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; SYLVIA M. BURWELL, 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)

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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Pursuant to this Court's order of October 9, 2014, the federal government respectfully responds to the petition for rehearing en banc. As we show below, the panel decision is correct and does not conflict with a decision of the Supreme Court or any other court. The petition therefore should be denied.

STATEMENT OF THE CASE

Plaintiff Matt Sissel is a Washington State resident who does not have health insurance. His suit challenges the constitutionality of the individual-coverage provision that the Supreme Court upheld 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,[1] a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the Internal Revenue Service (IRS). *See* 26 U.S.C. § 5000A.

Sissel's complaint alleged that the requirement to purchase insurance exceeds Congress's Commerce Clause power. It also alleged that the enactment of the individual-coverage provision was inconsistent with the Origination Clause, which states that "[a]ll Bills for raising Revenue shall originate in the House of

[1] As amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1.

The district court rejected the premise of Sissel's Commerce Clause claim, which is that the individual-coverage provision imposes a legal requirement that non-exempted individuals buy health insurance. JA 131. The court explained that, as interpreted by the Supreme Court in *NFIB*, the individual-coverage provision does not require the purchase of insurance. JA 127-131.

The district court rejected Sissel's Origination Clause claim on two independent grounds. First, the court held that the individual-coverage provision is not a bill for raising revenue within the meaning of the Origination Clause because any revenue generated by that provision is incidental to its primary purpose to expand health coverage. JA 132-136. Second, assuming that the individual-coverage provision is a bill for raising revenue, the court held that its enactment was consistent with the Origination Clause because the individual-coverage provision was an amendment to a House-originated bill for raising revenue and is thus authorized by the second half of the Origination Clause. JA 131-143.

A unanimous panel of this Court affirmed. The panel rejected the Commerce Clause claim because the individual-coverage provision, as interpreted in *NFIB*, gives individuals a lawful choice to make payment to the IRS instead of purchasing insurance. Panel Op. 8-10. The Court rejected the Origination Clause

claim on the ground that the individual-coverage provision is not a bill for raising revenue, *see* Panel Op. 10-16, without reaching the question whether the provision was also authorized by the second half of the Origination Clause.[2]

ARGUMENT

A. Sissel's Commerce Clause Claim Rests On A Misreading Of *NFIB*

Sissel's Commerce Clause claim rests on the incorrect premise that the individual-coverage provision imposes a legal requirement that individuals buy health insurance. The Supreme Court interpreted the individual-coverage provision to give individuals the "lawful choice" to make payment to the IRS "in lieu of buying health insurance." *NFIB*, 132 S. Ct. 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 the individual-coverage provision. Panel Op. 9-10.

As the panel noted (Op. 10), the post-*NFIB* decisions on which Sissel relies (Pet. 7-8) do not support his argument. Three of those decisions distinguished *NFIB*'s commerce power analysis in the course of rejecting challenges to other provisions. *See Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir.) (upholding

[2] This case does not implicate the statutory question regarding tax-credit eligibility that is pending before the en banc Court in *Halbig v. Burwell*, No. 14-5018 (D.C. Cir.). Sissel resides in Washington State, which elected to set up the State's Exchange for itself, and Sissel's eligibility for tax credits is not in dispute. *See* Plaintiff's Supplemental Brief Regarding Standing (filed June 2, 2014).

the Affordable Care Act's employer-responsibility provision); *United States v. Rose*, 714 F.3d 362 (6th Cir. 2013) (upholding Congress's power to regulate the intrastate manufacture and possession of child pornography); *United States v. Roszkowski*, 700 F.3d 50 (1st Cir. 2012) (upholding the federal ban on possession of firearms by felons). In *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588 (6th Cir. 2013), the court concluded that a Commerce Clause challenge to the individual-coverage provision was overtaken by *NFIB*. And in *Kinder v. Geithner*, 695 F.3d 772 (8th Cir. 2012), the court dismissed a challenge to the individual-coverage provision on standing grounds.

B. The Individual-Coverage Provision Is Not A Bill For Raising Revenue Within The Meaning Of The Origination Clause.

1. The Supreme Court has never invalidated a measure on Origination Clause grounds, and this case offers no occasion to break new ground. The panel correctly held that the individual-coverage provision is not a bill for raising revenue within the meaning of the Origination Clause. Panel Op. 10-16.

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." *United States v. Herrada*, 887 F.2d 524, 526 (5th Cir. 1989) (quoting *United States v. Norton*, 91 U.S. 566, 569 (1876); *Twin City Bank v. Nebeker*, 167 U.S. 196, 203 (1897); and *Millard v. Roberts*, 202 U.S. 429, 436 (1906)) (each quoting 1 Joseph Story, *Commentaries on the Constitution*

of the United States § 880, pp. 610–611 (1833)); *see also Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012). "'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.'" *Norton*, 91 U.S. at 569 (Supreme Court's emphasis) (quoting Circuit Justice Story's opinion in *United States v. Mayo*, 1 Gall. 396 (C.C. D. Mass. 1813)).

In *Norton*, the Supreme Court held that the Act to Establish a Postal Money Order System, 13 Stat. at L. 76, was not revenue raising within the meaning of the Origination Clause. The Act provided that "[a]ll moneys received from the sale of money orders, all fees received for selling them, and all moneys transferred in administering the Act, are 'to be deemed and taken to be money in the Treasury of the United States.'" *Norton*, 91 U.S. at 568. Although revenues were taken into the Treasury, the *Norton* Court "accepted the Congressional purpose declared at the outset of the first section of the Postal Act: 'To promote public convenience, and to insure greater security in the transmission of money through the United States mails.'" *Herrada*, 887 F.2d at 525-26.[3]

[3] *Norton* addressed the interpretation of an 1804 federal statute, but the Supreme Court explicitly relied on Origination Clause principles. *See Norton*, 91 U.S. at 568-69.

In *Nebeker*, "the Court held that an Act of Congress providing a national currency secured by a pledge of United States bonds, to meet the expenses of executing the law, and imposing a tax on the average amount of the notes in circulation of banking associations organized under the statutes was not a revenue bill under the Origination Clause." *Herrada*, 887 F.2d at 526. "Noting that the 'main purpose that Congress had in view was to provide a national currency based upon United States bonds' and that the 'tax was a means for effectually accomplishing' that purpose, the Court found no purpose by the Act to raise revenue to be applied in meeting the expenses or obligations of the government." *Ibid*. (quoting *Nebeker*, 167 U.S. at 203).

In *Millard*, "the Court held that a bill providing for the taxation of property in the District of Columbia to provide funds for adequate railroad terminal facilities in the District of Columbia was not a bill to raise revenue." *Herrada*, 887 F.2d at 526. "The Court noted that '[w]hatever taxes are imposed are but means to the purposes provided by the act [i.e., to provide railroad terminal facilities].'" *Ibid*. (quoting *Millard*, 202 U.S. at 437 (alteration in *Herrada*)).

Likewise, 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.

The Supreme Court's precedents thus "instruct [courts] to consider the overarching purpose of an Act when one of its provisions is subject to an Origination Clause challenge." *Herrada*, 887 F.2d at 528; *accord 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. 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).

2. The primary purpose of the individual-coverage provision is not to raise revenue, but to "expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596; *accord Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012). Any revenue that that the individual-coverage provision may generate is "incidental to that provision's primary purpose." *Munoz-Flores*, 495 U.S. at 399.

That revenue-raising is not the primary purpose of the individual-coverage provision 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, 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.

The panel correctly rejected Sissel's invitation to announce a new two-part test for determining whether a measure is a bill for raising revenue for purposes of the Origination Clause. Panel Op. 14. Sissel proposed that a taxing measure should be regarded as a bill for raising revenue unless (1) it funds a particular government program or (2) is supported by another constitutional power such as the Commerce Clause power. *See ibid*. That two-pronged approach has no support in any judicial precedent or in the precedent of the House itself.

Indeed, although some Members of the House now support Sissel as *amici*, none claims to have raised an Origination Clause objection when the Affordable Care Act was under consideration. That silence is telling because 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 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 contemporaneous resolution was introduced with regard to H.R. 3590.[4]

C. The Individual-Coverage Provision Was An Amendment To A House-Originated Bill For Raising Revenue.

Sissel's claim fails even assuming that the individual-coverage provision is a bill for raising revenue, because the individual-coverage provision was an amendment to a House-originated bill for raising revenue. As such, the amendment was authorized by the second half of the Origination Clause, which grants the Senate the same power to amend a House-originated bill for raising revenue that the Senate has to amend all other bills. U.S. Const. art. I, § 7, cl. 1 ("the Senate may propose or concur with Amendments as on other Bills").

There is no dispute that the individual-coverage provision was an amendment to H.R. 3590, which originated in the House. All of the provisions of that House-originated bill were amendments to the Internal Revenue Code, and the bill included revenue-raising provisions as well as tax exemptions. *See* JA 113-118 (H.R. 3590 as passed by House). For example, Section 5 of the House-

[4] The House resolution on which plaintiff's *amici* rely was introduced three years after the Affordable Care Act was passed. *See* Rep. Franks Amicus Br. 1 (citing H.R. Res. 153, 113th Cong., introduced on April 12, 2013).

originated bill was projected to raise revenue by increasing the tax penalties owed for failing to file certain income tax returns. The bill's supporters thus emphasized that the bill's tax exemptions were "fully paid for" by its revenue-raising provisions. 155 Cong. Rec. H10551 (daily ed. Oct. 7, 2009) (Rep. Tanner); 155 Cong. Rec. E2459 (daily ed. Oct. 6, 2009) (Rep. Green) (similar).[5]

Sissel objects (Pet. 10-11) that the Senate struck the text of the House-originated bill and substituted the text of the Affordable Care Act. But substitution amendments have been employed by the Senate since the beginning of the Republic. *See* Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate of the United States* § 35, at 97 (1813) ("A new bill may be ingrafted, by way of amendment, on the words, 'Be it enacted,' &c."). The Senate has repeatedly used that procedure for revenue-raising legislation. *See*, *e.g.*, Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97–248, 96 Stat. 324 (1982) (tax increase signed into law by President Reagan); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (tax-reform bill signed by President Reagan); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 ("fiscal cliff" bill signed by President Obama). And courts of

[5] Similarly, the Joint Committee on Taxation projected that the House-originated bill would increase revenue by $86 million over a five-year period and by $7 million over a ten-year period. JCX-40-09, *Estimated Revenue Effects of H.R. 3590, The "Service Members Home Ownership Tax Act of 2009*" (Oct. 6, 2009), https://www.jct.gov/publications.html?func=startdown&id=3589 .

appeals have uniformly rejected Origination Clause challenges to that substitution procedure. *See*, *e.g.*, *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 164 (5th Cir. 1985) (rejecting Origination Clause challenge to TEFRA even though the Senate "struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal"); *accord Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd*, 749 F.2d 27 (3d Cir. 1984).

The Origination Clause grants the Senate the same power to amend a House bill for raising revenue as the Senate has to amend any other bill. The Constitution does not preclude the Senate from replacing the text of any other bill. Therefore, the Origination Clause does not preclude the Senate from replacing the text of a House bill for raising revenue. The Origination Clause is satisfied as long as the Senate amends a House-originated bill for raising revenue. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (rejecting an Origination Clause challenge to a corporation tax that the Senate "substituted" for a House-originated inheritance tax); *Rainey v. United States*, 232 U.S. 310, 317 (1914) (rejected an Origination

Clause claim because the challenged "section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House").[6]

[6] *See also* James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 1 (Congressional Research Service, March 15, 2011) ("The Senate … may generally amend a House-originated revenue measure as it sees fit."); *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."); S. Rep. No. 42-146, at 3 (1872) ("[t]he Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose" to a bill for raising revenue); 10 *The Documentary History of the Ratification of the Constitution* 1269 (Kaminski & Saladino eds. 1993) (William Grayson) (recognizing that, consistent with the Origination Clause, the "Senate could strike out every word of the bill, except the word *Whereas*, or any other introductory word, and might substitute new words of their own."); *id*. at 1268 (James Madison) (agreeing with Grayson's understanding of the Senate's amendment power).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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OCTOBER 2014

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this response has been prepared in 14-point Times New Roman, a proportionally spaced font, and does not exceed 15 pages, excluding material not counted under Rule 32.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2014, I electronically filed the foregoing response 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.

/s/ Alisa B. Klein
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