

No. 14-20039

In The
United States Court of Appeals
for the
Fifth Circuit

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

v.

SYLVIA MATHEWS BURWELL, SECRETARY, DEPARTMENT OF
HEALTH AND HUMAN SERVICES; JACOB J. LEW, SECRETARY,
DEPARTMENT OF TREASURY,
Defendants-Appellees.

*On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
The Honorable Nancy F. Atlas, Presiding
4:13-cv-01318*

**REPLY BRIEF OF PLAINTIFFS-APPELLANTS
STEVEN F. HOTZE, M.D.; BRAIDWOOD
MANAGEMENT, INCORPORATED**

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Plaintiffs-Appellants Steven F. Hotze, M.D. (“Hotze”) and Braidwood Management, Incorporated (“Braidwood”), by and through their counsel, hereby submit their reply brief in response to the Brief for the Appellees Sylvia Mathews Burwell, Secretary of Health and Human Services, and Jacob J. Lew, Secretary of the Treasury (collectively, “Defendants”), and to the Brief *Amici Curiae* of Congressman Sandy Levin and Senator Ron Wyden (“*Amici Levin & Wyden*”), in order to obtain a ruling that the Individual Mandate, 26 U.S.C. § 5000A, and the Employer Mandate, 26 U.S.C. § 4980H, are unconstitutional.

SUMMARY OF THE REPLY ARGUMENT

Defendants and their *Amici* admit to the paramount importance of the Origination Clause as set forth in Article I, Section 7, Clause 1, of the United States Constitution. (*Amici Levin & Wyden Br. 5* – “The Origination Clause was critical to the balance that was struck”) Neither Defendants nor their *Amici* dispute the teaching of Supreme Court Justice Thurgood Marshall that “[a] law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.” *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990). All parties agree that the Patient Protection and Affordable Care Act (“ACA”) must be null and void to the extent that it violates the Origination Clause.

Defendants argue fallaciously that if congressmen did not object at the time to the passage of ACA based on the Origination Clause, then the statute must thereby be in compliance with it. But Congress can no more waive application of the Origination Clause than it could waive the requirement of separation of powers, which of course it cannot do.

Defendants' additional arguments are likewise specious. ACA imposes many billions of dollars-worth in new taxes as one of the largest tax increases in history. While striking down the State Medicaid Mandate portion of ACA as unconstitutional, the Supreme Court upheld the Individual Mandate portion of ACA solely under Congress's power of taxation, not attendant to any other legitimate federal power, and expressly ruled that ACA-as-a-tax must still comply with other constitutional provisions not raised in that case. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2598 (2012) (Roberts, C.J., for the Court). Its massive new taxes must still comply with the Origination Clause.

Defendants assert that the purpose of ACA was not to raise revenue, and therefore need not comply with the Clause. (Defs. Br. 18-22) But their argument about purpose is at odds with their own congressional *Amici*, who explain that the Origination Clause applies "to all 'bills for raising revenue,' regardless [of] whether the bill was 'for the purpose of revenue.'" (*Amici* Levin & Wyden Br. 10, quoting 5 The Debates in the Several States on the Adoption of the Federal

Constitution 510 (Jonathan Elliot ed., 1861)). “[T]he Origination Clause ... provided for an expansive category of bills that would need to originate in the House – that is, all ‘bills for raising revenue,’ even those that did not have as their purpose the raising of revenue” (*Id.* 10-11)

Moreover, Defendants’ “purpose” argument fails because ACA cannot be upheld based on an alleged purpose that is itself *invalid* under the Constitution. The stated purpose of ACA is unconstitutional under the Commerce Clause. Congress may not act exclusively under its taxing power and avoid compliance with the Origination Clause for ACA. (States *Amici* Br. 19-24)¹ Defendants have no answer to this.

Defendants next argue, with even less heft, that the originating House bill, H.R. 3590, somehow was a bill for raising revenue, despite being a waiver of a tax for servicemen on extended duty. (Defs. Br. 23-27) But the safeguard provided by the Origination Clause is not to protect the people against a *waiver* of taxes, but against an increase in them. The only parts of H.R. 3590 that were expected to raise revenue were estimate and penalty provisions for non-compliance, which do not constitute revenue-raising under the Origination Clause. Defendants fail to rebut controlling authority on this point.

Defendants ultimately resort to demanding an essentially unlimited power of

¹ While Defendants address the congressional *Amici*, Defendants fail to rebut the *amicus* brief filed by Texas and 19 other States [Doc. 512632231].

the Senate to replace any House bill with whatever the Senate wants, without any restraint by the Origination Clause. Of course this would swallow the Clause and render it meaningless, contrary to how the Clause “has roots dating back to fourteenth-century England.” (*Amici* Levin & Wyden Br. 8) (citing 1 William Blackstone, *Commentaries on the Laws of England* 168-69 (1768), on why revenue bills could originate only in the House of Commons).

At stake is not merely ACA, but whether the short-term political expediency that railroaded ACA to passage also runs over the Origination Clause and renders it a dead letter. Plaintiffs – plus the 20 States, 2 Senators, and 90 Representatives who filed *amicus* briefs – demonstrate here that ACA is unconstitutional.

REPLY ARGUMENT

Defendants do not deny Plaintiffs’ observation that the U.S. Supreme Court, in its ruling in *NFIB*, left unresolved the issues presented in this case. *See NFIB*, 132 S. Ct. at 2598 (“Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, ***any tax must still comply with other requirements in the Constitution.***”) (emphasis added). The Supreme Court thereby expressly left open the issues presented on this appeal, including whether the tax imposed by ACA is unenforceable. *Id.* at 2584; *see United States v. Butler*, 297 U. S. 1, 69 (1936) (“The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly

granted. But *resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.*”) (emphasis added). The district court was entirely correct in finding that “[t]he claims that Plaintiffs press are different from those in *NFIB*.” RE-14 (ROA.202) Defendants do not argue otherwise here.

Defendants seek to overturn the district court ruling on standing, but muster only one paragraph and one inapplicable precedent in objection to Plaintiff Braidwood’s standing. (Defs. Br. 9-10) The remainder of Defendants’ argument against standing consists of misapplication of the Anti-Injunction Act, which is plainly not controlling here, and objections to the standing of Hotze, which are inconsequential in light of the standing by Braidwood. (*Id.* 10-14) Plaintiffs have standing as shown in Point I below.

On the merits, Defendants do not dispute what their own *Amici* expressly admit, which are centuries of history underlying the significance of the Origination Clause. (*Amici* Levin & Wyden Br. 8) Defendants argue that ACA was somehow not a revenue-raising bill or, if it is, then it was permissible as an amendment to H.R. 3590. (Defs. Br. 14-35) But as Point II below explains, ACA is revenue-raising and H.R. 3590 was not a revenue-raising bill, and thus there was nothing that ACA could constitutionally amend.

Point III below rebuts Defendants' heavy reliance on a D.C. Circuit decision concerning the Takings Clause claim (Defs. Br. 35-37), and Point IV addresses the omission in Defendants' brief on Plaintiffs' argument (Pls. Br. 56-57) that the ACA taxes could be deemed voluntary to avoid the grave constitutional issues.

I. Jurisdiction Is Proper Here.

The district court properly found that jurisdiction fully exists for this challenge to ACA: "Plaintiffs have standing to contest the ACA on the grounds alleged and ... this case is otherwise justiciable." RE-9 (ROA.197) Yet on appeal Defendants seek to avoid reaching the merits by arguing that standing is somehow lacking. (Defs. Br. 7-14) Defendants' arguments against standing were rejected below and should be rejected again here.

Given the procedural posture of this appeal, all allegations in the Complaint must be accepted as true and this Court "must accept as true the allegations in the complaint and construe them in the light most favorable to the plaintiff." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005). Accordingly, the issue of standing is resolved by construing the allegations in the Complaint in the light most favorable to Hotze and Braidwood.

Braidwood has standing to challenge ACA because it imposes additional costs on the employee benefit health plan of Braidwood in order for it to become compliant. RE-50 ¶ 28 (ROA.10) Hotze has standing to challenge ACA because

Hotze is burdened by penalties under ACA's minimum coverage requirement if he does not purchase ACA-compliant insurance. RE-48 ¶ 17 (ROA.8) Moreover, both Braidwood and Hotze have standing because ACA has caused insurance premiums to increase. RE-50 ¶ 30 (ROA.10)

“An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1972) (quoting Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). Where, as here, the lawsuit is at the pleading stage, reasonable inferences of standing are to be drawn in favor of plaintiffs and they need not prove injury. “For the purposes of standing, we need not consider if the plaintiffs can *prove* injury.” *Harris v. Zion*, 927 F.2d 1401, 1406 (7th Cir. 1991) (emphasis in original). “It is enough that the plaintiffs ... have pleaded good-faith allegations of damage that can be remedied by the federal courts. The test for standing, as for jurisdiction generally, is what the complaint alleges, not what the evidence shows.” *Id.* (citing *American Civil Liberties Union v. St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986)). “[T]hese injuries need not be large, an identifiable trifle will suffice” to establish standing, this Court has emphasized. *Save Our Community v. United States EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992) (inner quotation and citations omitted). Standing exists for Plaintiffs, as the district court properly held.

A. As the District Court Properly Held, Braidwood Has Standing and Its Claims Are Not Barred by the Anti-Injunction Act.

ACA compels Plaintiff Braidwood to take steps to switch to more expensive and less desirable health insurance coverage, or else face enormous penalties. RE-50 (ROA.10) The decision below correctly found that Braidwood has standing:

The Court agrees with Braidwood that it has standing to contest the constitutionality of the ACA under the Origination and Takings Clauses. Braidwood has alleged an injury that is “concrete, particularized, and imminent.” Braidwood is subject to the employer mandate as an “applicable large employer” since it “has approximately 73 full-time equivalent employees.”

RE-18 (ROA.206, footnotes omitted, citing 26 U.S.C. § 4980H(c)(2)(A)).

Specifically, the district court correctly found that:

Currently, Braidwood voluntarily offers its employees a high-deductible health coverage plan and the option to contribute money to Health Savings Accounts. Funding this plan costs Braidwood approximately \$198,000 per year. Braidwood alleges that it “must make decisions soon about whether to incur the new penalties imposed by [the] ACA or switch to more expensive and less desirable health insurance coverage pursuant to [the] ACA requirements.” Braidwood has plausibly asserted that it must take steps now to ensure compliance with the employer mandate in 2015 and that it imminently will accrue expenses in preparing for and implementing its plan. These allegations are sufficient, on a motion to dismiss, to meet the concrete injury requirement.

RE-18 (ROA.206, citation and quotation of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), omitted). The district court properly found that Plaintiff Braidwood also satisfies the additional requirements of standing:

Braidwood also meets the second and third elements of the constitutional standing analysis. Braidwood’s injury is “fairly traceable to the challenged

action;” indeed, Braidwood would not have any injury at all—at least as regards its provision of health coverage to its employees—if not for the requirements imposed by the employer mandate. And Braidwood’s injury would be “redressable by a favorable ruling,” which, under the claims Braidwood asserts, would require striking down all or part of the ACA as unconstitutional.

RE-19 (ROA.207). Just as the Fourth Circuit found that Liberty University had standing to challenge the Employer Mandate, so does the employer Braidwood here. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89-90 (4th Cir. 2013) (“Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care.”).

Defendants muster only one paragraph to argue against Article III standing by Braidwood, citing to only one authority in support: the 5-4 decision in favor of the NSA on an appeal from summary judgment, after full factual development. *See Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143, 1147 (2013) (plaintiffs sought pre-enforcement review, which the Court held requires a factual showing on summary judgment to prove that the injury is “certainly impending”). In contrast, this case at bar is on the pleadings, not on summary judgment, and there is no issue of pre-enforcement review here. Moreover, the D.C. Circuit recently rejected a similar argument by Defendants that there was a lack of standing to challenge the implementation of ACA there. *See Halbig v. Burwell*, 2014 U.S. App. LEXIS 13880, *12-*15 (D.C. Cir. July 22, 2014). The Employer Mandate

will be enforced against Braidwood as a large employer under ACA, and that establishes standing.

The remaining seven of eight paragraphs in Defendants' argument against standing by Braidwood are based entirely on the Anti-Injunction Act. (Defs. Br. 10-14) That argument is a nonstarter, as it was completely rejected in similar form by the U.S. Supreme Court in the *NFIB* decision, 132 S. Ct. at 2584, and subsequently by the Fourth Circuit too. *Liberty Univ.*, 733 F.3d at 89. The district court properly rejected application of the Anti-Injunction Act below. RE-20 to RE-22 (ROA.209-10) Defendants try to distinguish the Supreme Court ruling in *NFIB* by saying that it applied only to the Individual Mandate, but the logic obviously carries over to prevent applying the Anti-Injunction Act against challenges to the Employer Mandate also.

Ultimately, Defendants argue that “[a] ruling in Braidwood’s favor would necessarily preclude the Department of the Treasury from assessing or collecting the Section 4980H tax” and thus “the Anti-Injunction Act bars Braidwood’s challenge to Section 4980H.” (Defs. Br. 14, inner quotation omitted) But the same was true in *NFIB*: a ruling in favor of *NFIB* would have precluded the Department of Treasury from collecting the tax under the Individual Mandate, and yet the Supreme Court rejected application of the Anti-Injunction Act to preclude judicial review. It does not preclude standing by Braidwood here.

B. Hotze Likewise Has Standing.

The district court correctly found that there is no need to address the standing of Hotze,² “as it is well-settled that where one party has standing to assert the claims presented, a court does not have to ‘consider the standing of the other plaintiffs.’” RE-20 (ROA.208, quoting *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981)) Braidwood asserts the same claims as Hotze, and thus the standing by Braidwood renders a showing of additional standing by Hotze unnecessary. RE-20 (ROA.208 n.26) Defendants do not dispute this.

Moreover, Hotze has properly pled standing in his own right. Hotze does not qualify for any exemptions or waivers from ACA. RE-49 to RE-50 (ROA.9-10) He neither qualifies for Medicare (he is under the age of 65) nor for any “catastrophic plans” under 26 U.S.C. § 18022(e) in lieu of ACA bronze, silver, gold, or platinum plans (because he is over the age of 30). RE-49 (ROA.9) Similarly, Hotze is not eligible for ACA-approved forms of “minimum essential coverage” under 26 U.S.C. § 5000A, such as Medicaid, CHIP, TRICARE, veteran’s and Peace Corps health programs, eligible employer-sponsored plans of a spouse, or any other ACA-designated form of minimum essential coverage. RE-49 to RE-50 (ROA.9-10) Instead, ACA forces Hotze to pay more, either in the form of ACA penalties or by paying for ACA-compliant insurance. RE-50 (ROA.10)

² Defendants oddly refer to Hotze as “Mr. Hotze” rather than “Dr. Hotze,” despite how the caption and pleadings clearly indicate that he is a medical doctor.

The government-approved insurance plans under ACA do not typically cover medical expenses for effective wellness programs, such as those preferred by Hotze. (*Id.*) Hotze is also burdened by the increases in health insurance premiums wrought by the implementation of ACA. (*Id.*) These burdens give Hotze standing.

II. The Enactment of ACA Violated the Origination Clause, and the Amendment Power in the Senate Does Not Enable It to Bypass the Clause.

Defendants do not and cannot dispute the controlling Supreme Court holding that “[a] law passed in violation of the Origination Clause” should be invalidated just as a violation of the First Amendment would be. *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990). Instead, Defendants seek to avoid the result required by the Origination Clause here in four ways, none of which have any merit. First, Defendants argue that ACA is not revenue-raising by speculating that its purpose was not to raise taxes. That fails because its proffered purpose was not a valid one, and speculation about purpose cannot remove such a massive tax from scrutiny under the Origination Clause anyway. Second, Defendants argue that H.R. 3590 is itself a revenue-raising bill, but Defendants did not raise this argument in their moving papers below, and thereby waived it. *See Fisher v. Miocene Oil & Gas Ltd.*, 335 Fed. Appx. 483, 490 (5th Cir. 2009) (“Appellees failed to raise this argument adequately in the district court, they waived it, and we do not reach it.”) “A litigant’s failure to provide legal or factual analysis results in

waiver.” *Nw. Enters. Inc. v. City of Houston*, 352 F.3d 162, 183 n.24 (5th Cir. 2003), *modified on other gnds*, 2004 U.S. App. LEXIS 10607 (5th Cir. May 28, 2004). Substantively, Defendants’ argument also fails under clear Supreme Court authority which Defendants do not distinguish here. *Baral v. United States*, 528 U.S. 431, 436 (2000) (quoted by Pls. Br. 10).

Defendants’ two fallback arguments likewise fail. They insist upon a virtually unlimited power of amendment by the Senate, even for revenue-raising bills, but as the States *Amici* point out, “[t]he Senate’s “gut-and-amend” practice would gut the Origination Clause.” (States *Amici* Br. 24) So Defendants’ approach is a nonstarter. Finally, Defendants resort to a lack of objection by congressmen based on the Clause at the time of passage of ACA, but that obviously proves nothing because the Constitution applies nonetheless.

A. ACA Is a Revenue-Raising Bill and Its Lack of a Constitutional Basis, Outside of the Taxing Power, Renders Its Purpose Irrelevant.

Defendants do not, and cannot, deny that the Individual and Employer Mandates in ACA raise revenue to the tune of many billions of dollars. *See, e.g., NFIB*, 132 S. Ct. at 2594 (observing that the revenue for the Individual Mandate tax alone is expected to tally approximately \$4 billion annually by 2017). Defendants concede that these ACA taxes are paid into the general Treasury, just like many other revenue-raising statutes. Statutes, including ACA, which “levy

taxes in the strict sense of the word” are subject to full application of the Origination Clause. *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).³

Defendants argue that ACA is not revenue-raising within the meaning of the Origination Clause because an overall purpose of ACA, according to Defendants, was something other than raising revenue. (Defs. Br. 20) But, as Plaintiffs pointed out in their opening brief and as left unrebutted by Defendants (Pls. Br. 39), this end-justifies-the-means argument works only if the purpose or “end” is itself constitutional. An end-justifies-the-means argument can never work when the end is improper or, in this case, unconstitutional with respect to federal power. If Congress imposed an unprecedented tax with the purpose of usurping the power of the States, the tax would not be sustainable as incidental to the improper purpose. *See United States v. Butler*, 297 U.S. at 68 (“resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible”). Yet that is the “obviously inadmissible” situation here, where the Supreme Court held in *NFIB* that the stated purpose of ACA is

³ ACA also includes other revenue-raising provisions, such as its excise taxes on medical devices, which lack any plausible regulatory purpose other than to raise revenue, thereby independently subjecting ACA to the Origination Clause. (*Amici Cornyn, Cruz, et al.* Br. 7 n.4, citing Pub. L. No. 111-148, §9009, 124 Stat. at 862-65) Plaintiffs are not limited by standing doctrine from seeking invalidation of ACA based on that indisputably revenue-raising provision. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006) (“once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate”).

invalid under the Commerce Clause. 132 S. Ct. at 2593. Under *NFIB*, ACA can be sustained *only* as a revenue-raising tax subject to the Origination Clause.

Yet Defendants never address that the commercial regulation of people to buy health insurance is an unconstitutional end for Congress under *NFIB*. Where, as here, the end is beyond the power of Congress, its taxes must be analyzed without using the end as justification. See *Butler*, *supra* (cited by Pls. Br. 39, 41). Defendants fail to comply with the teaching in *Butler*, or distinguish it.

Defendants' position is 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." (Defs. Br. 15, quoting *United States v. Herrada*, 887 F.2d 524, 526 (5th Cir. 1989), other citations omitted). But Defendants' quoted phrase "for other purposes" obviously means "for other [*constitutionally valid*] purposes," not for invalid ones.

In *Herrada*, on which Defendants heavily rely, a special assessment was imposed pursuant to 18 U.S.C. § 3013, based on defendant's conviction on two counts of unlawful possession of a firearm by a convicted felon, 18 U.S.C. § 1202(a)(1). *Herrada*, 887 F.2d at 525. The assessment was valid, and outside of Origination Clause scrutiny, because it was secondary to a legitimate constitutional purpose: prohibiting convicted felons from possessing firearms. No such valid constitutional purpose exists here, and thus *Herrada* is inapposite.

The same principle that distinguishes this case from *Herrada* also separates this appeal from Defendants’ other cited precedents. In each of Defendants’ other authorities, and in *Munoz-Flores*, the challenged tax accompanied a valid constitutional purpose. As the 20 States explained well in their *amicus* brief here:

Indeed, in all of [these] cases, Congress had another, independent, and non-tax basis for passing the law at issue. *See Twin City Nat’l Bank of New Brighton v. Nebecker*, 167 U.S. 196 (1897) (National Bank Act of 1864; authorized by the Commerce Clause); *Millard v. Roberts*, 202 U.S. 429 (1906) (laws pertaining to District of Columbia railroads; authorized by the Commerce Clause and art. I, § 8, cl. 17); *Munoz-Flores*, 495 U.S. 385 (Victims of Crime Act of 1984; authorized by the Commerce Clause and Congress’s plenary authority over aliens). ... *See also United States v. Norton*, 91 U.S. 566, 568–69 (1875) (implying that postal money-order act is not a revenue law under Origination Clause).

(States *Amici* Br. 20 & 21 n.6) The States further explained that “[s]everal courts of appeals have held that laws were not ‘Bills for raising Revenue,’ but again, these laws were not passed solely pursuant to Congress’s taxing power.” (*Id.* 21 n.6, citing and explaining those decisions).

Defendants rely on a D.C. district court decision, which rejected a challenge to ACA under the Origination Clause by allowing it to be circumvented for any purpose other than taxation, presumably even unconstitutional ones. (Defs. Br. 16, 19-20, quoting *Sissel v. United States HHS*, 951 F. Supp. 2d 159, 168 (D.D.C. 2013), *appeal pending*). That cannot be right. Likewise, Defendants’ reliance on criminal cases in the Sixth and Tenth Circuits are unavailing here, because those decisions addressed special assessments for violations of a valid federal statute.

(Def. Br. 18) (citing *United States v. King*, 891 F.2d 780, 781 (10th Cir. 1989), and *United States v. Ashburn*, 884 F.2d 901, 902 (6th Cir. 1989)). Here, in contrast, the ACA taxes do not accompany a constitutional power. Instead, as pointed out by Plaintiffs in their opening brief and not refuted by Defendants or their *Amici*, ACA is akin to a new tax on land in Texas to fund a public works project in California, which would need to comply with the Origination Clause.

In ACA there is a lack of a relationship between the persons paying the taxes and the recipients of the benefits. This Court has confirmed that “courts must establish some relationship between the payors and the beneficiaries to avoid the strictures of the Origination Clause.” *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 428 n.56 (5th Cir. 1999) (relying on *Munoz-Flores*, 495 U.S. at 400 n.7). The ACA taxes do not fund the program or provide any benefits to Plaintiffs, and there is no “element of contract” to justify the exchange, in contrast with other decisions that upheld statutes under the Origination Clause. *Millard*, 202 U.S. at 437. Defendants never explain this defect to ACA.

Defendants have no answer to a hypothetical federal law, posed by Plaintiffs in their opening brief, taxing people who carry guns within 1000 feet of a school, to deter the possession of firearms near schools. When the purpose is not a valid federal power under *United States v. Lopez*, 514 U.S. 549 (1995), just as the stated purpose of ACA is invalid, then the tax can be sustained only as a revenue-raising

measure to the extent it complies with the Origination Clause. An invalid end can never justify the means. *See Butler*, 297 U.S. at 68 (“The act invades the reserved rights of the states. ... The tax, the appropriation of the funds raised, and the direction for their disbursement are but parts of the plan. ***They are but means to an unconstitutional end.***”) (emphasis added).

Finally, it is worth observing that Defendants’ speculation about the “real” purpose of ACA is a disfavored approach in this Court, which has expressly rejected “the Ninth Circuit’s ‘legislative intent’ approach,” and taken instead the more rigorous approach of being “required to construe the plain meaning of the statute.” *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 420-21 (5th Cir. 2009). What was said publicly in the election year of 2010 may not even be what was really meant. For example, the two stated purposes of *NFIB* were plainly proven false: it does not “achieve[] near-universal coverage,” as stated in the statute itself, Pub. L. No. 111-148, § 1501(a)(2)(D), (E), (G), and it is a tax, despite congressional and White House assertions otherwise. Legislative intent is not controlling. “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.***” *See Hubbard v. Lowe*, 226 F. 135, 137 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916) (emphasis added). The Constitutional Convention rejected an attempt by Edmund Randolph to make purpose controlling:

“Bills for raising money for the *purpose of revenue* or for appropriating the same shall originate in the House of Representatives.” See Priscilla H.M. Zotti and Nicholas M. Schmitz, “The Origination Clause: Meaning, Precedent and Theory from the 12th to 20th Century,” 3 BRITISH JOURNAL OF AMERICAN LEGAL STUDIES 71, 95 (Spring 2014) (emphasis in original).⁴ Defendants do not rebut this.

B. The Originating House Bill, H.R. 3590, Was Not Revenue-Raising.

Defendants and their *Amici* argue that H.R. 3590 was revenue-raising, but it plainly was not. It was an extension of a tax credit for servicemen. No revenue would be raised from that extension, and in fact revenue would be lost. Indeed, in Defendants’ moving papers below, they did not even argue that H.R. 3590 was a revenue-raising bill. (ROA.61-90)

Now Defendants and their *Amici* cite to a report by the Joint Committee on Taxation, which estimates that H.R. 3590 would generate \$86 million over five years and a (paltry) \$7 million over ten years. (Defs. Br. 24) But a close look at that report, which is available on the internet,⁵ reveals that the only “revenue” is from tax penalties for failure to file returns and for payments in estimated taxes. That is not “revenue” within the meaning of the Origination Clause. As

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

⁵ 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> (viewed 7/26/14).

demonstrated below, the Supreme Court has unanimously held that estimated tax payments “are not taxes in their own right,” *Baral v. United States*, 528 U.S. 431, 436 (2000), and thus do not raise revenue. “[M]ethods for collecting the income tax” are not themselves taxes, and thus the penalties for not filing tax forms under H.R. 3590 are not revenue either. *Id.* Defendants do not cite this controlling *Baral* precedent, let alone distinguish it.

Defendants argue that “[t]he 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.” (Defs. Br. 5) But the Supreme Court has never precluded application of the Origination Clause, and it has been applied to invalidate a statute. *See Hubbard*, 226 F. at 140. The Supreme Court had never held that the Second Amendment guarantees an individual right to bear arms until the Fifth Circuit so held in *United States v. Emerson*, 270 F.3d 203, 233 (5th Cir. 2001). The Supreme Court subsequently followed the lead of the Fifth Circuit, despite every other federal appellate court holding otherwise. *See District of Columbia v. Heller*, 554 U.S. 570, 638 n.2 (2008) (Stevens, J., dissenting) (“Until the Fifth Circuit’s decision in *United States v. Emerson*, 270 F.3d 203 (2001), every Court of Appeals to consider the question had understood [the Supreme Court precedent in] *Miller* to hold that the Second Amendment does not protect the right to possess

and use guns for purely private, civilian purposes.”). It is ACA that “br[oke] new ground,” in an unconstitutional way.

The failure of the House of Representatives to object to the violation of the Origination Clause at the time of passage, as in using the “blue slip” process, is of no consequence, and Defendants strike out in trying to make something of this. The “power to interpret the Constitution ... remains in the Judiciary.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). *See also INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating a congressional practice that had been common for at least a half-century, by holding that “we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution”). The lack of compliance with the Constitution does not turn on whether a representative objects at the time, as the people can assert their constitutional rights in litigation later. In striking down a federal law passed in violation of the Origination Clause, the *Hubbard* court restated the truism that “[a]ny and all violations of constitutional requirements vitiate a statute,” even if they represent merely “this kind of careless journey work” of originating a revenue bill in the wrong body. *Hubbard*, 226 F. at 140.

Finally, Defendants and their *Amici* argue without support from the Framers that a decrease in taxes can be revenue-raising within the meaning of the Origination Clause. (Defs. Br. 25; *Amici* Levin & Wyden Br. 18) But this does

not help Defendants because H.R. 3590 was a *waiver* of taxes, which cannot raise revenue under any plausible view.⁶ The concern of the Framers was with tax increases, not tax waivers like H.R. 3590, and thus it cannot meet the requirements of the Origination Clause for the enactment of ACA.

C. As 20 States, Led by Texas, Explained in Their *Amicus* Brief Without Rebuttal, Defendants Have No Support from *Texas Ass’n of Concerned Taxpayers (TACT)* or Any Other TEFRA Decisions.

Defendants and their *Amici* rely heavily on *Texas Ass’n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163 (5th Cir. 1985) (“*TACT*”). But it held that challenges to federal statutes under the Origination Clause were non-justiciable, a ruling that the Supreme Court subsequently rejected in *Munoz-Flores*. Accordingly, *TACT* is no longer good law today. As the 20 States *Amici* point out, “reliance on *TACT* is troubling because the Supreme Court effectively overruled it more than two decades ago.” (States *Amici* Br. 22)⁷

⁶ Defendants rely on an 1872 Senate report and a 2011 Congressional Research Service report suggesting that bills “raise revenue” even when they diminish existing tax rates. (Defs. Br. 25) Even if this Court were to accept this expansive view, that would not help Defendants here because, where H.R. 3590 addressed actual taxes (as distinct from penalties and estimated-tax payments), it only waived tax obligations, thereby raising zero revenue. RE-52 to RE-53 (ROA.12-13) The waiver of a tax obligation is not “raising Revenue” under any reasonable interpretation of the Origination Clause. U.S. CONST. art. I, § 7, cl. 1. (Cornyn, Cruz, *et al. Amici* 7, 18-28)

⁷ *Shepard’s* citation service fails to flag the *Texas Ass’n of Concerned Taxpayers (TACT)* decision as no longer being good law, and mistakenly characterizes a “But cf.” citation to it as merely “neutral” with respect to the subsequent Supreme Court decision of *Munoz-Flores* that overruled *TACT*. *Munoz-Flores*, 495 U.S. at 389

Moreover, neither the *TACT* decision nor the others involving the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324 (“TEFRA”), lend any support to Defendants’ position here. All of those decisions concerned taxes attendant to another valid federal power, unlike ACA here. (States *Amici* Br. 22) (citing and distinguishing cases).

D. Defendants Are Incorrect in Arguing that the Amendment Power Enables the Senate to Avoid the Origination Clause.

After arguing that the massive tax hike of ACA is not revenue-raising, but that H.R. 3590 somehow is, Defendants ultimately resort to an argument that none of this matters because the Senate can essentially amend bills however it likes, without any real obstacle posed by the Origination Clause. Such a reading would completely eviscerate the Origination Clause and render it null and void. Defendants’ position is contrary to the *Munoz-Flores* decision and more than 500 years of history underlying the Clause.

Defendants cite two pre-World War I decisions to support their argument. (Defs. Br. 28) Defendants tell us that in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (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.” (Defs. Br. 28) Three years later, according to Defendants, the Supreme Court

n.2. Perhaps because of this failure by *Shepard’s* to flag *TACT* properly, Defendants repeatedly rely on it in their brief here (Defs. Br. 6, 25, 29), and *Amici Levin & Wyden* cite it “*passim*” in their brief, despite how *TACT* was overruled.

“made clear that the Origination Clause does not limit the substance or scope of such Senate amendments.” (*Id.*, quoting *Rainey v. United States*, 232 U.S. 310, 317 (1914)). But neither helps Defendants here. As explained by Plaintiffs in their opening brief – and never rebutted by Defendants or their *Amici* – these decisions concerned the raising of revenue for constitutional federal programs, which ACA does not. (Pls. Br. 30) Moreover, *Flint* concerned a minor Senate amendment to an omnibus tax bill passed by the House, and *Rainey*, to the extent Defendants read it to imply that the originating House bill need not be revenue-raising, was overruled by *Munoz-Flores*.

The argument that the “as on other bills” provision in the Origination Clause allows the Senate to “amend” a House revenue raising bill, no matter how small or non-germane the subject matter, by replacing it in toto with one of the largest tax increases in history, seriously misreads that provision. As *Amici* Trent Franks *et al.* demonstrated, no such “amendments” were allowed at the time of the ratification on any bill, revenue-raising or not. (*Amici* Franks *et al.* Br. 26-28)

E. This Court May Consider Arguments Raised by Plaintiffs’ Congressional *Amici* Because They Relate Closely to the Same Issue Raised by Plaintiffs.

The Court may fully consider the compelling arguments by *Amici*, despite Defendants’ objections. (Defs. Br. 27) *See, e.g., Mapp v. Ohio*, 367 U.S. 643,

646, n. 3 (1961) (applying the exclusionary rule against the States even though that was argued by only *amicus curiae*).

The congressional *Amici* point out that there are reasons, in addition to those cited above, why *Flint* and *Rainey* are not helpful to Defendants here. *Flint* imposed a germaneness requirement that Defendants plainly failed to satisfy in enacting ACA. (House Majority Leader *et al. Amici* Br. 23-24) *Rainey*, to the extent it disagreed, was overruled by *Munoz-Flores*. (*Id.* Br. 26 n.21)

Defendants' sole citation for excluding a few of the *amicus* arguments is to a decision that *did* address an argument raised by only an *amicus* brief, but then observed that "an *amicus curiae* generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) (inner quotation omitted). The *amicus* briefs at bar do not "expand the scope" of this appeal, and their arguments should be fully considered here.

It is particularly significant that Defendants did not respond to the *amicus* brief filed by 20 States, including Texas, in support of this appeal and against the implementation of ACA in contravention of the Origination Clause. The enormously divisive impact of ACA on our Nation is apparent from the continued opposition, more than four years later, by 20 States against ACA's implementation.

Defendants have no answer to that. An *unconstitutional* statute that Balkanizes our Nation, as ACA does, should be enjoined.

III. Defendants Fail to Address the Takings Clause Violation in How ACA Compels Payments to Private Entities.

ACA violates the Takings Clause of the Fifth Amendment by compelling Plaintiffs to pay money directly to other private entities. Defendants fail to rebut Plaintiffs' opening brief and numerous authorities on this point, including Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896). (Pls. Br. 48-55)

Defendants overrely on a decision by the D.C. Circuit that dismissed a Takings Clause claim to ACA without addressing the heart of its merits, which is that direct redistribution schemes of forcing citizens to pay money directly to other private entities is unconstitutional under the Takings Clause precedents cited in Plaintiffs' opening brief. (Pls. Br. 49-53; Defs. Br. 35-37, citing *Association of American Physicians & Surgeons v. Sebelius*, 746 F.3d 468 (D.C. Cir. 2014) (AAPS)). Taxing person *A* by \$*X* unless he pays \$*Y* to person *B* is a violation of the Fifth Amendment Takings Clause, as explained by the authorities cited in Plaintiffs' opening brief (and not rebutted). The D.C. Circuit decision acknowledges the Supreme Court statement in *Kelo* 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." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (quoted by AAPS, 746 F.3d

at 470). But then the D.C. Circuit failed to apply that clear rule to ACA, and the resultant decision is not illuminating. This Court should apply the *Kelo* rule here.⁸

IV. Defendants Have Not Objected to an Interpretation of ACA as a Voluntary Tax, in Order to Avoid Its Constitutional Infirmities.

As reiterated by the Supreme Court in *NFIB*, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” 132 S. Ct. at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). ACA can be salvaged only by construing its tax to be voluntary, unenforceable, and uncollectible, akin to the optional Presidential Election Campaign Fund contribution section on the annual IRS Form 1040. This result would be entirely consistent with the extraordinary statutory limitations on collecting ACA taxes, 26 U.S.C. § 5000A(g)(2), which were cited favorably by the Supreme Court in *NFIB*, 132 S. Ct. at 2584. Holding that the ACA taxes are voluntary would comport nicely with Defendants’ argument that ACA is not revenue-raising under the Origination Clause. (Defs. Br. 15-22).

⁸ Defendants also argue that there is not a precedent directly on point for Plaintiffs on their Takings Clause claim, but it is ACA that imposes an unprecedented taking. As to standing, Plaintiff Braidwood is injured by this because it must either procure ACA-compliant insurance by making payments for some insurance, or face government penalties for not doing so.

CONCLUSION

For reasons provided above and in the opening brief of Hotze and Braidwood, the decision below should be reversed and the Individual and Employer Mandates in ACA should be enjoined from enforcement based on the Origination and Takings Clauses of the U.S. Constitution. Alternatively, as argued by Hotze and Braidwood in their opening brief and not rebutted by Defendants in their response, this Court should declare that the taxes imposed by the Individual and Employer Mandates of ACA are voluntary, unenforceable, and uncollectible, and thereby enjoin Defendants from collecting them in any manner that lacks a full disclosure and explanation of their voluntary and unenforceable legal status.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,957 words.

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CERTIFICATE OF FILING AND SERVICE

I, Andrew L. Schlafly, hereby certify pursuant to Fed. R. App. P. 25(d) that, on July 28, 2014, the foregoing Brief for Plaintiffs-Appellants was filed through the CM/ECF system and served electronically on the individuals listed below:

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