

No. 14-20039

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STEVEN F. HOTZE, M.D.; BRAIDWOOD MANAGEMENT, INC.,

Plaintiffs-Appellants,

v.

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human
Services; JACOB J. LEW, in his official capacity as Secretary of the Treasury,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS (No. 4:13-cv-01318) (Hon. Nancy F. Atlas)

BRIEF FOR THE APPELLEES

STUART F. DELERY

Assistant Attorney General

KENNETH MAGIDSON

United States Attorney

BETH S. BRINKMANN

Deputy Assistant Attorney General

MARK B. STERN

ALISA B. KLEIN

(202) 514-1597

Attorneys, Appellate Staff

Civil Division, Room 7235

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

STATEMENT REGARDING ORAL ARGUMENT

The two plaintiffs in this case challenge the constitutionality of two provisions of the Patient Protection and Affordable Care Act, 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. Plaintiffs allege that the enactment of 26 U.S.C. § 5000A and 26 U.S.C. § 4980H was inconsistent with the Origination Clause and, alternatively, that these statutory provisions violate the Takings Clause of the Fifth Amendment. The district court concluded that it had jurisdiction and rejected the claims on the merits.

Our brief shows that the suit should be dismissed for lack of jurisdiction. Assuming jurisdiction, the judgment of the district court should be affirmed because the claims have no merit.

Plaintiffs have requested 40 minutes per side for oral argument. We respectfully submit that 20 minutes per side is sufficient. We note that the D.C. Circuit allotted 15 minutes per side for a similar Origination Clause challenge to 26 U.S.C. § 5000A. *See Sissel v. U.S. Dep't of Health & Human Services*, No. 13-5202 (D.C. Cir.) (argument heard May 8, 2014).

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Jurisdiction was contested. On January 10, 2014, the district court dismissed the complaint for failure to state a claim. Plaintiffs filed a notice of appeal the same day. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs challenge the constitutionality of 26 U.S.C. § 5000A ("Section 5000A") and 26 U.S.C. § 4980H ("Section 4980H"). The questions presented are:

1. Whether the claims should be dismissed for lack of jurisdiction.
2. Assuming jurisdiction, whether the district court correctly held that the enactment of Sections 5000A and 4980H was consistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1.
3. Assuming jurisdiction, whether the district court correctly held that Sections 5000A and 4980H do not violate the Takings Clause of the Fifth Amendment.

STATEMENT OF THE CASE

1. The two plaintiffs in this case challenge the constitutionality of two provisions of the Patient Protection and Affordable Care Act (“Affordable Care Act” or “Act”), 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.

Plaintiff Steven Hotze is the founder and an employee of Braidwood Management, Inc. (“Braidwood”), which is also a plaintiff. Mr. Hotze challenges the constitutionality of 26 U.S.C. § 5000A, which is the provision that the Supreme Court upheld as a valid exercise of Congress’s taxing power in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (“*NFIB*”). Under Section 5000A, a non-exempted individual who does not have minimum essential health coverage must make a specified payment to the Internal Revenue Service (“IRS”).

Plaintiff Braidwood Management challenges the constitutionality of 26 U.S.C. § 4980H. Section 4980H imposes a tax on applicable large employers that fail to offer their full-time employees and their dependents adequate health coverage, if one or more full-time employees obtain a federal premium tax credit for health insurance purchased on an Exchange.

Plaintiffs allege that the enactment of Sections 5000A and 4980H was inconsistent with the Origination Clause. They also allege that Sections 5000A and 4980H violate the Takings Clause of the Fifth Amendment.

2. The district court concluded that it had jurisdiction and rejected plaintiffs' claims on the merits. For two independent reasons, the court held that the enactment of Sections 5000A and 4980H was consistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. First, the court held that Sections 5000A and 4980H are not "Bills for raising Revenue" within the meaning of the Origination Clause because any revenue generated by these provisions is "incidental" to their primary purpose to expand health coverage. RE 31-32 (ROA.263-264) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 399-400 (1990)). Second, even assuming that Sections 5000A and 4980H are "Bills for raising Revenue," the court held that their enactment was consistent with the Origination Clause because Sections 5000A and 4980H were amendments to a House-originated bill for raising revenue. RE 37-38 (ROA.269-270). Therefore, the amendments were authorized by "the second half of the Origination Clause, which states that 'the Senate may propose or concur with Amendments as on other bills.'" RE 34 (ROA.266) (quoting U.S. Const. art. I, § 7, cl. 1).

The district court rejected plaintiffs' Takings Clause claims because "it is beyond dispute that taxes and user fees . . . are not takings." RE 39 (ROA.271) (quoting *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2600 (2013)). The court noted that "[t]o permit Congress to tax certain conduct (*i.e.*, the failure to purchase or provide health coverage), but then to require Congress to provide 'just compensation' because the collection is a 'taking,' would render Congress's taxing authority nugatory." RE 40 (ROA.272) (citing *Association of American Physicians & Surgeons v. Sebelius*, 901 F. Supp. 2d 19, 38 (D.D.C. 2012), *aff'd*, 746 F.3d 468 (D.C. Cir. 2014)).

SUMMARY OF ARGUMENT

The Affordable Care Act expands access to health coverage through an array of related measures that include the two provisions that plaintiffs challenge here, Sections 5000A and 4980H. The Supreme Court upheld Section 5000A as a valid exercise of Congress's taxing power in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Under Section 5000A, a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the IRS. Under Section 4980H, a large employer will owe a tax if it does not offer adequate health coverage and one or more of its full-time employees obtain federally subsidized health coverage on an Exchange.

Plaintiffs contend that the enactment of Sections 5000A and 4980H was not consistent with the Origination Clause and, alternatively, that these provisions violate the Takings Clause of the Fifth Amendment. The district court rejected both claims. We show in Part I of the Argument that the claims should have been dismissed for lack of jurisdiction. Assuming jurisdiction, the judgment of the district court should be affirmed.

The district court correctly held that the enactment of Sections 5000A and 4980H was consistent with the Origination Clause, which states that “[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” U.S. Const. art. I, § 7, cl. 1. The Supreme Court has never invalidated an Act of Congress on the basis of the Origination Clause, and this case presents no reason to break new ground. Plaintiffs’ Origination Clause claim fails for two independent reasons.

First, Sections 5000A and 4980H are not “Bills for raising Revenue” within the meaning of the Origination Clause. The “taxing power is often, very often, applied for other purposes, than revenue,” *NFIB*, 132 S. Ct. at 2596 (citation omitted), and an exercise of the taxing power is not a bill for raising revenue within the meaning of the Origination Clause unless revenue-raising is the measure’s primary purpose. *See, e.g., Millard v. Roberts*, 202 U.S. 429, 437 (1906) (rejecting an Origination Clause challenge because “[w]hatever taxes are

imposed are but means to the purposes provided by the act”). The purpose of Sections 5000A and 4980H is not to raise revenue, but to “expand health insurance coverage.” *NFIB*, 132 S. Ct. at 2596. Any revenue that that these provisions may generate is “incidental to that provision’s primary purpose.” *United States v. Munoz-Flores*, 495 U.S. 385, 399 (1990).

Second, Sections 5000A and 4980H were amendments to a House-originated bill for raising revenue. Thus, even assuming *arguendo* that these amendments were “Bills for raising Revenue,” Sections 5000A and 4980H were permitted by the second half of the Origination Clause, which states that “the Senate may propose or concur with Amendments as on other bills.” Amici’s contention that a Senate amendment cannot “replace” the text of a House-originated revenue bill is not properly presented and, in any event, is foreclosed by governing precedent. *See Texas Ass’n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 164 (5th Cir. 1985) (rejecting an Origination Clause challenge to the Tax Equity and Fiscal Responsibility Act of 1982 even though the Senate “struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal”).

Plaintiffs’ contention that Sections 5000A and 4980H violate the Takings Clause of the Fifth Amendment is also meritless. “Just last term, the Supreme Court stated unequivocally that ‘it is beyond dispute that taxes and user fees . . . are

not takings.” RE 39 (ROA.271) (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013)). The D.C. Circuit recently rejected the same Takings Clause argument that plaintiffs make here. *See Association of American Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 469-70 (D.C. Cir. 2014). Plaintiffs provide no basis to reject the reasoning of the D.C. Circuit.

STANDARD OF REVIEW

The district court’s decision dismissing the complaint for failure to state a claim is subject to de novo review in this Court. *Lashley v. Pfizer, Inc.*, 750 F.3d 470, 473 (5th Cir. 2014). Jurisdictional issues are also reviewed de novo. *El Paso CPG Co. v. United States*, 748 F.3d 225, 228 (5th Cir. 2014).

ARGUMENT

I. The Complaint Should Be Dismissed For Lack Of Jurisdiction

A. Mr. Hotze Failed To Establish Standing To Challenge Section 5000A

As the party seeking federal court jurisdiction, Mr. Hotze bears the burden to establish his standing. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012). To establish standing, Mr. Hotze must show (among other things) that he is injured by the provision that he challenges. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Mr. Hotze seeks to challenge 26 U.S.C. § 5000A, which requires a non-exempted individual who does not have minimum essential health coverage to

make a specified payment to the IRS. However, Mr. Hotze admits that he has health coverage under the group health plan sponsored by his employer, Braidwood. *See* RE 47 ¶ 11 (ROA.7) (complaint). Thus, the complaint does not provide any reason to conclude that Mr. Hotze will owe a penalty under Section 5000A.

The complaint appears to assume that the health coverage provided under the Braidwood group health plan does not constitute minimum essential health coverage, *see* RE 48 ¶ 17 (ROA.8), but the complaint does not provide a factual basis to support that assumption. Section 5000A defines “minimum essential coverage” to include coverage under any employer-sponsored plan, with certain exceptions that are not relevant here. *See* 26 U.S.C. § 5000A(f)(1)(B), (2)(B).¹

Mr. Hotze’s circumstances differ from those of the plaintiff in *Sissel v. U.S. Dep’t of Health & Human Services*, 951 F. Supp. 2d 159 (D.D.C. 2013), *appeal pending*, No. 13-5202 (D.C. Cir.), who also challenged Section 5000A on Origination Clause grounds. In response to the D.C. Circuit’s order to demonstrate standing, Mr. Sissel filed an affidavit and supporting materials that show (among

¹ “Minimum essential coverage” does not include health coverage that consists only of coverage of certain “excepted benefits,” such as limited-scope vision or dental coverage. *See* 26 U.S.C. § 5000A(f)(3) (cross-referencing provisions of the Public Health Service Act codified at 42 U.S.C. § 300gg-91). The complaint does not allege that Mr. Hotze’s coverage consists only of such excepted benefits.

other things) that he does not have employer-sponsored coverage or any other form of minimum essential coverage. *See* Appellant’s Supplemental Brief Regarding Standing, *Sissel v. HHS*, No. 13-5202 (D.C. Cir.) (filed June 2, 2014).

Mr. Hotze did not make a comparable showing. Instead, his circumstances resemble those of the plaintiff in *Baldwin v. Sebelius*, 654 F.3d 877, 878-79 (9th Cir. 2011), who was found to lack standing to challenge Section 5000A because he “fail[ed] to allege that he does not have qualifying health insurance[.]” *Id.* at 878-79. Mr. Hotze likewise lacks standing to challenge Section 5000A.

B. Braidwood Failed To Establish Standing To Challenge Section 4980H, And, In Any Event, Its Claims Are Independently Barred By The Anti-Injunction Act

Braidwood Management seeks to challenge 26 U.S.C. § 4980H, but Braidwood failed to show that it will owe a tax under that provision. Section 4980H imposes a tax on applicable large employers that fail to offer their full-time employees and their dependents adequate and affordable health coverage, if one or more of their full-time employees obtain a premium tax credit for health coverage purchased on an Exchange. Under the terms of the statute, an employee is not eligible for a premium tax credit unless (among other eligibility requirements) the employer-sponsored coverage fails to cover at least 60% of the total allowed costs of benefits under the plan, or if the employee is required to pay more than 9.5% of his household income for that individual coverage. 26 U.S.C.

§ 36B(c)(2)(C). Although the complaint appears to assume that Braidwood will owe a tax under Section 4980H, *see* RE 50 ¶ 28 (ROA.10), the complaint does not identify the respects in which Braidwood’s coverage fails to meet the statutory requirements. *See Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (party seeking pre-enforcement review must allege facts showing that injury is “certainly impending”).

In any event, even assuming that Braidwood will owe a tax under Section 4980H, the Anti-Injunction Act bars this suit to restrain the assessment and collection of that tax. The Anti-Injunction Act provides, with statutory exceptions inapplicable here, that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a). “This statute protects the Government’s ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2582 (2012). “Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.” *Id.* at 2582 (citing *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8 (1962)); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 736

(1974). When the Anti-Injunction Act applies, it divests a court of subject-matter jurisdiction. *See Williams Packing*, 370 U.S. at 5.²

In *NFIB*, the Supreme Court held that the Anti-Injunction Act did not bar that pre-enforcement challenge to Section 5000A. In so ruling, the Court relied on the “text of the pertinent statutes.” *NFIB*, 132 S. Ct. at 2582. The Court stressed that the Anti-Injunction Act “applies to suits ‘for the purpose of restraining the assessment or collection of any *tax*.’” *Ibid.* (quoting 26 U.S.C. § 7421(a)) (Supreme Court’s emphasis). “Congress, however, chose to describe the ‘[s]hared responsibility payment’ imposed on those who forgo health insurance not as a ‘tax,’ but as a ‘penalty.’” *Id.* at 2583 (quoting 26 U.S.C. § 5000A(b), (g)(2)). The Court reasoned that “Congress’s decision to label this exaction a ‘penalty’ rather than a ‘tax’ is significant because the Affordable Care Act describes many other exactions it creates as ‘taxes.’” *Ibid.* (citation omitted). “Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” *Ibid.* (citation omitted).

In contrast to Section 5000A, Section 4980H repeatedly uses the term “tax” to describe the amount that a large employer will owe the IRS under the conditions

² The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief “with respect to Federal taxes.” 28 U.S.C. § 2201. The Declaratory Judgment Act’s tax exception is “is at least as broad as the Anti-Injunction Act.” *Bob Jones Univ.*, 416 U.S. at 732-733 n.7.

described in the statute. Section 4980H(b)(2) places a cap on the “aggregate amount of tax” that an employer may owe under that provision.

Section 4980H(c)(7) provides that the “tax imposed by” Section 4980H is “nondeductible.” Section 4980H(c)(7) cross-references 26 U.S.C. § 275(a)(6), which provides that no tax deduction is allowed for “[t]axes imposed by chapters 41, 42, 43, 44, 45, 46, and 54.” The “tax” imposed by the employer responsibility provision is nondeductible because it is one of the “[t]axes imposed by” chapter 43. *Ibid.* And the same assessment is described as a tax elsewhere in the Affordable Care Act. *See* 42 U.S.C. § 18081(f)(2)(A) (“The Secretary [of Health & Human Services] shall establish a separate appeals process for employers who are notified under subsection (e)(4)(C) that the employer may be liable for a tax imposed by section 4980H of Title 26[.]”).

The district court in *Halbig v. Sebelius*, __ F. Supp. 2d __, 2014 WL 129023 (D.D.C. Jan. 15, 2014), *appeal pending*, No. 14-5018 (D.C. Cir.), correctly declined to follow the reasoning of the Fourth Circuit in *Liberty University, Inc. v. Lew*, 733 F.3d 72, 86-89 (4th Cir. 2013), which ruled that the use of the word “tax” in Section 4980H is insufficient to implicate the Anti-Injunction Act. The Fourth Circuit read “the term ‘assessable payment’ as nullifying the effect of the word ‘tax.’” *Halbig*, 2014 WL 129023, at*10. “[H]owever, the natural conclusion to draw from Congress’s interchangeable use of the terms ‘assessable payment’ and

‘tax’ in Section 4980H is simply that Congress saw no distinction between the two terms.” *Halbig*, 2014 WL 129032, at *10. The “term ‘tax’ as used in 26 U.S.C. § 7421(a), the Anti-Injunction statute,” has “the same meaning as the term ‘tax’ as used elsewhere in the Internal Revenue Code, including in Section 4980H.” *Ibid.* (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (recognizing the “standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning”).

“Nor does it seem anomalous that Congress would have intended to allow pre-enforcement challenges by individuals while prohibiting pre-enforcement suits by employers.” *Halbig*, 2014 WL 129032, at *10. “In fact, another provision in Section 4980H confirms that Congress assumed that employers would raise their challenges in post-collection suits.” *Ibid.* “The statute provides that the Secretary of the Treasury ‘shall prescribe rules ... for the *repayment* of any assessable payment ... if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.’” *Ibid.* (quoting 26 U.S.C. § 4980H(d)(3)) (*Halbig* court’s emphasis). “No such comparable provision exists with respect to individuals.” *Ibid.*

Moreover, unlike Section 5000A, Section 4980H is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). Clearly, where Congress intended that an exaction be collectible by these summary administrative measures, it did not intend also to defeat that purpose by permitting pre-enforcement suits to restrain that collection. *See generally United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

A ruling in Braidwood’s favor “would necessarily preclude” the Department of the Treasury from assessing or collecting the Section 4980H tax. *Bob Jones Univ.*, 416 U.S. at 731-32. Accordingly, the Anti-Injunction Act bars Braidwood’s challenge to Section 4980H.

II. The Enactment Of Sections 5000A And 4980H Was Consistent With The Origination Clause

If the Court reaches the merits, the judgment of the district court should be affirmed. The district court correctly held that the enactment of Sections 5000A and 4980H was consistent with the Origination Clause, which states that “[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.” U.S. Const. art. I, § 7, cl. 1. Plaintiffs’ Origination Clause claims fail on two independent grounds. First, Sections 5000A and 4980H are not bills for raising revenue within the meaning of the Origination Clause. Second, Sections 5000A and 4980H were

amendments to a House-originated bill for raising revenue, and their enactment thus met the requirements of the Origination Clause.

A. Sections 5000A And 4980H Are Not Bills For Raising Revenue Within The Meaning Of The Origination Clause

1. *A provision does not implicate the Origination Clause unless its primary purpose is to generate revenue for the United States*

The district court correctly held that Sections 5000A and 4980H are not “Bills for raising Revenue” within the meaning of the Origination Clause. *See* RE 27-33 (ROA.215-221). For the Origination Clause to apply, it is not sufficient to show that a statutory provision will generate revenue or that the provision is an exercise of Congress’s taxing power. Rather, the Origination Clause applies only if generating revenue is the provision’s primary purpose.

The Supreme Court has long held 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.” *United States v. Herrada*, 887 F.2d 524, 526 (5th Cir. 1989) (quoting *United States v. Norton*, 91 U.S. 566, 569 (1876); *Twin City Bank v. Nebeker*, 167 U.S. 196, 203 (1897); and *Millard v. Roberts*, 202 U.S. 429, 436 (1906)) (each quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880, pp. 610–611 (1833)). “‘Bills for raising revenue’ when enacted into laws, become *revenue laws*,” which are “such laws ‘as are made for the direct and avowed purpose of creating revenue or public funds for the service

of the government.’” *Norton*, 91 U.S. at 569 (Supreme Court’s emphasis) (quoting Circuit Justice Story’s opinion in *United States v. Mayo*, 1 Gall. 396 (C.C. D. Mass. 1813) (interpreting an 1804 federal statute in light of Origination Clause principles).

The Supreme Court “has consistently interpreted the phrase ‘raising revenue’ narrowly to apply only to those bills, or provisions of bills, whose primary purpose is the collection of revenue.” RE 29 (ROA.217) (citing *Sissel*, 951 F. Supp. 2d at 168) (emphasis omitted). This Court’s *Herrada* decision reviewed the Supreme Court’s early precedents on the issue.

In *Norton*, the Supreme Court “held that the Act to Establish a Postal Money Order System, 13 Stat. at L. 76, was not revenue raising for purposes of the Origination Clause.” *Herrada*, 887 F.2d at 525. “The Act provided that ‘[a]ll moneys received from the sale of money orders, all fees received for selling them, and all moneys transferred in administering the Act, are “to be deemed and taken to be money in the Treasury of the United States.”’” *Ibid.* (quoting *Norton*, 91 U.S. at 568). “The *Norton* court accepted the Congressional purpose declared at the outset of the first section of the Postal Act: ‘To promote public convenience, and to insure greater security in the transmission of money through the United States mails.’” *Id.* at 525-26.

In *Nebeker*, “the Court held that an Act of Congress providing a national currency secured by a pledge of United States bonds, to meet the expenses of executing the law, and imposing a tax on the average amount of the notes in circulation of banking associations organized under the statutes was not a revenue bill under the Origination Clause.” *Herrada*, 887 F.2d at 526. “Noting that the ‘main purpose that Congress had in view was to provide a national currency based upon United States bonds’ and that the ‘tax was a means for effectually accomplishing’ that purpose, the Court found no purpose by the Act to raise revenue to be applied in meeting the expenses or obligations of the government.” *Ibid.* (quoting *Nebeker*, 167 U.S. at 203).

In *Millard*, “the Court held that a bill providing for the taxation of property in the District of Columbia to provide funds for adequate railroad terminal facilities in the District of Columbia was not a bill to raise revenue.” *Herrada*, 887 F.2d at 526. “The Court noted that ‘[w]hatever taxes are imposed are but means to the purposes provided by the act [i.e., to provide railroad terminal facilities].’” *Ibid.* (quoting *Millard*, 202 U.S. at 437 (alteration in *Herrada*)).

Likewise, in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court held that an assessment imposed on persons convicted of a federal misdemeanor was not a bill for raising revenue because “[a]ny revenue for the general Treasury

that [the provision] creates” was “‘incidental’ to that provision’s primary purpose” of compensating crime victims. *Id.* at 399.

Accordingly, the Supreme Court’s precedents “instruct [courts] to consider the overarching purpose of an Act when one of its provisions is subject to an Origination Clause challenge.” *Herrada*, 887 F.2d at 528; *see also United States v. King*, 891 F.2d 780, 781 (10th Cir. 1989) (“Where the main purpose of the act is other than raising revenue, it is not subject to challenge under the origination clause.”); *United States v. Ashburn*, 884 F.2d 901, 902 (6th Cir. 1989) (“The *Norton* Court agreed with Justice Story’s definition of ‘revenue laws’ as measures ‘made for the direct and avowed purpose of creating revenue or public funds for the service of the Government.’”) (quoting *Norton*, 91 U.S. at 569).

2. *The purpose of Sections 5000A and 4980H is to expand health coverage*

The purpose of the Affordable Care Act, and of Sections 5000A and 4980H in particular, is to expand health coverage for Americans. Congress was explicit about the purpose of Section 5000A: Congress found that this provision, “together with the other provisions of this Act, will add millions of new consumers to the health insurance market” and help to create “effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.” 42 U.S.C. § 18091(2)(C), (J). Likewise, Section 4980H encourages large employers to provide adequate health coverage and thus “build[s] upon and

strengthen[s] the private employer-based health insurance system, which covers 176,000,000 Americans nationwide.” *Id.* § 18091(2)(D).

The Affordable Care Act accomplishes its objective to expand health coverage through an array of related provisions, many of which have nothing to do with raising revenue. Some of the Act’s provisions, including Sections 5000A and 4980H, may have the effect of increasing revenue. Other provisions will have the effect of decreasing revenue. *See, e.g.*, 26 U.S.C. § 36B (premium tax credits to help eligible individuals buy insurance); 26 U.S.C. § 45R (tax credits for eligible small employers that provide health coverage). These revenue effects are merely “incidental” to the “primary purpose” of the Act, *Munoz-Flores*, 495 U.S. at 399, which is to expand access to affordable health coverage.

Addressing Section 5000A in particular, the Supreme Court explained that, “[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage.” *NFIB*, 132 S. Ct. at 2596. It follows from “this clear congressional purpose” that “any revenue created by” Section 5000A “is merely incidental.” *Sissel*, 951 F. Supp. 2d at 169. “Every shared responsibility payment, though it may grow the government’s coffers, symbolizes the government’s failure to attain its stated ‘goal [of] universal coverage.’” *Ibid.* (quoting *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011)). “In other words, Congress’s preference would be for” Section 5000A “to raise zero revenues, and

thus the provision cannot fairly be characterized as a ‘Bill[] *for* raising Revenue.’” *Ibid.* (court’s emphasis). “The same is true” of Section 4980H, “which also serves to expand health care coverage.” RE 32 (ROA.220).

That revenue-raising is not the purpose of Sections 5000A and 4980H is immaterial in determining whether the provisions are proper exercises of the taxing power, because “the taxing power is often, very often, applied for other purposes, than revenue.” *NFIB*, 132 S. Ct. at 2596 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 962, p. 434 (1833)). By contrast, the purpose of Sections 5000A and 4980H to expand health coverage forecloses the contention that these measures are “Bills for raising Revenue” within the meaning of the Origination Clause. “While some revenue under these mandates will be paid to the general Treasury, those payments are only ‘incidental’ to the ACA’s ‘overarching purpose.’” RE 32 (ROA.220) (citing *Munoz-Flores* and *Nebeker*). Therefore, Sections 5000A and 4980H are not bills for raising revenue within the meaning of the Origination Clause. RE 33 (ROA.221).

Plaintiffs incorrectly assert that Sections 5000A and 4980H must be treated as bills for raising revenue because revenue generated by these provisions will “go into the general Treasury of the United States.” Pl. Br. 29-30. “[T]he use of revenue is only one method of assessing the ‘purpose’ of the provision.” RE 30 (ROA.218). In *Norton*, the statute provided that “[a]ll moneys received from the

sale of money-orders, all fees received for selling them, and all moneys transferred in administering the act, are ‘to be deemed and taken to be money in the treasury of the United States.’” 91 U.S. at 568 (emphasis added). Nonetheless, “[t]he *Norton* court accepted the Congressional purpose declared at the outset of the first section of the Postal Act: ‘To promote public convenience, and to insure greater security in the transmission of money through the United States mails.’” *Herrada*, 887 F.2d at 525-526 (quoting *Norton*, 91 U.S. at 567-68). The *Norton* Court emphasized that “[b]ills for raising revenue’ when enacted into laws, become *revenue laws*,” which are “such laws ‘as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.’” *Norton*, 91 U.S. at 569 (Supreme Court’s emphasis) (quoting Circuit Justice Story’s opinion in *United States v. Mayo*, 1 Gall. 396 (C.C. D. Mass. 1813)).³

Plaintiffs’ argument “conflates the concept of ‘taxes’ with ‘bills for raising revenue.’” RE 32 n.50 (ROA.220). For example, plaintiffs assert that the assessments in Sections 5000A and 4980H “are not uniform as required of excise taxes by the Constitution.” Pl. Br. 30; *see* U.S. Const. art. I, § 8, cl. 1 (stating that “all duties, imposts and excises shall be uniform throughout the United States”). Plaintiffs thus disregard the fact that the “Taxing Clause and Origination Clause

³ Although *Norton* addressed the interpretation of an 1804 statute, the Supreme Court explicitly relied on Origination Clause principles. *See Norton*, 91 U.S. at 568-69.

challenges . . . represent separate lines of analysis.” *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999).⁴ In any event, the Supreme Court has never found a tax to be in violation of the Uniformity Clause. Where, as here, “Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied.” *United States v. Ptasynski*, 462 U.S. 74, 84 (1983).

B. Sections 5000A And 4980H Were Amendments To A House-Origined Bill For Raising Revenue, And Their Enactment Thus Met The Requirements Of The Origination Clause

Plaintiffs’ claims fail even assuming that Sections 5000A and 4980H are bills for raising revenue, because these provisions were amendments to a House-originated bill for raising revenue. RE 37 (ROA.225). As such, these amendments were authorized by the second half of the Origination Clause, which grants the Senate the same power to amend a House-originated bill for raising revenue that the Senate has to amend all other bills. U.S. Const. art. I, § 7, cl. 1 (“the Senate may propose or concur with Amendments as on other Bills”).

⁴ In dicta in *Texas Office of Pub. Util. Counsel*, this Court stated that “*Munoz-Flores* teaches us (1) to determine whether the funds are “part of a particular program to provide money for that program” and (2) to establish a connection between the payors and the beneficiaries.” 183 F.3d at 427 (citing *Munoz-Flores*, 495 U.S. at 399, 400 n.7). However, the cited footnote in *Munoz-Flores* expressly declined to decide whether the analysis would differ “if the program funded were entirely unrelated to the persons paying for the program,” explaining that the question “is not now before us.” *Munoz-Flores*, 495 U.S. at 400 n.7.

1. The House-originated bill was a bill for raising revenue

The bill that was enacted as the Affordable Care Act originated in the House as H.R. 3590. RE 52 ¶ 43 (ROA.12) (complaint). All of the provisions of that House bill were amendments to the Internal Revenue Code, and the bill included revenue-raising provisions as well as tax exemptions. *See* ROA.183-188 (copy of the House-originated bill). “Indeed, the entirety of that bill concerned revenue.” RE 37 (ROA.269) (district court decision). Accordingly, the Senate was free to amend the House bill as it saw fit, because the Origination Clause gives the Senate the same power to amend a House bill for raising revenue as the Senate has on all other bills.

Plaintiffs acknowledge that the Senate has the same power to amend a House bill for raising revenue as it has to amend all other bills. *See* Pl. Br. 45-46. As plaintiffs recognize (Br. 46), in *Rainey v. United States*, 232 U.S. 310 (1914), the Supreme Court confirmed that the second half of the Origination Clause means exactly what it says: as long as the Senate amends a House-originated bill for raising revenue, the requirements of the Origination Clause are met. The *Rainey* Court rejected an Origination Clause claim because the challenged provision “was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. *That is sufficient.*” *Id.* at 317 (emphasis added) (quoted with approval in Pl. Br. 46).

Plaintiffs assert that none of the provisions of H.R. 3590 as passed by the House was revenue raising. *See* Pl. Br. 44-45. As an initial matter, plaintiffs ignore the provisions of the House-originated bill that were designed to raise revenue. As plaintiffs’ amici acknowledge (Sen. Cornyn Amicus Br. 5-6), the House-originated bill was referred to the Joint Committee on Taxation, which is a nonpartisan committee of Congress that “assist[s] Members of the majority and minority parties in both houses of Congress on tax legislation.”⁵ The Joint Committee on Taxation estimated the revenue effects of the House-originated bill and projected that the bill would increase revenue by \$86 million over a five-year period and by \$7 million over a ten-year period.⁶ For example, Section 5 of the House-originated bill was projected to raise revenue by increasing the tax penalties owed for failing to file certain income tax returns. The bill’s supporters thus emphasized that the bill’s tax exemptions were “fully paid for” by its revenue-raising provisions. 155 Cong. Rec. H10551 (daily ed. Oct. 7, 2009) (Rep. Tanner); *see also* 155 Cong. Rec. E2459 (daily ed. Oct. 6, 2009) (Rep. Green) (similar).⁷

⁵ The Joint Committee on Taxation, Congress of the United States, *Overview*, <https://www.jct.gov/about-us/overview.html>.

⁶ JCX-40-09, *Estimated Revenue Effects of H.R. 3590, The “Service Members Home Ownership Tax Act of 2009”* (Oct. 6, 2009), <https://www.jct.gov/publications.html?func=startdown&id=3589>.

⁷ Plaintiffs’ amici assert that tax penalties for failure to file income tax returns are not “taxes.” *E.g.*, Rep. Cantor Amicus Br. 17. The relevant question, however, is whether a provision is a bill for raising revenue within the meaning of

Continued on next page.

More fundamentally, as a matter of historical practice, the Senate and House have long agreed that “a bill for raising revenue may be a bill to increase *or diminish* existing rates.” S. Rep. No. 42-146, at 5 (1872) (emphasis added); *see also* James V. Saturno, Congressional Research Service, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 4 (March 15, 2011) (explaining that “the House applies a broad standard, based on whether the measure in question has revenue-affecting potential”) (citing examples).

This Court properly declined to disrupt that settled congressional practice, reasoning that where “a constitutional provision governing the mode of internal operation of Congress contains a word or phrase susceptible of more than one meaning, and Congress has given that word or phrase an interpretation consistent with the limitations on authority contained in the provisions, the courts should not intrude into the deliberative processes of Congress to modify that judgment.” *Texas Ass’n of Concerned Citizens*, 772 F.2d at 167; *see also Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (noting that “members of Congress may differ over whether a proposed revenue bill or amendment will ‘increase’ or

the Origination Clause. Plaintiffs’ position is that what they characterize as tax penalties for failure to maintain minimum coverage (Section 5000A) or provide minimum coverage (Section 4980H) are bills for raising revenue because proceeds are paid into the general Treasury. Pl. Br. 29, 30. Thus, on plaintiffs’ reasoning, tax penalties for failure to file income tax returns are bills for raising revenue for the same reason.

‘decrease’ taxes overall,” and “the same revenue bill may well have varying effects upon the total taxes assessed in different years”).

The Supreme Court recently employed similar reasoning in addressing the scope of the President’s authority to make recess appointments. *See NLRB v. Noel Canning*, __ S. Ct. __, 2014 WL 2882090 (June 26, 2014). There, the Supreme Court emphasized that, “*in interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.*” *Id.* at *8 (Court’s emphasis). The Supreme Court reasoned that “the interpretive questions before us concern the allocation of power between two elected branches of Government” and concluded that any “‘doubtful question,’” “‘if not put to rest by the practice of the government, ought to receive a considerable impression from that practice.’” *Ibid.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819)); *see also ibid.* (“[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.”) (internal quotation marks and citations omitted).

Therefore, assuming that Sections 5000A and 4980H implicated the Origination Clause, the requirements of the Origination Clause were met because

Sections 5000A and 4980H were amendments to a House-originated bill for raising revenue.

2. *Substitution amendments are constitutionally permitted on House bills for raising revenue, just as they are constitutionally permitted on all other bills*

Plaintiffs' amici make an additional argument that plaintiffs do not advance. They contend that, even if H.R. 3590 as passed by the House was a bill for raising revenue, the Senate's amendment power did not allow the Senate to strike the text of the House-originated bill and substitute the provisions that were later enacted as the Affordable Care Act. *E.g.*, Rep. Cantor Amicus Br. 18-25. Plaintiffs' amici argue that the Senate's "power to amend" a House bill does not include the "power to replace" its text. *Id.* at 20. Because this argument is made only by amici, the argument is not properly before the Court. *See World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("[W]e will not consider the arguments raised only by the amicus curiae.").

Assuming that amici's argument is before the Court, the argument is foreclosed by the plain language of the Origination Clause and the precedents of this Court and the Supreme Court. As discussed above, the Origination Clause grants the Senate the same power to amend a House bill for raising revenue as the Senate has to amend any other bill. The Constitution does not preclude the Senate

from replacing the text of any other bill. Therefore, the Origination Clause does not preclude the Senate from replacing the text of a House bill for raising revenue.

In *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), the Supreme Court held that the Origination Clause permits the Senate to substitute new text for the text of a House-originated revenue bill. *See id.* at 143 (rejecting an Origination Clause challenge to a corporation tax that the Senate “substituted” for a House-originated inheritance tax). And, in *Rainey v. United States*, 232 U.S. 310 (1914), the Supreme Court made clear that the Origination Clause does not limit the substance or scope of such Senate amendments. As discussed above, the *Rainey* Court rejected an Origination Clause claim because the challenged “section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House.” *Id.* at 317. The Supreme Court emphasized: “*That is sufficient.* Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill.” *Ibid.* (emphasis added).⁸

⁸ The *Rainey* Court separately reserved the question whether Origination Clause claims are justiciable. *See* 232 U.S. at 317 (“Without intimating that there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated for the purpose of determining its validity, and upon the assumption, for the sake of the argument that such power may be invoked, again we think the court below disposed of the contention upon a ground entirely satisfactory which we adopt and approve[.]”). In *Munoz-Flores*, the Court held that Origination Clause claims are justiciable. *See* 495 U.S. at 389-97.

The Senate has repeatedly employed the procedure of striking the entire text of a House bill for raising revenue and substituting entirely new text. *See, e.g.*, Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”), Pub. L. No. 97–248, 96 Stat. 324 (1982) (tax increase signed into law by President Reagan); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (tax-reform bill signed by President Reagan); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (“fiscal cliff” bill signed by President Obama).

This Court and other courts of appeals uniformly rejected Origination Clause challenges to TEFRA even though the Senate “struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal.” *Texas Ass’n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 164 (5th Cir. 1985). This Court explicitly rejected the contention that “the Senate’s amendment of TEFRA, substituting a substantial tax increase for the House-authored tax cut, altered the legislation beyond the permissible scope of amendment.” *Id.* at 167; *see also Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (rejecting Origination Clause challenge to TEFRA); *Boday v. United States*, 759 F.2d 1472, 1476 (9th Cir. 1985) (same); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam) (same); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.) (same), *aff’d*, 749 F.2d 27 (3d Cir. 1984).

Contrary to amici’s suggestion, the Supreme Court’s decision in *Munoz-Flores* did not call this body of precedent into question. *Munoz-Flores* held that Origination Clause claims are justiciable, and then rejected the Origination Clause claim in that case because the challenged provision was not a “Bill[] for raising Revenue.” The issue here is not the justiciability of Origination Clause claims but the substantive reach of the Senate’s amendment power. The *Munoz-Flores* Court did not address that issue and, indeed, did not even quote the second half of the Origination Clause, which grants the Senate the same power to amend a House revenue bill as the Senate has to amend all other bills. *Compare Munoz-Flores*, 495 U.S. at 387 (The Origination Clause “mandates that ‘[a]ll Bills for raising Revenue shall originate in the House of Representatives.’ U.S. Const., Art. I, § 7, cl. 1.”) *with* U.S. Const. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; *but the Senate may propose or concur with Amendments as on other Bills.*”) (emphasis added).

The decisions in *Flint*, *Rainey*, and *Texas Association of Concerned Taxpayers* would control here even if they were not supported by historical evidence. In any event, the historical evidence shows that the Framers understood that the Senate could amend a House bill for raising revenue by substituting the Senate’s own text. Although amici assert that “the power to amend” does not include “the power to replace,” Rep. Cantor Amicus Br. 20, Thomas Jefferson

disagreed in the manual of parliamentary practice that he wrote for the Senate in 1801. There, Jefferson explained that “[a]mendments may be made so as totally to alter the nature of the proposition[.] . . . A new bill may be ingrafted, by way of amendment, on the words, ‘Be it enacted,’ &c.” Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate of the United States* § 35, at 97 (1813).

Likewise, addressing the Origination Clause during the ratification debates, William Grayson recognized that the “Senate could strike out every word of the bill, except the word *Whereas*, or any other introductory word, and might substitute new words of their own.” 10 *The Documentary History of the Ratification of the Constitution* 1269 (Kaminski & Saladino eds. 1993). Grayson objected to the Senate’s power to amend House-originated revenue bills because he “considered the power of proposing amendments to be the same in effect, as that of originating.” *Ibid.*; *see also id.* at 1267 (similar). James Madison agreed with Grayson’s understanding of the broad scope of the Senate’s amendment power, but Madison found it “of no great consequence, whether the Senate had a right of originating, or proposing amendments to money bills or not,” because the House is not required to pass the amendments made by the Senate. *Id.* at 1268. Thus, Madison assured the Virginia ratifying convention: “[Y]ou may safely lodge this power of amending with the Senate. When a bill is sent with proposed

amendments to the House of Representatives, if they find the alterations defective, they are not conclusive. The House of Representatives are the judges of their propriety, and the recommendation of the Senate is nothing.” *Ibid.*

Accordingly, it was clear at the time of the Framing that the Origination Clause does not limit the substance or scope of the Senate’s amendments to a House revenue bill. Indeed, the Framers rejected versions of the Origination Clause that would have limited the Senate’s amendment power.⁹ In 1872, the Senate emphasized that “[t]he Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose” to a bill for raising revenue. S. Rep. No. 42-146, at 3 (1872). “The exclusive prerogative of the House of Representatives in relation to such bills is simply to *originate* them.” *Ibid.* (emphasis in original). And the same point was made in the 1915 case on which plaintiffs rely: “The Senate of the United States, having full power to amend a revenue bill, has from the beginning originated taxes by inserting them in

⁹ In July of 1787, a committee chaired by Elbridge Gerry of Massachusetts proposed that “all bills for raising or appropriating money . . . shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch.” 1 *The Records of the Federal Convention of 1787*, at 526 (Max Farrand ed. 1911). After the Convention approved the Clause containing the Senate’s amendment power, Elbridge Gerry objected that this revision “effectually destroyed” his earlier proposal. 3 *The Records of the Federal Convention of 1787*, at 265 (Max Farrand ed. 1911) (emphasis omitted).

House legislation. The practice and the power is now well settled.” *Hubbard v. Lowe*, 226 F. 135, 139 (S.D.N.Y. 1915).

In a variant on the same argument, plaintiffs’ amici also contend that the Senate amendments to H.R. 3590 were not “germane” to the original House bill. But “[t]here can be no dispute that, generally speaking, the Senate is not limited by a germaneness requirement in amending House-originated legislation.” RE 35 (ROA.267). Thus, the Senate is not limited by a germaneness requirement in amending a House-originated revenue bill. The Supreme Court in *Rainey* emphasized that “it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill.” 232 U.S. at 317. The position that plaintiffs’ amici take here disregards *Rainey*’s holding and “the second half of the Origination Clause, which states that ‘the Senate may propose or concur with Amendments as on other bills.’” RE 34 (ROA.266).

Moreover, even assuming that a germaneness requirement exists, “[b]oth *Flint* and *Texas Association of Concerned Taxpayers* adopted ‘a very loose conception of germaneness.’” RE 36 (ROA.268) (quoting *Sissel*, 951 F. Supp. 2d at 173). “In *Flint*, the Supreme Court found the Senate’s substitution of a corporation tax bill in place of an inheritance tax provision was germane for Origination Clause purposes.” *Ibid.* And, in *Texas Association of Concerned Taxpayers*, this Court “found that the Senate’s amendment that *raised* taxes on

certain conduct or businesses was germane to a House bill that *cut* taxes without regard to the source of the revenue.” *Ibid.* (emphasis in original). “The unifying principle in these cases is that a Senate amendment to a bill that ‘raises revenue’ is germane so long as the original House bill related to tax or revenue issues.”

RE 36-37 (ROA.268-269). And as discussed above, H.R. 3590 as passed by the House “included both revenue-raising and revenue-decreasing provisions.” RE 37 (ROA.269).

The position that amici take here stands in notable contrast with their views at the time of the Affordable Care Act’s passage. Plaintiffs’ amici emphasize that many of them were in the House of Representatives at the time of the Affordable Care Act’s enactment. *See* Rep. Franks Amicus Br. 23. Despite their opposition to the legislation, none of these House members claims to have raised an Origination Clause objection at that time. That silence is telling because the House routinely defends its prerogatives under the Origination Clause through a process called “blue slipping,” whereby “[o]ffending bills and amendments are returned to the Senate through the passage in the House of a House Resolution” printed on blue paper. H.R. Rep. No. 111-708, at 93 (2011); *see also* James V. Saturno, Congressional Research Service, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 9 (March 15, 2011). Any Member of the House may offer a resolution seeking to invoke the Origination Clause, and, in the 111th Congress

alone, such a resolution was used to return six Senate bills and amendments that the House considered improper. *See* H.R. Res. 1653, 111th Cong. (2010); 156 Cong. Rec. H6904 (daily ed. Sep. 23, 2010). Notably, no such contemporaneous resolution was introduced with regard to H.R. 3590.¹⁰

* * *

In sum, Sections 5000A and 4980H are not “Bills for raising Revenue” within the meaning of the Origination Clause, and, in any event, these provisions were amendments to a House-originated bill for raising revenue and thus met the requirements of the Clause. The district court correctly held that plaintiffs’ Origination Clause claims fail as a matter of law.¹¹

III. Sections 5000A And 4980H Do Not Violate The Takings Clause Of The Fifth Amendment

The district court correctly rejected plaintiffs’ contention that Sections 5000A and 4980H violate the Takings Clause of the Fifth Amendment. The D.C. Circuit subsequently rejected the same Takings Clause challenge to

¹⁰ The House resolution on which plaintiffs’ amici rely was introduced three years after the Affordable Care Act was passed. *See* Rep. Franks Amicus Br., Addendum A (H.R. Res. 153, 113th Cong., introduced on April 12, 2013).

¹¹ The district court had no occasion to consider the additional point that Sections 5000A and 4980H were amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029. Plaintiffs do not address this subsequent legislation, which originated in the House as H.R. 4872.

Section 5000A. See *Association of American Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 469-70 (D.C. Cir. 2014) (AAPS).

“Just last term, the Supreme Court stated unequivocally that ‘it is beyond dispute that taxes and user fees . . . are not takings.’” RE 39 (ROA.227) (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013)).

Under the Supreme Court’s decision in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24–25 (1916), “an otherwise valid tax could run afoul of the takings clause only in a ‘case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property.’” AAPS, 746 F.3d at 470.

“In an apparent effort to squeeze” Sections 5000A and 4980H “into that narrow category,” AAPS, 756 F.3d at 470, plaintiffs argue that these provisions “compel[] Plaintiffs to pay money to other private entities: government-approved health insurance companies.” RE 54 ¶ 58 (ROA.14). “In support they cite the Court’s observation in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), that ‘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.’” AAPS, 746 F.3d at 470 (quoting *Kelo*, 545 U.S. at 477) (internal citations omitted). “But it is impossible to read that sentence in *Kelo*

(even if we were to treat it as a holding, which it isn't) as suggesting that any redistributive purpose sweeps an otherwise valid tax into the narrow group of measures condemned by *Brushaber*.” *Ibid*.

Moreover, the Supreme Court in *NFIB* rejected the contention that Section 5000A “compels” the purchase of insurance, emphasizing that individuals have the “lawful choice” to make payment to the IRS under Section 5000A “in lieu of buying health insurance.” 132 S. Ct. at 2597, 2600. Likewise, large employers may choose to pay the Section 4980H tax rather than provide health coverage. Although these assessments are “designed to expand health insurance coverage,” “taxes that seek to influence conduct are nothing new.” *Id.* at 2596.

In any event, insurance requirements are common at the federal, state and local levels. Plaintiffs do not identify any case that suggested that an insurance requirement implicates the takings clause because compliance may entail payment to a private insurance company. And here, Mr. Hotze receives health coverage through Braidwood’s group health plan, which is self-insured, rather than through a contract with an insurance company. *See* RE 47 ¶¶ 10-11 (ROA.7) (describing Braidwood’s “self-insured employee health coverage plan”). Plaintiffs’ assertion that Sections 5000A and 4980H compel them “to pay money to other private entities: government-approved health insurance companies,” RE 54 ¶ 58 (ROA.14), thus has no connection to the facts of this case.

CONCLUSION

The case should be remanded with instructions to dismiss the complaint for lack of jurisdiction. Alternatively, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART F. DELERY

Assistant Attorney General

KENNETH MAGISON

United States Attorney

BETH S. BRINKMANN

Deputy Assistant Attorney General

/s/ Alisa B. Klein

ALISA B. KLEIN

MARK B. STERN

(202) 514-1597

Attorneys, Appellate Staff

Civil Division, Room 7235

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,949 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

Alisa B. Klein