No. 14-20039

In The

United States Court of Appeals

for the

Fifth Circuit

STEVEN F. HOTZE, M.D.;
BRAIDWOOD MANAGEMENT, INCORPORATED,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB J. LEW, SECRETARY, DEPARTMENT OF TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston

BRIEF FOR PLAINTIFFS-APPELLANTS

ANDREW L. SCHLAFLY, ESQ.
939 Old Chester Road
Far Hills, New Jersey 07931
aschlafly@aol.com
(908) 719-8608

Attorney for Plaintiffs-Appellants, Steven F. Hotze, M.D., and Braidwood Management, Incorporated

COUNSEL PRESS • (888) 700-3226

CERTIFICATE OF INTERESTED PERSONS

The case number is 14-20039. The case is styled as *Hotze v. Sebelius*.

Plaintiff-Appellant Braidwood Management, Incorporated, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Steven F. Hotze, M.D.,
Appellant

Braidwood Management, Incorporated,
Appellant

Kathleen Sebelius, U.S. Secretary of Health & Human Services, in her official capacity,
Appellee

Jacob J. Lew, U.S. Secretary of the Treasury, in his official capacity,
Appellee

Andrew L. Schlafly,
Counsel for Appellants here, and also in the district court below

Alisa B. Klein and Mark B. Stern,
Counsel for Appellees

United States Attorney Kenneth Magidson (Southern District of Texas, Houston),
Initially served with the lawsuit as required

Carol Federighi, Scott Risner (terminated his representation prior to appeal), Assistant Attorney General Stuart F. Delery, Deputy Branch Director Sheila M. Lieber, U.S. Department of Justice, Civil Division,
Counsel for Defendants below

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: May 8, 2014

Counsel for Plaintiffs-Appellants Steven F. Hotze, M.D., and Braidwood Management, Incorporated

STATEMENT REGARDING ORAL ARGUMENT

The Patient Protection and Affordable Care Act ("ACA") was held by the U.S. Supreme Court to violate the Commerce Clause, and ACA constitutes an unprecedented expansion in power by the federal government. ACA survived initial judicial scrutiny only by being recharacterized as a tax in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) ("*NFIB*"). But the Court expressly left open the possibility that ACA-as-a-tax was unconstitutional on other grounds not yet presented to it. *Id.* at 2598.

This lawsuit challenges constitutional defects in ACA that were neither addressed nor resolved by *NFIB.* The outcome of this appeal affects many millions of Americans who are being required to pay extra taxes or else pay money to insurance companies as mandated by ACA. This appeal will also set a legal precedent for whether the Origination Clause and the Takings Clause remain meaningful restraints on federal power, or have been written out of the Constitution in furtherance of political goals pursued by the other branches of government.

In light of the enormous significance to the public of this appeal and the issues raised, oral argument would be appropriate. Plaintiffs-Appellants respectfully request forty (40) minutes to argue their side of this appeal, a portion of which could be shared with *amici* upon leave of the Court.

TABLE OF CONTENTS

Certificate of Interested Persons ii
Statement Regarding Oral Argument iv
Table of Contents v
Table of Authorities vii
Jurisdictional Statement 1
Statement of the Issues 2
Statement of the Case 3
A. Statement of Facts 4
B. Course of Proceedings 12
C. Disposition of the Case Below 13
Summary of the Argument 14
Argument 17
I. Standard of Review 17
II. The Enactment of ACA Violated the Origination Clause 18
A. The History of the Origination Clause Demonstrates Its Paramount Significance 20
B. Multiple Precedents Establish the Full Applicability of the Origination Clause Here 24
C. As a Tax by Virtue of *NFIB*, ACA Raises Revenue within the Meaning of the Origination Clause 33
1. The ACA Mandates Are Subject to the Origination Clause 33
2. The District Court and the Government Are Incorrect in Characterizing ACA as Something Other than Revenue-Raising 37
D. The Originating House Bill Was Not a Revenue-Raising Bill 44
E. Courts Are Duty-Bound to Apply the Origination Clause, and the House May Not Waive this Guarantee of Political Accountability 46
III. ACA Is an Unconstitutional "Taking" under the Fifth Amendment 48

A. A Tax that Compels a Transfer of Property from One Citizen to Another Is Subject to the Takings Clause 50

B. *NFIB* Did Not Affirm the ACA Taxes Against Challenge under the Takings Clause 53

IV. ACA Can Only Be Upheld By Declaring Its Taxes to Be Voluntary, Unenforceable, and Uncollectible 56

Conclusion 58

Certification of Compliance 59

Certificate of Service 60

TABLE OF AUTHORITIES

Cases **Pages**

Andrepont v. Murphy Exploration & Prod. Co,
566 F.3d 415 (5th Cir. 2009) 41

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987).....50

Assoc. of Am. Physicians & Surgeons v. Sebelius,
901 F. Supp. 2d 19 (D.D.C. 2012) 54

Baral v. United States,
528 U.S. 431 (2000) 10

Brown v. Legal Found. of Wash.,
538 U.S. 216 (2003) 52

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916) 52, 53, 54

City of Boerne v. Flores,
521 U.S. 507 (1997).....46

Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.,
967 F.2d 648 (D.C. Cir. 1992) 55

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 55

Hubbard v. Lowe, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed*,
242 U.S. 654 (1916) 27, 28, 29, 32, 48

Kelo v. City of New London,
545 U.S. 469 (2005) 51, 52

Koontz v. St. Johns River Water Mgt. Dist.,
133 S. Ct. 2586 (2013).....49, 50

Madisonville Traction Co. v. St. Bernard Mining Co.,
196 U.S. 239 (1905).....49

Millard v. Roberts,
202 U.S. 429 (1906) 30, 34, 35, 39, 41, 43

Missouri P. R. Co. v. Nebraska,
217 U.S. 196 (1910) 55

Nat'l Fed'n of Indep. Business (NFIB) v. Sebelius,
132 S. Ct. 2566 (2012) .....*passim*

Olcott v. The Supervisors,
83 U.S. (16 Wall.) 678 (1873) 49

Pennell v. San Jose,
485 U.S. 1 (1988).....55

Plessy v. Ferguson,
163 U.S. 537 (1896).....49

R.R. Retirement Bd. v. Alton R.R. Co.,
295 U.S. 330 (1935) 52

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995)..... 45

Sissel v. United States HHS,
951 F. Supp. 2d 159 (D.D.C. 2013) 43

Texas Assn. of Concerned Taxpayers, Inc. v. United States,
772 F. 2d 163 (5th 1985) 42

Texas Office of Pub. Util. Counsel v. FCC,
183 F.3d 393 (5th Cir. 1999) 29

Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,
363 S.W.3d 192, 55 Tex. Sup. J. 380 (Tex. 2012) 52

Twin City Bank v. Nebeker,
167 U.S. 196 (1897) .....*passim*

United States v. Butler,
297 U.S. 1 (1936).....39

United States v. Herrada,
887 F.2d 524 (5th Cir. Tex. 1989) 39, 42

United States v. Lopez,
514 U.S. 549 (1995).....38

United States v. Munoz-Flores,
495 U.S. 385 (1990).....*passim*

United States v. Norton,
91 U.S. 566 (1876).....30, 37, 39, 45

United States v. Ptasynski,
462 U.S. 74 (1983) 30, 31

Constitution, Statutes, Public Laws, and Regulations

U.S. CONST. amend. V 2, 3

U.S. CONST. art. I, § 7 ..... 2, 3, 8, 33, 46

U.S. CONST. art. I, § 8 ..... 5, 31

LA. CONST. art. III, § 16(B)
http://senate.legis.state.la.us/documents/constitution/Article3.htm#§16.Appropriations..... 21

2 U.S.C. § 639 45

18 U.S.C. § 3013 25

26 U.S.C. § 4980H 3, 30

26 U.S.C. § 5000A ..... *passim*

26 U.S.C. § 6096 57

26 U.S.C. § 9006 57

26 U.S.C. § 18022 6

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2201 1

28 U.S.C. § 2202 1

29 U.S.C. § 1001 *et seq.* 4

29 U.S.C. § 1002(32) 11, 30, 31

42 U.S.C. § 300gg-91 ..... 11, 30

42 U.S.C. § 18022 ..... 11, 30

Pub. L. No. 111-42, 123 Stat. 1963 (2009) 10

Pub. L. No. 111-148, 124 Stat. 119 (2010) 2, 5, 33, 42

Pub. L. No. 111-152, 124 Stat. 1029 (2010) 2

Pub. L. No. 112-10, 125 Stat. 38 (2011) 2

IRS Notice 2013-45, 2013-31 I.R.B. 116 3

Other Authorities

C. Beard, AMERICAN GOVERNMENT & POLITICS (1910) 32

VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES (1935) 34, 47

1 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (notes for July 6, 1787) (Yale University Press: 1937) http://press-pubs.uchicago.edu/founders/documents/a1_7_1s7.html 22

Federalist No. 58 (James Madison) http://avalon.law.yale.edu/18th_century/fed58.asp 23

Charles Merrill Hough, "Covert Legislation and the Constitution," 30 HARV. L. REV. 801 (1917) 27

James Madison, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787 (New York, Norton & Co. Inc. 1969) (May 29, 1787) 21

1 J. Story, COMMENTARIES ON THE CONSTITUTION (3d ed. 1858) 36

Priscilla Zotti and Nicholas Schmitz, "The Origination Clause: Meaning, Precedent, and Theory from the 12th Century to the 21st Century," 3 BRITISH JOURNAL OF AMERICAN LEGAL STUDIES 71-139 (2014), http://www.bcu.ac.uk/Download/Asset/acecfa6b-59c9-4f7b-a2cd-6a09a1bc281b 20, 22, 24, 37

Other

http://www.advisory.com/daily-briefing/resources/primers/medicaidmap (ACA Medicaid expansion map state-by-state) 16

http://www.brainyquote.com/quotes/quotes/m/marktwain141773.html (Mark Twain Quotations) 32

http://www.reid.senate.gov/press_releases/reid-unveils-final-senate-health-care-bill#.U2g1-_ldVHT ("Reid Unveils Final Senate Health Care Bill") 9

http://www.reid.senate.gov/press_releases/reid-unveils-senate-health-care-bill#.U2g0mfldVHT ("Reid Unveils Senate Health Care Bill") 9

Plaintiffs-Appellants Steven F. Hotze, M.D. ("Hotze") and Braidwood Management, Incorporated ("Braidwood"), by and through their counsel, hereby appeal and seek reversal of the decision and judgment below that dismissed their Complaint against Defendants-Appellees Kathleen Sebelius, Secretary, Health and Human Services, and Jacob J. Lew, Secretary, Department of Treasury (collectively, "Defendants" or "Government").

JURISDICTIONAL STATEMENT

Jurisdiction existed in the district court below under 28 U.S.C. §§ 1331 and 1361 because this action arose under Article I and the Fifth and Tenth Amendments of the United States Constitution. (ROA.7) Jurisdiction existed below for the requested declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202. (*Id.*)

Jurisdiction exists in this court on appeal pursuant to 28 U.S.C. § 1291. The United States District Court, Southern District of Texas, entered its final Judgment dismissing all the claims in this action on the 10th day of January, 2014 (ROA.196-231), and entered its Final Decision and Order on the same day (ROA.232). Plaintiffs-Appellants Hotze and Braidwood timely filed a notice of appeal (with the filing fee) on the same day, January 10, 2014, from the Final Decision and Order that disposed of all parties' claims. (ROA.233)

STATEMENT OF THE ISSUES

1. Whether the Patient Protection and Affordable Care Act ("ACA")[1] violates the Origination Clause, U.S. CONST. art. I, § 7, cl. 1.

2. Whether ACA violates the Takings Clause of the Fifth Amendment, U.S. CONST. amend. V.

3. Whether the tax penalties under ACA should be construed as voluntary, unenforceable and uncollectible, in order to avoid the constitutional infirmities presented by one or both of the foregoing issues.

[1] The Patient Protection and Affordable Care Act was enacted at Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, and by the Department of Defense Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.

STATEMENT OF THE CASE

Article I, Section 7 of the U.S. Constitution states:

> 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, § 7, cl. 1 (the "Origination Clause"). ACA was enacted in violation of the Origination Clause, because ACA did not originate as a revenue-raising bill in the House of Representatives. ACA also violates the Takings Clause of the Fifth Amendment, by compelling Plaintiffs Hotze and Braidwood to transfer property directly to other private entities without the requisite "public use." U.S. CONST. amend. V.

The U.S. Supreme Court has already held, in *NFIB*, that penalties under ACA constitute a tax for the purposes of the U.S. Constitution. Plaintiffs Hotze and Braidwood brought this action to seek declaratory and injunctive relief against the enforcement of ACA, as they have the right to do under federal statutes and the Tenth Amendment. (ROA.11, ROA.14, ROA.15)

Plaintiff Braidwood faces penalties for not providing ACA-compliant coverage known as the "Employer Mandate," 26 U.S.C. § 4980H,[2] and Braidwood is injured by increased costs due to the mandates imposed by ACA.

[2] Subsequent to the filing of this lawsuit, the Treasury Department postponed the effective date of the Employer Mandate by one year, from January 1, 2014, to January 1, 2015. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116.

(ROA.5-6, ROA.10-11) Braidwood's employees (including Plaintiff Hotze) face a penalty under ACA's "Individual Mandate," 26 U.S.C. § 5000A. (ROA.9-11)

But ACA is unconstitutional. It was enacted in violation of the Origination Clause of the U.S. Constitution, as set forth in Section 7 of Article I. In addition, the mandates of ACA violate the Takings Clause of the Fifth Amendment by requiring citizens to choose between paying a penalty or transferring their property directly to other private entities. ACA causes a massive redistribution of wealth directly from some citizens to others. These constitutional violations by ACA have not been addressed yet by the Fifth Circuit, or by the U.S. Supreme Court. These issues are squarely presented by this appeal.

The U.S. Supreme Court, in its ruling in *NFIB*, left these issues unresolved. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2598 (2012). The Court also left open the question of whether the tax imposed by ACA is unenforceable. *Id.* at 2584.

A. Statement of Facts.

Plaintiff Braidwood is a Texas corporation that provides a self-insured employee health coverage plan under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. (ROA.7) Braidwood's business consists of managing health and wellness services for patients. It has been repeatedly honored by the *Houston Chronicle* as one of the top workplaces in the

Houston area. (*Id.*) Braidwood has approximately 73 full-time equivalent employees, and currently provides coverage for medical expenses on a voluntary basis to Hotze and all its employees. (ROA.5) Plaintiff Hotze, also a resident of Texas, is the founder and one of the employees of Braidwood who participates in its health plan. (ROA.7)

On March 23, 2010, ACA became law. Pub. L. No. 111-148, 124 Stat. 119 (ROA.8) ACA penalizes nonexempt individuals, including Hotze, who do not maintain "minimum essential" health insurance coverage under ACA. 26 U.S.C. § 5000A. Individuals who declined to purchase government-approved health insurance effective beginning January 1, 2014, are assessed a "[s]hared responsibility payment" under the Individual Mandate. *Id.* § 5000A(b). (ROA.8) Although ACA describes this financial obligation as a "penalty", the U.S. Supreme Court ruled that Congress lacks the power to impose this penalty under the Commerce Clause, and the Court upheld this "[s]hared responsibility payment" only as an exercise of Congress's power to "lay and collect Taxes." *NFIB*, 132 S. Ct. at 2600 (citing U.S. CONST. art. I, § 8, cl. 1). Accordingly, this payment obligation under ACA is a tax. (ROA.8)

This ACA tax became effective on January 1, 2014, and increases to 2.5% of an individual's household income by 2016, up to a maximum amount that equals the average annual premium for insurance covering 60% of the expenses for ten

specified services, such as hospitalization and government-approved wellness services. 42 U.S.C. § 18022. (ROA.9) The Supreme Court held that this ACA tax is not a tax for the statutory purposes of the Anti-Injunction Act. *NFIB*, 132 S. Ct. at 2584.

Braidwood is subject to ACA because Braidwood is a business having more than 50 full-time equivalent employees. (ROA.9) But for years Braidwood has successfully provided a voluntary "high-deductible" health coverage plan for its employees, which directly covers them for medical expenses greater than about $4,000 per year. (*Id.*) Employees who choose to participate in Braidwood's current plan are then able to contribute money on a tax-free basis to their own Health Savings Accounts ("HSAs"), in order to cover expenses that are within their deductible as well as other qualified expenses. (*Id.*) This enables employees to carry over from year-to-year any contributions to their HSAs under this plan which they do not spend. (*Id.*)

Exemptions or waivers from ACA are not available to Hotze and many other employees of Braidwood. (ROA.9-10) They neither qualify for Medicare (they are under the age of 65) nor qualify for "catastrophic plans" under 26 U.S.C. § 18022(e) in lieu of ACA bronze, silver, gold, or platinum plans (because they are over the age of 30). (ROA.9) Likewise, Hotze and many other employees of Plaintiff Braidwood are not eligible for ACA-approved forms of "minimum

essential coverage" under 26 U.S.C. § 5000A (*e.g.*, Medicaid, CHIP, TRICARE, veteran's and Peace Corps health programs, eligible employer-sponsored plans of a spouse, or any other ACA-designated form of minimum essential coverage). (ROA.9-10)

In the year 2012, Braidwood funded its employee health plan at an expense of roughly $198,000. (ROA.10) ACA has forced Hotze and Braidwood to choose between incurring the new penalties imposed by ACA or switching to more expensive and less desirable health insurance coverage pursuant to ACA requirements. (*Id.*) Government-approved insurance plans under ACA do not typically cover medical expenses for effective wellness programs, such as those preferred by Hotze and other employees of Braidwood. (*Id.*) In addition, the implementation of ACA has caused increases in health insurance premiums. (*Id.*)

Hotze and Braidwood face irreparable harm in being compelled to switch to a more expensive government-approved insurance plan that does not cover or reimburse for desired medical services. (ROA.10) They will suffer unrecoverable financial losses from the implementation of ACA, which they will have no practical way of recouping from the federal government or from private, government-approved insurance carriers. (ROA.10-11) Indeed, Hotze and Braidwood have already suffered harm by the reduction in market choice for affordable health insurance, as insurance premiums have already increased in the

market due to ACA. (ROA.11)

ACA compels Hotze and others to pay penalties to the federal government, or else purchase health insurance that is far more expensive and less useful than existing employer-based coverage. (ROA.6) ACA compels Plaintiff Braidwood and similar Texas businesses to pay penalties of $2,000 for every full-time employee, above a 30-employee threshold, or switch to far more expensive and less desirable health insurance coverage. (ROA.7)

The Origination Clause of the U.S. Constitution requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1. (ROA.11) But the Individual Mandate or "[s]hared responsibility payment" under ACA constitutes a tax, as determined by the U.S. Supreme Court, as it "'shall be assessed and collected in the same manner' as tax penalties." *NFIB*, 132 S. Ct. at 2580, 2600 (quoting 26 U.S.C. § 5000A(g)(1)). (ROA.12) Specifically, this shared-responsibility tax imposed by ACA is paid into the Treasury as substantial revenue for the federal government, "expected to raise about $4 billion per year by 2017." *NFIB*, 132 S. Ct. at 2594.

Despite being a revenue-raising tax, ACA originated in the Senate, rather than in the House as required by the Origination Clause. (ROA.12) Senate Majority Leader Harry Reid, described and continues to describe ACA on his own official website as "the Senate health care bill":

> Nevada Senator Harry Reid unveiled the Senate health care bill that makes health care more affordable while reducing the federal deficit. Discussing a Nevada parent's struggle to cover his young child's hospital bills, Reid said, "We can't afford to overlook what this is really all about. More accurately, we can't afford to overlook who this is all about." This bill will cut the deficit by $130 billion, extend coverage to more than 94% of Americans and insure 31 million more of the uninsured.[3]

A few weeks later, Senate Majority Leader Harry Reid issued a similar press release – still available on his official website – entitled "Reid Unveils Final Senate Health Care Bill."[4]

Procedurally, the Senate substituted ACA into a House bill, H.R. 3590, entitled the "Service Members Home Ownership Tax Act of 2009." H.R. 3590, 111th Cong. (2009) ("SMHOTA"), which had passed the House of Representatives in October 2009. (ROA.12) SMHOTA sought to "amend the Internal Revenue Code of 1986 to modify first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees." (*Id.*)

SMHOTA was not a revenue-raising bill, and none of SMHOTA's six sections raised revenue within the meaning of the Origination Clause, specifically described as follows. (*Id.*) Section 1 of SMHOTA merely adopted "Service Members Home Ownership Tax Act of 2009" as H.R. 3590's short title. (*Id.*)

---

[3] http://www.reid.senate.gov/press_releases/reid-unveils-senate-health-care-bill#.U2g0mfldVHT (viewed 5/5/14).

[4] http://www.reid.senate.gov/press_releases/reid-unveils-final-senate-health-care-bill#.U2g1-_ldVHT (viewed 5/5/14).

Sections 2 and 3 of SMHOTA modified a first-time homebuyer's tax credit by waiving recapture of the credit for members of the armed forces ordered to extended duty service overseas, without raising revenue. (ROA.12-13) Section 4 of SMHOTA expanded exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" benefits under 26 U.S.C. § 132, without raising revenue. (ROA.13) Section 5 of SMHOTA increased filing penalties by $21 (from $89 to $110) for failure to file certain returns, without raising revenue. (*Id.*) Section 6 of SMHOTA amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. No. 111-42, tit. II, § 202(b), 123 Stat. 1963, 1964 (2009), to increase the amount of *estimated* taxes that certain corporations must pay, which the Supreme Court has unanimously held "are not taxes in their own right," *Baral v. United States,* 528 U.S. 431, 436 (2000), and thus do not raise revenue. (ROA.13)

In November 2009, the U.S. Senate deleted the entire contents of SMHOTA, renamed the bill as the "Patient Protection and Affordable Care Act" with Senate Amendment No. 2786, 111th Cong. (2009), and inserted ACA. (*Id.*) As amended in the Senate, ACA is a revenue-raising bill that did not originate with a revenue-raising bill in the House, and thus ACA violates the Origination Clause of the U.S. Constitution. (*Id.*) The ACA shared-responsibility tax is not a constitutional capitation or other direct tax because ACA does not apportion the tax among the

States according to the census. (*Id.*) The ACA shared-responsibility tax is not a constitutional duty, impost, or excise tax because Congress intended the tax to be non-uniform throughout the United States to adjust for the differing costs of medical care in different parts of the United States (*e.g.*, medical care costs are less in rural Kansas than in New York City), and Congress made the tax non-uniform for that reason. *See, e.g.*, 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). (ROA.13-14)

ACA compels Hotze and Braidwood to pay money to other private entities: government-approved health insurance companies, which thereby implicates the Takings Clause of the Fifth Amendment. (ROA.14) A portion of these payments by Hotze and Braidwood, as compelled by ACA, enriches the executives and shareholders of the private health insurance companies, and another portion of these compelled payments by Hotze and Braidwood forcibly subsidizes lower insurance premiums for others who have government-approved pre-existing conditions that ACA requires insurance companies to cover. (ROA.14-15) ACA thereby compels private individuals and entities to make payments to other private entities, without a public use and without just compensation, and without complying with the Fifth Amendment. (ROA.15) Congress lacks the authority to tax the public conditionally, based on someone's failure to transfer his property to another private entity. (*Id.*)

ACA does not contain a severability clause, and the shared-responsibility tax imposed by ACA is integral to the remainder of ACA, such that any unconstitutionality of this tax has the result of rendering all of ACA unconstitutional. (*Id.*)

B. Course of Proceedings.

Hotze and Braidwood sued Defendants on May 7, 2013, seeking declaratory relief against ACA and an injunction against its enforcement, by virtue of its violation of the Origination and Takings Clauses. (ROA.5-16) Specifically, Hotze and Braidwood sought equitable relief against Defendant Kathleen Sebelius, the Secretary of the Department of Health & Human Services, and Defendant Jacob J. Lew, the Secretary of the Department of the Treasury, an executive department of the U.S. government. (ROA.5, ROA.7)

Defendants moved to dismiss the Complaint, under FED. R. CIV. P. 12(b)(1) and 12(b)(6), on August 6, 2013. (ROA.53) Defendants sought to avoid a substantive ruling on ACA by raising an assortment of procedural objections, such as arguing that Plaintiffs somehow lacked standing and that the case was somehow not ripe. (ROA.67-73, ROA.76-78)

Hotze and Braidwood filed their brief in opposition to Defendants' motion to dismiss on August 27, 2013 (ROA.107-38), and the Government replied on September 24, 2013 (ROA.152-88). District Court Judge Nancy F. Atlas entered

her decision on January 10, 2014 (ROA.196-231), and her subsequent judgment on the same day (ROA.232). Hotze and Braidwood filed their Notice of Appeal on the same day also. (ROA.233)

C. Disposition of the Case Below.

The district court held in favor of Hotze and Braidwood on all jurisdictional and procedural issues, including standing, ripeness, and justiciability: "Plaintiffs have standing to contest the ACA on the grounds alleged and that this case is otherwise justiciable." (ROA.197, also ROA.210-14) But the lower court held against Hotze and Braidwood on the merits of their challenge: "The Court further concludes that Plaintiffs have failed to state a claim upon which relief can be granted under either the Origination Clause or the Takings Clause." (ROA.197)

After reviewing the statutory background for ACA and the outcome in *NFIB*, the district court found that "[t]he claims that Plaintiffs press are different from those in *NFIB*." (ROA.202) Specifically, the court below found that, unlike the claims in *NFIB*, Hotze and Braidwood seek declaratory and injunctive relief based on the Origination Clause and the Takings Clause of the Fifth Amendment. (*Id.*)

On the merits, the district court held that the Origination Clause does not apply to ACA, by concluding that it is not a revenue-raising bill within the meaning of the Clause (ROA.215-21) and, even if it were, that ACA originated in

the House of Representatives as required (ROA.221-26). The court further held that the Takings Clause does not apply to ACA, by finding that taxes are immune from application of that Clause. (ROA.227-31) Plaintiffs timely appealed. (ROA.233)

SUMMARY OF THE ARGUMENT

"Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, ***any tax must still comply with other requirements in the Constitution***." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (emphasis added). In fact, the taxes imposed by ACA do not "comply with other requirements in the Constitution" – namely, the Origination Clause and the Takings Clause.

Justice Thurgood Marshall, writing for the U.S. Supreme Court, established that:

> A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.

United States v. Munoz-Flores, 495 U.S. 385, 397 (1990). ACA is thereby no more immune from judicial scrutiny under the Origination Clause than it would be if ACA violated the First Amendment. Because the mandates in ACA are revenue-raising provisions that originated in the Senate rather than the House, ACA

violated the restraint imposed by the Origination Clause in Article I, Section 7, and ACA must be declared invalid and unenforceable. The Supreme Court reserved this issue for another day in *NFIB*, and that other day has arrived here and now.

In addition to its infirmity under the Origination Clause, ACA also violates the Takings Clause of the Fifth Amendment by compelling private citizens, Plaintiffs Hotze and Braidwood, to transfer their property directly to others – specifically, to private insurance companies. This issue likewise remained unresolved by the Supreme Court in *NFIB*. Just as taxing speech based on content would violate the First Amendment, imposing taxes to coerce payments directly to private parties violates the Takings Clause. The Fifth Amendment protection against one private citizen being ordered to transfer property to another private citizen is no less robust than the First Amendment and other parts of the Bill of Rights. ACA is unconstitutional under the Fifth Amendment by compelling one citizen to pay money directly to another.

This Court has a variety of options in addressing these constitutional defects in ACA. This Court could clarify that the central taxes imposed by ACA are not enforceable, but are voluntary and uncollectible. The Supreme Court itself held, in *NFIB*, that criminal prosecution, notices of lien and levies are all prohibited and not allowed when there is non-payment of these taxes under ACA. *NFIB*, 132 S. Ct. at 2584 (citing 26 U.S.C. §5000A(g)(2)(A) and §5000A(g)(2)(B)). By these

very terms of ACA itself, it imposes an uncollectible tax, and this Court could reduce the constitutional problems by confirming that the ACA taxes are uncollectible. But to the extent that the ACA taxes are construed to be enforceable to the tune of billions of dollars annually, ACA is unconstitutional and should be enjoined.

ACA has had a markedly divisive effect on our Nation, as illustrated by the contentious regional disagreement over it with respect to rejecting subsidies entailed in its Medicaid expansion.[5] Few, if any, pieces of federal legislation have divided our Nation regionally as severely – and as economically – as ACA has. In this Fifth Circuit, every state has rejected ACA's Medicaid expansion, while in several other Circuits, every state has accepted it.[6] The result, which will worsen over time as the ACA taxes sharply increase, is a redistribution of wealth from the people in this jurisdiction to people in other jurisdictions. If the federal government had enacted such divisive legislation in compliance with the U.S. Constitution, then this might be viewed as a cost of living in a large Republic. But the federal government did not comply with the Constitution in dividing the Nation so badly with this legislation. Adherence to the Constitution by invalidating ACA is the remedy.

---

[5] http://www.advisory.com/daily-briefing/resources/primers/medicaidmap (viewed 5/2/14).

[6] *Id.*

ARGUMENT

The decision below resolved all standing and jurisdictional issues in favor of Hotze and Braidwood,[7] who do not object to that portion of the ruling. But Hotze and Braidwood do appeal the lower court ruling with respect to the Origination and Takings Clauses. In addressing these issues *de novo*, this Court should declare ACA unconstitutional and enjoin it, or at least clarify that the taxes imposed by its Individual and Employer Mandates are voluntary, unenforceable and uncollectible.

I. Standard of Review.

The standard of review here is *de* novo for the grant of the motion to dismiss by the district court. *See Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009) (citing *Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 839 (5th Cir. 2004), *cert. denied*, 543 U.S. 995 (2004)). This Court should "construe the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor." *Severance*, 566 F.3d at 501 (citing *Lovick v. Ritemoney Ltd*., 378 F.3d 433, 437 (5th Cir. 2004)). *See also LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005) (citing *Bombardier Aerospace v. Ferrer,*

[7] On standing, ACA imposes additional costs on the employee benefit health plan of Plaintiff Braidwood in order for it to become compliant. (ROA.10) Meanwhile, Plaintiff Hotze faces imminent penalties under ACA's minimum coverage requirement. (ROA.8) In addition, Defendants have not denied that ACA has caused insurance premiums to increase. (ROA.10) The district court found that standing by Plaintiffs exists. (ROA.204-08)

Poirot & Wansbrough, P.C. 354 F.3d 348, 352 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004)).

The decision below was based on FED. R. CIV. P. 12(b)(6), and thus on appeal all allegations in the Complaint must be accepted as true, and reversal is appropriate if plaintiffs might be able to prove any facts justifying relief. "A Rule 12(b)(6) motion should be granted only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief," and the appellate court "must accept as true the allegations in the complaint and construe them in the light most favorable to the plaintiff." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005).

II. The Enactment of ACA Violated the Origination Clause.

The Origination Clause is a fundamental safeguard against overreaching federal power, by ensuring that only the representatives most accountable to the people – the more frequently elected House of Representatives – would control the purse strings. The long history of the enormous significance of the Origination Clause cannot seriously be doubted, and its continuing vitality has been confirmed by the Supreme Court. Because the passage of ACA failed to comply with the Origination Clause, ACA is unconstitutional and must be enjoined. This Clause is one of the "other requirements in the Constitution" with which ACA does not comply, as the Supreme Court allowed in *NFIB*. 132 S. Ct. at 2598.

The court below held that Plaintiffs' challenge to ACA under the Origination Clause is ripe and fully justiciable. (ROA.210-14, ROA.215) But although ACA raises billions of dollars in new revenue through its new taxes, the lower court concluded that ACA is not a revenue-raising measure subject to the Origination Clause. (ROA.221) If affirmed, the decision below renders the Origination Clause a dead letter, a nullity lacking any practical significance. This is contrary to the teachings of the Fifth Circuit, the U.S. Supreme Court, and the compelling history of the meaning and significance of the Origination Clause as a bulwark against voracious federal legislative power in burdening the people with revenue-raising bills.

The Supreme Court, in *NFIB*, confirmed that the ACA mandates impose new taxes, and these new taxes plainly raise substantial new revenue for the Treasury. Below the government did not argue that the originating House bill, H.R. 3590, was a revenue-raising bill. The district court erred in holding that the Origination Clause does not apply to ACA. (ROA.221) That holding below runs afoul of hundreds of years of protection provided by the Clause to the people, as explained by Point II.A., and overturns multiple precedents confirming the significance of ACA, as discussed in Point II.B. By imposing substantial new taxes, ACA raises revenue within the meaning of the Origination Clause (Point II.C), and ACA did not originate as a revenue-raising bill in the House as the

Clause requires (Point II.D). Courts are duty-bound to apply fully the Origination Clause against offending legislation, such as ACA, and the House of Representatives may not waive the rights of the people to this essential protection (Point II.E).

A. The History of the Origination Clause Demonstrates Its Paramount Significance.

The Origination Clause is deeply rooted in our constitutional republic, embodying a principle of political accountability that was highly valued before, during and after the Constitutional Convention in 1787. Prior to the Convention a majority of the states had versions of the Origination Clause in their own state constitutions, to guarantee that revenue-raising measures could originate only from representatives who are the most accountable to the people. *See* Priscilla H.M. Zotti and Nicholas M. Schmitz, "The Origination Clause: Meaning, Precedent and Theory from the 12th to 20th Century," 3 BRITISH JOURNAL OF AMERICAN LEGAL STUDIES 71, 91 Table 1 (Spring 2014) [hereinafter, *Zotti & Schmitz*].[8] Scholars have traced the history of the Origination Clause back even earlier to the British Parliament in the 1600s, where new taxes could originate only in the House of Commons and not in the House of Lords, and the roots of this basic liberty extend all the way back to the Magna Carta itself. *See id.* 77-78.

[8] http://www.bcu.ac.uk/Download/Asset/acecfa6b-59c9-4f7b-a2cd-6a09a1bc281b (viewed 5/2/14).

Today many state constitutions continue to have origination clauses in order to maximize political accountability for those who initiate new taxes. *See, e.g.*, LA. CONST. art. III, § 16(B) ("Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.").[9] The Origination Clause is as fundamental and important a limitation on legislative power as the Bill of Rights and other safeguards of liberty are.

No less of a giant among the Framers than the future Vice President Elbridge Gerry of Massachusetts insisted, during the Constitutional Convention, on inclusion of the Origination Clause in the U.S. Constitution, in order to "restrain the Senatorial branch from originating money bills" as the Senate subsequently did with ACA. James Madison, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, 35-38 (New York, Norton & Co. Inc. 1969) (May 29, 1787). The compelling need for this Clause was clear: the Senate would be (and still is) less representative and less accountable to the people than members of the House of Representatives are, and thus less restrained by the people against raising new revenue from them.

---

9 http://senate.legis.state.la.us/documents/constitution/Article3.htm#§16.Appropriations (viewed 5/3/14).

Madison's notes from the Constitutional Convention set forth in detail the discussions about the Origination Clause, and confirm how important it was to the delegates. Madison observed that it was the view of the Framer George Mason, who was one of the strongest opponents of a powerful new federal government, that prevailed at the Convention in order to limit the power of the Senate:

> The consideration which weighted with the Committee was that the 1st branch would be the immediate representatives of the people, the 2nd would not. Should the latter have the power of giving away the peoples money, they might soon forget the source from whence they received it. We might soon have an Aristocracy.

1 M. Farrand, *The Records of the Federal Convention of 1787*, 543 (notes for July 6, 1787) (Yale University Press: 1937) (statement by George Mason).[10]

Multiple delegates to the Constitutional Convention, including Elbridge Gerry, John Dickenson and Edmund Randolph, felt that ratification of the new Constitution would be in jeopardy if this essential limitation on the origination of revenue-raising bills were not included. *See Zotti & Schmitz*, at 97-98. By an overwhelming vote of 9-2, the appropriate Committee approved the provision that "All bills for raising revenue shall originate in the House of Representatives," with only the small states of Maryland and Delaware in dissent. *See id.* at 99. The additional caveat that the Senate would retain the power to amend was never

[10] This quote and comments by other Framers about the Origination Clause are available online from the University of Chicago Press and the Liberty Fund here: http://press-pubs.uchicago.edu/founders/documents/a1_7_1s7.html (viewed 5/6/14).

officially recorded at the Constitutional Convention, *id.*, an omission that underscores how the power to amend by the Senate should not be allowed to swallow the rule that was passed and recorded.

James Madison became an enthusiastic supporter of the Origination Clause during the ratification process. As Madison wrote in promoting ratification of the Constitution:

> The House of Representatives cannot only refuse, ***but they alone can propose, the supplies requisite for the support of the government***. … This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect, ever just and salutary measure.

Federalist No. 58 (emphasis added).[11] The people may never have ratified the Constitution if the Origination Clause were not in it, in order to restrain the new federal power from raising revenue without maximum accountability. The Senate – the body of Congress less accountable to the people, both in how often they are elected and in how many people each senator represents – was expressly prevented from originating revenue-raising measures.

The district court below interpreted the Origination Clause narrowly to apply only if the "purpose" of the legislation "was primarily to raise revenue." (ROA.220 n.50) But the Constitutional Convention expressly ***rejected*** such a

[11] http://avalon.law.yale.edu/18th_century/fed58.asp (viewed 5/7/14).

narrow scope for the Clause, by turning down Edmund Randolph's proposed language:

> Bills for raising money for the ***purpose of revenue*** or for appropriating the same shall originate in the House of Representatives

Zotti & Schmitz, at 95 (emphasis in original). The Framers did not want the safeguard of the Origination Clause to depend on what the purpose of the Bill was. The Constitution that was approved by the delegates to the Constitutional Convention, and subsequently ratified by the people, lacks any limitation of "purpose" on the essential protection guaranteed by the Origination Clause.

Our Nation exists in part because colonists rebelled against taxation without representation by the British Parliament, and because colonists rejected the excuse that those taxes were somehow justified by lofty purposes. New taxes are burdens regardless of what the stated purpose for them may be. The Framers understood and appreciated this, and produced a Constitution prohibiting the initiation of revenue-raising bills by anyone other than the representatives closest and most accountable to the people.

B. Multiple Precedents Establish the Full Applicability of the Origination Clause Here.

Three landmark decisions form the guideposts for analysis under the Origination Clause: one by Justice Thurgood Marshall in writing for the U.S. Supreme Court, another by Judge Charles Merrill Hough, who applied the Clause to

strike down a statute prior to his elevation to the Second Circuit, and the third by the Fifth Circuit in explaining an essential meaning of the Clause.

Starting with the Supreme Court, it clarified that challenges to statutes under the Origination Clause should be decided on their merits, and are not political issues that would somehow be non-justiciable. *United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990). The government argued there, as it may again argue here, that the judiciary should not confront and decide the constitutionality of the procedures used by Congress to enact a law. But the Supreme Court expressly rejected the government's argument in *Munoz-Flores.* The Court held that "[w]e conclude initially that this case does not present a political question and therefore reject the Government's argument that the case is not justiciable." *Id.*

The *Munoz-Flores* decision considered an argument that a tiny "special assessment" on persons convicted of a federal misdemeanor was enacted in violation of the Origination Clause of the Constitution. The defendant there had pled guilty to two misdemeanor counts of aiding and abetting aliens to elude investigation by immigration officers, and defendant's sentence included a special assessment of only $25 on each count under 18 U.S.C. § 3013 (1982 ed., Supp. V) as that statute existed at the time. 495 U.S. at 388.

Writing for the Supreme Court, Justice Marshall emphasized that the Origination Clause has as much vitality and continuing strength as the First

Amendment does. *Id.* at 397 (violations of the Origination Clause are just as serious and deserving of judicial scrutiny, despite being passed by both the House and Senate and signed by the President, as violations of the First Amendment are). He likewise shredded, on behalf of the Court, the argument that subsequent passage by the House of Representatives of a revenue-raising bill that originated in the Senate would somehow cure its constitutional defect:

> Although the House certainly can refuse to pass a bill because it violates the Origination Clause, ***that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments***. Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review. As an initial matter, we are unwilling to presume that the House has a greater incentive to safeguard its origination power than it does to refuse to pass a bill that it believes is unconstitutional for other reasons. ***Such a presumption would demonstrate a profound lack of respect for a coordinate branch of Government's pledge to uphold the entire Constitution***, not just those provisions that protect its institutional prerogatives.

Munoz-Flores, 495 U.S. at 392-93 (emphasis added, citation omitted). When it comes to raising revenue, the House may prefer not to have the political accountability required by the Origination Clause, but the Supreme Court was emphatic that it is the duty of the courts to uphold the Origination Clause when the House fails to.

The second leading precedent is the compelling decision of Judge Charles Merrill Hough in striking down a federal statute as unconstitutional under the

Origination Clause. Judge Hough was elevated to the Second Circuit within a year of writing this decision, where he was a leading jurist alongside Judge Learned Hand. Subsequent to Judge Hough's seminal ruling under the Origination Clause, he published an article in the *Harvard Law Review* predicting that there would increasingly be "statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained." Charles Merrill Hough, "Covert Legislation and the Constitution," 30 HARV. L. REV. 801, 801 (1917). Nearly a century later, his prediction continues to ring true.

Judge Hough was presented with a challenge to the constitutionality of the Cotton Futures Act of 1914, which was major federal legislation attempting to reduce speculative trading in cotton futures, by regulating color, quality and other attributes of cotton. Judge Hough observed that:

> [E]very one who has studied the investigations, reports, and discussions preceding and producing that passage of the act knows that nothing was further from the intent or desire of the lawmakers than the production of revenue, ***nevertheless the result of their efforts is a revenue bill within the constitutional meaning***.

Hubbard v. Lowe, 226 F. 135, 137 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916) (emphasis added). The Cotton Futures Act imposed "a tax intended to be prohibitive," *id.*, just as ACA is being defended as imposing a tax in order to deter people from going without health insurance. (ROA.219)

Of course, what "every one" says (or speculates) about the underlying

purpose of legislation does not allow it to avoid application of the Origination Clause. The *Hubbard* court held: "It is immaterial what was the intent behind the statute; ***it is enough that the tax was laid***, and the probability or desirability of collecting any taxes is beside the issue." 226 F. at 137 (emphasis added). The Clause applies with full force to bills that impose taxes and thereby raise revenue, period. The court struck down the Cotton Futures Act because it did not originate in the House. It harmonized prior decisions that had upheld statutes against challenge under the Origination Clause, by observing that the prior decisions all assumed full application of the Clause to federal statutes. "If these courts had not assumed that a revenue bill of Senate origin was a nullity, why spend so much time in proving that the act under consideration was not such a bill?" *Id.* at 140.

Accordingly, the court ruled that "[t]he Cotton Futures Act is not, and never was, a law of the United States. It is one of those legislative projects which, to be a law, must originate in the lower house." *Id.* at 141. The decision was made easier by how the Senate had marked its bill as a Senate bill, but the underlying rationale of the ruling is clear: if a revenue-raising bill originated in the Senate rather than the House, then it is void *ab initio* by virtue of Article I, Section 7. Congress, if it so chooses, may reenact the same law in a proper manner (as Congress subsequently did for the Cotton Futures Act), but the improperly enacted law is without effect.

The United States appealed this ruling against it to the Supreme Court, but subsequently moved for dismissal of its appeal, which the Court granted while also awarding costs. 242 U.S. 654 (1916). Accordingly, *Hubbard v. Lowe* remains good law in its application of the Origination Clause to invalidate unconstitutional legislation. It stands as a clarion call against resorting to what the *Hubbard* court aptly described as "mental strain" pursued by others to salvage defective bills, by recharacterizing them as somehow being non-revenue-raising. 226 F. at 140.

The district court below made no mention of *Hubbard v. Lowe*, even though it was fully argued there by Plaintiffs. (ROA.134) Nor did the lower court decision mention the Fifth Circuit decision on point, which was fully briefed by both sides below: *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (briefed at ROA.86 and ROA.131-32). There the Fifth Circuit explained:

> The *Munoz-Flores* Court does not discuss in great detail the importance, in Origination Clause analysis, of some kind of relationship between the payors and the beneficiaries. Still, it makes sense that the Court would insist on some link, because an assessment on one group for the benefit of a completely unrelated group is how courts have distinguished taxes raised for general federal outlays from fees raised for specific programs. Otherwise, Congress could always avoid the Origination Clause requirement because, in theory, all revenue is raised to fund some "particular program." Thus, ***courts must establish some relationship between the payors and the beneficiaries to avoid the strictures of the Origination Clause.***

183 F.3d at 428 n.56 (emphasis added). That "relationship between the payors and the beneficiaries" is completely absent under the ACA taxes. The taxes to be paid

by Plaintiffs under ACA do not benefit Plaintiffs, but go into the general Treasury of the United States.

A smattering of older rulings under the Origination Clause, from more than a century ago, cast little light on the issue at hand. *See Rainey v. United States*, 232 U.S. 310 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard v. Roberts*, 202 U.S. 429 (1906); *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897); *cf. United States v. Norton*, 91 U.S. 566 (1875). Those century-old decisions are easily distinguishable here, because they concerned the raising of revenue for constitutional federal programs, rather than for an unconstitutional exercise of federal power under the Commerce Clause as attempted by ACA.

The ACA taxes are not excise taxes related to a valid program, which might fit within the older case law, because the ACA taxes are not uniform as required of excise taxes by the Constitution. "[T]he Uniformity Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found." *U.S. v. Ptasynski*, 462 U.S. 74, 84 (1983). The amount of the "penalty" under §5000A of ACA varies with the cost of the health insurance avoided (*i.e.*, it costs more in Manhattan, New York, than in Manhattan, Kansas). *See, e.g.*, 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) (non-uniform "individual" tax); 26 U.S.C. §4980H(a)(1) ("employer" tax incorporates criteria from 26 U.S.C.

§5000A(f)(2)); 26 U.S.C. §5000A(f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) (non-uniform "employer" tax). The uniformity requirement does not allow an excise tax to be higher in Hollywood than in Peoria, based on the wealthier population in Hollywood, and it does not allow ACA to do likewise. The effect of ACA's taxes is to put Texas (which declined to take payouts under ACA's Medicaid program and declined to set up a state health insurance exchange) against California and New York (which embraced ACA's programs). This type of Balkanization is what the Uniformity Clause prohibits, for taxes other than income taxes. *Ptasynski*, 462 U.S. at 81.

The drafters of ACA made no attempt to satisfy the uniformity requirements required by the Constitution for direct or indirect taxes, and instead unjustifiably built ACA on the Commerce Clause. The Supreme Court in *NFIB* held that the Individual Mandate is not a lawful *direct* tax (which would require apportionment to the census), 132 S. Ct. at 2598-99, and the Individual Mandate likewise is not a lawful *indirect* tax (which would require uniformity throughout the Nation). U.S. CONST. art. I, § 8, cl. 1. The ACA taxes can only qualify as income taxes; all the other possibilities (duties, imposts and excises) require uniformity in application, which ACA lacks. But ACA-as-an-income-tax places it outside of the precedents that declined to strike down the statutes under the Origination Clause.

In 1910, historian Charles Beard lamented that the Origination Clause

seemed to have died, stating that "[i]t can hardly be said that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem." C. Beard, AMERICAN GOVERNMENT & POLITICS 706-07 (1910). But reports of the demise of the Origination Clause have been greatly exaggerated, to paraphrase Mark Twain.[12] Merely a few years after Beard's remark, the *Hubbard* court struck down the Cotton Futures Act based the Origination Clause, and 80 years later the Supreme Court confirmed the continuing strength of the Clause in *Munoz-Flores*.

Constitutional protections of liberty are obviously not contingent on how often they are invoked, or how highly they are held in "public esteem." Congressmen swear to uphold the Constitution and, as a result, there should never be any violations of the Origination Clause in need of correction by the courts. But in the rare instance that Congress does breach this fundamental restraint on its power, as happened with ACA, courts are duty-bound to defend the Constitution against the transgression.

[12] Mark Twain famously said, "The reports of my death have been greatly exaggerated." http://www.brainyquote.com/quotes/quotes/m/marktwain141773.html (viewed 5/3/14).

C. As a Tax by Virtue of *NFIB*, ACA Raises Revenue within the Meaning of the Origination Clause.

ACA's billion-dollar tax provisions did not originate with a revenue-raising bill in the House, and thus are unconstitutional. As a tax that raises revenue, ACA does indeed violate the Origination Clause, which expressly requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7. "A law passed in violation of the Origination Clause" should be reviewed and invalidated by the Courts as readily as a violation of the First Amendment would be. *Munoz-Flores*, 495 U.S. at 397 (quoted in full above).

1. The ACA Mandates Are Subject to the Origination Clause.

The Individual and Employer Mandates in ACA are plainly revenue-raising, to the tune of billions of dollars. *See* Pub. L. No. 111-148, §§ 1501, 10106 (individual mandate provision); *id*. § 1513 (employer responsibility provision). Specifically, the revenue for these ACA taxes is expected to tally approximately $4 billion by 2017. *NFIB,* 132 S. Ct. at 2594. It is undisputed that these ACA taxes are paid into the general Treasury, just like many other revenue-raising statutes.

The Origination Clause applies fully to these discrete provisions of ACA, by requiring an inquiry into 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." *Twin City Bank v. Nebeker,* 167 U.S. at 202-03 (emphasis added). Even if ACA as a whole has additional purposes or goals, these exactions

imposed by ACA "levy taxes in the strict sense of the word," and thus are fully subject to the Origination Clause. *Nebeker*, 167 U.S. at 202.

Unlike special assessments, the massive taxes raised by ACA flow directly to the Treasury, and that weighs strongly in favor of applying the Origination Clause. In successfully raising a point-of-order to table a Senate-originated bill during the New Deal, Democratic Senator Kenneth McKellar observed that a pending bill would cause revenue to "go into the Treasury … just exactly as do the moneys which arise from tariff taxes or internal revenue taxes or any other taxes." VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §316 (1935). The ACA assessments "would be mingled with and become a part of all the revenues of this Government," and ACA thus "is as completely a revenue bill as it is possible to make it." *Id.*

The revenue-raising attribute of ACA is further confirmed by the *NFIB* decision, which upheld it as tax revenue to be paid into the general Treasury. 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, the revenue raised by ACA is ***not*** to be spent on any program. The ACA taxes constitute an ***income*** tax that cannot plausibly be characterized as a special

assessment which might escape scrutiny under the Origination Clause. Given its justification under the Taxing Power as decided in *NFIB*, the tax penalty imposed by Section 5000A is a real tax and not justifiable based on some overall regulatory program.

As a massive, multi-billion-dollar ***income*** tax, ACA's tax penalties do not qualify for an exception from the Origination Clause for regulatory programs that simultaneously raise funds to support those program. *See 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"). As an enormous ***income*** tax, ACA's penalties are not merely a "special assessment" that might escape application of the Origination Clause. *Id.* at 398; *Nebeker,* 167 U.S. at 202-03; *Millard v. Roberts,* 202 U.S. 429, 436-37 (1906).

Nor do the tax penalties under ACA qualify for any exemptions from the Origination Clause as identified by Justice Story, which the older case law cited favorably. Justice Story listed examples of non-revenue bills that might "incidentally create revenue" and thereby be exempt from the Origination Clause:

(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."

1 J. Story, COMMENTARIES ON THE CONSTITUTION §880, pp. 610-611 (3d ed. 1858) (cited by *Nebeker*, 167 U.S. at 202-03 (1897)).

Justice Story's exemptions do not apply to ACA because, unlike ACA, Justice Story's exemptions were all based on projects authorized by non-tax constitutional powers. The tax penalties in ACA are far broader in scope than the examples provided by Justice Story and, in sharp contrast with his exemptions, there is no justification for ACA outside of the taxing power of Congress. Under *NFIB*, the only constitutional basis for ACA is the taxing power itself, and it cannot be saved from constitutional limits on taxation by citing an unconstitutional purpose.

In addition, scholars point out that Justice Story's exemptions from the Origination Clause have been overplayed beyond its clear meaning at the Constitutional Convention:

> it appears that the Court in *Nebeker* was attempting to follow the relevant discussion in Justice Joseph Story's 1833 Commentaries, which in turn may be viewed in the context of the Constitutional Convention of 1787, and the Maryland Constitution of 1776. This chain, however, has several weak links. … The opinion in *Nebeker* cited Story's Commentaries at §880 which used the "incidental" revenue language while citing the 1787 Convention ("2 Elliot's Debates, 283, 284"). However, the Convention delegates were at that

> time rejecting – not accepting − a proposal by Edmund Randolph to eliminate the origination requirement for revenue-raising that was not "*for the purpose of revenue*."

Zotti & Schmitz at 121-22 (emphasis in original, footnotes omitted). The scholars concluded that the delegates to the Constitutional Convention ***rejected*** the exemptions from the Origination Clause which were only suggested by Justice Story decades later:

> Regarding that rejected proposal, Randolph, Mason and Madison all referred to the proposal as excluding "incidental" revenue-raising from the requirements of the Origination Clause. Additionally, that proposal failed. That failed proposal was quite different from the one ultimately ratified in the Constitution (which does not specify that the scope of "Bills for raising Revenue" only includes those for the "*purpose of revenue*"). To the extent that Story may have been relying upon the 1787 deliberations for the notion that incidental taxes are exempt from the requirements of the Origination Clause, Story must have been mistaken, and the *Norton* and *Nebeker* Courts equally mistaken to follow suit.

Id. at 122-23 (emphasis in original, footnote omitted).

2. The District Court and the Government Are Incorrect in Characterizing ACA as Something Other than Revenue-Raising.

The district court acknowledged, as the Supreme Court held, that ACA cannot be properly based on the Commerce Clause. (ROA.200) But then the district court failed to appreciate the significance of that fact, which is that ACA cannot stand as an exercise of commercial regulatory power by Congress. ACA was upheld ***only because*** it raises revenue. Given that ACA remains law precisely

because it is a revenue-raising bill, ACA cannot properly avoid application of the Origination Clause.

The holding below that the ACA taxes are merely incidental to some other purpose, when that other purpose is itself unconstitutional, should not immunize ACA from the Origination Clause. If Congress sought to impose a tax on people who carry guns within 1000 feet of a school in order to deter the carrying of guns in the proximity of schools, then such a tax would need to comply with the Origination Clause because it would not be justified under the Commerce Clause in light of *United States v. Lopez*, 514 U.S. 549 (1995). Such a law could not be sustained as merely being a "means to the purposes provided by the act" (ROA.217, inner quotation omitted), when the purpose of regulating guns near schools has been held to be beyond the scope of the Commerce Clause. *Lopez*, 514 U.S. at 567-68. Yet that is the conceptual underpinning of the decision below, and the heart of the government's defense of ACA.

The Supreme Court has already held as unconstitutional the stated primary purpose of ACA – to regulate people who would otherwise decide not to purchase health insurance. If Congress wants to tax those people, then the *NFIB* Court was willing to uphold such a tax provided it did not violate other constitutional protections. Such a tax is not sustainable as a means to an end that is itself

unconstitutional: regulating people who do not currently purchase ACA-compliant health insurance.

It is the unconstitutionality of ACA under the Commerce Clause that sets it apart from the tax to fund a postal money order system in *Norton*, the tax to support the national currency in *Twin City Bank v. Nebeker*, and the tax for funding the construction of railroad terminals in D.C. in *Millard*. There was a lawful constitutional end in each of those precedents relied upon by the government and district court below. A constitutionally justified end is absent in ACA. The argument that the "ends justifies the means" does not work when the "end" itself is not constitutional under the Commerce Clause: "resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." *United States v. Butler*, 297 U.S. 1, 69 (1936). The ACA taxes do not merely "incidentally create revenue" for a valid legislative end; the ACA taxes are the only constitutional basis of the law, in contrast with the decisions upholding other statutes against an Origination Clause challenge. *Nebeker*, 167 U.S. at 202; *Millard*, 202 U.S. at 436; *cf. Norton*, 91 U.S. at 455.

Likewise, in the Fifth Circuit decision on which the district relied, a small special assessment of merely $100 accompanied a conviction under a constitutional criminal statute. *United States v. Herrada*, 887 F.2d 524, 527 (5th Cir. Tex. 1989) (cited and discussed by ROA.217-18). The cost of collecting and

processing the tiny assessment may have even exceeded its revenue, which belies any argument that the statutory provision was genuinely revenue-raising. In contrast, the multi-billion-dollar ACA taxes are far more than their costs of collection, and the enormous revenue generated by the ACA taxes is far greater than the incidental taxes in the precedents relied upon by the district court.

The district court held that "ACA, by and through the individual mandate and employer mandate, is plainly designed to expand health insurance coverage," by inducing people who do not have health insurance to purchase it. (ROA.219, inner quotation omitted) "These mandates, in other words, are but a means to an end, which is to advance health care coverage." (*Id.*) The district even held, in adopting an argument made by the government, that "Congress's preference is undoubtedly that individuals purchase insurance in lieu of paying the tax, and thus for the individual mandate to raise zero revenues." (*Id.*, inner quotation omitted). But if that were truly the overriding goal, then higher taxes would advance that goal better than lower taxes would, and the Employer Mandate would not have been delayed until after the midterm elections. It is precisely because these penalties are revenue-raising measures that they are increased in modest steps, with politically inspired delays, just as other tax increases are done incrementally, in recognition that many voters ardently oppose increasing revenue with tax hikes.

The district court never confronted the fact that the commercial regulation of people to buy health insurance is an unconstitutional end for Congress under *NFIB*. The district court analysis is akin to citing a goal of Congress to silence all so-called "hate speech," and then upholding a tax penalty as a means to that end. When the end is beyond the power of Congress, its taxes must be analyzed without using the end as justification. *See United States v. Butler*, 297 U.S. at 69.

The ACA taxes fail as a "means to an end" for an additional reason: the lack of a relationship between the persons paying the taxes and the recipients of the benefits. *Munoz-Flores* suggested that the Origination Clause would apply if "the program funded were entirely unrelated to the persons paying for the program." *Munoz-Flores*, 495 U.S. at 400 n.7. Such is the scenario here, because the persons paying the taxes under ACA are unrelated to those receiving the benefits. The ACA taxes on Plaintiffs do not fund the program or provide any benefits to Plaintiffs, and there is no "element of contract" to justify the exchange. *Millard*, 202 U.S. at 437. Hence the Origination Clause fully applies.

A further defect in the "means to an end" approach adopted by the district court is that it contravenes Fifth Circuit teachings on how the plain meaning of a statute trumps assertions of legislative intent. *See, e.g.*, *Andrepont v. Murphy Exploration & Prod. Co*, 566 F.3d 415, 420-21 (5th Cir. 2009) (rejecting "the Ninth Circuit's 'legislative intent' approach" and emphasizing that "[w]e are

required to construe the plain meaning of the statute"). It is not controlling that some view the legislative intent for ACA to improve the nation's health care system by compelling people to purchase health insurance. In *NFIB*, the Supreme Court itself rejected the expressed legislative intent of congressmen who denied they were imposing new taxes. Moreover, the stated legislative purpose that ACA will "achieve[] near-universal coverage" is demonstrably false. Pub. L. No. 111-148, § 1501(a)(2)(D), (E), (G). The district court drew a distinction between legislative intent and legislative purpose in justifying its use of the latter (ROA.220), but neither trumps plain meaning in construing the ACA taxes.

The district court cited only two decisions of this Circuit in support of its dismissal under the Origination Clause. First, it relied on the easily distinguishable criminal appeal of *United States v. Herrada* discussed above, where the $100 "special assessment" was little more (and perhaps less) than its attendant costs of collection and processing. The district further relied on *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F. 2d 163 (5th 1985), *cert. denied*, 476 U.S. 1151 (1986) (cited at ROA.222-23), which held that a challenge to a statute under the Origination Clause was a non-justiciable political question. But the holding in *Texas Ass'n of Concerned Taxpayers* was overruled by *Munoz-Flores*, as Plaintiffs had pointed out in their brief below, and thus lacks precedential value. (ROA.131)

Most of all, the ruling below relies heavily on a decision by the District Court for D.C., which rejected a challenge to ACA under the Origination Clause. But that decision narrowed the scope of the Origination Clause to nearly nothing, failing to recognize its essential role in ensuring maximum political accountability for revenue-raising bills. The D.C. district court eviscerated the Clause by ruling that "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 v. United States HHS*, 951 F. Supp. 2d 159, 168 (D.D.C. 2013).

That holding by the District Court in D.C. is contrary to the teachings of this Circuit and the Supreme Court, and speculation about "the primary purpose of the provision" is too easy of a bypass to the Constitution. "The road to Hell is paved with good intentions" is a wise proverb, and the Constitution protects our Nation against going down that road no matter how good the intentions may appear. The multi-billion-dollar transfer of wealth away from Texas annually by the ACA taxes cannot be justified based on speculation about legislative intent and purpose.

ACA stands in stark contrast with a property tax upheld long ago in D.C., which helped fund a massive public works project "demanded for the best interest of the national capital and by the public at large." *Millard*, 202 U.S. at 437. When the taxpayers benefit from the program, as in *Millard* and other cases upholding taxes under the Origination Clause, its role is diminished. But ACA is like a tax on

land in Texas to fund a public works project in California, which would obviously be unconstitutional if such tax originated in the Senate.

D. The Originating House Bill Was Not a Revenue-Raising Bill.

The district court also missed the meaning of the Origination Clause by omitting the necessary inquiry as to whether the House bill was a ***revenue-raising*** bill. The opinion below sidesteps that fundamental issue by first asking whether ACA originated in the House, and then asking whether the Senate bill was germane to the House bill. That approach mistakenly overlooks the central requirement that the House bill be revenue-raising, and thereby strips the Origination Clause of its value. Under the approach taken below, the House bill could be a blank page, or nearly so, and the Senate could then amend it to include massive revenue-raising burdens. Nothing could be further from the meaning and significance of the Origination Clause.

The approach taken by the district court caused it to wade into the murky waters of "germaneness",[13] which Plaintiffs never alleged or argued. The issue is not whether ACA was "germane" to the original House bill (H.R. 3590), but whether the original House bill was revenue-raising. The government tacitly conceded below that H.R. 3590 was not a revenue-raising bill in the House, and

[13] The district court found that germaneness is satisfied as long as two bills concern revenue, even if the revenue in the two bills is completely unrelated. (ROA.224-25)

targeted tax exemptions like H.R. 3590 do not constitute a "bill for raising revenue" under the Origination Clause. *Cf. Norton,* 91 U.S. at 567-68. Such targeted tax exemptions are tax expenditures – a form of spending, not revenue-raising. *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.

ACA was indeed unrelated to the House bill (H.R. 3590), but there is no need for the Court to grapple with germaneness as the district court did, in order to decide this case. (ROA.223-26) It suffices to recognize that the House bill was not revenue-raising, but the Senate bill (ACA) was. That is what the Origination Clause forbids.

The district court reasoned that "the ACA originated in the House of Representatives" simply because it was amended into H.R. 3590 after the latter was stripped and reduced to a shell bill. (ROA.221) But that puts the cart before the horse. The Origination Clause does not permit the Senate to make amendments unless and until the revenue-raising bill first passes the House, as the Clause makes clear:

> Step 1: "All Bills for raising Revenue shall originate in the House of Representatives"
>
> Step 2: "but the Senate may propose or concur with Amendments as on

other Bills"

U.S. CONST. art. I, sec. 7, cl. 1. The proper analysis ensures full accountability by not reaching Step 2 unless Step 1 is first satisfied. *See, e.g., Rainey*, 232 U.S. at 317 ("It appears that the section was proposed by the Senate ***as an amendment to a bill for raising revenue which originated in the House***. That is sufficient.") (emphasis added). The issue is not whether a bill that became ACA originated in the House, as the district court held (ROA.221), but whether a ***revenue-raising*** bill that became ACA first passed in the House. Defendants conceded below that H.R. 3590 was ***not*** a revenue-raising bill when it originated and passed in the House, and thus the Senate lacked power to amend it with the revenue-raising ACA.

Congress knows how to comply with the Origination Clause when it wants to, and remains free to pass laws that satisfy its guarantees of full political accountability for revenue-raising measures. Congress was not in compliance in passing ACA.

E. Courts Are Duty-Bound to Apply the Origination Clause, and the House May Not Waive this Guarantee of Political Accountability.

Federal courts have a duty to apply the Origination Clause, based on "whether a bill is 'for raising Revenue' or where a bill 'originates.'" *Munoz-Flores*, 495 U.S. at 396; *see also City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("power to interpret the Constitution … remains in the Judiciary"). This duty of the federal courts stands in contrast with the U.S. Senate, which has an

interest in minimizing the effect of the Origination Clause. *See, e.g.*, VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §317 (1935) (during the New Deal, the Senate and the House in the 68th Congress reached opposite conclusions on whether the Origination Clause applied to S. 3674).

As the district court held, any acceptance by the House of a bill sent back to them by the Senate cannot magically create compliance with the Origination Clause after it was violated. (ROA.225 n.56) The court observed that the Supreme Court had already considered and rejected the view that the House can somehow cure an Origination Clause defect after-the-fact. "The Supreme Court rejected a similar argument in *Munoz-Flores*, noting that 'congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality.'" (ROA.225 n.56, quoting *Munoz-Flores*, 495 U.S. at 391). The Origination Clause is obviously a restraint on where a law ***originates***, not where it ends up, and the House can no more waive its constitutional obligations than a court could.

But the district court cited favorably a separate opinion by Justice Scalia, not joined by anyone else on the Supreme Court, which suggested that the mere title on a bill conclusively determines from where it originated. (ROA.225 n.56, citing *Munoz-Flores*, 495 U.S. at 409 (Scalia, J., concurring)). That argument fails to recognize that the House may not want the political accountability associated with

revenue-raising provisions, and may prefer to enact non-revenue-raising measures to be sent over to the Senate for the insertion of tax hikes. Political accountability is avoided more often than it is desired, but the Origination Clause ***requires it*** of the House in the origination of a revenue-raising bill, or else it cannot become law.

The House simply has no power to shirk its own political accountability for originating revenue-raising measures, or to waive the constitutional rights of the people. The Origination Clause protects the people by requiring maximum accountability in the passage of laws that raise revenue. Whether the violation of the Clause was careless or intentional is of no consequence. The Clause was violated, and that ends the inquiry. In striking down a federal law passed in violation of the Origination Clause, the *Hubbard* court restated the truism that "[a]ny and all violations of constitutional requirements vitiate a statute," even if they represent merely "this kind of careless journey work" of originating a revenue bill in the wrong body. *Hubbard v. Lowe,* 226 F. at 140.

III. ACA Is an Unconstitutional "Taking" under the Fifth Amendment.

ACA is also invalid under the Takings Clause of the Fifth Amendment, because ACA compels Plaintiffs to pay money directly to other private entities in violation of clear Fifth Amendment precedents. It is not the payment to government that constitutes the taking, but how the ACA taxes force citizens to pay money directly to private corporations (insurance companies). Government may

not, consistent with the Fifth Amendment, compel one citizen to pay money directly to a corporate entity, as ACA does. As the first Justice Harlan restated in his prescient dissent in *Plessy v. Ferguson*:

> "Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not …. ***The right of eminent domain nowhere justifies taking property for a private use***."

163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (quoting *Olcott v. The Supervisors*, 83 U.S. (16 Wall.) 678, 694 (1873), emphasis added). *See also Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905) ("That principle, this court has said, ***grows out of the essential nature of all free governments***.") (emphasis added).

The opinion below devoted only a few pages to Plaintiffs' Fifth Amendment claim, without citing Justice Harlan's admonition in his *Plessy* dissent or to the *Olcott* and *Madisonville Traction Co.* precedents. (ROA.226-30) Instead, the district court upheld ACA against the Fifth Amendment challenge by declaring that taxes are somehow immune from application of the Takings Clause, even when they compel private citizens to pay money to other private citizens. The lower court held that it "is dispositive in this case" that "'it is beyond dispute that taxes and user fees … are not takings.'" (ROA.227, quoting *Koontz v. St. Johns River Water Mgt. Dist.*, 133 S. Ct. 2586, 2600 (2013)). But taxes that infringe on

constitutional rights are not exempt from scrutiny simply because they are taxes. *Koontz* does not stand for the proposition that government may imposes taxes to coerce one citizen to pay money directly to another. A tax that compels the transfer of property in violation of the Fifth Amendment is just as unconstitutional as a tax that infringes on First Amendment rights. Explained another way, the "taking" in a tax compelling a private transfer of property is not the tax itself, but the property transferred because of the tax.

Taxes that step on First Amendment rights, for example, have been repeatedly invalidated by the U.S. Supreme Court. "Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular ***views*** by specific magazines." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (emphasis in original). The constitutional defect is not the amount of the tax burden, but the harmful effect that it has with respect to individual rights.

The protections guaranteed by the Fifth Amendment are no less robust than those secured by the First Amendment, and it was error for the court below not to apply the Fifth Amendment fully against the taxes imposed by ACA.

A. A Tax that Compels a Transfer of Property from One Citizen to Another Is Subject to the Takings Clause.

The district court erred in holding that taxes are categorically immune from application of the Takings Clause, even though the effect (as here) of the taxes is to

coerce one citizen to pay money to another. Such an interpretation of the Takings Clause would render it useless against creative schemes designed to redistribute wealth directly, by coercing residents to transfer their property to private corporations.

In *Kelo v. City of New London*, a 5-4 Supreme Court upheld the power of a town to take private property, upon payment of just compensation to the owners, so that the property could subsequently be transferred to a private corporation for development. 545 U.S. 469 (2005). But if taxes can be imposed to coerce the transfer of property directly from residents to private corporations, then why bother with eminent domain and just compensation? Next time, a town could use its taxation power to coerce residents to transfer their property to private developers as desired by the powers-that-be, or else pay penalties. The Fifth Amendment stands tall against such schemes.

Alternatively, if the Fifth Amendment did not apply to taxes as held by the court below, then what is to prevent government from imposing direct redistribution-of-wealth schemes? Conceptually, if ACA withstands scrutiny under the Fifth Amendment, then nothing would stand in the way of government using its tax power to coerce citizens to pay money into exchanges for the direct benefit of others, or to induce everyone to give $100 directly to his neighbor under threat of a tax penalty for non-compliance. If the Fifth Amendment somehow does

not apply to taxes that coerce payments from one citizen to another, then federal law could impose a tax of $110 on everyone who fails to give $100 to a neighbor.

The Takings Clause protects money as much as it protects real property. *See R.R. Retirement Bd. v. Alton R.R. Co.,* 295 U.S. 330, 357 (1935). A law requiring that a portion of a money account 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. of Wash.,* 538 U.S. 216, 240 (2003). The portion of Plaintiffs' premiums that subsidizes insurance executives' salaries, and artificially lowers premiums for others who have preexisting conditions, constitutes a "taking". ACA compels some private individuals (including Plaintiffs) to support private insurance companies and others who benefit from ACA. This violates the Takings Clause, because "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 though *A* is paid just compensation." *Kelo,* 545 U.S. at 477. *See also Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC,* 363 S.W.3d 192, 197, 55 Tex. Sup. J. 380 (Tex. 2012).

As the decision below acknowledges, the Fifth Amendment limits the taxation power of government, as recognized in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916) (ROA.229-30). *Brushaber* made it clear that the

Takings Clause (like every other clause in the Bill of Rights) does limit government power, including the taxing power. *Id.* at 24. It can hardly be argued otherwise. A tax that coerced people to make a statement would obviously be unconstitutional under the First Amendment. A tax that coerced people to turn in their guns would obviously be unconstitutional under the Second Amendment. And a tax that coerces people to transfer property to other private citizens is plainly unconstitutional under the Fifth Amendment. But the decision below errs in construing the example of how the Fifth Amendment would apply against taxation in *Brushaber* as the ***only*** way that the Fifth Amendment could apply. The example given in dictum in *Brushaber* is not to the exclusion of other situations in which the Fifth Amendment properly applies against taxation.

B. *NFIB* Did Not Affirm the ACA Taxes Against Challenge under the Takings Clause.

The district court erred in ruling that the Supreme Court, in *NFIB*, held that ACA is somehow constitutional under the Takings Clause. The Supreme Court did not so rule. The Court merely affirmed the tax as being within the taxation power of the federal government. The Court expressly stated that the ACA tax may be unconstitutional for reasons not raised in the *NFIB* litigation. Chief Justice Roberts emphasized in *NFIB* that "any tax must still comply with other requirements in the Constitution." *NFIB,* 132 S. Ct. at 2598 (Roberts, C.J., for the Court). It was neither raised nor decided whether the ACA tax violates the Takings Clause.

The D.C. Circuit likewise misread the *NFIB* decision to preclude a challenge to ACA under the Takings Clause, concluding that:

> if the government were prohibited from using tax money for the benefit of the American people, or if it was required to give the money back, its taxation powers would be useless.

Ass'n of Am. Physicians & Surgs. v. Sebelius, 901 F. Supp. 2d 19, 38 (D.D.C. 2012). No one argues that the government is prohibited from using tax money for the benefit of Americans. What the Fifth Amendment prevents is using the tax power to coerce citizens to redistribute their property directly to others, as ACA does. The Bill of Rights limits the taxing power as much as it limits every other government power. As the Supreme Court ruled in *Brushaber*, "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*, 240 U.S. at 24.

ACA is analogous to a law that imposed a new tax on everyone who failed to donate 1% of their income annually to their local hospitals. Such a law would be unconstitutional as a violation of the Takings Clause, not because Congress lacks the power to tax, but because Congress lacks the power to use taxation to compel private citizens to transfer their money to other private entities. Such a law may be considered highly desirable, and perhaps even enormously beneficial. But it would also clearly be an unconstitutional taking, just as ACA is.

ACA's penalties qualify as a "specific, separately identifiable fund of money" that is subject to the Takings Clause. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 555 (1998) (Breyer, J., dissenting); *accord id.* at 529 (plurality). Plaintiffs do not obtain "a fair approximation of the cost of the benefits supplied" for that portion of their insurance premiums that insurers take to enrich themselves and subsidize low premiums for those with pre-existing conditions. *Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.,* 967 F.2d 648, 654 (D.C. Cir. 1992) (inner quotations omitted).

To the extent that private insurers apply Plaintiffs' funds to subsidize their executives' salaries, and third parties' insurance premiums, the insurers' private nature cannot insulate ACA 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). Where, as under ACA, the regime fails to provide a remedy for the return of money wrongfully taken, then 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).

IV. ACA Can Only Be Upheld By Declaring Its Taxes to Be Voluntary, Unenforceable, and Uncollectible.

As reiterated by the Supreme Court in *NFIB*, "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *NFIB*, 132 S. Ct. at 2594 (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)). The only way to avoid the application of the Origination and Takings Clauses to invalidate ACA is by construing its tax to be voluntary, unenforceable, and uncollectible, akin to the optional Presidential Election Campaign Fund contribution section on the IRS Form 1040. ACA would still be a tax as held in *NFIB*, but a voluntary, unenforceable, and uncollectible one in order to avert a constitutional crisis otherwise.

To some extent, Congress itself has already authorized this result with the following ACA provision:

> 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.

26 U.S.C. § 5000A(g)(2). The Supreme Court cited this provision favorably in *NFIB*. 132 S. Ct. at 2584.

There is precedent for a voluntary tax on the annual IRS Form 1040. The first page of the widely used return invites taxpayers to contribute, voluntarily, a few dollars to the Presidential Election Campaign Fund:

> Every individual (other than a nonresident alien) whose income tax liability for the taxable year is $ 3 or more may designate that $ 3 shall be paid over to the Presidential Election Campaign Fund in accordance with the provisions of section 9006(a) [26 USCS § 9006(a)]. In the case of a joint return of husband and wife having an income tax liability of $ 6 or more, each spouse may designate that $ 3 shall be paid to the fund.

26 USCS § 6096.

If ACA is not revenue-raising, as the government argues, then the Court could take that as an invitation to rule that the taxes under ACA are voluntary, as Congress itself implied with its provision against collection. But to the extent that the government insists here that the ACA taxes are fully mandatory and that the revenue fully belongs to government, notwithstanding the statutory ban on collection efforts and criminal penalties, then ACA is unconstitutional under the Origination and Takings Clauses.

CONCLUSION

For the foregoing reasons, the dismissal of the Complaint below should be reversed and the Individual and Employer Mandates in ACA should be enjoined from enforcement by virtue of the Origination and Takings Clauses of the U.S. Constitution.

In the alternative, this Court should declare that the taxes imposed by the Individual and Employer Mandates of ACA are voluntary, unenforceable, and uncollectible, and enjoin Defendants from collecting them in any manner that lacks a full disclosure and explanation of their voluntary and unenforceable legal status.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: May 8, 2014

Counsel for Plaintiffs-Appellants Steven F. Hotze, M.D., and Braidwood Management, Incorporated

CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 13,578 words.

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Plaintiffs-Appellants
Steven F. Hotze, M.D., and
Braidwood Management,
Incorporated

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on May 8, 2014, the foregoing Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically on the individuals listed below:

Alisa Beth Klein, Esq.
alisa.klein@usdoj.gov
Mark Bernard Stern, Esq.
mark.stern@usdoj.gov
U.S. Department of Justice
Civil Division, Appellate Staff
Suite 7235
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 514-1597

Carol Federighi, Senior Litigation Counsel
carol.federighi@usdoj.gov
U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878
Ben Franklin Station
Washington, DC 20044
(202) 514-1903

The required copies will be forwarded to the court upon approval.

/s/ Robyn Cocho
Robyn Cocho