No. 13-5202

In the U.S. Court of Appeals for the District of Columbia Circuit

MATT SISSEL,
Appellant,

v.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *ET AL.*
Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, CIVIL CASE NO. 1:10-cv-01263-BAH,
HON. BERYL A. HOWELL

AMICUS CURIAE BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF APPELLANT AND REVERSAL

LAWRENCE J. JOSEPH
(D.C. Bar No. 464777)
1250 Connecticut Ave., NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amicus curiae* Association of American Physicians & Surgeons, Inc. ("AAPS") states (a) that AAPS is an Arizona-based nonprofit membership organization that conducts educational activities and represents the collective interests of medical professionals and patients before the federal and state executive, legislative, and judicial branches of government; (b) that AAPS is an umbrella group for several thousand members from all sectors and modes of medical practice; and (c) that AAPS has no parent corporations and that no publicly held company owns any stock in it.

Dated: November 8, 2013 Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777

1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Association of American Physicians & Surgeons

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Association of American Physicians & Surgeons, Inc. ("AAPS") presents the following certificate as to parties and *amici curiae*, rulings, and related cases.

A. Parties and *Amici*

AAPS adopts Appellant's statement of parties and *amici*, supplemented by AAPS as an *amicus curiae.*

B. Rulings under Review

AAPS adopts Appellant's statement of rulings under review.

C. Related Cases

AAPS adopts the Appellant's statement of related cases, supplemented by *Ass'n of Am. Physicians & Surgeons v. Sebelius*, No. 13-5003 (D.C. Cir.).

Dated: November 8, 2013 Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777

1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Association of American Physicians & Surgeons

CERTIFICATE ON NEED FOR A SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), the Association of American Physicians & Surgeons, Inc. ("AAPS") requires a separate brief to address arguments under the Origination Clause issue raised in *Ass'n of Am. Physicians & Surgeons v. Sebelius,* No. 13-5003 (D.C. Cir.), a separate action that is pending in this Court against overlapping defendants. AAPS's Origination Clause arguments include arguments *not raised* by the Plaintiff-Appellant in this action, either at trial or in this appeal, which therefore typically would not be considered on appeal. *Am. Dental Ass'n v. Shalala*, 3 F.3d 445, 448-49 (D.C. Cir. 1993). In the event that this Court does not reach AAPS's Origination Clause issues in the current *AAPS* appeal, AAPS intends – via either a supplemented complaint on remand or a new lawsuit in this Circuit – to challenge a rulemaking under the same statute, presenting the same Origination Clause issues. Either way, a *Sissel* decision on the Origination Clause could negatively affect AAPS in this Circuit, which gives AAPS a heightened interest is presenting its arguments here. Even where the Plaintiff-Appellant has not raised the issues that AAPS seeks to raise, this Court has discretion to reach these purely legal issues here. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976). AAPS writes separately to present its arguments in full, which the Court should either reach or expressly decline to reach, thereby ensuring that AAPS's arguments will be considered here or in a future AAPS case.

With that background, Rule 29(d) does not apply to the legislator *amici*, and – while AAPS largely supports the *amicus* brief filed by the Center for Constitutional Jurisprudence ("CCJ") – AAPS respectfully disagrees that with the CCJ brief's suggestion that Section 6 of the House bill provided an offsetting increase in revenue. *See* CCJ Br.at 22; *see also* AAPS Br. at 17 & n.8. For the foregoing reasons, AAPS files this separate brief.

Dated: November 8, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Association of American Physicians & Surgeons

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

REGULATIONS AND RULES

OTHER AUTHORITIES

GLOSSARY

AAPS	Association of American Physicians & Surgeons
HHS	Department of Health & Human Services
NFIB	*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012)
PPACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010)
SMHOTA	Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009)

IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons, Inc. ("AAPS") is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS members include thousands of physicians nationwide in all practices and specialties, many in small practices. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship. The members of *amicus* AAPS include without limitation medical caregivers – who also are consumers of medical care – as well as medical employers and owners and managers of medical businesses subject to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). AAPS is the lead plaintiff in *Ass'n of Am. Physicians & Surgeons v. Sebelius*, No. 13-5003 (D.C. Cir.), which challenges PPACA under the Origination Clause, among other grounds. In that litigation, the federal defendants have argued –and AAPS has disputed – that AAPS waived its arguments under the Origination Clause. In the event that this Court agrees with the federal defendants in the current *AAPS* appeal, however, AAPS intend to bring the same claims against a subsequent PPACA rulemaking – whether on remand or

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

in a new lawsuit in this Circuit – which would raise the same Origination Clause issues. For the foregoing reasons, AAPS has a direct and vital interest in the issues before this Court. *Amicus* AAPS files this brief with the consent of all parties.

STATEMENT OF ISSUES

In addition to the issues raised in the Appellants' brief, AAPS respectfully submits the following issues are relevant to resolving the Origination Clause's impact on PPACA:

(1) Whether – provision by provision – the House bill into which the Senate inserted PPACA was a revenue-raising bill as it passed the House?

(2) Whether – if any provision of the House bill raised revenue – the Senate PPACA amendment was germane to the revenue-raising House provisions?

STANDARD OF REVIEW

This Court reviews dismissals under FED. R. CIV. P. 12(b)(6) *de novo. Kaemmerling v. Lappin*, 553 F.3d 669, 676-77 (D.C. Cir. 2008). Even when the issues before this Court are purely legal, the Court generally does not consider "separate contentions raised by *amicus curiae* … [that] are beyond the scope of the issues raised below by the appellants." *Am. Dental Ass'n v. Shalala*, 3 F.3d 445, 448-49 (D.C. Cir. 1993) (*citing Kamen v. Kemper Financial Services*, 500 U.S. 90, 97 n.4 (1991) *and United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981)). Nonetheless, the Court plainly has *discretion* to consider such *amici* arguments:

"The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). Given that AAPS has a parallel challenge to PPACA pending in this Circuit and intends to bring a future challenge if its current appeal does not resolve the issue, judicial economy may favor this Court's considering these additional issues here. Whether the Court considers the AAPS arguments or elects not to consider them, the Court's decision should address the scope of its decision with respect to these issues.

STATEMENT OF THE CASE AND OF FACTS

Amicus AAPS adopts Mr. Sissel's statement of facts, Sissel Br. at 2-3, which plainly establish jurisdiction. As such, the entire case hinges on the constitutional issue of whether or not PPACA's enactment violated the Origination Clause.

By way of background, U.S. CONST. art. I, §8 grants Congress the authority "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the … general welfare," provided that "all duties, imposts and excises shall be uniform throughout the United States." That section also authorizes Congress to "regulate commerce … among the several states" and "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Id.* Under the Origination Clause, "[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.

Under the federal Taxing Power, direct taxes "shall be apportioned among the several states … according to their respective numbers," except that Congress may "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. CONST. art. I, §2; *id.*, amend. XVI. Further, "[n]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." *Id.* art. I, §9.

SUMMARY OF ARGUMENT

In *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), the Supreme Court held that PPACA's "individual mandate" to purchase health insurance exceeded the Commerce Power, but the Chief Justice's "saving construction" upheld the corresponding "penalties" as within the Taxing Power, even though Congress did not intend those penalties as taxes. *NFIB* thus forecloses the Administration's attempt to revisit the scope of the Commerce Power (Section I). Moreover, because the *NFIB* saving construction converted the penalties into taxes for constitutional purposes, the Senate amendment inserting PPACA into H.R. 3590 qualifies as a revenue-raising amendment under the Origination Clause (Section II.A). Because no provision of the House bill raised revenue within the

meaning of the Origination Clause, the Senate's revenue-raising PPACA amendment violated the Origination Clause (Section II.B). Moreover, assuming *arguendo* that the any single provision of the House bill did raise revenue, the Senate PPACA amendments were not germane to the revenue-raising House provisions under the Supreme Court's and this Circuit's precedents (Section II.C).

ARGUMENT

I. PPACA'S INSURANCE *MANDATE* EXCEEDS THE FEDERAL GOVERNMENT'S AUTHORITY

AAPS agrees with Mr. Sissel that *NFIB* forecloses the Administration's attempt to rescue the individual mandate under the Commerce Clause. Sissel Br. at 6-13. Under *Agostini v. Felton,* 521 U.S. 203, 237 (1997), *NFIB* binds this Court.

II. PPACA'S ENACTMENT VIOLATED THE ORIGINATION CLAUSE

By decentralizing power among the three branches and by placing the taxing power in the hands of the legislative branch closest to the People, the Founders intended Separation of Powers generally and the Origination Clause specifically to protect liberty. *U.S. v. Munoz-Flores,* 495 U.S. 385, 394-96 (1990). Indeed, 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. Having waged war to escape such taxes, the Founders carefully designed the Constitution so that the People could control their new government:

> "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). Alternatively, 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). As explained in the next three subsections, PPACA violated this central tenet of our Democracy.[2]

A. As a Tax Under the *NFIB* Saving Construction, PPACA Raises Revenue Within the Meaning of the Origination Clause

Although the Supreme Court has declined definitively to outline the contours of what qualifies as a revenue-raising bill under the Origination Clause, *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), the Court's decisions provide enough detail to resolve this case. First, "revenue bills are those that levy

---

[2] Significantly, federal courts have the ultimate duty to interpret the Origination Clause (*e.g.*, "whether a bill is 'for raising Revenue' or where a bill 'originates'"). *Munoz-Flores*, 495 U.S. at 396; *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("power to interpret the Constitution … remains in the Judiciary"). This is particularly appropriate here, where the Legislative Branch's two houses have divergent interests in the Clause's breadth. *See, e.g.*, VI CANNON'S PRECEDENTS OF HOUSE OF REPRESENTATIVES OF THE UNITED STATES §317 (1935) (Senate and House in the 68th Congress reached opposite conclusions on whether the Origination Clause applied to S. 3674). In administrative law, courts deny deference when more than one agency interprets a statute. *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993).

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, pp. 610-611 (3d ed. 1858)). 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." Story, COMMENTARIES §880. Here, PPACA raises tax revenues.

Significantly, the Origination Clause applies not only to whole bills but also to discrete sections and amendments, 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, PPACA's taxes qualify as income taxes.[3] As income taxes, PPACA's taxes

[3] *NFIB* held that the PPACA taxes are not direct taxes that must be apportioned to the census. *NFIB,* 132 S.Ct. at 2599. Although *NFIB* did not go further and hold what type of tax PPACA *actually is,* the only other choices are duties, imposts and excises (which the Constitution requires to be uniform), U.S. CONST. art. I, §8, and income taxes. U.S. CONST. amend. XVI. Although the Origination Clause applies equally to income taxes and excise taxes, this Court should recognize that PPACA's taxation is not uniform because "the Uniformity

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. Thus, even if PPACA as a whole has some other purposes, the PPACA provisions at issue – namely, the tax penalties – have no other constitutional purpose but the raising of revenue under the Chief Justice's saving construction.

PPACA's tax penalties cannot qualify as special assessments under the "general rule" that statutes that create a regulatory program may simultaneously raise funds to support that program. *Munoz-Flores*, 495 U.S. at 397-98 ("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"). Under that "general rule," revenue raised via targeted provisions such as the "special assessment provision at issue in th[at] case" fall

---

Clause requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found." *U.S. v. Ptasynski*, 462 U.S. 74, 84 (1983). Uniformity would not allow excise taxes to be higher in New York than in Kentucky based on New Yorkers' higher cost of living or greater incomes, and it does not allow ACA to do the same thing. *See* 26 U.S.C. §5000A(e)(1)(B)(ii), (f)(1)(C), (f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) (non-uniform "individual" tax); 26 U.S.C. §4980H(a)(1) ("employer" tax incorporates criteria from 26 U.S.C. §5000A(f)(2)); *see also* 26 U.S.C. §5000A(f)(2)(A)-(B); 42 U.S.C. §300gg-91(d)(8); 29 U.S.C. §1002(32) (criteria incorporated into "employer" tax). With the exception of income taxes, the Uniformity Clause prohibits this type of Balkanization. *See Ptasynski*, 462 U.S. at 81. Because they are non-uniform, PPACA's taxes must be income taxes to have even a chance of being constitutional.

outside the Origination Clause. *Id.* at 398; *Nebeker*, 167 U.S. at 202-03; *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906). By contrast, §5000A can avoid other constitutional tax-related infirmities – *see* note 3, *supra* – only as income tax under the Sixteenth Amendment, and PPACA's regulatory program is wholly outside of the federal power except taxation.

Unlike special assessments, 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, going 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).

Moreover, as justified by *NFIB* under the Taxing Power, §5000A's tax penalty is not part of PPACA's governmental program. It survives solely as a tax. Thus unlike in *Munoz-Flores* and in "*Nebeker* and *Millard* [where] the special

assessment provision was passed as part of a particular program to provide money for that program" and 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 general Treasury.

B. The House Bill Was Not a Revenue-Raising Bill for Purposes of the Origination Clause

The Senate's authority to attach revenue-raising amendments to House bills applies only to House *revenue* 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)); *Sperry Corp. v. U.S.*, 12 Cl. Ct. 736, 742 (1987), *rev'd on other grounds,* 853 F.2d 904 (Fed. Cir. 1988); *Armstrong v. U.S.*, 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). If the Senate PPACA amendments raise revenue – as opposed to establishing a regulatory program – this Court must determine whether SMHOTA was a "bill[] for raising revenue" into which the Senate could import its PPACA amendments.[4]

[4] In adopting the Senate amendments, the House did not acquiesce to an Origination-Clause violation, given that §5000A (as passed by Congress) was not

1. Bills that Close Revenue Streams Do Not "Raise" Revenue

To analyze whether SMHOTA "raises revenue," a court must define that phrase. Although this Circuit has not decided the issue, competing extra-circuit interpretations have focused on whether bills must *increase* revenues or merely *levy* revenues (*i.e.*, without increasing revenues).[5] Of course, if "raise" means "increase," PPACA obviously violated the Origination Clause because the House bill did not increase revenue. But AAPS respectfully submit that this increase-levy dichotomy obscures a third category of bill relevant here. Specifically, bills that *close* a particular revenue stream do not raise revenue.

The extra-circuit decisions holding "raise" to mean "levy" arise under the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) ("TEFRA"), and focus primarily on whether the Senate's tax-increasing

---

even a tax as far as Congress was concerned. *NFIB*, 132 S.Ct. at 2582-84. The Senate cannot avoid the Origination Clause merely by "enact[ing] revenue-raising bills so long as it merely describes such bills as 'user fees'" or (here) penalties. *Sperry Corp. v. U.S.*, 925 F.2d 399, 402 (Fed. Cir. 1991). Only now that §5000A is unambiguously a tax, and *only a tax*, is the Origination Clause violation clear. In any event, the House *cannot* acquiesce to a violation of the Constitution. *Munoz-Flores*, 495 U.S. at 391. Origination-Clause claims thus presents justiciable separation-of-powers questions on which courts have the final word. *Id.* at 393.

[5] *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") with *Armstrong*, 759 F.2d at 1381-82; *Wardell v. U.S.*, 757 F.2d 203, 204-05 (8th Cir. 1985); *Heitman v. U.S.*, 753 F.2d 33, 35 (6th Cir. 1984); *Rowe v. U.S.*, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.* 749 F.2d 27 (3d Cir. 1984).

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). Because the House bill there *levied* revenues without *increasing* revenues, the TEFRA cases are inapposite to bills like SMHOTA that do not levy any revenue, but instead close various revenue streams.

Where they delve deeper than germaneness,[6] the TEFRA cases rely on the seminal 1870s congressional dispute on the Origination Clause. *See Armstrong*, 759 F.2d at 1381-82. That history supports the conclusion that closing revenue streams does not "raise" revenue. The 1870s 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 consisted a revenue measure under the Origination Clause but that tax repeal in the House did not constitute a revenue measure.

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

> Suppose the existing law lays a duty of 50 per cent[.] upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per

---

6 AAPS addresses germaneness separately in Section II.C, *infra.*

> cent[.], 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 – the 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.

Id. (*quoting* S. REP. NO. 42-146 (1872)). The Senate report explains that, had the bill merely reduced the tea and coffee rates or even continued them while raising or lowering the 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). AAPS respectfully submits that the Senate report correctly analyzes the Origination Clause's contours with respect to bills that do not raise any revenue and instead terminate taxes on something or someone.

Indeed, targeted tax exemptions like SMHOTA's benefits to military personnel can achieve non-revenue purposes. 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. *See U.S.*

v. Norton, 91 U.S. 566, 567-68 (1875). Instead, such targeted tax exemptions can be 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 tax exemptions are not *revenue* bills.

2. SMHOTA Did Not Raise Revenue

With that background, none of SMHOTA's six sections raised revenue within the Origination Clause's meaning.

1. SMHOTA §1 merely provided the bill's short title.

2. SMHOTA §§2-3 modified the first-time homebuyers' tax credit by waiving recapture of the credit for members of the armed forces ordered to extended duty service overseas. In the absence of this waiver, first-time homebuyers who sold their homes soon after claiming the credit would lose the credit. *See* 26 U.S.C. §36(a), (f). These provisions not only *lowered* revenues but also zeroed out taxes for the affected sources of income. As such, these sections did not raise revenue.

3. SMHOTA §4 expanded exclusions from income for fringe benefits that are "qualified military base realignment and closure fringe" under 26 U.S.C. §132, which does not raise revenue for the same reason that SMHOTA §§2-3 do not raise revenue.

4. SMHOTA §5 increased filing penalties by $21 (from $89 to $110) 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; *U.S. v. Herrada*, 887 F.2d 524, 527 (5th Cir. 1989). If this minor penalty enhancement qualifies as "raising revenues" under the Origination Clause, that would invalidate numerous Senate-initiated bills that assess penalties.[7]

5. SMHOTA §6 amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to increase the amount of *estimated* tax that certain corporations pay. But "[w]ithholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax." *Baral v. U.S.*, 528 U.S. 431, 436 (2000). Because estimated-tax payments are not "revenue," §6 cannot make H.R. 3590 a revenue bill.

In summary, as it passed the House, H.R. 3590 was not a revenue bill. Legislators who came of professional age before *Baral* may have once considered tinkering with estimated taxes to constitute revenue, but *Baral* foreclosed that view. "Any and all violations of constitutional requirements vitiate a statute," even if they represent merely "this kind of careless journey work" in originating a

[7] As explained in Section II.C, *infra*, PPACA would not be germane to SMHOTA §5, even if §5 did raise revenue under the Origination Clause.

revenue bill in the wrong body. *Hubbard v. Lowe*, 226 F. 135, 140 (S.D.N.Y. 1915), *appeal dismissed* 242 U.S. 654 (1916). The Origination Clause thus prohibited substituting the Senate's revenue-raising PPACA for SMHOTA.

C. Because SMHOTA Did Not "Raise Revenue" under the Origination Clause, this Court Need Not Consider the *Flint* Germaneness Test

As indicated, the Origination Clause applies not only to whole bills but also to discrete sections and amendments, *Nebecker*, 167 U.S. at 202-03, subject to a test for germaneness. *Flint*, 220 U.S. at 142-43 (Origination Clause allows Senate "amendment … germane to the subject-matter of the [House] bill and not beyond the power of the Senate to propose"), *abrogated in part on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540-43 (1985). Under *Flint*, the "Senate may propose any amendment 'germane to the subject-matter of the [House] bill.'" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 949 n.8 (D.C. Cir. 1984), *abrogated in part on other grounds*, *Raines v. Byrd*, 521 U.S. 811 (1997). Unlike PPACA and the House and Senate bills in *Flint*, SMHOTA was in no way a "general bill for the collection of revenue." *Flint*, 220 U.S. at 142-43. Indeed, no part of SMHOTA raised revenue within the meaning of the Origination Clause, *see* Section II.B.2, *supra*, which obviates this Court's reviewing PPACA's

germaneness to SMHOTA.[8]

Because the appellate rules do not give AAPS the opportunity to file a reply to whatever the Administration offers in opposition to this argument, AAPS offers this preemptive rebuttal. The only two SMHOTA provisions that even remotely "raise" revenue within any grammatically permissible construction of that term are SMHOTA §5 and SMHOTA §6, neither of which qualifies as a "general [provision] for the collection of revenue." *Flint*, 220 U.S. at 142-43. To be germane to the fields covered by SMHOTA §5 and SMHOTA §6, PPACA would need to confine itself (a) to penalties (not taxes) for failure to file returns that Congress had the authority to require (SMHOTA §5), or (b) to tinkering with *estimated* tax payments without raising new revenue (SMHOTA §6). By contrast, PPACA raises wholly new revenue, wholly unrelated to SMHOTA. If the Origination Clause means anything, the Senate's PPACA amendments cannot qualify as germane.

CONCLUSION

This Court should hold that the PPACA insurance mandates exceed the enumerated powers that the Constitution confers on Congress and that PPACA's enactment violated the Origination Clause.

---

[8] AAPS respectfully but emphatically disagrees with Mr. Sissel that the House bill raised corporate taxes. *See* Sissel Br. at 26-27.

Dated: November 8, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Ave., NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Association of American Physicians & Surgeons

BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the attached *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 4,255 words, including footnotes, but excluding this Brief Form Certificate, the Statement with Respect to Parties and *Amici,* the Table of Authorities, the Table of Contents, the Glossary, the Addendum, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

Dated: November 8, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph

1250 Connecticut Ave., NW
Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Association of American Physicians & Surgeons

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November 2013, I have caused the foregoing document to be served on the parties' counsel of record via the Court's CM/ECF System.

/s/ Lawrence J. Joseph

Lawrence J. Joseph