Appeal No. 14-20039

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Steven F. Hotze, M.D., et al,

Plaintiffs-Appellants,

v.

Kathleen Sebelius, Secretary, Department of Health and Human Services, et al,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of Texas
Case No. 4:13-cv-01318

BRIEF FOR HOUSE MAJORITY LEADER ERIC CANTOR, HOUSE MAJORITY WHIP KEVIN MCCARTHY, AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* SUPPORTING APPELLANTS

David M. Morrell
JONES DAY
717 Texas
Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600

Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
Jonathan A. Berry
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and the Judicial Education Project*

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation; that no *amicus curiae* on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any *amicus curiae* on this brief.

Dated: May 15, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas

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INTEREST OF THE *AMICI CURIAE*[1]

House Majority Leader Eric Cantor and House Majority Whip Kevin McCarthy are the second- and third-ranking members in the United States House of Representatives. As senior members of House leadership, *amici* have an unparalleled interest in safeguarding their Chamber's constitutionally prescribed role as the only organ of government with the power to initiate legislation that increases taxes on the people. Given the Constitution's vesting of this power in the House, *amici* have a powerful stake in ensuring that the courts protect it here.

The Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation.

INTRODUCTION AND SUMMARY

The power to tax—to take private property by force—has long been recognized as "the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Abuses of that power led directly to the American Revolution. The Framers thus took care to enshrine into the Constitution the principle that tax levies

[1] In accordance with Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this *amicus* brief. No person or entity other than *amici* or its counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission.

must originate in the People's House by providing, in the Origination Clause, that "[a]ll bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. As James Madison explained, the House "alone can propose the supplies requisite for the support of government," a "power over the purse [that] may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." *The Federalist* No. 58, at 359 (Clinton Rossiter ed., 1961). The Origination Clause thus embodies one of the Constitution's most fundamental structural protections in defense of individual liberty.

Endorsing the congressional manipulations that yielded the Affordable Care Act ("ACA")—which were more extreme than anything any court has previously considered—would eradicate this foundational protection. On December 24, 2009, the Senate passed a 2000-page bill that upended the American healthcare system and imposed some 20 new taxes expected to raise hundreds of billions of dollars over the next decade. The Senate, recognizing that it is constitutionally forbidden from originating tax increases, did so by seizing upon a six-page House Bill (H.R. 3590) that provided tax credits for soldiers. The Senate took that bill, deleted every letter after the enacting clause, and replaced it with 2000 pages of unrelated tax increases, fundamental transformations of healthcare and health insurance, and various other legislative knick-knacks. But rather than simply call this new piece of legislation what it was—a Senate bill—the Senate claimed to have made only some "Amendments" to

the House bill. Senate Bill Replacing H.R. 3590 ("Strike out all after the enacting clause and insert . . . ."). [2] If the Senate's wholesale replacement of a short tax-credit-bill with massive, unrelated tax-increases does not violate the Origination Clause, then nothing does. This is not a slippery slope; it is the bottom of the puddle at the bottom of the hill.

First, the ACA is clearly a "bill for raising revenue" for purposes of the Origination Clause. The courts have long taken a narrow view of what constitutes a "bill for raising revenue," but even the most miserly interpretation of that phrase encompasses bills "that levy taxes in the strict sense of the word." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA does just that. It imposes all sorts of new taxes—taxes on investment income, taxes on medical devices, taxes on "Cadillac" healthcare plans, and so on. The district court's conclusion that the ACA nonetheless is *not* a "bill for raising revenue," because its overall purpose is "to expand health insurance coverage," ROA 219 (citation omitted), has no basis in the Constitution or the decisions of the Supreme Court and this Court. It also ignores the obvious point that 2000-page bills have multiple purposes—one of which, in the ACA's case, was plainly to "raise revenue" via new taxes. As the Supreme Court long-ago explained, the dispositive question is whether "*any*" of an act's "provisions" are intended "to raise revenue to be applied in meeting the expenses or obligations of the Government."

[2] http://goo.gl/O9sSDE.

Nebeker, 167 U.S. at 203 (emphasis added). Under that settled rule, the ACA is plainly a "bill for raising revenue" subject to the Origination Clause.

Second, "bills for raising revenue" must originate in the House *as* "bills for raising revenue." The text makes this clear: "All Bills for raising Revenue shall originate in the House of Representatives . . . ." Art. I, § 7, cl. 1. That language would be nonsensical if Congress could enact tax increases that originated in the House as non-tax legislation. The Senate cannot take a House bill naming airports and convert it into an excise tax on airplanes.

This simple rule dooms the ACA because the House bill commandeered by the Senate was *not* a "bill for raising revenue." Rather, it was a collection of tax credits and deductions (rather than tax increases), an increase in the penalty for failing to file a tax return (a penalty, not a tax), and a slight alteration in the timing, but not the total amount, of certain estimated tax payments (which themselves are not taxes). None of these provisions would have levied any "taxes in the strict sense of the word" (*Nebeker*, 167 U.S. at 202). In sum, H.R. 3590 did not become a "bill for raising revenue" until the Senate rewrote it.

Third, even if the House bill were a "bill for raising revenue," the Origination Clause still would not permit the Senate to replace a six-page bill providing tax credits to soldiers with a 2000-page healthcare-and-tax-increase bill. The Clause's exception for Senate participation in "bills for raising revenue" is narrow and specific: "[T]he Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, cl. 1.

The word "amendment" does not encompass wholesale "replacement"; otherwise, the Origination Clause would accomplish nothing of substance. The Senate could originate whatever taxes it pleased by simply replacing unrelated House tax cuts. The amendment exception would swallow the origination rule and far outstrip what James Madison described as "the paltry right of the Senate to propose alterations in money bills."[3]

Finally, the Supreme Court and this Court have held that Origination Clause claims are justiciable in all respects. As the Supreme Court explained in *United States v. Munoz-Flores*, such claims have "none of the characteristics that *Baker v. Carr* identified as essential to a finding that a case raises a political question" and are "therefore justiciable." 495 U.S. 385, 396 (1990). Accordingly, this Court can and must rule upon the merits of Appellants' challenge.

ARGUMENT

I. The ACA Is A "Bill For Raising Revenue" That Had To Be Enacted In Compliance With The Origination Clause.

The ACA is a "bill for raising revenue" within the meaning of the Origination Clause. Over a century ago, the Supreme Court held that "revenue bills are those that levy taxes in the strict sense of the word." *Nebeker*, 167 U.S. at 202 (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA readily satisfies that definition: many of its provisions impose new taxes, the revenues from

[3] Letter from James Madison to George Washington (Oct. 18, 1787), *in* 10 *The Papers of James Madison Digital Edition* 196 (C.G.A. Stagg ed., Univ. of Va. Press, 2010).

which go to fund the general operations of government. If the ACA is not a "bill for raising revenue," then no legislation is.

A. Bills That Impose New Taxes To Fund General Governmental Operations Are "Bills For Raising Revenue."

The Supreme Court has made clear that any bill imposing new taxes to fund general government operations qualifies as a "bill for raising revenue" under the Origination Clause. As the Court explained in its most recent decision construing the Clause, a "statute that creates a particular governmental program and that raises revenue to support that program, *as opposed to a statute that raises revenue to support Government generally*, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 398 (emphasis added). The Court thus made clear in *Munoz-Flores* what bills are "bills for raising revenue" (any bill "that raises revenue to support Government generally"), and what bills are not (any bill "that creates a particular governmental program and that raises revenue to support that program"). Or put more simply: "[T]he Constitution requires tax increases to originate in the House of Representatives." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas, Alito, JJ. dissenting).

The Supreme Court's pre-*Munoz-Flores* decisions further support the definition of "bills for raising revenue" as those that raise revenue to support government generally. For example, in *Nebeker*, the Court explained that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes

which may incidentally create revenue." 167 U.S. at 202. In other words, bills that impose taxes always constitute "bills for raising revenue," unless "'[t]here was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.'" *Munoz-Flores*, 495 U.S. at 398 (quoting *Nebeker*, 167 U.S. at 203).

This Court, too, has recognized that legislation containing general tax increases must comply with the Origination Clause. In ruling that a fee-imposing Act—which required cellular carriers to make contributions to a service fund—was not a "bill for raising revenue," this Court explained that taxing legislation escapes the Clause's requirements only if there is "a connection between the payors [of the tax] and the beneficiaries." *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 n.51 (5th Cir. 1999). Otherwise, the Court explained, "Congress could *always* avoid the Origination Clause requirement because, in theory, all revenue is raised to fund some 'particular program.'" *Id.* at 428 n.56.

B. The ACA Imposes Numerous New Taxes To Fund General Governmental Operations And Is Thus A "Bill For Raising Revenue."

The ACA falls squarely within the Supreme Court's longstanding definition of "bills for raising revenue." It imposes some 20 new taxes, each of which collects funds that go into the treasury's general coffers. The most notorious of these taxes is the individual mandate to buy health insurance, recently re-characterized as a "tax" on

the refusal to buy such insurance. *See NFIB*, 132 S. Ct. at 2600. But the ACA also imposes many other new taxes, including:

- a new 3.8 percent surtax on investment income earned in households making at least $250,000 (or $200,000 for single people), *see* Pub. Law No. 111-152, § 1411 (2010);[4]
- a new 40% excise tax on comprehensive, so-called "Cadillac" health insurance plans, *see* Pub. Law No. 111-148, § 9001 (2010);[5]
- a new excise tax on medical device manufacturers, *see id.* § 9009; *see also* Pub. Law No. 111-152, § 4191;
- a new excise tax on indoor tanning salons, *see* Pub. Law No. 111-148, § 5000B; and
- a new "annual fee on branded prescription pharmaceutical manufacturers and importers," *id.* § 9008.[6]

Any one of these new taxes is independently sufficient to make the ACA a "bill for raising revenue," for the Senate cannot evade the Origination Clause by embedding tax increases in larger omnibus bills. *See, e.g.*, *Nebeker*, 167 U.S. at 203 (test is whether "the act" or "any of its provisions" raises revenue). Furthermore, none of the ACA's new taxes was enacted only to support "a particular governmental program." *Munoz-Flores*, 495 U.S. at 398. To the contrary, each of these taxes is paid into the general account of the United States Treasury. They therefore raise revenue by "levy[ing] taxes in the strict sense of the word." *Nebeker*, 167 U.S. at 202; *see also*

[4] http://goo.gl/U5enbK.

[5] http://goo.gl/i9pfdN.

[6] For a summary of some 20 tax increases contained in the ACA, see *Full List of Obama Tax Hikes*, Americans for Tax Reform (last visited May 14, 2014), http://goo.gl/yMZEw9.

NFIB, 132 S. Ct. at 2583 (Roberts, C.J.) (noting that the ACA describes "many" of the "exactions it creates as 'taxes'").

Moreover, even if these exactions were targeted at funding particular programs, the ACA still would be a "bill for raising revenue." Unlike an assessment for crime victims—where the payors (convicted criminals) have a direct connection to the beneficiaries (crime victims)—the ACA's various tax increases contain no "connection" between "the payors [of the tax] and the beneficiaries." *Pub. Util. Counsel*, 183 F.3d at 427 n.51. Individuals paying a higher tax on investment income, for example, have no "link" to those who will benefit from the government expenditures those taxes fund. For both of these reasons, the ACA is "a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 398.

C. The District Court's "Purpose" Analysis Is Inconsistent With Precedent And History.

The district court nonetheless held that the ACA is not a "bill for raising revenue." It reasoned that the Origination Clause inquiry looks "to the overarching purpose of the challenged bills." *Hotze v. Sebelius*, No. 4:13-cv-01318, 2014 WL 109407, at *9 (S.D. Tex. Jan. 10, 2014). The court stated that a bill would not be one for "raising revenue" if it "imposed a tax that only 'incidentally' created revenue." *Id.* The court concluded that because the "ACA, by and through the individual mandate and employer mandate, is 'plainly designed to expand health insurance coverage,'" *id.*

at *10 (quoting *NFIB*, 132 S. Ct. at 2596), "neither the ACA as a whole nor the individual and employer mandates *per se* within the act are a 'Bill[] for raising revenue' subject to the Origination Clause," *id.*

That blinkered analysis is mistaken. As noted above, the ACA contains numerous provisions designed for the sole and express purpose of "raising revenue" through tax increases. The Supreme Court made clear in *Munoz-Flores* that the Senate cannot circumvent the Clause by simply inserting tax increases into larger bills that have additional regulatory purposes. Rather, the proper inquiry is whether *any* provision of the bill "raises revenue to support Government generally." 495 U.S. at 398; *see also id.* (inquiry is whether there was a "'purpose by the act or by *any of its provisions* to raise revenue to be applied in meeting the expenses or obligations of the Government'" (quoting *Nebeker*, 167 U.S. at 203) (emphasis added)). There is no "omnibus bill" exception in the Clause.

Munoz-Flores confirms as much. That case involved the Victims of Crime Act of 1984, which "established a Crime Victims Fund . . . as a federal source of funds for programs that compensate and assist crime victims." 495 U.S. at 398. If the analysis were merely a question of a statute's "overarching purpose," the Court could have upheld the Victims of Crime Act simply by noting that its overarching purpose was to benefit crime victims rather than to raise revenue. But the Court did not do that. Rather, it analyzed each potential taxing provision *on its own* and found that none of *those specific provisions* was intended to raise general revenues; rather, each was "passed

as part of a particular program to provide money for that program." *Id.* at 399. A similar provision-by-provision analysis is required here.[7]

The district court's "purpose" analysis is also mistaken even as applied specifically to the individual and employer mandates. Federal law imposes all manner of taxes designed in part to discourage the taxed activity (or, after *NFIB*, the taxed *in*activity)—gas taxes, cigarette taxes, casino taxes, and the like. Yet no case has ever suggested that all such "sin" or excise taxes are categorically exempt from the Origination Clause because of an "overarching" regulatory purpose. Indeed, because "'*[e]very* tax is in some measure regulatory,'" *NFIB*, 132 S. Ct. at 2596 (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)) (emphasis added), the district court's "regulatory purpose" exception would devour the Origination Clause entirely. Moreover, and quite perversely, it would make the Clause *least* likely to apply to the taxes *most* threatening to individual liberty—those in which the government seeks not only to raise revenue, but also to discourage or even to destroy the taxed activity.

[7] The district court relied heavily on this Court's pre-*Munoz-Flores* decision in *United States v. Herrada*, which also reviewed the Victims of Crime Act and noted that its special assessment was "but a subsidiary element of a comprehensive Congressional scheme aimed at aiding the victims of crime." 887 F.2d 524, 527 (5th Cir. 1989). But this Court, too, analyzed the assessment provisions *specifically*, holding that the purpose of *those provisions* was "to fund the Crime Victims Assistance Fund, whereby the federal government provides financial assistance to victims of crime," rather than to raise "general funds for the United States Treasury." *Id.* Nothing in that opinion supports ignoring the ACA's taxing provisions simply because they were surrounded by other provisions with different purposes.

Such a gaping loophole would have been inconceivable to the Framers. When the Sons of Liberty dumped tea into Boston Harbor to protest the British levying an excise tax on tea, they did not care that the "the Tea Act was not . . . motivated by the desire to raise money."[8] They cared only about the principle of "no taxation without representation." *Id.* What mattered was not the *motivation* behind taxes, but that they were being imposed *at all* without representation by the people.

The judicial decision invalidating the Cotton Futures Act confirms that regulatory excise taxes are fully subject to the Origination Clause. In that case, even though "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). In *Hubbard*, Congress was attempting to achieve a regulatory objective through a "a tax intended to be prohibitive." *Id.* The court rightly held that it was irrelevant whether Congress's motivation was to regulate or raise revenue: "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." *Id.*[9] The "mandates" are no different and are thus taxes for the same reason.

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[8] 1 Joseph R. Conlin, *The American Past: A Survey of American History* 132 (8th ed. 2009), goo.gl/9ZROH0.

[9] *Hubbard* further suggested that courts might lack power to look behind a bill's formal designation as originating in the House or the Senate, 226 F. at 139-41—a conclusion the Supreme Court later rejected in *Munoz-Flores*, 495 U.S. at 389-398.

Finally, to the extent Congress's overall understanding *is* relevant, there is no question that the Senate *believed* the ACA was a "bill for raising revenue" within the meaning of the Clause. Otherwise, it never would have gone to the trouble of latching onto a House bill, gutting it, and replacing it with the ACA. The Senate deployed this gambit precisely because *it* regarded the ACA as a "bill for raising revenue." The district court erred in reaching the opposite conclusion.

II. The ACA Violates The Origination Clause Because It Did Not Originate In The House As A "Bill For Raising Revenue."

A. "Bills For Raising Revenue" Must Originate In The House As Such.

There is no serious question that "bills for raising revenue" must originate in the House *as* "bills for raising revenue." As Lewis Deschler explains in his *Precedents of the U.S. House of Representatives*, "[a] principle frequently applied is that the Senate may substitute one kind of tax for a tax that the House proposed, but *may not impose a tax* if one had not originally been proposed by the House." 3 Lewis Deschler, *Precedents of the U.S. House of Representatives* ch. 13, § 19, at 1863 (1994) (emphasis added).[10] The Government did not argue otherwise below, *see* ROA 173-75, and for good reason. Nothing in the Clause's text or history suggests that the Senate could originate a tax increase merely by purporting to amend a non-revenue House bill, and, were it otherwise, the Clause would do nothing.

[10] http://goo.gl/7NkKt2.

In arguing for ratification, Madison was emphatic that "[t]he House of Representatives cannot only refuse, but *they alone can propose*, the supplies requisite for the support of government." *The Federalist* No. 58, at 359 (Madison) (emphasis added). Or as Virginia's Representative White argued in the first Congress, the Clause authorizes "the House of Representatives alone to originate money bills" and thus "places an important trust in our hands, which . . . we ought not part with." 1 *Annals of Cong.* 359 (1789) (Joseph Gales ed., 1834). Representative Theodorick Bland, also of Virginia, echoed this sentiment in arguing that "[t]he Constitution had particularly entrusted the House of Representatives with the power of raising money; great care was necessary to preserve this privilege inviolate; it was one of the greatest securities the people had for their liberties under this Government." *Id.* at 364. The Framers thus uniformly believed, as Thomas Jefferson explained, that for any "bill to raise money, [ ] origination in the Senate would condemn it by the constitution." *The Papers of Thomas Jefferson* (Julian P. Boyd et al. eds., Princeton Univ. Press, 1950)[11]; *see also* William H. Moody, *Constitutional Powers of the Senate: A Reply*, N. Am. Rev. 386, 387 (Mar. 1902) ("The legislative power of the Senate is the exact equivalent of that of the House, with the single exception that the former cannot originate 'bills raising revenue'—that is, bills providing for the laying and collecting of taxes, duties, imposts, and excises.").

[11] http://goo.gl/hFVtB9.

These statements make sense only if the Clause requires that "bills for raising revenue" originate as revenue bills. "The exclusive privilege of originating money bills," *The Federalist* No. 66, at 404 (Clinton Rossiter ed., 1961) (Madison), would be meaningless if the Senate were empowered to originate revenue-raising measures by commandeering bills that do not themselves raise revenue. Accordingly, even the Senate itself—which has every institutional incentive to construe the Origination Clause narrowly—has long recognized that it cannot "propose an amendment raising revenue to any bill coming from the House, but only to a bill raising revenue." 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 1489, at 952 (1907).[12]

B. The ACA Did Not Originate In The House As A "Bill For Raising Revenue."

The ACA violated the Origination Clause because it did not originate in the House as a bill for raising revenue. The House bill whose number the Senate used for the ACA was a six-page, double-spaced bill titled the "Service Members Home Ownership Tax Act of 2009." H.R. 3590, § 1.[13] That bill contained five operative provisions, none of which levied "taxes in the strict sense of the word" (*Nebeker*, 167 U.S. at 202). As Justice Miller has explained, in the Origination Clause, "the expression 'bills for raising revenue' would have reference to laws for the purpose of obtaining money by some form of taxation or other means of raising the necessary

[12] http://goo.gl/qZosxE.

[13] http://goo.gl/qhfmmE.

funds to be used in supplying the wants of government." Samuel Freeman Miller, *Lectures on the Constitution of the United States* 204 (1893); *see also, e.g.*, S. Rep. No. 42-146, at 5 (1872) ("To say that a bill which provides that no revenue shall be raised is a bill 'for raising revenue,' is simply a contradiction of terms."); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 877 (1833) ("No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution.").[14]

Under these settled rules, no provision of H.R. 3590 was one for "raising revenue." The bill's three primary provisions would have provided targeted tax benefits to military servicemembers. The first provided an exemption from "recapture" of a "first-time homebuyer credit for individuals on qualified official extended duty." H.R. 3590, § 2. Providing a tax credit does not "levy taxes in the strict sense of the word;" indeed, such credits are not "levies" at all. *Nebeker*, 167 U.S. at 202; *see also, e.g.*, *Johnson's Dictionary, Improved by Todd* 200 (1836) (defining "levy" as "to raise, collect, impose" or "the act of raising money").[15] The second provision—an "Extension of First-Time Homebuyer Credit for Individuals on Qualified Official Extended Duty Outside the United States"—likewise provided a tax credit and is thus not a "levy" either. *See* H.R. 3590, § 3. The same analysis applies to the third provision, an "exclusion from gross income of qualified military base realignment and

[14] http://goo.gl/dF5lTT.

[15] http://goo.gl/tKqcK1.

closure fringe." *Id.* § 4. Providing a tax deduction, just like paying a tax credit, does not "levy" a tax. Tax expenditures—"deductions" or "credits"—do not levy taxes on the people and are thus not "bills for raising revenue" under the Origination Clause. None of this should be surprising, as the manifest purpose of the Origination Clause was to protect the people not from tax decreases, but from tax increases.

The fourth provision in H.R. 3590 was not a tax increase either. It would have increased the penalty for failure to file required partnership or S-corporation tax returns. *Id.* § 5. Penalties are not taxes. To the contrary, penalties (exactions imposed as punishment for violating a legal obligation) and taxes (exactions imposed on lawful activity in order to fund government operations) are mutually exclusive. *See, e.g.*, *NFIB*, 132 S. Ct. at 2594-97.

Finally, the fifth provision in H.R. 3590 also did not levy taxes. Denominated a revision to the "Time for Payment of Corporate Estimated Tax," it would have amended Section 202(b) of the Corporate Estimated Tax Shift Act of 2009, which governs the "Time For Payment of Corporate Estimated Taxes." The provision addressed only the *timing* (not even the total amount) for payment of *estimated* taxes: Corporations ordinarily must pay estimated income taxes in quarterly installment payments. *See* 26 U.S.C. § 6655. The revision merely required a larger third-quarter payment, with a correspondingly reduced fourth-quarter payment. *See* H.R. 3590, § 6; Corporate Estimated Tax Shift Act of 2009, Pub. L. No. 111-42, § 202(b)(2) (2009). Thus, it did not even increase estimated taxes, much less increase taxes. *See Baral v.*

United States, 528 U.S. 431, 436 (2000) ("estimated tax remittances are not taxes in their own right").

This provision, like the rest, does not trigger the Origination Clause because it would not have entitled the Government to any general revenues that it did not already have a right to collect. Even if changing the timing for payment of estimated taxes might incidentally raise revenue, such a change does not itself "levy taxes in the strict sense of the word" (*Nebeker*, 167 U.S. at 202). As Justice Story explained in considering similar examples, bills that "authorize[] a discharge of insolvent debtors upon assignments of their estates to the United States," or that give "a priority of payment to the United States in cases of insolvency" are not "bills for raising revenue," "although all of them might incidentally bring, revenue into the treasury." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 877 (1833). So too here.

In sum, the original H.R. 3590 was *not* a "bill for raising revenue," while the ACA *is* a "bill for raising revenue." Because the Origination Clause denies the Senate the power to *itself* originate "bills for raising revenue," the ACA (or at least all of its tax increases) is unconstitutional.

III. Even If The Original H.R. 3590 Were A "Bill For Raising Revenue," The Senate's Replacement Bill Still Was Not A Constitutionally Permissible "Amendment."

Even if H.R. 3590 were a revenue-raising bill, the ACA was still enacted in violation of the Origination Clause. Rather than replace a tax-credit for soldiers with

a tax-increase on soldiers, or with omnibus taxing legislation related to soldiers, or even with omnibus tax reform dealing with similar concepts to those addressed in the original H.R. 3590, the Senate transformed that modest six-page tax reduction into a 2,000-page opus that constitutes "the most expansive social legislation enacted in decades"[16] and that imposes some 20 new taxes. It is difficult to imagine a more dramatic difference between original House bill and ultimate Senate product. If the Origination Clause permits *this*, then it imposes *no* substantive limits on the Senate's power to originate tax increases, so long as the Senate jumps through the simple hoop of replacing *any* House-originated revenue bill with tax increases of its own—no matter how unrelated. Such a result would be inconsistent with the text of the Origination Clause and with the original understanding of the Senate's limited power to amend revenue bills.

A. The Power To "Propose Or Concur With Amendments" Is Limited To "The Paltry Right To Propose Alterations."

The Origination Clause requires that bills for raising revenue "shall originate in the House," but also states that "the Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, cl. 1. The Clause makes sense—and has substantive bite—only if the amendment exception does not devour the origination rule. James Madison had it right when he told George Washington that those protesting the Senate's power to amend "bills for raising revenue" were exaggerating

[16] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. Times, Mar. 23, 2010, http://goo.gl/WXTb4y.

its importance, because that power was limited to "the paltry right of the Senate to propose alterations in money bills." Madison Letter, *supra*. The power to "amend" legislation does not include the power to replace tax-cut legislation with completely unrelated tax-increasing legislation. This is clear from the text and history of the Clause, as well as from judicial decisions.

First, the word "amendment" means continuing a preexisting thing. In everyday speech, amendment is different from creation, substitution, or elimination. The Origination Clause reinforces this point by distinguishing between "originat[ion]" (which must occur in the House) and "Amendment" (which may occur in the Senate). If the power to amend included the power to replace, this juxtaposition would make no sense, as dictionaries of the era confirm. For example, *Webster's Dictionary* (1830) defined "originate" as: "To cause to be; to bring into existence; to produce what is new"; but defined "amendment" as: "A word, clause, or paragraph, added or proposed to be added to a bill before a legislature." *American Dictionary of the English Language* 31, 575 (1830). Samuel Johnson similarly defined "originate" as "to bring into existence," but defined "amend" as "to reform, grow better, correct." *Johnson's Dictionary, Improved by Todd* 16, 237;[17] *see also* 3 *Precedents of the U.S. House of Representatives* ch.13, § 19, at 1863 (explaining that the Senate's power to amend revenue-raising measures is "broad, but not unlimited").

[17] http://goo.gl/xa3UtH.

The Clause's explanatory phrase "as on other bills" reinforces this distinction. That language makes clear that the Constitution does not provide a special Senate-amendment power in the context of revenue bills beyond the amendment power as generally understood at the time. And the background rule at the framing—the rule that applied in the unicameral Articles of Confederation Congress—was: "No new motion or proposition shall be admitted under colour of amendment as a substitute for the question or proposition under debate until it is postponed or disagreed to." 20 *Journals of the Continental Congress* 479 (1781). By including the phrase "as on other bills," the framers were clarifying that they were referring to "amendment" as they understood it in the specific context of "bills for raising revenue." That meaning squarely forbids "substitute[s]" of tax-increasing measures for non-tax-increasing measures under "color of amendment." *See also* House Rule XVI, cl. 7 (113th Congress) ("No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.").[18]

Historical evidence confirms that the Senate's power to amend bills that raise revenue is not unlimited. For example, when this issue arose at the Constitutional Convention, Madison explained that "[t]he words amend or alter form an equal source of doubt and altercation." *Journal of the Constitutional Convention* 516 (E.H. Scott ed., 1896). And "[w]hen an obnoxious paragraph"—one containing "extraneous matter"—"shall be sent down from the Senate to the House of Representatives, it will

[18] http://goo.gl/9MIWmh.

be called an origination under the name of an amendment." *Id.* at 515-16. Madison explained that whether such Senate changes would constitute "amendments"—as opposed to "originations" masquerading as amendments—would "turn on the degree of connection between the matter and object of the bill, and the altercation or amendment offered to it." *Id.* at 516. Madison thus made clear that, to be permissible, a Senate "amendment" must have a sufficient "degree of connection" with the underlying House bill for raising revenue.

Madison emphasized this limitation because many other framers were concerned about giving the Senate too much power over taxation. Thus, George Mason took solace in Madison's understanding that "[b]y authorizing amendments in the Senate, it got rid of the objections that the Senate could not correct errors of any sort, and that it would introduce into the House of Representatives the practice of tacking foreign matter to money bills." *Id.* at 512 . Hugh Williamson, a North Carolina delegate, noted that "many would not strengthen the Senate, if not *restricted* in the case of money-bills." *Id.* at 532 (emphasis added). Edmund Randolph—a member of the Committee of Detail and later the Nation's first Attorney General—regarded the Origination Clause "as of such consequence, that, as he valued the peace of this Country, he would press the adoption of it." *Id.* at 518. And George Dickinson, a Delaware delegate, explained that "all the prejudices of the people would be offended by refusing this *exclusive privilege* to the House of Representatives." *Id.* at 517 (emphasis added). Needless to say, none of these views suggests that, contrary to

constitutional text and structure, the Senate enjoys an unlimited power to originate tax increases under the guise of amendment.

Judicial precedent likewise confirms that the power to "propose or concur with amendments" is not an unbounded replacement power. For example, in *Flint v. Stone Tracy Co.*, the Supreme Court reviewed a Senate amendment that simply altered a House-passed tax on inheritances to make it a similar tax on corporations. As the Court explained: "In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor." 220 U.S. 107, 143 (1911). The Senate's minor alteration to a substantial house bill that already increased taxes is well within the plain meaning of "amendment." And indeed, the Court upheld Congress's ultimate enactment *precisely because* "[t]he amendment was germane to the subject-matter of the bill," which made it "not beyond the power of the Senate to propose." *Id.* The Ninth Circuit's decision in *Munoz-Flores* is similar; in reasoning left undisturbed by the Supreme Court, that court held that "[t]he Senate's amendment must be germane to the subject matter of the House bill." *United States v. Munoz-Flores*, 863 F.2d 654, 661 (9th Cir. 1988), *rev'd on other grounds*, 495 U.S. 385 (1990).

Moreover, invalidating legislation that replaces a modest tax-reduction with a massive unrelated tax-increase accords fully with *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163 (5th Cir. 1985). There, this Court considered whether replacing a House tax bill with a different Senate tax bill violated the requirement that amendments must be "'germane to the subject matter of the bill and not beyond the

power of the Senate to propose.'" *Id.* at 168 (quoting *Flint*, 220 U.S. at 143). In that instance, both the House and Senate bills effected substantial revisions to the tax code. Accordingly, this Court concluded that the "Senate's amendment, adding new taxes, was germane to the subject matter and thus within the range of amendments permitted by the origination clause." *Id.* To be sure, this Court considered germaneness at a high level of generality; but at least both bills there embodied substantial tax-reform legislation.[19] The same cannot be said about H.R. 3590 and the ACA.

B. Replacing A Six-Page Tax-Credit Bill With A 2000-Page Tax-Increase And Healthcare Bill Exceeds The "Paltry Right To Propose Alterations."

Under either the original understanding of the Origination Clause (limiting amendments to "paltry . . . alterations") or the Supreme Court's subsequent gloss (requiring that amendments be "germane to the subject-matter of the bill"), the ACA cannot survive. The Senate alterations to H.R. 3590 cannot remotely be described as either "paltry" or "germane." *See, e.g.*, *Oxford Dictionary of English* 733 (3d ed. 2010) (defining "germane" as "relevant to a subject under consideration").[20] Even the most cursory review under the most permissive imaginable test would condemn the Senate's conversion of a six-page bill that provides special tax breaks for soldiers into

[19] *Concerned Taxpayers* further held that the question of whether that bill originated in the House as a "bill for raising revenue" was a "nonjusticiable political question." 772 F.2d at 167. As explained below, that holding cannot survive *Munoz-Flores*.

[20] http://goo.gl/c8Przs.

the most significant piece of social-welfare and tax-increasing legislation in decades. Indeed, it is difficult to imagine a more extreme example.

If the Senate's passage of the ACA were a permissible "amendment," then there would be no limit on its ability to "originate" (*i.e.*, "bring into existence") "bills for the raising of revenue." The Senate will *always* be able to find *some* House revenue bill, delete its text, and then pass an entirely different, Senate-originated tax increase. Such an unbounded "amendment" power would eviscerate the Clause and run headlong into the Framers' uniform understanding that the Clause accomplished something important. On the other hand, if it did not, then the Framers were fools to worry about what future generations would think if they "found we had parted with the power which the Constitution intended for the immediate representatives of the people? Would they not justly charge us with betraying the privileges we are sworn to maintain, by transferring the power of raising revenue to the Executive and Senate?" 1 *Annals of Cong.* 376 (Tucker).

Permitting the Senate to originate tax increases behind the fig leaf of a happenstance "H.R." number would render this bedrock House prerogative—the *only* power the Constitution gives to the House but withholds from the Senate—an empty formality. One of the great structural protections of the Constitution—and "one of the great privileges of the people" (*id.*)—would thus be destroyed.

IV. The ACA's Validity Under The Origination Clause Is Fully Justiciable.

Finally, Supreme Court precedent makes clear that all aspects of Appellants' challenge to the ACA are fully justiciable. The Court squarely held in *Munoz-Flores* that "[a] law passed in violation of the Origination Clause" is "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." 495 U.S. at 397.[21] In so doing, the Court specifically rejected the Government's argument that courts "could not fashion 'judicially manageable standards' for determining either whether a bill is 'for raising Revenue' or where a bill 'originates.'" *Id.* at 395. In the wake of *Munoz-Flores*, this Court, too, has adjudicated Origination Clause claims on the merits. *See Tex. Office of Pub. Util.*, 183 F.3d at 427. The district court thus correctly concluded that Appellants' claims are fully justiciable.

In this case, the Government has argued that courts need not scrutinize the ACA because of "the House's acceptance of the Senate's amendment." ROA 89. But the Supreme Court rejected that very argument in *Munoz-Flores*, explaining that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality," because the courts have "the duty to review the constitutionality of congressional enactments." 495 U.S. at 391. The Origination Clause protects "individual rights" as part of the Constitution's

[21] This opinion thus supersedes the language in much older cases—such as *Rainey v. United States*, 232 U.S. 310 (1914)—that the Government may incorrectly urge upon the Court here.

diffusion of "power the better to secure liberty." *Id.* at 394. The principle that "separation of powers protect[s] the individual," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), is "no less true of such allocations within the Legislative Branch." *Munoz-Flores*, 495 U.S. at 394; *see also id.* at 395 ("The authors of the Constitution divided such functions between the two Houses based in part on their perceptions of the differing characteristics of the entities.").

The Supreme Court repeatedly has made clear that the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The House cannot give the Senate its power to originate taxes any more than the President can make Congress the commander-in-chief. The fact that the House ultimately passed the ACA is thus irrelevant.

CONCLUSION

For the forgoing reasons, the judgment of the district court should be reversed.

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Respectfully submitted,

/s/ Gregory G. Katsas

David M. Morrell
JONES DAY
717 Texas
Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600

Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
Jonathan A. Berry
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and the Judicial Education Project*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Gregory G. Katsas
Gregory G. Katsas

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: May 15, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas