores these factual deficiencies in his opposition brief. He argues that he "participates in the ACA-noncompliant Braidwood plan and does not satisfy the 'minimum essential coverage' required by the individual mandate." Pls.' Opp'n 6. But that is no more than a legal conclusion, unsubstantiated by supporting factual allegations. The Court should not confuse conclusory legal arguments with the

type of factual allegations necessary to show the existence an injury-in-fact. *See also FW/PBS, Inc.*, 493 U.S. at 231 ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.") (internal quotations omitted).

Without factual support upon which to base standing, Hotze offers a conclusory review of various other cases in which individuals have challenged the minimum coverage provision, but he fails to distinguish his complaint from those that courts have found insufficient. For example, Hotze says that the Third Circuit and the Ninth Circuit relied on plaintiffs' failure to make allegations that Hotze has made, but he does not indicate what those allegations are.

Moreover, Hotze misses the fundamental point of the relevant precedent concerning the minimum coverage provision. An individual can have standing to challenge the provision only if he alleges that he will suffer an actual, imminent injury because of its operation – *i.e.*, that he will not only be subject to the provision, but also that he will actually lack minimum essential coverage in 2014 or later. This is evident from each of the cases identified by the parties. Plaintiffs' reliance on *Walters v. Holder*, Case No. 2:10-cv-76, 2012 WL 3644816 (S.D. Miss. Aug. 23, 2012), is particularly curious, because in that case the court found that two plaintiffs *lacked* standing to challenge the minimum coverage provision given that they already had health insurance. *Id.* at *2. Indeed, Hotze identifies only two cases in which courts found that a plaintiff had standing to challenge Section 5000A, and neither supports his argument. In *Sissel v. United States*, __ F. Supp. 2d __, 2013 WL 3244826 (D.D.C. June 28, 2013), *appeal*

docketed as 13-5202 (D.C. Cir.), the plaintiff alleged that he lacked health insurance, and that in order to prepare for the minimum coverage provision he had already made specific changes in his professional and educational behavior. *See Sissel*, Am. Compl., ECF 40 (Oct. 11, 2012) ¶¶ 24-27. And in *NFIB*, the Supreme Court did not address the issue of standing. But in the Eleventh Circuit, the government did not contest the existence of standing when an individual plaintiff alleged that she must "make financial arrangements now to ensure compliance" with the provision in 2014. *See Florida v. U.S. Dep't of Health & Human Servs.*, Appellants' Br., 2011 WL 1461593, at *6 n.1 (11th Cir. Apr. 1, 2011). Unlike those individuals, Hotze does not allege that he lacks insurance – to the contrary, he participates in his employer's plan – nor does he allege that the minimum coverage provision has already forced him to change his behavior.

Apart from whether he already has health insurance, Hotze also contends in his opposition brief that he is harmed by the minimum coverage provision because "insurance premiums have already increased in the market due to ACA." Compl. ¶ 33 (quoted in Pls.' Opp'n 4-5). *See also id.* ¶ 30 (alleging that "[t]he implementation of ACA has already caused increases in health insurance premiums"). These allegations fail to establish standing, as they constitute nothing more than a generalized grievance. Hotze does not allege that his own premiums or costs have actually increased, let alone that such an increase is attributable to the minimum coverage provision (which is the only statutory provision he seeks to challenge). By alleging that the *statute* has caused effects on the *market* – rather than alleging that the minimum coverage provision has caused an injury to him – Hotze fails to allege a basis for standing. *See Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560-61 & n.1 (1992) (recognizing that standing requires an injury to be particularized, in that it "must affect the plaintiff in a personal and individual way," and that there be "a causal connection between the injury and the conduct complained of – the injury has to be fairly trace[able] to the challenged action of the defendant"). Moreover, Hotze's generalized claims fail even to allege that a decision in his favor on the minimum coverage provision would redress the injuries. *See id.* at 561 (recognizing that standing requires that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision"). As a result, vague allegations about increased premiums do not give rise to standing.[2]

[2] The fact that Hotze's allegations say nothing about his own premiums – such as when or by how much they allegedly increased – may well reflect Hotze's lack of evidence concerning the effects of the ACA, rather than mere oversight. Indeed, early indications are that the law is *slowing* the growth of premiums. *See, e.g.*, U.S. Dep't of Health & Human Services, *Rate Review Annual Report* (Sept. 2013), at 3 (available at http://aspe.hhs.gov/health/reports/2013/acaannualreport/ratereview_rpt.pdf) (finding that ACA provisions providing accountability for insurers' rate increases "saved consumers approximately $1.2 billion on their premiums when compared to the amount initially requested by insurers"); U.S. Dep't of Health & Human Servs., Research Brief, *Health Insurance Premium Increase in the Individual Market Since the Passage of the Affordable Care Act* (Feb. 22, 2013), at 4 (available at http://aspe.hhs.gov/health/reports/2013/rateIncreaseIndvMkt/rb.pdf) (recognizing that the ACA has "slow[ed] the rate of premium growth in the individual market [and] increased the availability and accessibility of information about health insurance rate changes"); Kaiser Family Foundation, *Employer Health Benefits: 2013 Annual Survey* (2013), at 24 (available at http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf) (indicating similar trends in average annual premiums before and after enactment of the ACA); RAND Corporation, *The Affordable Care Act and Health Insurance Markets* (2013), at viii (available at www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR189/RAND_RR189.sum.pdf) ("In analyses that held age, actuarial value, and tobacco use constant, we estimated that, for five of the ten states we examined" – including Texas – "and for the United States overall, the law causes no change in premiums.").

Finally, Hotze (like Braidwood) contends that he has standing to bring a claim under the Origination Clause because "the Origination Clause protects liberty." Pls.' Opp'n 5. Plaintiffs argue that their claim "concerns the procedure by which Congress may enact laws, and Plaintiffs seek to enforce the constitutional requirement that new taxes be initiated only by those representatives closest to the people." *Id.* at 5-6. This is a quintessential example of a generalized grievance that fails to give rise to standing. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *Texas Against Governmental Waste & Unconstitutional Governmental Conduct v. U.S. Dep't of Treasury*, 619 F. Supp. 2d 274, 281 (N.D. Tex. 2009) (holding that plaintiffs lacked standing to challenge the distribution of TARP funds to auto manufacturers because their "complaint is a generalized grievance based on their interest, shared by all other citizens, in seeing the Executive act only as authorized by law").

B. Braidwood Lacks Standing

Braidwood fares no better in its attempt to establish standing for its challenge to the employer responsibility provision. Indeed, Braidwood's allegations suffer from similar deficiencies as Hotze's, as Braidwood fails to identify factual allegations in the complaint showing that it will be injured to the provision when it takes effect. In response, Braidwood contends that it "will pay penalties for not being [sic] an ACA-compliant plan." Pls.' Opp'n 3. But the assertion that Braidwood will be non-compliant is a legal conclusion, and an uncertain one at that. Defendants' motion explains the

various preconditions that must exist before Braidwood would be subject to the Section 4980H assessable payment in 2015, and Braidwood's opposition brief ignores those points. Braidwood simply contends that, in order to satisfy the requirements of Section 4980H, "Braidwood has to pay more and accept less." *Id.* at 9. But the complaint is devoid of factual allegations that would support that point. Whether Braidwood will be subject to the assessable payment will turn on the nature of the coverage it offers to its employees *and* the future actions of those employees (specifically, whether at least one of the full-time employees is certified as having enrolled in a qualified health plan in an exchange and that full-time employee is allowed premium tax credits). *See* 26 U.S.C. § 4980H(b)(1). Because Braidwood does not allege in the complaint that the coverage it offers will necessarily fall short of the standards for adequate coverage, or that any of its full-time employees will enroll in a qualified health plan and receive premium tax credits, it has failed even to allege that it will be subject to Section 4980H.

Without allegations showing that the employer responsibility provision will actually affect it, Braidwood is left with the same generalized grievances alleged by Hotze that have been addressed above. Braidwood also contends that the "ACA imposes additional costs on the employee benefit health plan of Plaintiff Braidwood in order for it to become compliant." Pls.' Opp'n 2. But this argument is unsupported by allegations in the complaint. (Moreover, Braidwood offers no explanation for how it has already incurred additional costs in order to comply with a statutory provision that will not even take effect until 2015.) And while Braidwood concedes that it currently provides health coverage to its employees, it fails to explain how its coverage will necessarily fall short

of the standards for minimum essential coverage. As a result, Braidwood offers little more than speculation about what may happen in the future, which is insufficient to give rise to standing.

C. Braidwood's Challenge Is Barred by the Anti-Injunction Act

Defendants' motion also explains that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests the Court of jurisdiction over Braidwood's challenge to Section 4980H because the claim seeks to preclude the assessment or collection of a tax. *See* Defs.' Mot. 13-16. Braidwood's response relies heavily on *NFIB*, and argues that the Supreme Court's holding that a challenge to the minimum coverage provision is not barred by the AIA necessarily means that a challenge to the employer responsibility provision is also not barred. *See* Pls.' Opp'n 11. Braidwood misreads the *NFIB* ruling. In holding that a challenge to the minimum coverage provision was not barred by the AIA, the Supreme Court recognized that Congress "chose to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.'" *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2582 (2012). The Court recognized that "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.'" *Id.* *NFIB* thus makes clear that, for purposes of the AIA, the language used by Congress matters, and the analysis must include consideration of the "text of the pertinent statutes." *Id.* Yet Braidwood's opposition brief pays little attention to the statutory language, dismissing such analysis as "wordplay" and "splitting hairs." Pls.' Opp'n 12. Indeed, Braidwood does not even acknowledge that the employer

responsibility provision repeatedly uses the term "tax" to describe the amount that a large employer will owe the IRS under specified circumstances. *See, e.g.*, 26 U.S.C. § 4980H(b)(2), (c)(7); *see also* 42 U.S.C. § 18081(f)(2) (referring to the "tax imposed by section 4980H"). This use of the term "tax" distinguishes the employer responsibility provision from the minimum coverage provision, which instead uses the term "penalty." And as the Supreme Court recognized in *NFIB*, "[w]here Congress uses certain language in one part of the statute and different language in another, it is generally presumed that Congress acts intentionally." *NFIB*, 132 S. Ct. at 2583.

Braidwood also cites *Liberty Univ., Inc. v. Lew*, __ F.3d __, 2013 WL 3470532 (4th Cir. July 11, 2013), which held that the AIA does not apply to challenges to the assessment or collection of the Section 4980H tax. *See also Oklahoma v. Sebelius*, Case No. CIV-11-30-RAW, 2013 WL 4052610, at *10 (E.D. Okla. Aug. 12, 2013) (adopting *Liberty Univ.*'s AIA holding). But as Defendants' motion explains, *see* Defs.' Mot. 15, the Fourth Circuit erred in this respect. It is immaterial that Congress used synonymous terms to describe the amounts to be assessed under Section 4980H, given that Congress also, clearly and expressly, described those amounts as a "tax." The term "tax" has the same meaning in Section 4980H as it does in the AIA. *See* 26 U.S.C. § 7421(a) (barring the restraint of "*any* tax") (emphasis added). *See also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (It is a "standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning."). Moreover, the Fourth Circuit erred in reasoning that it would be "anomalous" to treat the minimum coverage provision (which is not subject to the AIA)

and the employer responsibility provision differently. *Liberty Univ.*, 2013 WL 3470532, at *6. The employer responsibility provision, unlike the minimum coverage provision, is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers for the minimum coverage provision penalty) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). The AIA serves to protect these summary administrative measures from pre-enforcement interference. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). It was thus perfectly logical for Congress to treat the Section 4980H tax like all other taxes in the Internal Revenue Code for purposes of the AIA, even though it did not intend the AIA to pose a jurisdictional bar against a suit challenging the constitutionality of Section 5000A.

Because a ruling in Braidwood's favor "would necessarily preclude" the Department of the Treasury from assessing or collecting the Section 4980H tax assessment, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731-32 (1974), the AIA bars Braidwood's premature effort to bring its claim.

D. Braidwood's Challenge Is Not Ripe

Finally, Defendants' motion explains that Braidwood's pre-enforcement challenge satisfies neither prong of ripeness, because the claim is not fit for review and Braidwood has not alleged that it would suffer any hardship absent review at this time. *See* Defs.' Mot. 16-18; *Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

In arguing that its claim is fit for review, Braidwood misunderstands the question and Defendants' argument. Braidwood understands Defendants as arguing that its "claims are unripe because Braidwood supposedly will not be penalized until 2015."

Pls.' Opp'n 10. But it is not simply that a penalty is more than one year away, because Braidwood has not even alleged that. Instead, Braidwood cannot establish with any reliability that it will *ever* be subject to the tax assessment associated with Section 4980H. Braidwood's claim is not fit for review now because its alleged "injury is speculative and may never occur" at all. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008).

Braidwood also fails to show that it would face hardship if the Court defers review. Braidwood contends that it would "suffer[] an immediate loss in the value of its employee health plan." Pls.' Opp'n 11 (citing Compl. ¶¶ 28-30). But that is not alleged in the complaint, nor is it evident why the "value" of the company's health plan would be affected by deferring review of its challenge to a statutory provision that has not even taken effect. Absent a "direct effect on [its] day-to-day business," such as a risk of "serious criminal and civil penalties" for failing to make *immediate* changes, a plaintiff cannot show the existence of hardship. *See Abbot Labs.*, 387 U.S. at 152-53. Because Braidwood has made no such allegations, its claim is not ripe for review.

II. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted

If the Court determines that it has jurisdiction over one or more of Plaintiffs' challenges, Plaintiffs' complaint fails to state a claim upon which relief can be granted.

A. Neither the Minimum Coverage Provision nor the Employer Responsibility Provision Constitutes a "Taking" for Which Compensation Is Due

Plaintiffs contend that the ACA – apparently the minimum coverage provision and the employer responsibility provision – violates the Takings Clause of the Fifth

Amendment by "compel[ling] Plaintiffs to pay money directly to other private entities." Pls.' Opp'n 22. Because Plaintiffs concede that both provisions are exercises of Congress's taxing power, the thrust of their argument is that Congress may not "impos[e] taxes to coerce payments to private parties." *Id.* at 4. But as the Supreme Court recently explained, "[i]t is beyond dispute that '[t]axes . . . are not 'takings.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003)).

Plaintiffs' opposition brief simply ignores this clear statement from the Supreme Court. They argue that the taxing power is limited by other provisions of the Constitution, *see* Pls.' Opp'n 22-23, but that says nothing about the interplay between the taxing power and the Takings Clause. And as the extensive precedent cited in Defendants' brief shows, exercises of the taxing power are, with very limited exceptions, not takings. *See* Defs.' Mot. 20 (collecting cases). *See also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("Exercises of the taxing power are one obvious example" of laws that affect recognized economic values without running afoul of the takings clause.).

Plaintiffs' argument that the ACA "compels Plaintiffs to pay money directly to other entities," Pls.' Opp'n 22, also fails to account for the Supreme Court's ruling in *NFIB*. There, the Supreme Court held that individuals have the "lawful choice" to make a payment to the IRS under the minimum coverage provision "in lieu of buying health insurance." *NFIB*, 132 S. Ct. at 2597, 2600. The same is true of the employer responsibility provision: it "leaves large employers with a choice for complying with the

law – provide adequate, affordable health coverage to employees or pay a tax." *Liberty Univ., Inc.*, 2013 WL 3470532, at *14. The provisions do not "compel private citizens to transfer their money to other private entities," Pls.' Opp'n 23, because they permit individuals and applicable large employers to pay a tax in lieu of purchasing or providing coverage. And it is clear that "the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money." *Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054-55 (11th Cir. 2008).

Plaintiffs fail to identify a single case in which a court has found that a statutory provision like those at issue here constitutes a taking. Because the minimum coverage provision and the employer responsibility provision are valid exercises of the taxing power, they do not constitute takings, and Plaintiffs' claim must fail.

B. The Minimum Coverage Provision Does Not Impose an Unconstitutional Direct Tax

Hotze asserts in the complaint that the "shared-responsibility tax is not a constitutional capitation or direct tax because ACA does not apportion the tax among the States according to the census." Compl. ¶ 52. Defendants' motion explains that this claim was expressly rejected by the Supreme Court in *NFIB*. *See* Defs.' Mot. 21. Hotze recognizes as much in his opposition brief, where he states that "*NFIB* established that the ACA taxes are not direct taxes that must be apportioned based on the census." *See* Pls.' Opp'n 15. Hotze has therefore conceded the issue.

C. The Minimum Coverage Provision Does Not Violate the Uniformity Clause

Hotze also contends that the minimum coverage provision violates the Uniformity Clause of the Constitution "because Congress intended the tax to be non-uniform throughout the United States to account for the differing costs of medical care in different parts of the United States." Compl. ¶ 53. Defendants' motion explains that this fails to state a claim because a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884). *See* Defs.' Mot. 22-23.

Hotze's response brief dedicates just one paragraph to this claim. Hotze analogizes to a hypothetical law that makes "an excise tax on liquor bottles' caps . . . higher in New York than in Kentucky based on New Yorkers' higher cost of living or greater disposable income." Pls.' Opp'n 16. But Hotze fails to explain how the minimum coverage provision operates in such a manner. Indeed, Hotze says virtually nothing about the provision in this argument, and fails to identify any statutory language that runs afoul of the Uniformity Clause.

Hotze's analogy, and his broader argument, fail for the simple reason that the minimum coverage provision does not apply differently in Kentucky and New York. In general, the penalty is the greater of a fixed amount or a percentage of the individual's household income, but may not exceed the national average premium for the lowest-tier plans offered through health insurance exchanges for the individual's family size. 26 U.S.C. § 5000A(c)(1), (2). It may be true that the median household income in one state

is greater than in another state, but that does not mean that the tax applies differently in each state. Indeed, "[i]t was settled fairly early that the [Uniformity] Clause does not require Congress to devise a tax that falls equally or proportionately on each State." *United States v. Ptasynski*, 462 U.S. 74, 82 (1983). (If the test for uniformity required otherwise, then any tax on income would become non-uniform merely by virtue of differing levels of income throughout the country.) Hotze suggests that the tax will apply differently in Texas compared to California or New York, based on how particular states are proceeding with respect to *other* provisions of the ACA, but he fails to explain how the application of the minimum coverage provision turns on such decisions. Hotze's unsubstantiated assertions that the provision will apply differently in different states thus fail to state a viable claim under the Uniformity Clause.[3]

D. The ACA's Enactment Was Consistent With the Origination Clause

Finally, Defendants' motion explains that the ACA's enactment was consistent with the Origination Clause because the statute originated in the House as H.R. 3590 and, even if this Court determines otherwise, the ACA is not a "Bill for raising Revenue" within the particular meaning of the Origination Clause. *See* Defs.' Mot. 23-30.

[3] Moreover, the only case cited by Hotze on this issue concerned a tax unlike the minimum coverage provision. The law at issue in *Ptasynski* established tax rates for domestic crude oil, and exempted certain classes of oil from the tax, including oil produced in certain geographic regions including portions of Alaska. 462 U.S. at 76-78. The law at issue there bears little resemblance to the minimum coverage provision, but in any event the Court upheld that law, and its consideration of the Uniformity Clause precludes Hotze's claim. Most significant for Hotze's challenge, the Court recognized that, "[w]here Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied." *Id.* at 84.

1. The ACA Originated in the House as H.R. 3590

Plaintiffs' brief says virtually nothing about the bill passed by the House as H.R. 3590, or why the Senate's subsequent amendment does not constitute a proper amendment of a bill that originated in the House. Plaintiffs argue only that H.R. 3590 "was not a revenue-raising bill for the purposes of the Origination Clause." Pls.' Opp'n 18. Essentially, Plaintiffs contend that the House originated a bill, but the Senate originated a "Bill for raising Revenue." This argument is flawed in several respects. Even if the Court were to look to the content of the original House bill, that bill's focus on revenue collection measures resolves any doubt that, if the ACA is a "Bill for raising Revenue," then so is the House bill.

Plaintiffs spend little time discussing the substance of H.R. 3590 as it originated in the House, perhaps because the House bill focused heavily on modifying revenue-collection measures. Indeed, every provision of H.R. 3590 concerned the Government's collection of revenue. That bill, entitled the Service Members Home Ownership Tax Act of 2009, modified certain tax-credit, tax-penalty, and estimated-tax provisions of the Internal Revenue Code. *See* Ex. 1 (H.R. 3590 as passed by House on Oct. 8, 2009). For example, Sections 2 and 3 of the bill modified the first-time homebuyers tax credit for members of the armed forces. The tax credit, as originally enacted into law, provided a tax incentive for the purchase of a new residence by first-time homebuyers in 2009 and 2010, and provided for the recapture of the credit from taxpayers who sold their homes soon after claiming the credit. *See* 26 U.S.C. § 36(a), (f). In H.R. 3590, the House sought to modify the credit to waive recapture for members of the armed forces who

received Government orders for extended duty service, and to extend the eligibility period for individuals whose service required them to be outside the United States for an extended period in 2009. *See* Ex. 1, §§ 2, 3. H.R. 3590 also increased filing penalties for the failure to file a partnership or S corporation return. *See id.*, § 5. And in its most clear attempt to raise additional revenue, H.R. 3590 sought to amend the Corporate Estimated Tax Shift Act of 2009 to increase the amount of estimated tax payments owed by corporations with assets of at least $1,000,000,000. *See id.*, § 6 (amending section 202(b) of the Corporate Estimated Tax Shift Act of 2009, set forth at Title II of Pub. L. 111-42, 123 Stat. 1964 (2009), § 202(b)).

Plaintiffs ignore the substance of these provisions. They merely contend that "[t]argeted tax exemptions like the House bill's benefits to military personnel do not constitute a 'bill for raising revenue' under the Origination Clause," because they constitute "expenditures." *See* Pls.' Opp'n 18. As a matter of law, it is of no moment that certain sections of the bill sought to decrease tax burdens (by expanding eligibility for tax credits) rather than increasing revenue. As the Ninth Circuit recognized, "once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes [] into one raising taxes." *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985). Moreover, Plaintiffs' argument is factually incorrect. As discussed above, multiple provisions of H.R. 3590 as it passed the House would have increased revenue. *See* Ex. 1, §§ 5, 6. Plaintiffs' failure to account for these provisions cannot mask that certain provisions of the House-passed bill were designed to raise revenue. As a result, there can

be no dispute that, if the ACA is a "Bill for raising Revenue" merely because certain provisions of the bill raise revenue, then H.R. 3590 is no different. Because the ACA originated in the House as H.R. 3590, its enactment was consistent with the Origination Clause.

2. The ACA Is Not a "Bill for Raising Revenue" Within the Particular Meaning of the Origination Clause

If the Court determines that the ACA did not originate in the House, Plaintiffs' challenge is still without merit because the bill passed by the Senate and enacted as the ACA is not actually a "Bill for raising Revenue" subject to the Origination Clause. The enactment of the ACA would thus be consistent with the Origination Clause even assuming *arguendo* that the bill originated in the Senate.

In moving to dismiss, Defendants explained that the fact that Congress exercised its powers under the General Welfare Clause when it enacted Section 5000A did not convert that provision into a "Bill for raising Revenue" for purposes of the Origination Clause. *See* Defs.' Mot. 25. Because the Clause applies only to "Bills for raising Revenue," it is not enough to show that the bill was an exercise of Congress's taxing power or that it generates revenue, as is the case with the ACA. Instead, the Clause applies only if generating revenue was the ACA's key purpose, which it was not.

Plaintiffs seem to concede as much, as they argue that the Origination Clause applies if a provision of the bill "had the purpose of 'rais[ing] revenue to be applied in meeting the expenses or obligations of the Government.'" Pls.' Opp'n 14 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202-03 (1897)). But the purpose of the ACA, and

the particular provisions identified by Plaintiffs, was not to raise revenue. While Plaintiffs correctly observe that "[s]everal provisions of ACA raise billions of dollars in new revenue," Pls.' Opp'n 14, the fact that provisions will raise revenue does not in itself say anything about their purpose. Defendants have explained that the provisions of the ACA that raise revenue (such as the minimum coverage provision and the employer responsibility provision) are not designed with a primary purpose to raise revenue, but instead that raising revenue is "but means to the purposes provided by the act," *Millard v. Roberts*, 202 U.S. 429, 437 (1906). *See* Defs.' Mot. 27. Plaintiffs' motion does not dispute this fundamental point.

Instead, Plaintiffs contend that the ACA is subject to the Origination Clause simply because the minimum coverage provision and the employer responsibility provision were enacted as exercises of Congress's taxing power. *See* Pls.' Opp'n 14-21. But Plaintiffs' argument improperly conflates two distinct constitutional provisions and doctrines. The Origination Clause applies to a limited subset of bills authorized by the taxing power. Several considerations make this clear. While Plaintiffs' argument equates "Bills for raising Revenue" with bills passed under the tax power, the different scope of the constitutional provisions is indicated by their use of different language. While the General Welfare Clause authorizes Congress to "lay and collect Taxes, Duties, Imports, and Excises," U.S. Const. art. I, § 8, cl. 1, the Origination Clause uses a different term ("Revenue") and applies only to "Bills *for* raising Revenue," U.S. Const. art. I, § 7, cl. 1 (emphasis added). As the Supreme Court recognized in *NFIB*, "the taxing power is often, very often, applied for other purposes than revenue." *NFIB*, 132 S. Ct. at 2596

(quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 962, p. 434 (1833)). The fact that Congress's primary purpose in enacting a bill is not to raise revenue is immaterial in determining whether the law is a proper exercise of the tax power, but it is dispositive for purposes of the Origination Clause. *See Nebeker*, 167 U.S. at 202-03; *Millard*, 202 U.S. at 437. For these reasons, "Taxing Clause and Origination Clause challenges . . . represent separate lines of analysis." *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999).

Plaintiffs return, late in their opposition brief, to an argument about the purposes served by the ACA. Despite their earlier concession as to the significance of the bill's purpose, *see* Pls.' Opp'n 14, Plaintiffs later argue that the application of the Origination Clause does not turn on the bill's purpose, *see id.* at 20-22. But in making that argument, they rely on cases in which the Fifth Circuit has considered legislative purposes in entirely dissimilar contexts. *See, e.g.*, *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 420-21 (5th Cir. 2009) (considering whether 33 U.S.C. § 928(b) authorizes an award of attorney's fees). "Under the Supreme Court's precedents – sparse as they may be on this subject – so long as the primary purpose of the provision is something other than raising revenue, the provision is not subject to the Origination Clause." *Sissel*, 2013 WL 3244826, at *7. Unlike the taxing power, the Origination Clause applies only if generating revenue is the legislation's key purpose. "[R]evenue 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." *Nebeker*, 167 U.S. at 202-03; *see also Millard*, 202 U.S. at 437 (statute imposing property taxes designed to finance railroad construction activities

was not bill for raising revenue). Even Congress's decision to label a measure as a "tax" does not necessarily subject the provision to the Origination Clause when the bill is designed to serve other purposes. *See Nebeker*, 167 U.S. at 202-03; *Millard*, 202 U.S. at 437. As the Supreme Court noted in *United States v. Norton*, 91 U.S. 566 (1875), "'Bills for raising revenue' when enacted into laws, become *revenue laws*," and "revenue laws" include "such laws 'as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.'" *Id.* at 569 (quoting *United States v. Mayo*, 1 Gall. 396, 26 F. Cas. 1230, 1231 (C.C. Mass. 1813)) (emphasis in original).

Plaintiffs also fail in their attempt to show that the purpose of the provisions here was actually to raise revenue. *See* Pls.' Opp'n 21. With respect to the payment associated with the minimum coverage provision, Plaintiffs ignore the Supreme Court's recognition that, "[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. And they offer no substantive response to Defendants' explanation that the primary purpose of the employer responsibility provision is to end conditions under which "employers who do not offer health insurance to their workers gain an unfair economic advantage relative to those employers who do provide coverage, and millions of hard-working Americans and their families are left without health insurance." H.R. Rep. No. 111-443 (II), at 985 (2010). Instead, Plaintiffs offer a policy argument about whether the ACA will succeed in achieving its fundamental goals. *See* Pls.' Opp'n 20-21. Plaintiffs miss the point, as it is immaterial to the application of the Origination Clause whether a statute ultimately

fulfills its purpose. (Indeed, such a determination could not be made at the time of the bill's passage, when the application of the Origination Clause must be assessed.)

Finally, Plaintiffs contend that the Origination Clause applies if there is no "relationship between the persons paying the taxes and the recipients of the benefits." *Id.* at 17. Plaintiffs suggest that the Origination Clause requires that a taxpayer himself must benefit from the goals served by the exercise of the taxing power. *See id.* at 20. But that is legally incorrect. The Supreme Court recognized in *United States v. Munoz-Flores*, 495 U.S. 385, 400 (1990), that "the beneficiaries of the bill are not relevant." The Court left open the *possibility* that the Clause may apply absent a connection between the persons paying the tax and the purposes served by the tax, *see id.* at 400 n.7, but even if such a relationship were necessary it exists here. For example, the minimum coverage provision assesses a tax penalty in order to encourage the purchase of health insurance coverage. There is a clear relation between that purpose and the tax penalty at issue, given that the only individuals who will pay the tax penalty have chosen not to maintain minimum coverage.

CONCLUSION

For the reasons stated herein, and in Defendants' motion, the Court lacks jurisdiction over Plaintiffs' complaint and Plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs' complaint should therefore be dismissed with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2013, I filed the foregoing document via the court's ECF system, which will cause service to be made on the following counsel:

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