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, ET AL.,
Defendants-Appellees.

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

BRIEF OF U.S. REPRESENTATIVE TRENT FRANKS, CHAIRMAN OF THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE, AND 42 OTHER MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE AS TO PARTIES AND AMICI CURIAE

A. Parties and *Amici Curiae*.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that the following Congressional *amici curiae* have joined this brief in support of the Petition for Rehearing *En Banc*:

1. Rep. Trent Franks
2. Rep. Michele Bachmann
3. Rep. Joe Barton
4. Rep. Kerry L. Bentivolio
5. Rep. Marsha Blackburn
6. Rep. Jim Bridenstine
7. Rep. Mo Brooks
8. Rep. Steve Chabot
9. Rep. K. Michael Conaway
10. Rep. Ron DeSantis
11. Rep. Jeff Duncan
12. Rep. John Duncan
13. Rep. John Fleming
14. Rep. Bob Gibbs
15. Rep. Louie Gohmert
16. Rep. Andy Harris
17. Rep. Tim Huelskamp
18. Rep. Walter B. Jones, Jr.
19. Rep. Jim Jordan
20. Rep. Steve King
21. Rep. Doug LaMalfa
22. Rep. Doug Lamborn
23. Rep. Bob Latta
24. Rep. Thomas Massie
25. Rep. Mark Meadows
26. Rep. Markwayne Mullin
27. Rep. Randy Neugebauer
28. Rep. Stevan Pearce
29. Rep. Robert Pittenger
30. Rep. Bill Posey

31. Rep. David P. Roe
32. Rep. Todd Rokita
33. Rep. Matt Salmon
34. Rep. Mark Sanford
35. Rep. David Schweikert
36. Rep. Marlin A. Stutzman
37. Rep. Lee Terry
38. Rep. Tim Walberg
39. Rep. Randy K. Weber, Sr.
40. Rep. Brad R. Wenstrup
41. Rep. Lyne A. Westmoreland
42. Rep. Rob Wittman
43. Rep. Ted S. Yoho

Undersigned counsel further certifies that, to the best of his knowledge, with the exception of House Majority Leader Kevin McCarthy, House Majority Whip Steve Scalise, and the Judicial Education Project, who filed for leave to file a brief as *Amici Curiae* on October 9, 2014, all the parties, intervenors, and other *amici* appearing before the District Court and in this Court are listed in Appellant's Petition for Rehearing *En Banc*.

B. **Ruling Under Review.**

Undersigned counsel further certifies that, to the best of his knowledge, the ruling under review is also set forth in Appellant's Petition for Rehearing *En Banc*, and is incorporated by reference herein.

/s/ Joseph E. Schmitz

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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*[1]

Congressman Trent Franks is Chairman of the House Judiciary Subcommittee on the Constitution and sponsor of H. Res. 153 declaring that the Origination Clause was violated by the passage of the Patient Protection and Affordable Care Act (ACA). He and his 42 co-*amici* and co-sponsors of H. Res. 153 all have an institutional interest in preserving the exclusive power of the House to originate Bills for raising revenue under the Origination Clause like the ACA.

SUMMARY OF ARGUMENT

The panel decision ruled that ACA, designed to raise approximately $500 billion in revenues, is not a "bill[] for raising Revenue" under the Origination Clause because ACA's "primary purpose" was not to raise revenue. The history of that Clause, its purpose, and a proper reading of the relevant Supreme Court decisions, clearly demonstrate that the panel fundamentally erred in devising this novel "purpose test." Properly understood, only revenues generated from "user fees" and the like are exempted from the Origination Clause, not the indisputable taxes in the ACA. Even congressional supporters of the ACA understood it was subject to the Origination Clause. This case raises an issue of exceptional importance -- the separation of powers -- that also merits a rehearing *en banc*.

[1] 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).

ARGUMENT

I. The Panel Decision Conflicts With Supreme Court Decisions And Ignores The Constitutional History Of The Origination Clause

In an unprecedented opinion, the panel concluded that a Bill which raises $500 billion in taxes is subject to the Origination Clause "only if its *primary purpose* is to raise general revenues. . . ." Op. at 15 (emphasis in original). The panel's "purposive approach" is not "embodied in Supreme Court precedent" as the panel mistakenly concluded. Op. 13. If allowed to stand, the Senate could easily circumvent the Origination Clause by ascribing another "purpose" to revenue raising bills, thereby rendering the Origination Clause a dead letter.[2]

The "purposive approach" does not have any basis in the plain reading of the text of the Clause or its constitutional history, to which the panel, though expressing interest in that history at oral argument, did not even mention it in its

[2] As the only federal court thus far to strike down a tax for violating the Origination Clause put it, "*It is immaterial what was the intent behind the statute;* it is enough that the tax was laid, and the probability or desirability of collecting any taxes is beside the issue." *See Hubbard v. Lowe*, 226 F. 135, 137 (S.D.N.Y. 1915), appeal dismissed, 242 U.S. 654 (1916) (emphasis added). Moreover, two of the decisions that the panel relied on for its "primary purpose" rule cautioned against adopting any such a categorical approach: "What bills belong to that class [of revenue bills under the Origination Clause] is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897); *Millard v. Roberts*, 202 U.S. 429, 436 (1906) (quoting *Nebeker*).

opinion.[3] Rather than discussing the rich history and purpose of the Origination Clause, which *amici* provided in their brief and the scholarly article on the subject on which *amici* relied,[4] the panel relied on a few distinguishable cases, particularly *United States v. Munoz-Flores*, 495 U.S. 385 (1990), and one sentence from Joseph Story's *Commentaries* taken out of context. That reliance was seriously misplaced.

1. The Colonists thought that anything that taxed them at all for any reason was a "money bill" and therefore subject to origination restrictions. All but one of the first 13 States included an Origination Clause provision in their respective constitutions, and only one of those pre-ratification constitutions had a "purpose" reference. *Amici* Br. 18. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the Federal clause:

> No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, *under any pretext whatsoever*, without the consent of the

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[3] 26:44: Judge Wilkins: "So just to be clear . . . we'd like something stronger than Justice Story's 'Commentaries on the Constitution' as evidence of the original intent. We'd like something from one of the founders on how to determine whether a bill is 'for raising revenue.' Is there anything you can point to from the founders that helps us answer that question?" * * * *
27:47: Judge Rogers: "I think it would be helpful if you could answer Judge Wilkins' question."
27:52: DOJ Counsel: "I have not seen a citation in the Supreme Court cases, you know, to other descriptions by other members of the founding generation of what is a 'bill for raising revenue'."
Oral argument audio recording excerpts by elapsed time in minutes:seconds at http://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=13-5202&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE.

[4] Priscilla Zotti & Nicholas Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BR. J. AM. LEG. STUDIES 71 (2014).

> people, or their representatives in the legislature. * * * * All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.[5]

More compelling, by deleting the words "for purpose of revenue" in the final version of the Origination Clause, the Framers appeared to have decided that the term "money bills" was a synonym for "bills for raising money" without the limiting "for the purpose of revenue" clause.[6]

Early judicial opinions further demonstrate the Framers' broad meaning of "bills for raising revenue." For example, in *United States v. James*, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875), the court opined:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, *either directly or indirectly,* or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return. . . . It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

Id. at 578. Even congressional supporters of ACA concede that the history of the clause demonstrates that it was intended by the Framers to be broadly construed.[7]

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[5] Mass. Constitution of 1780, Art. XXIII; Art. VII (emphasis added).

[6] James Madison, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787, p. 442 (New York, Norton & Co. Inc., 1969); *Amici* Br. at 18-19; Pet. at 13, n.6.

[7] "[T]he Origination Clause, in its final form, provided for an *expansive category* of bills that would need to originate in the House –that, all "bills for raising revenue," even those that did *not* have as their purpose the raising of revenue. . . ." Brief *Amici Curiae* of Congressman Sandy Levin, *et al*., at pp. 10-11 (July 17, 2014) (emphasis added) filed in *Hotze v. Burwell*, No. 14-20039 (5th Cir.) (appeal

2. In *Munoz-Flores*, the Court was considering whether a nominal $25 assessment levied on persons convicted of federal crimes was a "Bill for raising revenue." 495 U.S. at 385. The Court concluded that the assessment provision was not a "Bill for raising revenue" because the fines were earmarked for a special Victims Fund, and that only "incidentally" *if* there were any excess funds in the account and those funds were deposited in the General Treasury, that fact alone would not subject the assessment provision to the Origination Clause. *Id*. at 399.

The panel seriously misconstrued the adverb "incidentally" used in *Munoz-Flores* in two major respects. **First**, the panel interpreted "incidentally" not as *Munoz* meant, *i.e.* any *excess* revenue in a relatively small amount that *may* by happenstance or "incidentally" exceed the cap on the Victims Fund, with any such "surplus" being deposited in the General Treasury. Indeed, no "such an excess in fact materialize[d]." *Id*. at 399. Rather, the panel transformed "incidentally" to mean "incidental to" in the sense of being "connected with" or "related to" a legislative program that is the subject matter of the underlying law. **Second**, the panel reached the *opposite* conclusion of *Munoz* and held that since *all* of the taxes were "incidental to" the underlying purpose of ACA, even though deposited in the

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pending). Senator Harry Reid, the chief sponsor of the "Senate Health Care Bill," would certainly be surprised to learn that the ACA is not a "bill for raising revenue" inasmuch as he intentionally took what he mistakenly thought was a House revenue raising bill and then replaced it with the ACA and its half trillion dollars in new taxes in a maneuver he mistakenly thought complied with the Senate amendment provision of the Origination Clause. *See Amici* Br. 30.

General Treasury, then *mirable dictu,* all these taxes were not "revenue raising" subject to the Origination Clause. The Founders would be alarmed by this radical rule that could so easily eviscerate the Origination Clause.

The panel's confusion may have arisen from its recitation of the oft-repeated but miscited quote from Justice Story cited in *Munoz* and prior cases that the Origination Clause applies "to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." Joseph Story, 2 *Commentaries on the Constitution of the United States,* Sec. 877. A*mici* submit that the ACA levies taxes in the "strict sense of the word." But the rest of Story's quote explains what he means by "bills for other purposes":

> No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely 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, although all of them *might incidentally* bring, revenue into the treasury.

Id. (emphasis added). The Founders were not worried about these kinds of revenue raising measures or "user fees." The nominal assessments in *Munoz* are akin to such "user fees" to be remitted by convicted criminals who (mis)use the criminal justice system; the $500 billion in taxes levied in ACA, including those imposed on Appellant for not purchasing health insurance, are not.

II. This Case Raises An Issue Of Exceptional Importance: Separation Of Powers

While the Petition correctly points out that this appeal raises important issues under the Commerce Clause and the Origination Clause worthy of *en banc* review (Pet. at 2), a*mici* would add that the intra-branch separation of powers issues in this case are no less important to protecting liberty than either the inter-branch separation of powers or the separation of powers between the national government and the States under the Tenth Amendment.

As the Court in *Munoz* explained:

> This Court has repeatedly emphasized that "the Constitution diffuses power, the better to secure liberty." (internal quotes and citation omitted)
> * * *
> What the Court has said of the allocation of powers *among* branches is no less true of such allocations *within* the Legislative Branch. (citations omitted; emphasis in original). . . . The authors of the Constitution divided such functions between the two Houses based in part on their perceptions of the differing characteristics of the entities. See The Federalist No. 58 (defending the decision to give the origination power to the House on the ground that the Chamber is more accountable to the people should have the primary role in raising revenue) . . . . At base, though, the Framers' purpose was to protect individual rights. As James Madison said in defense of that Clause: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). *Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.*

495 U.S. at 394-95 (except as noted, emphasis added).

Moreover, the Supreme Court in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("NFIB"), was vigorously protective of the separation of powers between the Federal and State governments when it struck down by a vote of 7-2 the Medicaid provisions of the ACA as violative of the Tenth Amendment. *Id*. at 2666-67. *NFIB* repeatedly cites *New York v. United States*, 505 U.S. 144 (1992), which in turn relies on *United States v. Butler*, 297 U.S. 1, 69 (1936) ("resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.").

CONCLUSION

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

Date: October 14, 2014

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on this14th 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.

/s/ Joseph E. Schmitz
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