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

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| MATT SISSEL,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,<br><br>Defendants. | ) | Case No. 1:10-cv-01263 (BAH) |

**DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

**INTRODUCTION**

Plaintiff Matt Sissel seeks to overturn the minimum coverage provision of the Patient Protection and Affordable Care Act ("ACA"), 26 U.S.C. § 5000A, despite the fact that on June 28, 2012, the Supreme Court upheld Section 5000A as a valid exercise of Congress's taxing power. *See Nat'l Fed'n of Indep. Business ("NFIB") v. Sebelius*, 132 S. Ct. 2566, 2601 (2012). In response to the Court's decision, Plaintiff has amended his complaint to make what he calls "only a minor amendment" to his original claim. Pl.'s Mot. to Amend 1. In his new complaint, Plaintiff continues to argue that Section 5000A is unconstitutional in that it exceeds Congress's enumerated powers. Am. Compl. ¶ 1. In doing so, Plaintiff attempts to parse the language of Section 5000A to subdivide the provision into a requirement to purchase insurance and a penalty on those who fail to do so. *Id.* But that interpretation has been considered and rejected by the Supreme Court, which held that Section 5000A as a whole is sustainable as an exercise of Congress's tax power, providing for a monetary assessment on those non-exempt individuals who lack qualifying insurance. Individuals like Plaintiff are not required to buy insurance, but

instead may lawfully choose to pay the assessment. Plaintiff's amendment thus makes only semantic changes to advance a theory that the Supreme Court has already rejected. Because the Court has held that Section 5000A is a valid exercise of Congress's taxing power, Plaintiff's first claim should be dismissed.

Plaintiff's amended complaint also adds a new claim, in which he challenges the ACA as a violation of the Origination Clause of the Constitution. Am. Compl. ¶¶ 35-41. The Supreme Court has never invalidated an Act of Congress on this basis, and the ACA was enacted in compliance with the Clause's requirements. The Origination Clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7. The ACA originated in the House and is not a "Bill for raising Revenue" within the particular meaning of the Origination Clause.

Because neither count of his amended complaint states a claim upon which relief can be granted, Plaintiff's amended complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

## BACKGROUND

On March 23, 2010, President Obama signed into law the ACA, a comprehensive effort to reform health insurance markets, expand access to health care services, and control costs. *See* Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), § 1501(a)(2)(C), (G) (statement of Congressional findings). Central to the law's efforts to expand access to health care is the minimum coverage provision, which requires that all Americans, with specific exemptions, either maintain a minimum level of health insurance coverage or pay a penalty on their tax returns starting with tax year 2014. *See* 26 U.S.C. § 5000A.

Plaintiff filed this suit on July 26, 2010, asserting in a single count that the minimum coverage provision was unconstitutional because it was enacted without authority under the Commerce Clause. *See* Orig. Compl. ¶¶ 32-35. His original complaint sought "a declaration that the Act's Individual Mandate is unconstitutional and invalid both on its face and as applied to him," *id.* ¶ 20; a declaration that the entire Affordable Care Act is invalid, *id.* ¶ 21; and injunctive relief enjoining the operation of Section 5000A and the assessment of penalties for those non-exempted individuals who do not maintain a minimum level of health insurance, *id.* at 12. After Defendants moved to dismiss the complaint, the case was stayed pending the Supreme Court's resolution of *National Federation of Independent Business v. Sebelius*, No. 11-393, in which the plaintiffs raised a challenge fundamentally identical to Plaintiff's.

On June 28, 2012, the Supreme Court upheld the minimum coverage provision as a valid exercise of Congress's taxing power. *See NFIB*, 132 S. Ct. at 2594-2600. In its opinion, the Supreme Court upheld Section 5000A in its entirety. *See id.*; *see also id.* at 2601 ("The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.") (Roberts, C.J.), 2609 ("I agree with the CHIEF JUSTICE . . . that the minimum coverage provision is a proper exercise of Congress' taxing power.") (Ginsburg, J., concurring).

In response to the Supreme Court's decision, Plaintiff sought leave to amend his complaint. His amended complaint makes only minor changes to his existing Commerce Clause challenge. *Compare, e.g.*, Orig. Compl. ¶ 20 ("Plaintiff seeks a declaration that the Act's Individual Mandate is unconstitutional and invalid both on its face and as applied to him.") *with* Am. Compl. ¶ 20 ("Plaintiff specifically seek a declaration that the Act's requirement to buy health insurance is unconstitutional under the Commerce Clause, and invalid both on its face and

as applied to him"). He also adds a second claim, asserting that Section 5000A was enacted in violation of the Origination Clause. *See* Am. Compl. ¶¶ 35-41.

## STANDARD OF REVIEW

Defendants move to dismiss Plaintiff's amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In applying this rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).[1]

## ARGUMENT

### I. Plaintiff's Claim That Section 5000A Exceeds Congress's Enumerated Powers Has Already Been Rejected by the Supreme Court

Plaintiff's original complaint asserted in a single claim that the minimum coverage provision was enacted in excess of Congress's enumerated powers. In amending his complaint, Plaintiff has made only semantic changes to his claim. He now asserts that "the Act's requirement to buy health insurance is unconstitutional under the Commerce Clause." Am. Compl. ¶ 20. That claim is squarely foreclosed by the Supreme Court's decision in *NFIB*, which upheld Section 5000A as a valid exercise of Congress's taxing power. While his amended complaint replaces the term "individual mandate" with "purchase requirement," the Supreme Court has held that Section 5000A is not a mandate *or* a requirement to purchase insurance. *See, e.g.*, *NFIB*, 132 S. Ct. at 2596-97 ("While the individual mandate clearly aims to induce the

[1] Because Plaintiff raises facial challenges to the minimum coverage provision, he bears the burden of showing that "no set of circumstances exist under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), that is, "that the law is unconstitutional in *all* of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added).

purchase of health insurance, it need not be read to declare that failing to do so is unlawful."); *id.* at 2597 ("[I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law."); *id.* ("[T]he shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.").

Plaintiff's theory appears to be that Section 5000A contains two components – a regulatory "requirement" to purchase insurance, 26 U.S.C. § 5000A(a), and a regulatory "penalty" to enforce the requirement, 26 U.S.C. § 5000A(b) – only one of which was considered by the Supreme Court. But the Court approached the statute differently. The Court recognized "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." *NFIB*, 132 S. Ct. at 2598. Plaintiff's revised enumerated-power challenge to Section 5000A thus depends entirely on an interpretation of Section 5000A that the Supreme Court has definitively rejected. It should accordingly be dismissed.

**II. The ACA's Enactment Was Consistent With the Origination Clause**

Plaintiff has also amended his complaint to add a claim that the ACA violates the Origination Clause. The Origination Clause provides 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. The Supreme Court has reviewed only eight Origination Clause claims in its history and has *never* invalidated an Act of Congress on that basis. Plaintiff presents no reason to break new ground. Plaintiff's claim should be dismissed for two independent reasons: the ACA originated in the House and, in any event, is not a "Bill for raising Revenue" within the meaning of the Origination Clause.

First, as Plaintiff himself acknowledges, the bill that became the ACA originated in the House as H.R. 3590, a bill that modified certain tax-credit, tax-penalty, and estimated-tax provisions of the Internal Revenue Code. *See* Ex. 1 (list of Congressional actions taken on H.R. 3590); Pl.'s Am. Compl. Ex. 1 (text of H.R. 3590 as introduced in the House). After the bill passed the House on October 8, 2009, the Senate amended it by striking its text and substituting the provisions that ultimately became the Act. After passage in the Senate on December 24, 2009, the House agreed to the bill as amended on March 21, 2010. The enrolled bill was submitted to the President, who signed it into law on March 23, 2010.

This commonplace procedure satisfied the Origination Clause. It makes no difference that the Senate amendments to H.R. 3590 were expansive. Article I, Section 7 provides that "the Senate may propose or concur with Amendments as on other Bills." The Senate may amend a House bill in any way it deems advisable, even by amending it with a total substitute, without running afoul of the Origination Clause. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (Senate amendment substituting a corporation tax for an inheritance tax was valid); *Boday v. United States*, 759 F.2d 1472, 1476 (9th Cir. 1985); *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (holding that the Origination Clause was satisfied where the Senate replaced the "entire text of the House bill except for its enacting clause"); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984) ("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)).

Plaintiff contends that the bill's origination in the House should be disregarded because the Senate's amendment was not "lawful," insofar as "the subject matter of the one had nothing whatsoever to do with the other." Pl.'s Mot. to Amend 9; *see also* Am. Compl. ¶ 40. To that

end, Plaintiff relies on *Flint*, which rejected an Origination Clause challenge and observed that the Senate's amendment was "germane to the subject-matter of the [House] bill." 220 U.S. at 143. But the question of whether an amendment is germane is entrusted not to the courts but instead to the Senate, in proposing the amendment, and to the House, in accepting it. "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." *Rainey v. United States*, 232 U.S. 310, 317 (1914); *see also United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in the judgment).[2]

Second, the minimum coverage provision in any event is not a "Bill for raising Revenue" within the particular meaning of Article I, Section 7, so its enactment would be consistent with the Origination Clause even assuming *arguendo* that it had originated in the Senate. Although, as noted above, Congress exercised its powers under the General Welfare Clause when it enacted the minimum coverage provision, that did not convert the provision into a "Bill for raising Revenue" for purposes of the Origination Clause. For the Clause to apply, it is not sufficient to show that the bill generates proceeds or was an exercise of Congress's taxing power. Rather, unlike the General Welfare Clause, the Origination Clause applies only if generating revenue is the legislation's key purpose. As the Supreme Court has stated, "revenue bills are those that levy

[2] To hold that the Origination Clause is satisfied, this Court need only determine that the bill that became the ACA originated as H.R. 3590, whatever the substance of that bill initially. Even so, a more detailed analysis of the legislative history of the Act confirms that the substance of the minimum coverage provision, including the tax penalty, originated in the House. The minimum coverage provision was first passed in a separate House-originated bill. H.R. 3962, 111th Cong., § 501 (passed by the House on Nov. 7, 2009).

Moreover, the minimum coverage provision and other ACA provisions relating to revenues were subsequently amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, which itself originated in the House as H.R. 4872. Whatever argument Plaintiff makes regarding H.R. 3590, he says nothing about this subsequent legislation. The current statutory provision at Section 5000A is based in part on the enactment of H.R. 4872, the origination of which is undisputed.

taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202-03 (1897) (statute imposing tax as "a means . . . of giving to the people a currency" was not bill for raising revenue); *see also Millard v. Roberts*, 202 U.S. 429, 437 (1906) (statute imposing property taxes designed to finance railroad construction activities was not bill for raising revenue). Thus, a statute that is valid under the General Welfare Clause because it is productive of some revenue need not originate in the House of Representatives under the Origination Clause if that revenue is incidental to the overall purpose of the statute. *See Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999) (observing that "Taxing Clause and Origination Clause challenges . . . represent separate lines of analysis"). The different scope of the constitutional provisions is underscored by their language: Congress's tax power authorizes it to "lay and collect Taxes, Duties, Imports, and Excises," Const. Art. I, § 8, cl. 1, while the Origination Clause uses a different term ("Revenue") and applies only to "Bills *for* raising Revenue," Const. Art. I, § 7, cl. 1 (emphasis added).

In both *Nebeker* and *Millard*, the Supreme Court held that an assessment that Congress had labeled as a "tax" was not subject to the Origination Clause, because each bill was designed to serve other purposes, even though it incidentally generated revenue. In *Nebeker*, the challenged provision of the National Bank Act taxed the circulating notes of banking associations. 167 U.S. at 202-03. The Court concluded that the provision was not a bill for raising revenue within the meaning of the Origination Clause 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." *Id*. at 203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to provisions

levying taxes on property within the District of Columbia to finance railroad construction. 202 U.S. at 437. Again, the Court determined that the challenged measures were not subject to the Origination Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." *Id*.

Most recently, in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court rejected a challenge to a provision of the Victims of Crime Act of 1984 that required courts to impose a monetary "special assessment" on any person convicted of a federal misdemeanor offense. 495 U.S. at 401. The Court concluded that the provision was not a bill for raising revenue, even though the challenged statute provided a mechanism for some of the funds collected to be deposited into the general fund of the Treasury. *Id.* at 398-400. The Court reasoned that "[a]ny revenue for the general Treasury that [the special assessment provision] creates is [only] incidental to [the] provision's primary purpose" of compensating and assisting crime victims. *Id*. at 399.

Under this standard, the ACA is not a "Bill[] *for* raising Revenue." U.S. Const. art. I, § 7 (emphasis added). The provisions of the Act that generate revenue, *see, e.g.*, Pub. L. No. 111-148, §§ 1501, 10106 (minimum coverage provision); *id*. § 1513 (employer responsibility provision), are not designed with a primary purpose "to raise revenue to be applied in meeting the expenses or obligations of the government," *Nebeker*, 167 U.S. at 203; they are "but means to the purposes provided by the [A]ct." *Millard*, 202 U.S. at 437. With respect to the payment associated with the minimum coverage provision, the Supreme Court recognized that, "[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. The central purpose of the Act, and of the minimum coverage provision in particular, is to improve the nation's health care system by

reforming insurance markets, reducing the number of Americans without health coverage, and controlling costs. Congress was clear about these goals: it found that the minimum coverage provision, "together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services." Pub. L. No. 111-148, § 1501(a)(2)(C). According to Congress, the provision will "achieve[] near-universal coverage by building upon and strengthening the private employer-based health insurance system," "improve financial security for families," and "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Id.* § 1501(a)(2)(D), (E), (G).

The Act accomplishes these purposes through a series of interrelated provisions, many, if not most, of which have nothing to do with raising revenue. As the D.C. Circuit recognized with respect to the minimum coverage provision in particular,

> [C]ongressional findings never suggested that Congress's purpose was to raise revenue. The Government estimates the penalty would raise $4 billion, but congressional findings emphasize 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*, __ S. Ct. __ (2012). Conspicuously absent from Congress's discussion of the objectives of the minimum coverage provision is any reference to the revenue it would generate; indeed, by encouraging the purchase of health insurance, the provision will operate most successfully by generating even less revenue. The fact that revenue-raising was not the minimum coverage provision's primary purpose is immaterial when determining whether it is a proper exercise of Congress's taxing power because it is settled that "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)). The absence of such a primary revenue-raising purpose, however, is dispositive for purposes of the Origination Clause. *See Millard*, 202 U.S. at 437.

Finally, the ACA's compliance with the Origination Clause is underscored by the House's acceptance of the Senate's amendment. The House enforces the Origination Clause through a procedure known as "blue slipping." "When a Senate bill or amendment to a House bill infringes on the constitutional prerogative of the House to originate revenue measures, that infringement may be raised in the House as a matter of privilege." H.R. Rep. No. 111-708, at 92 (2011). Any Member may raise the issue, by the introduction of a "blue slip" resolution, and following passage of a resolution by the full House the measure is returned to the Senate.[3] *Id.* at 92-93; *see also* Cong. Research Serv., RL 31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (2011) at 9. Alternatively, rather than return the measure, the House could pass a similar or identical House bill. *See* H.R. Rep. No. 111-708 at 93. During the 111th Congress, the House returned six bills to the Senate due to concerns regarding the Origination Clause. Notably, the House did not pass a blue slip resolution in response to the Senate's passage of H.R. 3590. It is telling that the House of Representatives, which has a strong institutional interest in enforcing its prerogatives under the Origination Clause, did not believe there was any Origination Clause defect with the enactment of the ACA.

## CONCLUSION

For the reasons stated herein, the Court should dismiss Plaintiff's amended complaint for failure to state a claim upon which relief can be granted.

Dated: November 8, 2012.

Respectfully submitted,

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Acting Assistant Attorney General

[3] "This practice is referred to as 'blue slipping' because the resolution returning the offending bill to the Senate is printed on blue paper." H.R. Rep. No. 111-708, at 93.

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