No. 14-20039

In the United States Court of Appeals for the Fifth Circuit

STEVEN F. HOTZE, M.D., AND BRAIDWOOD MANAGEMENT, INC.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, U.S. SECRETARY OF HEALTH & HUMAN SERVICES, AND JACOB J. LEW, U.S. SECRETARY OF THE TREASURY, IN THEIR OFFICIAL CAPACITIES,
Defendants-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CIVIL NO. 4:13-CV-01318, HON. NANCY F. ATLAS

AMICI CURIAE BRIEF OF SENATORS JOHN CORNYN AND TED CRUZ, CONGRESSMAN PETE SESSIONS, *ET AL.* (ADDITIONAL *AMICI CURIAE* ON INSIDE COVER) IN SUPPORT OF APPELLANTS AND REVERSAL

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No. 14-20039

In the United States Court of Appeals for the Fifth Circuit

ADDITIONAL *AMICI CURIAE*:

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CERTIFICATE OF INTERESTED PERSONS

The case number is 14-20039. The case is styled as *Hotze v. Sebelius.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Steven F. Hotze, M.D.,
Appellant

Braidwood Management, Inc.,
Appellant

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

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

Foundation for Moral Law,
Amicus Curiae

U.S. Reps. Trent Franks, Michele Bachmann, Joe Barton, Kerry L. Bentivolio, Marsha Blackburn, Jim Bridenstine, Mo Brooks, Steve Chabot, K. Michael Conaway, Ron DeSantis, Jeff Duncan, John Duncan, John Fleming, Bob Gibbs, Louie Gohmert, Andy Harris, Tim Huelskamp, Walter B. Jones, Jr., Jim Jordan, Steve King, Doug LaMalfa, Doug Lamborn, Bob Latta, Thomas Massie, Mark Meadows, Markwayne Mullin, Randy Neugebauer, Stevan Pearce, Robert Pittenger, Bill Posey, David P. Roe, Todd Rokita, Matt Salmon, Mark Sanford, David Schweikert, Marlin A. Stutzman, Lee Terry, Tim Walberg, Randy K. Weber, Sr., Brad R. Wenstrup, Lyne A. Westmoreland, Rob Wittman, Ted S. Yoho (collectively, "House *Amici Curiae*"),
Amici Curiae

Citizens' Council for Health Freedom, Janice Chester, M.D., Mark Hauser, M.D., Graham L. Spruiell, M.D. (collectively, "Health Freedom *Amici Curiae*"), *Amicus Curiae*

Association of American Physicians & Surgeons, Inc. (hereinafter, "AAPS"), *Amicus Curiae*

House Majority Leader, House Majority Whip, and the Judicial Education Project (hereinafter, "*Judicial Education Project Amici Curiae*"), *Amicus Curiae*

U.S. Sens. John Cornyn and Ted Cruz U.S. Reps. Pete Sessions, Robert Aderholt, Joe Barton, Kerry Bentivolio, Charles W. Boustany, Jr., Kevin Brady, Paul Broun, Vern Buchanan, John Carter, Steve Chabot, Tom Cole, K. Michael Conaway, Paul Cook, Kevin Cramer, John Culberson, Jeff Duncan, Blake Farenthold, John Fleming, Bill Flores, Scott Garrett, Bob Gibbs, Louie Gohmert, Trey Gowdy, Morgan Griffith, Ralph M Hall, Richard Hudson, Tim Huelskamp, Lynn Jenkins, Bill Johnson, Sam Johnson, Walter Jones, Steve King, Jack Kingston, John Kline, Doug LaMalfa, Leonard Lance, James Lankford, Michael T. McCaul, Patrick T. McHenry, Mark Meadows, Jeff Miller, Mick Mulvaney, Randy Neugebauer, Richard Nugent, Pete Olson, Robert Pittenger, Bill Posey, Scott Rigell, Phil Roe, Keith Rothfus, Matt Salmon, Steve Scalise, Mike Simpson, Lamar Smith, Steve Stockman, Lee Terry, Mac Thornberry, Randy Weber, Daniel Webster, Lynn A. Westmoreland, Roger Williams, Joe Wilson, Robert J. Wittman, Robert Woodall, Ted Yoho, and Don Young, (collectively, "Legislative *Amici*"), *Amici Curiae*

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Dated: May 15, 2014

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amici curiae are U.S. Senators and Representatives (collectively, "*Amici*") serving in the One Hundred Thirteenth Congress. *Amici* and their roles in Congress are listed in the Addendum ("Add."). As legislators and as citizens, *Amici* share an interest in the federal government operating in accordance with the U.S. Constitution, that great guarantee of liberty conceived of and adopted by our Founding Fathers. As members of a co-equal legislative branch of our federal government, *Amici* have a compelling interest in protecting – and a constitutional duty to protect – the separation of powers within the federal government, both to ensure individual liberty to all citizens and to guard against tyranny. Accordingly, *Amici* have direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Dr. Steven Hotze and Braidwood Management (collectively, "Plaintiffs") sue the Secretaries of the Treasury and of Health and Human Services (collectively, the "Administration") for declaratory and injunctive relief against enforcement of the "Employer Mandate" and "Individual Mandate," 26 U.S.C. §§4980H, 5000A, of the Patient Protection and Affordable Care Act, Pub. L. No.

[1] *Amici* file this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amici* and their counsel – contributed monetarily to this brief's preparation or submission.

111-148, 124 Stat. 119 (2010) ("PPACA"). Plaintiffs challenge these mandates on two grounds, including that the Senate-initiated PPACA raises revenue in violation of the U.S. Constitution's requirement that revenue-raising measures originate in the House of Representatives. U.S. CONST. art. I, §7, cl. 1. Finding that it had both Article III jurisdiction and statutory subject-matter jurisdiction over Plaintiffs' claims, the District Court dismissed Plaintiffs' complaint on the merits for failing to state a claim on which relief could be granted.

The Supreme Court held that §5000A's Individual Mandate to purchase health insurance exceeds the Commerce Power, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2587-93 (2012) ("*NFIB*"), but could be "saved" by interpreting the corresponding "penalty" as within the Taxing Power, 132 S.Ct. at 2598-2600, even though Congress did not intend that penalty as a tax. 132 S.Ct. at 2582-84. While recognizing that "any tax must still comply with other requirements in the Constitution," 132 S.Ct. at 2598, *NFIB* did not consider – much less resolve – whether PPACA's enactment violated the Origination Clause.[2] This litigation thus picks up where *NFIB* left off.

PPACA's enactment violated the Origination Clause's command that "[a]ll

[2] "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted).

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. PPACA's revenue-raising taxes originated in the Senate, and the underlying House bill did not raise revenue. Regardless of whether PPACA generally or §5000A specifically had regulatory purposes other than raising revenue, under *NFIB*, §5000A's taxes have no other *constitutional* purpose. The only constitutional basis for the mandate renders the statute unconstitutional under the Origination Clause. As a Senate-initiated, revenue-raising bill, PPACA is void in its entirety.

The Senate's PPACA Amendments Were Drafted Outside the Committee Structure and Rushed Without Deliberative Attention

On November 21, 2009, the Senate Majority Leader called up H.R. 3590 – which had nothing to do with raising revenue, much less healthcare – and offered an amendment that replaced the bill with PPACA. 155 Cong. Rec. S11,967 (2009); *id.* at S11,607-816. As explained in Sections I-III, *infra*, that decision rendered PPACA invalid under the Origination Clause. Several factors contributed to that inadvertent result.

First, PPACA was drafted in the Majority Leader's office, outside the usual committee process, without the deliberative value that committees provide. Because Democrats then had a 60-vote supermajority, the legislative process consisted of horse-trading to secure the moderate members of the majority caucus,

without inviting input from the Senate minority.

Second, although a nominal effort was made to secure a House shell bill under traditional Senate practice, PPACA's drafters apparently believed (incorrectly) that the Individual Mandate was within the Commerce Power. As a result, they failed properly to consider the Origination Clause's implications on enacting PPACA as an amendment to H.R. 3590, the House bill.

Third, and finally, whatever legislative end-game the Majority Leader had planned for the House, those plans were thwarted by a special election on January 19, 2010, when Massachusetts elected Scott Brown as the Senate's forty-first Republican. Losing a filibuster-proof majority eliminated the Senate Democrats' options for acceding to a House bill or accepting House amendments to the Senate bill without Republican support. Consequently, the Democrats were compelled to stick with the Senate-adopted PPACA, 155 Cong. Rec. S13,891 (2009), as modified only by a reconciliation bill not subject to Senate filibuster. 2 U.S.C. §641(e)(2). PPACA passed without a Republican vote in the House or Senate.

The House Shell Bill Chosen as PPACA's Vehicle Did Not Raise Revenue

The House bill called up by the Senate Majority Leader was not a bill for raising revenue. On October 8, 2009, H.R. 3590 – the Service Members Home Ownership Tax Act of 2009 ("SMHOTA") – passed the House by a 416-0 vote. 155 Cong. Rec. H11,126 (2009). SMHOTA was as short as it was uncontroversial,

consisting of six sections spanning only six pages:

- SMHOTA §1 (ROA.184) provided the bill's short title.
- SMHOTA §§2-3 (ROA.184-187) waived recapture of the first-time homebuyers' tax credit for members of the armed forces, foreign service, and intelligence community ordered to extended duty service overseas. In the absence of this waiver, first-time homebuyers would lose the credit if they sold their home too soon after claiming the credit. *See* 26 U.S.C. §36(a), (f).
- SMHOTA §4 (ROA.187-188) added new exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" under 26 U.S.C. §132.
- SMHOTA §5 (ROA.188) increased civil penalties by $21 (from $89 to $110) for failing to file certain returns for partnerships and S corporations under 26 U.S.C. §§6698(b)(1), 6699(b)(1), respectively.
- SMHOTA §6 (ROA.188) amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to shift 0.5% of *estimated* taxes for certain corporations from the fourth quarter to the third quarter, with an offsetting reduction to fourth-quarter payments.

H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009).

As the nonpartisan Joint Committee on Taxation made clear about the sixth

section, the slight increase in third-quarter payments would be offset by an equal and opposite decrease in fourth-quarter payments.[3] Taken together, therefore, SMHOTA eliminated taxes on various revenue streams (§§2-4), increased penalties for failure to file certain returns (§5), and temporally shifted a fraction of a percent of fourth-quarter estimated-tax payments to third-quarter payments, with a corresponding reduction to fourth-quarter payments (§6).

STATEMENT OF FACTS

Amici address only the Origination Clause issue, for which the relevant facts are the adoption of SMHOTA and PPACA by the House and Senate, respectively.

SUMMARY OF ARGUMENT

Under *NFIB*, PPACA's Individual Mandate falls outside of the Commerce Power, and Congress would have the constitutional power to impose the Individual Mandate *only* through the Taxing Power. The Individual Mandate, therefore, has only one *constitutional* purpose – raising revenue – and that purpose triggers scrutiny under the Origination Clause.

PPACA's enactment violated the Origination Clause because the Senate-initiated §5000A raises revenue, and no section of the underlying House-initiated

[3] "[P]ayments due in July, August, and September, 2014, shall be increased to 100.25 percent of the payment otherwise due and the next required payment shall be reduced accordingly." Joint Committee on Taxation, Technical Explanation of H.R. 3590, the "Service Members Home Ownership Tax Act of 2009" Scheduled for Consideration by the House of Representatives on October 7, 2009, at 9 (Oct. 6, 2009) (JCX-39-09) (Add. 18) (hereinafter, "Joint Committee Report").

bill raised revenue. First, the House bill did not *increase* revenue in any respect: it expanded three tax exemptions, temporally shifted certain estimated-tax payments without changing the rates, and increased certain civil penalties. Second, even if "raise" were construed to mean "levy," the House bill would still not be a revenue-raising bill because, where it addressed taxation, the bill made tax expenditures without any revenue-related purpose and zeroed out revenue streams, which cannot qualify as levying revenue. Because the Senate amendments raise revenue where the House bill did not, PPACA is invalid under the Origination Clause.

ARGUMENT

Congress lacks authority under Article I of the U.S. Constitution to impose PPACA's Individual Mandate unless the associated penalty can qualify as a lawful tax. *NFIB*, 132 S.Ct. at 2587-93, 2598-2600. Because the Individual Mandate originated in a Senate amendment to a House bill that did not raise revenue, PPACA's enactment violated the Origination Clause.[4]

I. THE ORIGINATION CLAUSE IS AN ESSENTIAL PROTECTION OF LIBERTY

The Origination Clause is not a technicality – it is an indispensable bulwark

[4] PPACA includes other revenue-raising provisions. For example, PPACA's excise taxes on medical devices also triggers the Origination Clause. *See* Pub. L. No. 111-148, §9009, 124 Stat. at 862-65. *Amici* focus on the Individual Mandate's tax because it is what the parties contest. The same arguments apply equally to the medical-device tax, which has no conceivable regulatory purpose other than to raise revenue.

against tyranny. The Founders regarded the Constitution's "separation of governmental powers into three coordinate Branches [as] essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). By decentralizing power among three branches and by placing the taxing power in the legislative branch closest to the People, the Founders intended separation of powers generally and the Origination Clause specifically to protect liberty. *United States v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990).

As every schoolchild in America knows, the power over taxation was a central concern of the American revolutionaries. This Nation dissolved its ties with England largely because of unfair taxation, with England's "imposing taxes on us without our consent" among the grievances laid out in the Declaration of Independence. 1 Stat. 1, 2 (1776). Having waged war to escape such taxes, the Founders designed the Constitution to allow the People to control their government, and not vice versa:

> "The consideration which weighed ... was, that the [House] would be the immediate representatives of the people; the [Senate] would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it."

5 J. Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 283 (1881) (George Mason of Virginia). The Origination Clause "will oblige some member in the lower branch to move, and people can then mark him." *Id.* at 189 (Hugh

Williamson of North Carolina). The Origination Clause is thus a procedural protection of liberty itself: "The history of liberty has largely been the history of observance of procedural safeguards," *Corley v. United States*, 556 U.S. 303, 321 (2009) (interior quotations omitted), which this Court can and should enforce in Plaintiffs' challenge to PPACA's enactment.

Federal courts have the duty to evaluate congressional enactments under the Origination Clause, including "whether a bill is 'for raising Revenue' or where a bill 'originates.'" *Munoz-Flores*, 495 U.S. at 396. Judicial resolution is particularly appropriate where the legislative branch's two houses have divergent interests in the Origination Clause's breadth and thus can reach opposite answers to the same questions. *See, e.g.*, VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §317 (1935). While "[s]eparation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others," "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011). The House, of course, always can protect its prerogatives by withholding a vote on a Senate bill. But "the aim of [the separation of powers] is to protect … *the whole people* from improvident laws," *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) (emphasis added), not merely to protect the institutional prerogatives of the respective branches.

Neither the House nor the Senate can *acquiesce* to a violation of the Origination Clause, any more than they can acquiesce to any other violation of the Constitution. *Munoz-Flores*, 495 U.S. at 391. When – as here – they do acquiesce to such a violation, intentionally or otherwise, federal courts must enforce the Origination Clause against the offending statute.

II. AS A TAX UNDER *NFIB*, PPACA RAISES REVENUE WITHIN THE MEANING OF THE ORIGINATION CLAUSE

As converted to a tax by *NFIB*, PPACA's Individual Mandate raises revenue within the meaning of the Origination Clause. Although the Supreme Court has not definitively outlined the contours of revenue-raising bills under the Origination Clause, *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), the Court's decisions provide three interrelated rules for deciding cases under the Clause. First, "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." *Id.* (*citing* 1 J. Story, COMMENTARIES ON THE CONSTITUTION §880, at 610-11 (3d ed. 1858)).[5] Second, as a "general rule," the Origination Clause does not apply to "a statute that

[5] Justice Story's treatise identified several examples of non-revenue bills that might "incidentally create revenue": (1) "bills for establishing the post office and the mint, and regulating the value of foreign coin;" (2) "a bill to sell any of the public lands, or to sell public stock;" and (3) "a bill [that] regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency." 1 Story, COMMENTARIES §880.

creates a particular governmental program and that raises revenue to support that program," as opposed to "rais[ing] revenue to support Government generally." *Munoz-Flores*, 495 U.S. at 398. Third, when Congress lacks regulatory authority over a field under Article I, courts assume that taxes imposed in that field have a revenue-raising purpose, rather than an ulterior (and impermissible) regulatory purpose. *McCray v. United States*, 195 U.S. 27, 50-51 (1904). Under these rules, PPACA raises revenues within the Origination Clause's meaning.

A. The Individual Mandate Raises Revenue in the "Strict Sense" Rather than Incidentally to Another Regulatory Purpose Because the Individual Mandate Has No Other Constitutional Purpose

Unlike taxation of fields over which Congress has overlapping, non-tax authority – *e.g.*, currency, post offices, and interstate commerce – PPACA's Individual Mandate lacks any alternate justification to the congressional power to tax. As such, PPACA cannot avoid the Individual Mandate's revenue-raising purpose as incidental to another, non-revenue purpose. For that reason, the Administration cannot seek cover in decisions concerning statutes for which Congress had alternate, non-tax authority under Article I.

The Origination Clause applies not only to whole bills but also to discrete sections, asking whether the "act, or by *any of its provisions"* had the purpose of "rais[ing] revenue to be applied in meeting the expenses or obligations of the government." *Nebecker*, 167 U.S. at 202-03 (emphasis added). Under *NFIB*, to the

extent that they could be constitutional at all, §5000A's taxes are income taxes.[6] PPACA's taxes therefore supply revenue to the Treasury and "levy taxes in the strict sense of the word," rather than "incidentally create revenue." *Nebeker*, 167 U.S. at 202. In *United States v. Herrada*, 887 F.2d 524, 528 (5th Cir. 1989), *cert. denied* 493 U.S. 958 (1990), this Court read the Supreme Court's precedents under the Origination Clause to require "consider[ing] the overarching purpose of an Act when one of its provisions is subject to an Origination Clause challenge." Of course, for a statute to have an overarching or primary purpose that is constitutional, the statute must have *multiple* constitutional purposes. But, under *NFIB*, even if PPACA as a whole or §5000A itself had other purposes, §5000A's taxes would have no other *constitutional* purpose but the raising of revenue.[7]

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[6] In essence, *NFIB* already has held that the Individual Mandate is not a direct tax (which would require apportionment to the census), 132 S.Ct. at 2598-99, and the Individual Mandate similarly is not an indirect tax (which would require uniformity throughout the Nation). *See* Opening Br. at __. That leaves income taxation as the only potentially viable form of taxation.

[7] The *Herrada* panel recognized that it was reaching a different result than the Ninth Circuit reached in *Munoz-Flores*. *See id.* In the Supreme Court, the majority analyzed the revenue-raising attributes of the challenged tax – 18 U.S.C. §3013 – by itself, rather as a part of the larger Victims of Crime Act of 1984, Pub. L. No. 98-473, tit. II, §§1401-1406, 98 Stat. 1837, 2170-75 (1984). *See Munoz-Flores*, 495 U.S. at 397-401. Nothing requires reading *Herrada* to hold that this Court can (or must) rely on a statute's overarching non-revenue purpose if Congress lacks Article I authority for that purpose. To the extent that *Herrada* is read to hold otherwise, *Munoz-Flores* overruled *Herrada* by focusing on whether "[t]here was [a] purpose by the act *or by any of its provisions* to raise revenue to be applied in meeting the expenses or obligations of the Government." *Munoz-Flores*, 495 U.S.

PPACA's taxes are collected in connection with the income tax, with annual revenue approximating $4 billion by 2017. *NFIB*, 132 S.Ct. at 2594. These taxes go to the general funds of the U.S. Treasury. 44 Cong. Rec. 4420 (1909) (Mr. Heflin); *Haskin v. Secretary of the Dep't of Health & Human Serv.*, 565 F.Supp. 984, 986-87 (E.D.N.Y. 1983) (*citing* 2 H. McCormick, SOCIAL SECURITY CLAIMS AND PROCEDURES 418 (3d ed. 1983)). If funds "go into the Treasury … just exactly as do the moneys which arise from tariff taxes or internal revenue taxes or any other taxes [where they] would be mingled with and become a part of all the revenues of this Government," the statute "is as completely a revenue bill as it is possible to make it." VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §316 (1935) (argument supporting successful point of order to table a Senate-originated bill) (Rep. McKellar). Because Congress lacks constitutional authority to regulate in §5000A's arena, whatever regulatory purpose Congress may have had in PPACA *as designed*, that purpose cannot deflect §5000A's raising taxes in the "strict sense of the word" under *Nebeker*, 167 U.S. at 202, because PPACA survived *NFIB* only as a tax.

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at 398 (internal quotations omitted, emphasis added). In keeping with that general holding, the Supreme Court analyzed §3013's revenue-raising impact as a discrete section, rather than analyzing its role in the larger statute. *Id.* at 398-99.

B. The Individual Mandate is Not a Special Assessment that Supports a Regulatory Program

Because *NFIB* saved the Individual Mandate solely by construing it as a tax, PPACA's tax penalties cannot qualify as special assessments that raise funds to support a regulatory program and thus fall outside Origination Clause scrutiny. In *Munoz-Flores*, the Court held:

> [A] statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a "Bil[l] for raising Revenue' within the meaning of the Origination Clause."

Munoz-Flores, 495 U.S. at 397-98; *see also Millard v. Roberts*, 202 U.S. 429, 437 (1906) (taxes collected will be conveyed to railroads in consideration of the railroads' building a train station); *Nebeker*, 167 U.S. at 198-99 ("the expenses necessarily incurred in executing … this act … shall be paid out of the proceeds of the taxes or duties now or hereafter to be assessed") (internal quotations omitted). "As in *Nebeker* and *Millard*, then, the special assessment provision [in *Munoz-Flores*] was *passed as part of a particular program to provide money for that program*." *Munoz-Flores*, 495 U.S. at 398 (emphasis added). By contrast, the Individual Mandate's taxes flow directly and entirely into the Treasury, without funding anything unique to PPACA.

All the taxes that the Supreme Court has upheld as special assessments to fund a regulatory program were indirect taxes, *Flint*, 220 U.S. at 150 (excise tax on

the privilege of doing business in a corporate capacity); *Nebeker*, 167 U.S. at 198-99 (duty on average amount of its notes in circulation); *Munoz-Flores*, 495 U.S. at 387 (assessment on those convicted of certain federal crimes), or direct taxes, *Millard*, 202 U.S. at 435 (direct tax on land under the federal authority over the District of Columbia, U.S. CONST. art. I, §8, cl. 17), never an income tax. Unlike in *Nebeker*, *Munoz-Flores*, and *Millard* – where "[a]ny revenue for the general Treasury … create[d] is thus 'incidenta[l]' to that provision's primary purpose," *Munoz-Flores*, 495 U.S. at 399 – *NFIB* justifies the taxes here *solely* for their revenue-raising purpose of providing tax revenue to the Treasury.[8]

C. When Congress's Taxing Power Is the Only Constitutional Basis for a Statute, It Is Necessarily a Revenue-Raising Provision

When – as with the Individual Mandate – Congress has the authority to act only via taxation, the only constitutional purpose is that tax's revenue-raising purpose. To construe §5000A as a regulatory rather than revenue-raising measure, the District Court relied on an out-of-context quotation from *NFIB:* "Although the payment will raise considerable revenue, *it is plainly designed to expand health*

[8] In contrast to $4 billion annually that flows directly to the Treasury as an income tax under the Individual Mandate, *NFIB*, 132 S.Ct. at 2594, the funds that went to the Treasury under the *Munoz-Flores* statute were overflow funds beyond a statutory cap, which occurred in only one year and totaled less than $360,000 (*i.e.*, four percent of less than $9 million) that inadvertently flowed to the Treasury, with "no evidence that Congress contemplated the possibility of a substantial excess" over the statutory caps. *Munoz-Flores*, 495 U.S. at 398.

insurance coverage." ROA.245 (*quoting NFIB*, 132 S.Ct. at 2596) (alteration and emphasis in *Hotze*); ROA.263 (same). Because it did not even consider whether PPACA raised revenue under the Origination Clause, *NFIB* certainly did not hold that the Individual Mandate had a non-revenue purpose under the Origination Clause.

Amici respectfully submit that the District Court misreads *NFIB.* First, the cited point in *NFIB* distinguished between regulatory penalties and permissible taxation. *NFIB*, 132 S.Ct. at 2596. In the *Sanchez* and *Sonzinsky* cases cited by *NFIB*, Congress had Article I regulatory authority under the Commerce Clause over each field of taxation. *See United States v. Sanchez*, 340 U.S. 42, 43 (1950) (regulatory tax on marijuana); *Sonzinsky v. United States*, 300 U.S. 506, 511 (1937) (regulatory tax on firearms); *cf. Herrada*, 887 F.2d at 527 (special assessment for violations of federal crimes). Thus, notwithstanding that Congress framed the laws upheld in these cases as taxes, Congress had constitutional non-tax authority to regulate the relevant field for each law.[9]

But if, as here, Congress lacks authority to regulate a field, it cannot purport

[9] Similarly, Congress has non-tax authority over all of the permissibly incidental revenue streams identified in Justice Story's treatise, on which *Nebeker* relied. *See* U.S. CONST. art. I, §8, cl. 7 (post office); *id.* cl. 5 (foreign coin); *id.* cl. 4 (bankruptcy); U.S. CONST. art. IV, § 3, cl. 2 (public lands); *see also Nebeker*, 167 U.S. at 203 (national currency); *Millard*, 202 U.S. at 437 (District of Columbia under U.S. CONST. art. I, §8, cl. 17); *cf. United States v. Norton*, 91 U.S. (1 Otto) 566, 568-69 (1875) (post office).

merely to tax that field then disavow the tax's revenue for an unauthorized regulatory purpose. *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 780-81 (1981) ("[a] statute … is to be construed … to avoid raising doubts of its constitutionality"). The Administration can cite no decision in which the Supreme Court or this Court ascribed a *non-revenue* regulatory purpose to a statute under the Origination Clause when Congress lacked the Article I authority to enact that statute outside the taxing power. Unlike in the decisions on which the Administration seeks to rely, §5000A's regulatory program is wholly outside of the federal power except as a tax under *NFIB.*

In such circumstances, the Supreme Court assumes that taxes raise revenue, rather than assume that they exercise regulatory authority that Congress lacks:

> "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.*"

McCray, 195 U.S. at 51 (*quoting In re Kollock*, 165 U.S. 526, 536 (1897)) (emphasis added). Like this case, *McCray* and *Kollock* involved indirect congressional regulation via taxation of areas that the Court held Congress to lack Article I authority to regulate directly.[10] When a statute has no other constitutional

[10] Although the Supreme Court might decide *McCray* and *Kollock* differently under today's broader conception of the Commerce Clause, its doing so would not undermine *McCray* and *Kollock* on the proposition for which *Amici* cite them.

basis besides Congress's Taxing Power, then it is crystal clear that the statute raises revenue and is not "incidental" to a regulatory function that Congress lacks the constitutional authority to impose. Because Congress lacks authority for §5000A's Individual Mandate as a direct regulation under the Commerce Clause, *McCray* and *Kollock* hold that Congress is assumed to act within its authority by raising revenue in §5000A.

III. THE HOUSE BILL WAS NOT A REVENUE-RAISING BILL

The House bill did not raise revenue under either of the two prevailing frameworks used by other Circuits for evaluating statutes under the Origination Clause. Those courts have split between interpreting "raise" to mean "increase" and interpreting it to mean "levy." Whichever definition this Court chooses, SMHOTA did not raise revenue. Because the *NFIB* saving construction of PPACA raises revenue within the Origination Clause's meaning, *see* Section II, *supra*, the failure of the House bill to raise revenue is fatal to PPACA.

At the outset, the Origination Clause's proviso that "the Senate may propose or concur with Amendments as on other Bills," U.S. CONST. art. 1, §7, cl. 1, applies only to revenue-raising Senate amendments of House-originated revenue

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Subsequent courts "must understand [a prior decision] as [the decision] understood itself," meaning that "the [il]legitimacy and [un]constitutionality of the [government act] in question … was assumed, and [the decision] must be understood on that basis." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1633 (2014) (plurality).

bills. James Saturno, Section Research Manager, Congressional Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, at 6 (Mar. 15, 2011) (*citing* 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907)); *Rainey v. United States*, 232 U.S. 310, 317 (1914); *Sperry Corp. v. United States*, 12 Cl. Ct. 736, 742 (1987), *aff'd in pertinent part on other grounds*, 925 F.2d 399 (Fed. Cir.), *cert. denied* 502 U.S. 809 (1991); *Armstrong v. United States*, 759 F.2d 1378, 1382 (9th Cir. 1985); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 688 (1986). Accordingly, if the Senate PPACA amendments raise revenue and the House SMHOTA bill did not raise revenue, PPACA violates the Origination Clause.[11]

The circuits have split on whether bills must *increase* revenues or merely *levy* revenues without necessarily increasing them. *Compare Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (statute that "diminishes the revenue of the government" "is not a bill to raise revenue"); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) ("the [Origination Clause's] mandate that 'all Bills for raising Revenue shall originate in the House of Representatives' appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes")

[11] The fact that the House approved the Senate amendments does not insulate PPACA from judicial scrutiny under the Origination Clause because the House cannot acquiesce to a violation of the Constitution. *Munoz-Flores*, 495 U.S. at 391.

(citations omitted), *cert. denied* 436 U.S. 907 (1978) *with Armstrong*, 759 F.2d at 1381-82; *Wardell v. United States*, 757 F.2d 203, 204-05 (8th Cir. 1985); *Heitman v. United States*, 753 F.2d 33, 35 (6th Cir. 1984); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.* 749 F.2d 27 (3d Cir. 1984). This Circuit has not squarely decided the issue, but a prior decision suggests the commonsense interpretation that "raising" means "to increasing."[12]

If "raise" means "increase," PPACA violated the Origination Clause because SMHOTA did not increase revenue. But even under the broader standard of levying revenues, SMHOTA did not raise revenues. Because SMHOTA neither increased nor levied revenue, this Court should find that the House bill here did not raise revenue under the Origination Clause.

A. SMHOTA Did Not *Increase* Revenue

Under *Bertelsen*, 65 F.2d at 722, a statute that "diminishes the revenue of the government" "is not a bill to raise revenue." Similarly, under *Carter*, 580 F.2d at

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[12] In 1906, this Court cited *United States ex rel. Michels v. James*, 26 F. Cas. 577 (S.D.N.Y. 1875), for the proposition that statutes might be revenue bills for statutory purposes without being revenue-raising bills under the Origination Clause. *Bryant Bros. Co. v. Robinson*, 149 F. 321, 325 (5th Cir. 1906). For *constitutional* purposes, *James* held that "bills for raising revenue … impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government … [and] draw money from the citizen." *James*, 26 F. Cas. at 578. While recognizing a looser definition for various statutory references to "revenue laws," this Court assumed the commonsense, raise-means-increase understanding of the Origination Clause.

1058, the Senate – acting alone under its power to ratify treaties – can approve treaties that *decrease* taxes, but not treaties that *increase* taxes.[13] This view of the Origination Clause complies with the common understanding of the motivation for having the House initiate revenue bills: to protect the People from oppressive taxation. Where taxes are not increased, and especially where they are decreased, that protection is unnecessary. Under this view, only SMHOTA §5 and SMHOTA §6 could even arguably raise revenue, given that the other provisions were either the innocuous short title (§1) or tax *cuts* (§§2-4). Although the Supreme Court has not addressed the question, it is obvious that tax *cuts* do not raise revenue.[14]

1. SMHOTA §5's Penalties Do Not Qualify as Revenue

Increased civil penalties like SMHOTA §5 do not have the primary purpose of raising revenue; they merely provide an incentive for complying with other, validly enacted laws. SMHOTA §5 increased by $21 (from $89 to $110) the

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[13] Because the treaty power requires only Senate approval, U.S. CONST. art. II, § 2, cl. 2, treaties that *increase* taxes would not originate in the House. By contrast, "our government regularly enters into treaties and conventions limiting the amount of tax that the United States may collect from its own citizens." *Coplin v. United States*, 6 Cl.Ct. 115, 134 (1984) (collecting treaties), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom O'Connor v. United States*, 479 U.S. 27 (1986). To allow tax-limiting treaties but not tax-imposing treaties under the Origination Clause necessarily assumes the raise-means-increase interpretation.

[14] The District Court claims that SMHOTA "included … revenue-raising … provisions" ROA.269, but does not identify precisely *which* provisions "raise" revenue. Insofar as §§1-4 do not increase revenue, *Amici* assume that the District Court meant either or both of §§5-6.

penalty for failing to file certain returns. Such penalties do not "levy taxes in the strict sense of the word" required to trigger the Origination Clause, *Nebeker*, 167 U.S. at 202; *Herrada*, 887 F.2d at 527, that is "'to be applied in meeting the expenses or obligations of the government.'" *Herrada*, 887 F.2d at 527 (*quoting Nebeker*, 167 U.S. at 203). The purpose of civil penalties like those increased by SMHOTA §5 is to encourage compliance with the law, not to raise revenue. If this Court held that this minor enhancement to civil penalties qualifies as "raising revenues" under the Origination Clause, the Court's decision would invalidate numerous Senate-initiated bills that assess civil penalties for violations of laws otherwise validly enacted under Article I.

2. SMHOTA §6's Shift of the Timing of Estimated-Tax Payments Does Not Qualify as Revenue

SMHOTA §6 amended §202(b) of the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. at 1964, to increase by a fraction of a percent the amount of estimated tax that certain corporations pay in the third quarter, while reducing by the same amount the estimated taxes due in the fourth. Section 6 did not increase revenues for two independent reasons.

First, it applies only to *estimated-tax* payments, which do not affect the taxes that a corporation ultimately will owe. An estimated-tax payment is not the same thing as a tax payment: "[w]ithholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax." *Baral v. United*

States, 528 U.S. 431, 436 (2000). Even if §6 had *increased* estimated-tax payments, that would not have increased tax revenues. Because estimated-tax payments are not "revenue," §6 cannot make H.R. 3590 a revenue bill.

Second, it does not alter the amount of estimated-tax payments. The Corporate Estimated Tax Shift Act merely *shifted* them by a fraction of a percent within the tax year, without increasing the overall annual estimated-tax payment rates. Joint Committee Report, at 9 (Add. 18). It does not raise revenue for a corporation to pay more in estimated taxes in September and then to pay that same amount less in estimated taxes in December.

B. SMHOTA Did Not *Levy* Revenue

Even assuming *arguendo* that "raise" means "levy," the House bill did not "raise revenue." SMHOTA §§1, 5, and 6 do not levy revenue for the same reasons that they do not increase revenue, *see* Section III.A, *supra*, but tax-cutting provisions like SMHOTA §§2-4 arguably might *levy* revenue even if they do not *increase* it. For example, one might argue that a bill that lowers a tax rate from 50 percent to 40 percent still continues to levy revenue at the new, lower 40-percent rate. Nonetheless, for two independent reasons, the tax-cutting provisions in §§2-4 do not levy revenue for purposes of the Origination Clause.

1. Any Revenue-Related Effect Was Incidental to SMHOTA §§2-4's Regulatory Purposes

Without changing the otherwise-applicable tax rates for other Americans,

SMHOTA §§2-4 provided targeted tax exemptions to benefit military, intelligence, and foreign-service personnel. Those exemptions functioned to encourage Americans to serve their country. This "willingness ... to sink money" into valuable government programs – here, national defense and foreign policy – is not indicative of a "bill for raising revenue" under the Origination Clause:

> There is nothing in the context of the act to warrant the belief that Congress, in passing it, was animated by any other motive than that avowed in the first section [namely, "to promote public convenience, and to insure greater security in the transmission of money through the United States mails"]. A willingness is shown to sink money, if necessary, to accomplish that object. [¶] In no just view, we think, can the statute in question be deemed a revenue law.

Norton, 91 U.S. at 567-68;[15] *cf. Nebeker*, 167 U.S. at 202 ("revenue bills … are not bills for other purposes which may incidentally *create* revenue") (emphasis added). Instead, such targeted tax exemptions are best considered "tax expenditures," a form of spending. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 859 (1995) (Thomas, J., concurring); *see* 2 U.S.C. §639(c)(2)-(3) (distinguishing revenues from tax expenditures). As government *spending*, targeted

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[15] *Norton* was a criminal prosecution that hinged on whether to apply a general two-year statute of limitations versus the five-year statute of limitations applicable to the "revenue laws of the United States." 91 U.S. at 567. The meaning of such statutory phrases can differ from the meaning of the Origination Clause. *Bryant Bros.*, 149 F. at 325 ("while the post office laws are revenue laws, within the meaning of the statute cited, they are not laws for raising revenue, within the provision of the Constitution") (internal quotations omitted).

tax exemptions to benefit national defense and foreign policy are not *revenue-raising* bills.

2. SMHOTA §§2-4 Closed Revenue Streams

SMHOTA §§2-4 closed revenue streams; they did not "raise" or "levy" them. "To say that a bill which provides that no revenue shall be raised is a bill 'for raising revenue' is simply a contradiction of terms." S. REP. NO. 42-146, at 5 (1872) (Add. 6). In other words, closing a tax stream, without taking any steps to levy revenue or to continue a tax, does not raise revenue under the Origination Clause.

The decisions from other Circuits that have interpreted "raise" to mean "levy" are completely inapposite. Those decisions arose under the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) ("TEFRA"), and focused on whether the Senate's tax-increasing amendment was "germane" to the House's tax-cutting bill under *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). *See Wardell*, 757 F.2d at 204-05 (collecting cases).[16] With TEFRA, both the House and Senate bills addressed revenue, just as the House and Senate bills had done in *Flint.* Specifically, the *Flint* House and Senate bills each raised taxes (albeit *different taxes*), *Flint*, 220 U.S. at 143, whereas the Senate's tax-

[16] Because the Senate's PPACA amendment raises revenue and the underlying House bill did not raise revenue, this Court need not decide whether PPACA was germane to the House bill.

raising TEFRA bill amended a House *tax-cutting* bill. *Armstrong*, 759 F.2d at 1380-81. But all four *Flint* and TEFRA bills levied or continued various forms of revenue-generated taxation. Here, by contrast, the House bill *closed* revenue streams with respect to military, intelligence, and foreign-service personnel, without itself levying or continuing any revenue whatsoever.

These TEFRA decisions from other Circuits rely on a seminal 1870s congressional dispute on the Origination Clause, *Armstrong*, 759 F.2d at 1381-82, the history of which supports the conclusion that closing revenue streams does not "raise" revenue. The dispute arose because the House relied on the Origination Clause first to return a Senate-initiated bill that repealed a tax, then to return Senate revenue-raising amendments to a House bill to repeal a tax. *See* 2 HINDS' PRECEDENTS §1489. In other words, the House took the position that tax repeal in the Senate raised revenue under the Origination Clause but that tax repeal in the House did not raise revenue.

In response to these inconsistent House actions, a Senate committee evaluated the Origination Clause and reported its findings to the Senate and House:

> Suppose the existing law lays a duty of 50 per centum upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per centum, is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be

> ingrafted, by way of amendment, in the Senate upon any House bill which did not provide for raising – … that is, collecting – revenue. This bill did not provide that the duty on tea and coffee should be laid at a less rate than formerly, but it provided simply that hereafter no revenue should be raised or collected upon tea or coffee. To say that a bill which provides that no revenue shall be raised is a bill "for raising revenue" is simply a contradiction of terms.

S. REP. NO. 42-146, at 5 (Add. 6). The Senate report explains that, had the bill merely reduced the tax rate for tea and coffee or even continued them while increasing or lowering the tax rates for other articles, "it would have been a bill for 'raising revenue.'" S. REP. NO. 42-146, at 5. Because the bill "proposed no such thing" and "did not provide for raising *any* revenue," the report concluded that "it is therefore incorrect to call it a bill 'for raising revenue.'" *Id.* at 6 (emphasis in original). SMHOTA similarly terminated tax streams, which could qualify as raising revenue only as a "contradiction of terms." S. REP. NO. 42-146, at 5. This Court should not adopt that nonsensical reading of the Origination Clause.

Enacting a free-standing exemption to otherwise-applicable, pre-existing taxes simply does not levy revenue. If a hypothetical tax law provided in §1 that "all citizens must pay an annual $5 housing tax," it would not raise revenue to enact a new §2 that provides "notwithstanding §1, military, intelligence, and foreign-service personnel are exempt from the housing tax under §1." The new enactment would simply close a revenue stream from the affected personnel. That

is all that SMHOTA §§2-4 do.

CONCLUSION

Amici Senators and Representatives respectfully ask this Court to hold that PPACA's enactment violated the Origination Clause of the U.S. Constitution and that PPACA is therefore void in its entirety.

Dated: May 15, 2014

Respectfully submitted,

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No. 14-20039, *Hotze v. Sebelius*.

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,895 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

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I hereby certify that, on May 15, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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