[NOT SCHEDULED FOR ORAL ARGUMENT]

No. 13-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATT SISSEL,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as Secretary of the Treasury,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (No. 1:10-CV-01263-BAH) (Hon. Beryl A. Howell)

BRIEF FOR THE APPELLEES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIR. R. 28(a)(1)

A. Parties and *Amici*

Matthew Sissel is the plaintiff-appellant. The defendants-appellees are the U.S. Department of Health and Human Services; Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; the U.S. Department of the Treasury; and Jacob J. Lew, in his official capacity as Secretary of the Treasury. Amicus briefs in support of plaintiff have been filed by the Center for Constitutional Jurisprudence; the Association of American Physicians and Surgeons; and Representatives Trent Franks, et al.

B. Ruling Under Review

The rulings under review are the June 28, 2013 order and opinion that granted the government's motion to dismiss the amended complaint. The decision was issued by the Honorable Beryl A. Howell in Case No. 1:10-cv-01263-BAH (D.D.C.). *See* Docket Nos. 50, 51.

C. Related Cases

This case was not previously before this Court. We are unaware of any related cases in the courts of appeals or in district court in the District of Columbia.

s/ *Alisa B. Klein*
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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court dismissed the amended complaint for failure to state a claim on June 28, 2013. *See* JA 120. Plaintiff filed a notice of appeal on July 5, 2013. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under 26 U.S.C. § 5000A ("Section 5000A"), a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the Internal Revenue Service ("IRS"). The questions presented are:

1. Whether Section 5000A imposes a legal requirement that a non-exempted individual purchase minimum essential health coverage.

2. Whether the enactment of Section 5000A was consistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1.

STATUTES AND REGULATIONS

Section 5000A is reproduced in the addendum to plaintiff's brief.

STATEMENT OF THE CASE

Under 26 U.S.C. § 5000A, a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the IRS. In the amended complaint, plaintiff Matt Sissel alleged that Section 5000A requires non-exempted individuals to purchase insurance and that this requirement exceeds Congress's power under the Commerce Clause. Sissel also alleged that the enactment of Section 5000A was not consistent with the Origination Clause. The district court dismissed the amended complaint for failure to state a claim.

STATEMENT OF FACTS

Plaintiff Matt Sissel is an individual who does not have health insurance. *See* JA 4 ¶ 5 (amended complaint). He challenges the statutory provision that the Supreme Court upheld as a valid exercise of Congress's taxing power in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). Under that provision of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act"), Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the IRS. *See* 26 U.S.C. § 5000A.

District court proceedings in this case were stayed pending the Supreme Court's decision in *NFIB*. *See* JA 125-126. In *NFIB*, the Supreme Court interpreted Section 5000A to give individuals the "lawful choice" to make payment to the IRS "in lieu of buying health insurance." 132 S. Ct. at 2597, 2600. The Supreme Court held that, so construed, Section 5000A is a valid exercise of Congress's taxing power. *See id*. at 2593-2600.

In light of *NFIB*, the district court rejected the premise of Sissel's Commerce Clause claim, which is that Section 5000A imposes a requirement that non-exempted individuals buy health insurance. *See* JA 131. The district court explained that, as interpreted by the Supreme Court, Section 5000A does not require the purchase of insurance. *See* JA 127-131.[1]

The district court also rejected Sissel's contention that the enactment of Section 5000A was inconsistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. The court held that Section 5000A is not a bill for raising revenue within the meaning of the Origination Clause and that, in any event, the bill enacted as the Affordable Care Act originated in the House. JA 131-143.

[1] Accordingly, the district court did not opine on whether the Commerce Clause discussion in the Chief Justice's *NFIB* opinion constituted a holding of the Supreme Court. *See* JA 128 n.8.

SUMMARY OF ARGUMENT

The Affordable Care Act expands access to health coverage through an array of related measures. Among the Act's hundreds of provisions are measures that regulate health insurance companies, measures that encourage employers to offer health coverage to their employees, and measures that encourage individuals to maintain health coverage. Under the provision at issue here ("Section 5000A"), a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the Internal Revenue Service. The Supreme Court upheld Section 5000A as a valid exercise of Congress's taxing power in *NFIB v Sebelius*, 132 S. Ct. 2566 (2012).

The district court correctly rejected the premise of Sissel's Commerce Clause claim, which is that Section 5000A imposes a requirement that individuals buy health insurance. As interpreted by the Supreme Court, Section 5000A does not require the purchase of insurance. The Supreme Court interpreted Section 5000A to give individuals the "lawful choice" to make payment to the IRS "in lieu of buying health insurance." *Id*. at 2597, 2600. Sissel's assertion that he will be a "violator of federal law if he fails to buy the prescribed insurance," Pl. Br. 12, is foreclosed by the Supreme Court's definitive construction of Section 5000A.

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

First, Section 5000A is not a "Bill[] for raising Revenue" within the meaning of the Origination Clause. The "taxing power is often, very often, applied for other purposes, than revenue," *NFIB*, 132 S. Ct. at 2596 (citation omitted), but an exercise of the taxing power is not a bill for raising revenue within the meaning of the Origination Clause unless revenue-raising is the measure's primary purpose. *See, e.g.*, *Millard v. Roberts*, 202 U.S. 429, 437 (1906) (rejecting an Origination Clause challenge because the "taxes are imposed are but means to the purposes provided by the act"). The purpose of Section 5000A is not to raise revenue, but to "expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. Any revenue that Section 5000A may generate is "incidental to that provision's primary purpose." *United States v. Munoz-Flores*, 495 U.S. 385, 399 (1990).

Second, the bill that was enacted as the Affordable Care Act originated in the House. Sissel concedes that the Affordable Care Act originated in the House as

H.R. 3590, but he asserts that the Senate's amendment to the House-passed bill was not "lawful" because "the subject matter of the one had nothing whatsoever to do with the other." Pl. Br. 21. The Origination Clause, however, does not limit the scope of the Senate's amendment power. To the contrary, the Origination Clause grants the Senate the same power to "propose or concur with Amendments as on other Bills," U.S. Const. art. I, § 7, cl. 1, which includes amendments that are substituted for the text of a House-originated bill. Accordingly, the Supreme Court has held that an amendment in the nature of a substitution is permissible under the Origination Clause, *see Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911), and the Court has emphasized that "it is not for this court to determine whether the amendment was or was not outside the purposes of the original bill." *Rainey v. United States*, 232 U.S. 310, 317 (1914). Senate substitutes of House-originated revenue bills have been employed since the Eighteenth Century and remain commonplace today. *See, e.g.*, *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (rejecting Origination Clause challenge to the Tax Equity and Fiscal Responsibility Act of 1982, where the Senate replaced the "entire text of the House bill except for its enacting clause").

STANDARD OF REVIEW

The district court's decision dismissing the amended complaint for failure to state a claim is subject to de novo review in this Court. *See English v. District of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013).

ARGUMENT

A. Section 5000A Does Not Impose A Requirement To Buy Insurance.

Sissel's contention that the Affordable Care Act's "requirement to buy health insurance is unconstitutional under the Commerce Clause," JA 8 ¶ 20, is "premised on a misreading of the Supreme Court's opinion in *NFIB*." JA 131. The Supreme Court held that Section 5000A does *not* impose a requirement to buy health insurance. Instead, the Court interpreted Section 5000A to give individuals the "lawful choice" to make payment to the IRS "in lieu of buying health insurance." *Id*. at 2597, 2600. The Court emphasized that, "if someone chooses to pay rather than obtain health insurance, they have fully complied with the law." *Id*. at 2597.

Based on that interpretation of Section 5000A, the Supreme Court upheld Section 5000A as a valid exercise of Congress's taxing power. The Supreme Court explained that "Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it." *Id*. at 2598. Sissel's professed concern that

he will be a "violator of federal law if he fails to buy the prescribed insurance," Pl. Br. 12, is put to rest by the Supreme Court's interpretation of Section 5000A.

"[T]he Supreme Court did not subdivide the minimum coverage provision into a 'purchase requirement' and a 'tax on not having insurance' as the plaintiff contends." JA 130. "Rather, in *NFIB*, the Supreme Court considered two alternative readings of a *single* provision—26 U.S.C. § 5000A—and concluded that one reading violated the Commerce Clause, while the alternative reading passed muster under the Taxing Clause." JA 130-131 (emphasis in original). "In fact, the Chief Justice specifically foreclosed the plaintiff's reading of his opinion by writing in no uncertain terms that '§ 5000A need not be read to do more than impose a tax . . . to sustain it.'" JA 131 (quoting *NFIB*, 132 S. Ct. at 2598). "The plaintiff's insistence on reading § 5000A to 'do more than impose a tax' is therefore a non-starter." *Ibid*.

B. The Enactment of Section 5000A Was Consistent With the Origination Clause.

The enactment of Section 5000A was consistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. As the district court explained, Sissel's Origination Clause claim fails on two independent grounds. Section 5000A is not

a bill for raising revenue within the meaning of the Origination Clause, and, in any event, the bill that was enacted as the Affordable Care Act originated in the House.

1. Section 5000A is not a bill for raising revenue within the meaning of the Origination Clause.

The district court correctly held that Section 5000A is not a "Bill[] for Raising Revenue" within the meaning of the Origination Clause. *See* JA 132-136. For the Origination Clause to apply, it is not sufficient to show that a statutory provision will generate revenue or that the provision is an exercise of Congress's taxing power. Rather, the Origination Clause applies only if generating revenue is the legislation's primary purpose.

The Supreme Court has long held that "revenue bills are those that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebecker*, 167 U.S. 196, 202-03 (1897) (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880, pp. 610–611 (1833)). "'Bills for raising revenue' when enacted into laws, become *revenue laws*," which are "such laws 'as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.'" *United States v. Norton*, 91 U.S. 566, 569 (1875) (Supreme Court's emphasis) (quoting Circuit Justice Story's opinion in *United States v. Mayo*, 1 Gall. 396 (C.C. Mass. 1813) (interpreting an 1804 federal statute in light of Origination Clause principles).

Accordingly, the Supreme Court has repeatedly held that exercises of the taxing power are not revenue bills within the meaning of the Origination Clause. In *Nebecker*, the Court held that a tax imposed on the circulating notes of banking associations was not a bill for raising revenue because "the tax was a means for effectually accomplishing the great object of giving to the people a currency," rather than "to raise revenue to be applied in meeting the expenses or obligations of the government." 167 U.S. at 203. In *Millard v. Roberts*, 202 U.S. 429 (1906), the Court rejected an Origination Clause challenge to provisions levying taxes on property within the District of Columbia to finance railroad construction because the "taxes imposed are but means to the purposes provided by the act." *Id*. at 437. And, in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court held that an assessment imposed on persons convicted of a federal misdemeanor was not a bill for raising revenue because "[a]ny revenue for the general Treasury that [the provision] creates" was "incidental to that provision's primary purpose" of compensating crime victims. *Id*. at 399. *See also United States v. King*, 891 F.2d 780, 781 (10th Cir. 1989) ("Where the main purpose of the act is other than raising revenue, it is not subject to challenge under the origination clause."); *United States v. Herrada*, 887 F.2d 524, 528 (5th Cir. 1989) (Supreme Court precedents "instruct us to consider the overarching purpose of an Act when one of its provisions is subject to an Origination Clause challenge"); *United States v. Ashburn*, 884 F.2d

901, 902 (6th Cir. 1989) ("The *Norton* Court agreed with Justice Story's definition of 'revenue laws' as measures 'made for the direct and avowed purpose of creating revenue or public funds for the service of the Government.'") (quoting *Norton*, 91 U.S. at 569).

The purpose of the Affordable Care Act, and of Section 5000A in particular, is to improve the nation's health care system by reforming health insurance markets, reducing the number of Americans without health coverage, and controlling costs. Congress was explicit about the purpose of Section 5000A: it found that this provision, "together with the other provisions of this Act, "will add millions of new consumers to the health insurance market" and help to create "effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." 42 U.S.C. § 18091.

The Affordable Care Act accomplishes these objectives through an array of related provisions, many of which have nothing to do with raising revenue. Some of the Act's provisions, including Section 5000A, may have the effect of increasing revenue. *See also, e.g.*, 26 U.S.C. § 4980H (tax on certain large employers that fail to offer their full-time employees and their dependents adequate health coverage). Other provisions will have the effect of decreasing revenue. *See, e.g.*, 26 U.S.C. § 36B (premium tax credits to help eligible individuals buy insurance); 26 U.S.C. § 45R (tax credits for eligible small employers that provide

health coverage). These revenue effects are merely "incidental" to the "primary purpose" of the Act, *Munoz-Flores*, 495 U.S. at 399, which is to expand access to affordable health coverage.

Addressing Section 5000A in particular, the Supreme Court explained that, "[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. Likewise, this Court observed that "the aim of the shared responsibility payment is to encourage everyone to purchase insurance; the goal is universal coverage, not revenue from penalties." *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012). As the district court explained, it follows from "this clear congressional purpose" that "any revenue created by" Section 5000A "is merely incidental." JA 135. "Every shared responsibility payment, though it may grow the government's coffers, symbolizes the government's failure to attain its stated 'goal [of] universal coverage.'" *Ibid*. (quoting *Seven-Sky*, 661 F.3d at 6). "In other words, Congress's preference would be for" Section 5000A "to raise zero revenues, and thus the provision cannot be fairly characterized as a 'Bill[] *for* raising Revenue.'" *Ibid*. (district court's emphasis).

That revenue-raising is not the purpose of Section 5000A is immaterial in determining whether it is a proper exercise of Congress's taxing power, because "'the taxing power is often, very often, applied for other purposes, than revenue.'"

NFIB, 132 S. Ct. at 2596 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 962, p. 434 (1833)). By contrast, Section 5000A's purpose to expand health coverage forecloses the contention that the measure is a "Bill[] for raising Revenue" within the meaning of the Origination Clause. The differences between the taxing power and Origination Clause are underscored by the differences in their language: Congress's taxing power authorizes it to "lay and collect Taxes, Duties, Imports, and Excises," U.S. Const. art. I, § 8, cl. 1, whereas the Origination Clause applies only to "Bills *for* raising Revenue," U.S. Const. art. I, § 7, cl. 1 (emphasis added).

Sissel's contrary argument overlooks the fact that the "Taxing Clause and Origination Clause challenges . . . represent separate lines of analysis." *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999). For example, Sissel relies heavily on the Sixth Circuit's decision in *Rodgers v. United States*, 138 F.2d 992 (6th Cir. 1943), *see* Pl. Br. 15-16, which did not involve the Origination Clause and instead considered whether certain assessments contravened the Constitution's restrictions on direct taxes. *See* U.S. Const. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."). Sissel does not contend that Section 5000A is a direct tax, an argument that the Supreme Court

rejected in *NFIB*. *See* 132 S. Ct. at 2599 ("The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.").

Sissel also mistakenly relies on the Sixth Circuit's decision in *United States v. Ashburn*, 884 F.2d 901 (6th Cir. 1989), *see* Pl. Br. 15, which rejected an Origination Clause challenge to the provision that the Supreme Court later upheld in *Munoz-Flores*. The *Ashburn* court reasoned that "the assessments 'imposed are but means to the purposes provided by the act,'" 884 F.2d at 902 (citing *Millard*, 202 U.S. at 437), whereas "'revenue laws'" are "measures 'made for the direct and avowed purpose of creating revenue or public funds for the service of the Government.'" *Ibid*. (quoting *Norton*, 91 U.S. at 569).

Here, too, "any revenue raised by" Section 5000A "will be merely 'incidental' to that provision's primary purpose,'" which is to expand health coverage. JA 136 (quoting *Munoz-Flores*, 495 U.S. at 399). "Hence, under the Supreme Court's precedents," Section 5000A "is not a 'Bill[] for raising Revenue' within the meaning of the Origination Clause and therefore it need not have 'originate[d] in the House of Representatives.'" *Ibid.*

2. The bill enacted as the Affordable Care Act originated in the House.

Even assuming that Section 5000A had been bill for raising revenue, Sissel's Origination Clause claim "would still fail as a matter of law because the bill that later became the Affordable Care Act originated in the House of Representatives."

JA 136. Sissel concedes that H.R. 3590, which is the bill that was later enacted as the Affordable Care Act, originated in the House. *See* JA 13 ¶ 40 (amended complaint). Every provision of the bill passed by the House concerned the means by which the Government collects revenue, including increases in the amount of estimated taxes owed by corporations and modifications to the first-time homebuyer tax credit. *See* JA 113-118 (H.R. 3590 as passed by House). After H.R. 3940 passed the House, the Senate amended it by striking its text and substituting the provisions that ultimately became the Affordable Care Act. *See* JA 13-14 ¶ 40 (amended complaint); JA 26 (Senate amendment to H.R. 3590). The House agreed to the bill as amended, and the enrolled bill was submitted to the President, who signed it into law. *See* JA 41 (actions taken on H.R. 3590).

The Senate's substitution procedure satisfied the Origination Clause. The text of the Origination Clause authorizes the Senate to propose the same type of amendments to "Bills for raising Revenue . . . as on other Bills." U.S. Const. art. I, § 7, cl. 1. Accordingly, as early as 1911, the Supreme Court held that the Origination Clause permits the Senate to substitute new text for the text of a House-originated revenue bill. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (rejecting an Origination Clause challenge to a corporation tax the Senate "substituted" for a House-originated inheritance tax). The Senate has employed such amendments since the eighteenth century, *see* Thomas Jefferson, *A Manual of*

Parliamentary Practice: For the Use of the Senate of the United States § 35, at 97 (Lancaster, Pa., William Dickson 1813), and Senate substitutes of House-originated bills remain commonplace today. *See*, *e.g.*, Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (tax-reform bill signed by President Reagan); American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313 ("fiscal cliff" bill signed by President Obama).

The Senate employed the same substitution procedure in enacting the Tax Equity and Fiscal Responsibility Act of 1982, and the courts of appeals rejected Origination Clause challenges even though the Senate replaced the "entire text of the House bill except for its enacting clause." *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985); *see also, e.g.*, *Boday v. United States*, 759 F.2d 1472, 1476 (9th Cir. 1985) ("Senate completely amended the content of the bill" that originated in the House); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam) ("Senate kept the number and the enacting clause, but adopted an amendment completely replacing the rest of the bill"); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.) ("Although the Senate amendment substituted an entirely new text for the House version, . . . the bill began in the House for Origination Clause purposes.") (citation omitted)) , *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984).

Sissel declares that the Senate's amendment of H.R. 3590 was not "lawful" because "the subject matter of the one had nothing whatsoever to do with the other," Pl. Br. 21, noting that, in *Flint*, the Supreme Court observed that the Senate "'amendment was germane to the subject-matter of the bill.'" Pl. Br. 21 (quoting *Flint*, 220 U.S. at 143). However, in *Rainey v. United States*, 232 U.S. 310 (1914), the Supreme Court made clear that the question whether an amendment is germane to a bill is a matter to be determined not by the courts but by the Senate in proposing an amendment, and by the House in accepting it. Rejecting an Origination Clause challenge, the Supreme Court held: "Having become an enrolled and duly authenticated act of Congress, *it is not for the court to determine whether the amendment was or was not outside the purposes of the original bill*." *Id*. at 317 (emphasis added).

That holding followed from the text of the Origination Clause, which grants the Senate the same power to "propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. "The Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose" to a bill for raising revenue. S. Rep. No. 42-146, at 3 (1872). "The exclusive prerogative of the House of Representatives in relation to such bills is simply to *originate* them." *Ibid*. (emphasis in original). Indeed, the Framers

rejected versions of the Origination Clause that would have limited the Senate's amendment power.[2]

The district court correctly rejected Sissel's contention that *Rainey*'s holding was overruled by *Munoz-Flores*. JA 140. Although the Court in *Munoz-Flores* declared that Origination Clause challenges are justiciable, the Court did not suggest that Senate amendments would be reviewed by the judiciary "to determine whether the amendment was or was not outside the purposes of the original bill." *Rainey*, 232 U.S. at 317. As discussed above, such a germaneness requirement would be flatly at odds with the text of the Origination Clause, which does not impose a germaneness constraint on the Senate's amendment power.

Although the Constitution does not establish a requirement that Senate amendments be germane, the House and Senate are free to establish germaneness requirements as a matter of their own internal rules, pursuant to each chamber's

[2] In July of 1787, a committee chaired by Elbridge Gerry of Massachusetts proposed that "all bills for raising or appropriating money . . . shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 526 (1911). The delegates eventually struck this proposal due to "the inconveniences urged ag[ainst] a restriction of the Senate to a simple affirmative or negative." 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 263 (1911) (statement of Edmund Randolph). The Convention also rejected an origination proposal that would have limited the Senate's ability "to increase or diminish the sum to be raised, or change the mode of levying it, or the object of its appropriation." *Id.* at 273.

authority to "determine the Rules of its Proceedings." Article I, Section 5.[3] This constitutional provision gives each chamber "full power to establish such rules, including a regulation of the subject of amendments to bills[.]" S. Rep. No. 42-146, at 3 (1872); *see also United States v. Ballin*, 144 U.S. 1, 5 (1892) (a chamber's power to set its "Rules" is "absolute and beyond the challenge of any other body or tribunal"). Moreover, each chamber has the means to enforce its rules. Accordingly, James Madison, in addressing the Origination Clause, assured the Virginia ratifying convention in 1788: "[Y]ou may safely lodge this power of amending with the senate. When a bill is sent with proposed amendments to the house of representatives, if they find the alterations defective, they are not conclusive. The house of representatives are the judges of their propriety[.]" 3 Max Farrand, *The Records of the Federal Convention of 1787*, at 318 (1911).

The House routinely defends its prerogatives under the Origination Clause though a process called "blue slipping," whereby "[o]ffending bills and amendments are returned to the Senate through the passage in the House of a House Resolution" printed on blue paper. H.R. Rep. No. 111-708, at 93 (2011). Any Member of the House may offer a resolution seeking to invoke the Origination Clause, and, in the 111th Congress alone, such a resolution was used to

[3] *See, e.g.*, Standing Rules of the Senate, 110th Cong., 1st Sess., Rule XVI ¶ 4 (2008) (setting a germaneness requirement for amendments to appropriation bills); *id.* Rule XXII ¶ 2 (same for amendments following a cloture motion).

return six Senate bills and amendments that the House considered improper. *See* H.R. Res. 1653, 111th Cong. (2010); 156 Cong. Rec. H6904 (daily ed. Sep. 23, 2010). Notably, no such resolution was passed with regard to H.R. 3590.

In any event, even assuming that *Flint* established a judicially enforceable germaneness requirement, the concept of germaneness is "very loose." JA 142 (district court opinion). The House bill reviewed in *Flint* would have established an inheritance tax, whereas the bill as amended by the Senate removed the inheritance tax and inserted in its place a corporation tax. *See ibid*. (citing *Flint*, 220 U.S. at 143-44). "Although a corporate income tax is germane to an inheritance tax insofar as they are both taxes, the similarities end there." *Ibid*. Thus, if Section 5000A were a bill for raising revenue, the most that *Flint* would require is the House-passed bill also be a bill for raising revenue. *See ibid*.[4]

Sissel acknowledges that H.R. 3590 as passed by the House "did raise corporate taxes," Pl. Br. 26-27, but he asserts that those tax increases would have

[4] As the district court noted, "[t]his broad conception of a germaneness requirement is also in keeping with current congressional practice with respect to revenue bills." JA 142 n.19. "'Current precedent . . . recognizes that the Senate generally has the power to amend a House-originated revenue bill without regard to germaneness, but that it may not propose a revenue-related amendment to a non-revenue bill.'" *Ibid*. (quoting Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 Yale J. Int'l L. 1, 13 (2013)). *See also Hubbard v. Lowe*, 226 F. 135, 139 (S.D.N.Y. 1915) ("The Senate of the United States, having full power to amend a revenue bill, has from the beginning originated taxes by inserting them in House legislation. The practice and the power is now well settled.").

been offset by tax credits authorized under the bill. *See ibid*. As the district court observed, this argument is "self-defeating" because the Affordable Care Act also authorizes tax credits (as well as taxes). JA 143; *see also* pp. 11-12, *supra* (examples). If the House-passed bill—which contained only revenue-related measures—was not a bill for raising revenue, then neither was the Affordable Care Act, which contains many provisions that have nothing to do with the collection of revenue. *See* JA 143; *see also* JA 26-39 (Affordable Care Act table of contents).

Sissel's argument is also internally inconsistent, because he declares that the House-bill enacted as the Tax Equity and Fiscal Responsibility Act of 1982 "was itself a bill for raising revenue," Pl. Br. 25, even though that bill was expected to reduce total tax revenues by a billion dollars between 1982 and 1986, whereas the bill as amended by the Senate increased revenues by about 100 billion dollars between 1983 and 1985. *See Armstrong*, 759 F.2d at 1380-81; *see also* Pl. Br. 23 ("'once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform *a proposal lowering taxes* [] into one raising taxes'") (quoting *Armstrong*, 759 F.2d at 1382) (plaintiff's emphasis). Thus, by plaintiff's logic, H.R. 3590 as passed by the House was a bill for raising revenue regardless of whether that bill was expected to be "deficit-neutral." Pl. Br. 27. In any event, as the *Armstrong* court observed, "members of Congress may differ over whether a proposed revenue bill

or amendment will 'increase' or 'decrease' taxes overall," and "the same revenue bill may well have varying effects upon the total taxes assessed in different years." 759 F.2d at 1381.

In short, Section 5000A was not a "Bill[] for raising Revenue" within the meaning of the Origination Clause, and, in any event, the bill enacted as the Affordable Care Act originated in the House. Thus, the district court correctly held that Sissel's Origination Clause claim fails as a matter of law.[5]

[5] The district court had no occasion to consider the additional point that Section 5000A was amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152. Sissel does not address this subsequent legislation, which originated in the House as H.R. 4872.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2013

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I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,241 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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