

No. 13-5202

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

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**Matt Sissel,**

*Plaintiff-Appellant,*

*v.*

**United States Department of Health and Human Services, et al.,**

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Columbia  
Case No. 1:10-cv-01263

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**BRIEF FOR HOUSE MAJORITY LEADER KEVIN MCCARTHY, HOUSE  
MAJORITY WHIP STEVE SCALISE, AND THE JUDICIAL EDUCATION  
PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S  
PETITION FOR REHEARING *EN BANC***

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## CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 27(a)(4), the House Majority Leader, House Majority Whip, and Judicial Education Project certify as follows:

### **Parties and Amici**

All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Appellant's Petition for Rehearing *En Banc*.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, I hereby certify that I am aware of no corporation, association, joint venture, partnership, syndicate, or other similar entity that is a party to this suit or of any such entity that has a financial interest in the outcome of this litigation; that no *amicus curiae* on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any *amicus curiae* on this brief.

Dated: October 9, 2014

/s/ Gregory G. Katsas  
Gregory G. Katsas

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## **GLOSSARY**

ACA

Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010

## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

As two of the most senior members of House leadership, *amici* have an unparalleled interest in safeguarding their Chamber’s constitutionally prescribed role as the only body of government with the power to initiate tax increases. The Judicial Education Project (“JEP”) is dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers and educating citizens about these constitutional principles.

### INTRODUCTION AND SUMMARY

The power to tax—to take private property by force—has long been recognized as “the power to destroy.” *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The Framers carefully limited that power by confining the origination of tax increases to the People’s House. The Origination Clause provides that “[a]ll bills for raising Revenue shall originate in the House of Representatives.” Art. I, § 7, cl. 1. As James Madison explained, the House “alone can propose the supplies requisite for the support of government,” a “power over the purse [that] may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” *The Federalist* No. 58, at 359 (Clinton Rossiter ed., 1961). The Origination Clause thus embodies one of the Constitution’s most fundamental structural protections in defense of individual liberty.

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<sup>1</sup> No person or entity other than *amici* or its counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief’s preparation or submission. Fed. R. App. P. 29(c)(5).

The panel decision would all but eradicate this bedrock protection. That decision exempts a 2000-page bill replete with numerous tax increases from the Clause by reducing the bill into a single, non-taxing “paramount aim.” Op. at 13. But omnibus legislation is the norm. If every tax increase enveloped by regulatory provisions or objectives were exempt from the Origination Clause, then the Clause would be wholly ineffective. And if the ACA’s imposition of 20 new taxes to raise hundreds of billions of dollars is not a “bill for raising Revenue,” then nothing is.

The courts have long taken a narrow view of what constitutes a “bill for raising revenue,” but even the most miserly interpretation of that phrase encompasses bills like the ACA that “levy taxes in the strict sense of the word.” *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA imposes taxes on investment income, taxes on medical devices, taxes on “Cadillac” healthcare plans, and so on. In concluding that the ACA is *not* a “bill for raising revenue,” the panel ignored the obvious point that 2000-page bills have multiple purposes—*one* of which, in the ACA’s case, was plainly to raise revenue. And as the Supreme Court long-ago explained, the dispositive question is whether “*any*” of an act’s “provisions” are intended “to raise revenue to be applied in meeting the expenses or obligations of the Government.” *Nebeker*, 167 U.S. at 203 (emphasis added). Under the Supreme Court’s settled rule, the ACA is thus a “bill for raising revenue” subject to the Origination Clause.

Rehearing *en banc* is necessary to review a flawed decision that conflicts with

both the Supreme Court's and this Court's precedent and that will, if permitted to stand, upend the balance of power in Congress. The panel decision strips the House of Representatives of its "power over the purse," *see The Federalist* No. 58, at 359, and does so in the jurisdiction that possesses venue over the entire federal government. This case thus presents *both* an intra-circuit conflict *and* a question of exceptional importance. Rehearing *en banc* is amply warranted.

### ARGUMENT

The Supreme Court has long held that "Bills for raising Revenue" "are those that levy taxes in the strict sense of the word." *Nebeker*, 167 U.S. at 202 (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA satisfies that definition: many of its provisions impose new taxes, the revenues from which go to fund general operations of government. The panel's contrary holding—that the ACA is *not* a "bill for raising revenue," because its "primary aim" is "to increase the number of Americans covered by health insurance and decrease the cost of healthcare"—has no basis in the Constitution or the decisions of any court. *See* Op. at 13 (citation omitted).

#### **I. Bills That Impose New Taxes To Fund General Governmental Operations Are "Bills For Raising Revenue."**

The Supreme Court has made clear that any bill imposing new taxes to fund general government operations qualifies as a "bill for raising revenue" under the Origination Clause. As the Court explained in its most recent decision construing the

Clause, 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.” *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) (emphasis added). The Court thus made clear what bills *are* “bills for raising revenue” (any bill “that raises revenue to support Government generally”), and what bills are *not* (any bill “that creates a particular governmental program and that raises revenue to support that program”). *Id.*; *see also Nebeker*, 167 U.S. at 202. In other words, “the Constitution requires tax increases to originate in the House of Representatives.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

The panel adopted a contrary rule in holding that the ACA was not a “bill for raising revenue” because its revenue-raising features were “incidental,” Op. at 16, to the “primary aim” of “induc[ing] participation in health plans,” *id.* at 13. But as the Supreme Court explained in *Munoz-Flores*, tax-increasing bills are *always* “bills for raising revenue,” *unless* “[t]here was *no* 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.” 495 U.S. at 398 (quoting *Nebeker*, 167 U.S. at 203) (emphasis added). And this Court likewise explained in *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083 (D.C. Cir. 2012), that the Communications Act would not violate the Origination Clause (as interpreted by the agency), because *that* act “clearly funds *only*” the relevant

governmental program “and *not* the Government generally.” *Id.* at 1090 (emphases added). The panel decision cannot be reconciled with these binding decisions.

## II. If Anything Is A Bill For Raising Revenue, The ACA Is.

The ACA itself strikingly demonstrates the breadth of the panel’s ruling—and its reduction of the Origination Clause to virtually nothing. The ACA imposes some 20 new taxes, each of which raises revenue that goes into the Treasury’s general coffers.<sup>2</sup> Each of these new taxes is sufficient to make the ACA a “bill for raising revenue” under longstanding precedent, *see, e.g., Nebeker*, 167 U.S. at 203 (test is whether “the act” or “any of its provisions” raises revenue), because none of the new taxes were enacted to fund “a particular governmental program.” *Munoz-Flores*, 495 U.S. at 398. Rather, all are collected by the Internal Revenue Service and paid into the general account of the United States Treasury, as the Government itself stressed in successfully defending the individual mandate to buy health insurance as a mere “tax” on remaining uninsured. *See NFIB*, 132 S. Ct. at 2593-94 (Roberts, C.J.).

The panel held that the ACA is nonetheless *not* a “bill for raising revenue,” because, it reasoned, only legislation with the “*primary purpose*” of raising “general

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<sup>2</sup> Examples include: a new 3.8 percent surtax on investment income earned in households making at least \$250,000, *see* Pub. Law No. 111-152, § 1402, 124 Stat. 1029, 1061 (2010); a new 40% excise tax on comprehensive, so-called “Cadillac,” health insurance plans, Pub. Law No. 111-148, § 9001, 124 Stat. 119, 848 (2010); a new excise tax on indoor tanning salons, *id.* § 5000B, 124 Stat. at 872-73; and a new “annual fee on branded prescription pharmaceutical manufacturers and importers,” *id.* § 9008, 124 Stat. at 859.

revenues,” Op. at 15, counts under the Clause. And according to the panel, the “paramount aim” of the ACA is not to raise taxes, but to force individuals to buy health insurance. *See id.* at 13. The \$4 billion in tax revenues raised from individuals who choose to remain uninsured is thus simply an irrelevant “by-product of the [ACA’s] primary aim to induce participation in health insurance plans.” *Id.*

This turns the Constitution on its head. *All* taxes are to some extent regulatory, as the Supreme Court explained in *NFIB*. *See* 132 S. Ct. at 2596. Yet under the panel decision, the *more* regulatory any particular tax may be, the *less* likely the Origination Clause is to apply at all. The panel thus would make the Clause entirely inapplicable to the very taxes *most* threatening to individual liberty—those where the Government is using its taxing power not only to tax, but also to destroy. *See, e.g., United States v. Sanchez*, 340 U.S. 42 (1950) (tax on marijuana); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (tax on sawed-off shotguns). That gets things precisely backwards.

Not surprisingly, no precedent from the Supreme Court or this Court supports the panel’s decision. To the contrary, both the Supreme Court and this Court have held that the dispositive inquiry is whether there 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. at 398 (quoting *Nebeker*, 167 U.S. at 203) (emphases added); *see also Rural Cellular*, 685 F.3d at 1090. Like the Origination Clause itself, past decisions contain no exception for broad-based bills, and *certainly* no

exception for taxes with regulatory objectives.

*Munoz-Flores* confirms as much. That case involved the Victims of Crime Act of 1984, which “established a Crime Victims Fund . . . as a federal source of funds for programs that compensate and assist crime victims.” 495 U.S. at 398. If the analysis were merely a question of a statute’s “primary purpose,” the Court would have upheld the Victims of Crime Act by simply noting that its primary purpose was to benefit crime victims. But the Court did not do that. Rather, it analyzed each potential taxing provision and found that none of them was intended to raise general revenues for the Government; rather, each was “passed as part of a particular program to provide money for that program.” *Id.* at 399.

This Court’s decision in *Rural Cellular* is similar. It performed a provision-by-provision analysis, and concluded that none of the provisions funds general government operations, before concluding that the Origination Clause was inapplicable. *See* 685 F.3d at 1090. Essential to this Court’s analysis was its determination that “[t]he Communications Act . . . clearly funds *only* the High-Cost Universal Service Support Program and not the Government generally.” *Id.* (emphasis added). Neither decision even suggests, much less holds, that the Origination Clause is inapplicable to omnibus bills or to regulatory taxes.

Because the panel’s contrary holding contradicts binding precedent, and renders virtually nugatory the House’s power of the purse, this Court should grant rehearing *en banc*.

## CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Dated: October 9, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 9th day of October 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 9, 2014

/s/ Gregory G. Katsas  
Gregory G. Katsas

*Counsel for Amici Curiae House Majority  
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# **ADDENDUM**

## CERTIFICATE AS TO PARTIES AND AMICI

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## CORPORATE DISCLOSURE STATEMENT

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Dated: October 9, 2014

/s/ Gregory G. Katsas  
Gregory G. Katsas