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August 1, 2014

Lyle W. Cayce
Clerk, U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Hotze v. Burwell*, No. 14-20039 (5th Cir.)

Dear Mr. Cayce,

This is a FRAP 28(j) response, on behalf of Plaintiffs-Appellants, concerning *Sissel v. HHS*, 2014 U.S. App. LEXIS 14397 (D.C. Cir. July 29, 2014), and Defendants-Appellants' letter of the same date.

The *Sissel* decision upheld, against an Origination Clause challenge, massive new taxes imposed by the Patient Protection and Affordable Care Act ("ACA") because the court found a regulatory purpose to ACA. *Id.* at *15-*25. But the court also observed that many other taxes have a regulatory purpose, *id.* at *21, and all new taxes could avoid the Origination Clause based on a regulatory purpose if this loophole were really to exist. The *Sissel* decision eviscerates the Clause by allowing its circumvention with platitudes about regulatory purpose.

Yet Defendants' own *amici* here – ranking Democrats on the related House and Senate committees – expressly rejected “purpose” as a limitation on the scope of the Origination Clause. (*Amici* Levin & Wyden Br. 10-11) Moreover, the *Sissel* decision never addressed, and conflicts with, the Supreme Court holding in *United States v. Butler*, 297 U.S. 1, 69 (1936) (explained by Pls. Br. 39, 41; Pls. Reply Br. 4, 14, 15, 18).

The *Sissel* decision also misapplied Justice Joseph Story's examples of incidental revenue-raising measures, which did not involve real taxes at all. (Pls. Br. 35-37) It was only revenue incidental to non-tax powers of Congress which Justice Story felt were outside of the Origination Clause, such as selling public lands or acting in connection with powers of the post office or mint. (*Id.* at 35) The Supreme Court emphasized in *Munoz-Flores* that the Origination Clause retains as much vitality as the First Amendment, which means the Clause cannot be as ineffective as the *Sissel* decision holds. (*Id.* at 14)

The *Sissel* decision that ACA is not a bill for raising revenue under the Origination Clause must come as a surprise to the Senate, which understood otherwise. (*Amici* Franks Br. 30; *Amici* Levin & Wyden Br. 2-3) In addition, some sections of ACA are indisputably revenue-raising without any plausible regulatory purpose (Pls. Reply Br. 14 n.3), so the *Sissel* rationale cannot salvage ACA.

Sincerely,

s/ Andrew L. Schlafly

Andrew L. Schlafly
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Steven F. Hotze, M.D., and
Braidwood Management, Inc.

CERTIFICATION OF SERVICE

I hereby certify that on August 1, 2014, I electronically filed the foregoing letter with the Clerk of this Court by using the appellate CM/ECF system, and understand that service on all parties of record will be accomplished through the appellate CM/ECF system.

/s/ Andrew L. Schlafly
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