UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF MATT SISSEL'S OPPOSITION TO MOTION TO DISMISS
[ORAL ARGUMENT REQUESTED]

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INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff Matt Sissel filed suit on July 26, 2010, to challenge the constitutionality of 26 U.S.C. § 5000A, generally known as the Individual Mandate provision of the Patient Protection and Affordable Care Act (PPACA). This provision imposes a tax on most Americans, including Sissel, if they do not buy and maintain a comprehensive, federally-approved health insurance plan. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2595-2600 (2012). An individual must maintain this "minimum essential coverage" or pay the tax, even if the individual believes it more financially feasible to purchase a less comprehensive plan (like catastrophic insurance), or—like Sissel—to pay for his own health care expenses out of pocket.

Sissel is a United States citizen and a permanent resident of Iowa. He operates an art studio and gallery in Cedar Rapids, and works part-time as a Public Affairs Specialist for the National Guard. First Amended Complaint (FAC) ¶ 5. Sissel currently is self-employed as an artist and markets his own artwork for sale. He is financially stable, has an annual income that requires him to file federal tax returns, and could afford health insurance if he wanted to obtain such coverage. But he does not have, need, or want to purchase health insurance. Since he left the National Guard almost four years ago, he has been uninsured, and he does not qualify for government-subsidized health insurance. *Id*. ¶¶ 5, 24.[1]

Sissel is healthy, has no pre-existing medical conditions, and pays out of pocket any medical expenses that arise. *Id.* ¶¶ 5, 24. He is not delinquent on any health-related expenses. *Id.* ¶ 24.

[1] As indicated in his November 1, 2012, letter to the Court, Sissel has been called for active duty training at Fort Meade, which will last until February 11, 2013. During that time, Sissel will temporarily have federally-provided health insurance. This does not moot Sissel's claim, since he will lose this coverage when his active-duty service ends.

Sissel intends to continue to self-insure because he believes the cost of health insurance premiums is excessive. *Id.*

On November 15, 2010, Defendants moved to dismiss Sissel's complaint, but that motion was still pending when, on November 14, 2011, the Supreme Court granted certiorari in *NFIB*, 132 S. Ct. 2566, to address the constitutionality of Section 5000A. All proceedings were then stayed to await the Court's decision. That decision was announced on June 28, 2012. Chief Justice Roberts joined the four dissenting Justices in ruling that the provision of the PPACA that *compelled purchase* of health insurance was unconstitutional under the Commerce Clause. *See id.* at 2589 (opn. of Roberts, C.J.) ("The Framers gave Congress the power to *regulate* commerce, not to *compel* it."); *id.* at 2643 (opn. of Scalia, Kennedy, Thomas, Alito, JJ.) (PPACA "exceeds federal power . . . in mandating the purchase of health insurance."). As the majority concluded, "our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity." *Id.* at 2599. But Chief Justice Roberts also joined four other Justices in upholding the constitutionality of what the Court characterized as "a tax on not obtaining health insurance." *Id.* at 2598.[2]

Sissel was given leave on October 11, 2012, to file an amended complaint reasserting his original allegation that the compulsory purchase of insurance under Section 5000A exceeded Congress' authority under the Commerce Clause, and adding a new cause of action: that the tax on not purchasing health insurance, found in Section 5000A(b), was invalid because it did not originate in the House of Representatives as required by Article I, section 7, clause 1 of the Constitution. Defendants have moved to dismiss on the grounds: (1) that the *NFIB* decision affirmed the

[2] Unless otherwise specified, citations to *NFIB* are to the portions of the opinion identified therein as the opinion of the Court.

constitutionality of Section 5000A in its entirety; (2) that Congress complied with the Origination Clause when enacting Section 5000A; and (3) that the tax on not having health insurance was not a "bill for raising revenue" and therefore not subject to the Origination Clause.

These arguments are unavailing for three reasons. First, the *NFIB* Court distinguished between a legal command to act or refrain from acting, which five Justices held to be beyond Congress' enumerated powers, and a tax on not having insurance, which the Court held was an exercise of the taxing power. Second, Congress violated the Origination Clause because it fashioned a revenue-raising bill when it deleted the full text of a House-enacted bill that was not a bill for raising revenue, and replaced that text with what became Section 5000A. Third, the Origination Clause does apply because the Section 5000A tax is not a "penalty assessment[]" or "fine[]" exempt from the Origination Clause, *see United States v. Ashburn*, 884 F.2d 901, 904 (6th Cir. 1989), but rests solely on the Tax Clause, and therefore must comply with the Constitution's limits on the power to tax. *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943).

For these three reasons, the Government's motion should be denied.

ORAL ARGUMENT REQUESTED

Pursuant to Local Rule 7(f), Sissel requests an oral hearing on the Government's Motion to Dismiss.

STANDARD OF REVIEW

The Government moves to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This requires the Court to "accept as true all material allegations of the complaint, and [to] construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Sissel's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A court may not grant a motion to dismiss

for failure to state a claim "even if it strikes a savvy judge that . . . recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 552, 556 (2007) (internal citation and quotation marks omitted). So long as the pleadings suggest a "plausible" scenario to "sho[w] that the pleader is entitled to relief," the Court may not dismiss. *Id.* at 555-56.

ARGUMENT

Plaintiff Matt Sissel's Amended Complaint makes two main arguments: First, that the purchase requirement provision of the Patient Protection and Affordable Care Act (PPACA), 26 U.S.C. § 5000A(a), is invalid as an exercise of Congress' power to regulate interstate commerce, and second, that insofar as Section 5000A(b) imposes a tax on persons who fail to obtain "minimum essential coverage," it is invalid because it did not originate in the House as required by the Origination Clause, U.S. Const. art. I, § 7, cl. 1.

I

SISSEL HAS STATED A CAUSE OF ACTION UNDER THE COMMERCE CLAUSE

Whatever else the Supreme Court did in *NFIB*, 132 S. Ct. 2566, it did not hold that the purchase requirement is a constitutional regulation of interstate commerce or a rule necessary and proper to carrying into effect a regulation of commerce. On the contrary, as Chief Justice Roberts wrote, "[t]he Federal Government does not have the power to order people to buy health insurance." *Id.* at 2601 (opn. of Roberts, C.J.). This position was endorsed by four other Justices, *see id.* at 2644, *et seq.*, and therefore is a holding of the Court. *See also id.* at 2599 ("The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.").

The government does not appear to dispute this point in its motion, but asserts that the Court "held that Section 5000A *as a whole* is sustainable as an exercise of Congress' tax power." Defendants' Motion to Dismiss Plaintiff's Amended Complaint (MTD) at 1 (emphasis added). In fact, the opinion of the Court in *NFIB* was that only the *tax assessment* of the PPACA, 26 U.S.C. § 5000A(b), was a constitutional "tax on those without health insurance," 132 S. Ct. at 2601 (opn. of Roberts, C.J.), but that the statute cannot and does not compel individuals to buy insurance in the first place.

The distinction between the *purchase requirement* and the *tax on not having insurance* was critical to the *NFIB* decision, because "the taxing power does not give Congress the same degree of control over individual behavior" as the Commerce Clause does. *Id.* at 2600. As the majority explained, speaking through Chief Justice Roberts, the *purchase requirement* was a compulsory order, which might have been backed by criminal penalties and other sanctions, while a tax "is limited to requiring an individual to pay money into the Federal Treasury, no more." *Id.* A tax leaves individuals "with a lawful choice to do or not do a certain act." *Id.* The Court underscored this point when it observed that if "the so-called tax" on non-compliance were to become so severe that it "loses its character as [a tax]" and becomes in effect "regulation and punishment," then the tax, too, would be unconstitutional. *Id.* at 2599 (citations and quotation marks omitted).

It is therefore the Supreme Court, not Sissel, that, in the government's words, "subdivide[d] the provision into a requirement to purchase insurance and a [tax] on those who fail to do so." MTD at 1. That distinction was made on pages 2599 and 2600 of the opinion of the Court in *NFIB*. While the Court did refer throughout the opinion to "section 5000A," it is evident from the context that the mandatory aspect of that section—which purported "to compel individuals not engaged in commerce to purchase an unwanted product," *id.* at 2586 (opn. of Roberts, C.J.)—was ruled unconstitutional;

what was upheld was the "tax citizens may lawfully choose to pay in lieu of buying health insurance." *Id.* at 2597.

The Court made clear that the distinction between an unconstitutional mandate to purchase insurance and an allowable tax in lieu of such purchase was at the very heart of the Court's ruling, and Chief Justice Roberts hinged his decisive opinion on that distinction. "Section 5000A," he wrote, "would . . . be unconstitutional if read as a command," but if the non-possession of health insurance is seen only as the triggering element for a tax, then the tax would be constitutional. *Id.* at 2601 (opn. of Roberts, C.J.).

Questions remain as to the effect of the *NFIB* decision with regard to the Commerce Clause. In their separate opinion, Justice Ginsburg, joined by Justices Kagan, Breyer, and Sotomayor, characterized Chief Justice Roberts' conclusion that the purchase requirement exceeded both the Commerce and Necessary and Proper Clauses as non-binding dicta, *see id.* at 2629 & n.12 (opn. of Ginsburg, J.). Chief Justice Roberts denied this. *Id.* at 2600-01 (opn. of Roberts, C.J.).

The Ninth Circuit Court of Appeals and several federal district courts have expressed confusion over the precise legal effect of the Commerce Clause elements of the *NFIB* decision. *See United States v. Henry*, 688 F.3d 637, 642 n.5 (9th Cir. 2012) (noting "considerable debate about whether the statements about the Commerce Clause are dicta or binding precedent"); *United States v. Spann*, No. 3:12-CR-126-L, 2012 U.S. Dist. LEXIS 136282 (N.D. Tex. Sept. 24, 2012) (same); *United States v. Williams*, No. 12-60116-CR-RNS, 2012 U.S. Dist. LEXIS 110371 (S.D. Fla. Aug. 7, 2012) (finding that Commerce Clause language in *NFIB* was a holding); *United States v. Moore*, No. CR-12-6023-RMP, 2012 U.S. Dist. LEXIS 124582, at *7 (E.D. Wash. Aug. 31, 2012) (describing Chief Justice Roberts' Commerce Clause language as a "concurring opinion").

Equally significant, the Obama Administration still maintains that Section 5000A is not an exercise of the tax power, and that it is instead an exercise of the Commerce Clause power. *See*, *e.g.*, Douglas Brinkley, *Obama and the Road Ahead: The Rolling Stone Interview*, Rolling Stone, Oct. 25, 2012[3] (President Obama: "It was interesting to see [the Court] take the approach that this was constitutional under the taxing power. The truth is that if you look at the precedents dating back to the 1930s, this was clearly constitutional under the Commerce Clause."); Mary Bruce, *White House Sticks to Individual Mandate as 'Penalty,' Not Tax*, ABC News, June 29, 2012[4] (White House Press Secretary Jay Carney asserting that it is not a tax but a penalty).

This case is an appropriate vehicle for resolving the confusion over whether lower courts are bound by Chief Justice Roberts' statement (endorsed by four other Justices) that the purchase requirement exceeds the Commerce Clause power. *See NFIB*, 132 S. Ct. at 2593 (Roberts, C.J., concluding that "[t]he commerce power thus does not authorize the mandate," and using an "accord" cite to the joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). If Section 5000A only imposes a tax, and is not an exercise of the Commerce Clause power, then this Court must weigh the merits of Sissel's argument that the tax is invalid under the Origination Clause. On the other hand, if this Court is not bound by the conclusion of five Justices in *NFIB* that the purchase requirement is unconstitutional under the Commerce Clause, then the Court could reject that conclusion as non-binding dicta, and hold that Section 5000A is in fact a regulation of interstate commerce—to which the Origination Clause does not apply—and then dismiss this case without considering Sissel's Origination Clause argument. Furthermore, if *NFIB*'s Commerce Clause language is dicta, then

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[3] *Available at* http://www.rollingstone.com/politics/news/obama-and-the-road-ahead-the-rolling-stone-interview-20121025?page=3 (last visited Nov. 13, 2012).

[4] *Available at* http://abcnews.go.com/blogs/politics/2012/06/white-house-sticks-to-individual-mandate-as-penalty-not-tax/ (last visited Nov. 13, 2012).

Sissel could still risk penalties for non-compliance beyond a simple increase in the amount of taxes due. *See NFIB*, 132 S. Ct. at 2600 ("An individual who disobeys [a regulation of commerce] may be subjected to criminal sanctions . . . includ[ing] not only fines and imprisonment, but all the attendant consequences of being branded a criminal."). This Court can resolve Sissel's cognizable legal injury (or prevent future injury) by issuing the relief sought. Therefore dismissal is unwarranted.

In short, this Court cannot dispose of Sissel's Origination Clause arguments unless it first determines that, under *NFIB*, Section 5000A is not a Commerce Clause enactment, but a tax. Sissel alleges that in accordance with the views of five Justices in *NFIB*, it is not a valid exercise of the Commerce Clause power. The government is obviously not entitled to judgment on the merits of *that* allegation. It would at best be entitled to dismissal as moot—but only if this Court also concludes that Section 5000A's tax provision is a *constitutionally valid tax*. That latter issue, however, requires adjudication of Plaintiff's Origination Clause Cause of Action. Accordingly, the government's motion to dismiss Sissel's Commerce Clause claims must be denied, absent a specific finding that Section 5000A constitutes an allowable tax under the Origination Clause, an issue not decided by the Supreme Court.

II

SISSEL HAS STATED A CAUSE OF ACTION UNDER THE ORIGINATION CLAUSE

The government asks the Court to dismiss Sissel's Origination Clause arguments, first by claiming that the challenged statute did originate in the House, and, alternatively, that it was not a "bill for raising revenue." MTD at 5. These arguments are without merit.

A. PPACA Originated in the Senate, Not as a Valid Amendment to a House Bill for Raising Revenue

The government's argument that Section 5000A originated in the House is absurdly formalistic. It cannot be disputed that Section 5000A originated in the *Senate* when the Senate struck the entire text of H.R. 3590, a House-passed bill that was not for raising revenue, and replaced it entirely with the text that ultimately became the PPACA—a procedure that has been called "gut-and-amend." *See* Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Pa. L. Rev. 239, 279 (2004) ("[T]hrough a process called 'gut and amend' . . . a bill that had gone through all the constitutionally mandated procedures was used as a shell with its language replaced by an entirely new and unrelated" purpose.). But this is not "origination" as the Origination Clause contemplates. A bill *originates* in the House when it is *initiated* there—*i.e.*, when its substance is submitted for deliberation and enactment in the House in the first instance. *Hubbard v. Lowe*, 226 F. 135, 137-38 (S.D.N.Y. 1915) (Origination Clause requires that the "chrysalis" of a statute be initiated in the House). In *United States v. Munoz-Flores*, 863 F.2d 654, 661 (9th Cir. 1988), *rev'd on other grounds*, 495 U.S. 385 (1990), the Ninth Circuit Court of Appeals determined that an appropriation bill with a legislative history similar to PPACA's originated in the Senate because the Senate "clearly initiated" that bill. It had been "introduced in the Senate Judiciary Committee" and "was first passed by the Senate and was only adopted by the House . . . later." *Id.* That bill, like the legislation challenged here, was finally attached by the Senate as an amendment to a bill that had already passed the House. *See id.* at 660-61. But that did not mislead the court of appeals, which concluded that the bill nevertheless "originated in the Senate." *Id.* at 661. The PPACA also originated in the Senate because, as the government acknowledges, MTD at 6, it was introduced first

in the Senate in the form of a gut-and-amend substitute for a House bill that was not a bill for raising revenue. It was then passed, first by the Senate, and afterwards by the House.

The government cites a number of cases for the proposition that for the Senate to replace the full text of a House-enacted non-revenue bill with its own bill for raising revenue suffices under the Origination Clause. But none of those cases stand for such a proposition. In prior Origination Clause cases, the Senate amended House bills that were *already bills for raising revenue*, by altering or adding provisions that also related to raising revenue. For example, in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), the House passed a bill creating one kind of tax, which the Senate amended by replacing it with a different kind of tax. The Supreme Court ruled this permissible because the final bill "originated in the House of Representatives *and was there a general bill for the collection of revenue.*" *Id.* at 143 (emphasis added). The Senate's amendment was "germane to the subject-matter of the bill," so that it was "not beyond the power of the Senate to propose." *Id.* Similarly, in *Rainey v. United States*, 232 U.S. 310 (1914), the Court upheld the tax because it "was proposed by the Senate as an amendment *to a bill for raising revenue which originated in the House*." *Id.* at 317 (emphasis added). And the many cases challenging the constitutionality of the 1986 TEFRA tax increase involved a Senate replacement for a House-enacted bill that was itself a bill for raising revenue. *See*, *e.g.*, *Boday v. United States*, 759 F.2d 1472, 1476 (9th Cir. 1985); *Frent v. United States*, 571 F. Supp. 739, 742 (E.D. Mich. 1983), *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984). Here, by contrast, it is undisputed that H.R. 3590 was *not* originally a bill for raising revenue. Unlike in the prior cases, the Senate's gut-and-amend procedure made H.R. 3590 for the first time into a bill for raising revenue. The precedents the government cites are therefore inapplicable.

The decisions in *Flint* and *Rainey* were dictated by the constitutional provision allowing the Senate to "propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. But these decisions recognized that this Clause requires Senate amendments to be "germane" to the subject of the original House bill, which must be a bill for raising revenue prior to any such amendments. *See Flint*, 220 U.S. at 142; *see also Munoz-Flores*, 863 F.2d at 661 ("[T]he power of the Senate to amend a bill originating in the House is not unlimited. The Senate's amendment must be germane to the subject matter of the House bill."); *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) ("*[A]ll* legislation relating to taxes . . . must be initiated in the House," although "once a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform *a proposal lowering taxes* [] into one raising taxes." (emphasis added)).

The germaneness requirement ensures that the Senate does not try to use its power to amend as a means of evading the Origination Clause. *See also Sperry Corp. v. United States*, 12 Cl. Ct. 736, 742 (1987), *rev'd on other grounds*, 853 F.2d 904 (Fed. Cir. 1988) ("[T]he Senate . . . may not attach a revenue raising bill to a non-revenue raising House bill."). To emphasize: Sissel does *not* challenge the gut-and-amend procedure generally; he challenges the constitutionality of a bill for raising revenue which originated in the Senate through the use of that device.[5] No court has ever held that the Senate can use the gut-and-amend procedure to create from scratch a bill for raising revenue. On the contrary, every court to address the question has held that the Senate must respect

[5] The Senate's own rules regard legislation that, like PPACA, begins in the Senate as an amendment in the nature of a substitute as having *originated* in the *Senate*. *See* Alan S. Frumin, ed., *Riddick's Senate Procedure* 90 (1992) ("In the case of a complete substitute for a bill . . . the text proposed to be inserted . . . [is] regarded for the purpose of amendment as a question or as original text and not as an amendment in the first degree.").

the Origination Clause, and that "courts will strike down a law when Congress has passed it in violation of such a command." *Munoz-Flores*, 495 U.S. at 396.

Courts reviewing previous Origination Clause challenges have been conscientious about requiring that any Senate amendment must be to House-approved *bill for raising revenue*, and that the Senate may not take a House-approved bill that is *not for raising revenue* and transform it through a purported amendment into a bill for raising revenue. Since H.R. 3590 was not a bill for raising revenue when it originated in the House, the procedure by which the Senate made it for the first time into a bill for raising revenue can find no shelter in *Flint*, *Boday*, *Frent*, *Armstrong*, or other cases the government cites.

Defendants do not contend, as they cannot, that the Senate's "amendment" to H.R. 3590 was "germane" to that bill; they contend instead that this Court is barred from inquiring whether that amendment was within constitutional boundaries. MTD at 7. But the Supreme Court explicitly rejected this argument in *Munoz-Flores*, 495 U.S. at 396-98, when it held that Origination Clause challenges *are* justiciable, and rejected the arguments of Justices Stevens and Scalia that courts are conclusively bound by Congress' statement that a bill was validly passed. The majority concluded that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments." *Id.* at 391.

The government also contends that the Origination Clause was satisfied because "the substance of" Section 5000A, including the tax, originated in the House in *another* bill: H.R. 3962. MTD at 7 n.2 (emphasis added). This simply means that a *similar* bill passed the House in 2009. But the text of that bill, H.R. 3962, differed significantly from the language that ultimately became the PPACA. That bill would have imposed a 2.5% "tax on individuals without acceptable health

care coverage," and this did not pass the Senate.[6] The PPACA originated in Senate Amendment 2786, which struck out the full text of H.R. 3590, and substituted instead a differently worded provision that imposed a "shared responsibility penalty" of at least $750 for a person who does not obtain "minimum essential coverage." *See* 155 Cong. Rec. S11642 (Nov. 19, 2009). In short, H.R. 3962 and Senate Amendment 2786 were different bills in name, number, and content. Whatever similarities they may have had "in substance," this cannot satisfy the constitutional obligation that all bills for raising revenue must originate in the House. To hold that that requirement is satisfied whenever the Senate initiates legislation similar to something the House considered at some previous date would be to rob *Flint*'s "germaneness" requirement of all meaning. The Senate could then originate bills for raising revenue whenever it chose language that merely resembled language from some obsolete House-generated bill.[7]

Nor can the House's subsequent passage of the Senate-created PPACA, or of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), purge the legislation of its constitutional violation. In *Munoz-Flores*, 863 F.2d at 660-61, the House of Representatives also subsequently passed legislation which included a Senate-originated bill for raising revenue, but the court of appeals still found that Congress had violated the Origination Clause. As the Supreme Court made clear in *Munoz-Flores*, the House's failure to employ a blue slip procedure or otherwise object to the Senate's unconstitutional action does not relieve federal courts of their duty to enforce constitutional requirements. *See* 495 U.S. at 393 ("In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been

[6] The text of the H.R. 3962 is *available at* http://housedocs.house.gov/rules/health/111_ahcaa.pdf (last visited Nov. 13, 2012).

[7] Indeed, under the government's theory, the Senate could escape the Origination Clause by introducing language similar to a bill the House had *voted down*.

appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims.").

The Constitution, in short, requires that the House originate all bills for raising revenue. While the Senate may "propose . . . amendments" to House-originated revenue bills, it has no authority to transform a bill that is not a House-originated revenue bill into a revenue bill by erasing its entire text and substituting other, revenue-raising text. "Whatever the Senate's power to amend may be, it may not do so at all if its amendment turns a bill for some purpose other than raising revenue into a bill that raises revenue." Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 Buff. L. Rev. 633, 688 (1986). The PPACA resulted from an attempt by the Senate to transform a House-passed bill that did not raise revenue into a bill for raising revenue; this violates the Origination Clause.

B. The PPACA Is a Bill for Raising Revenue

Finally, the government contends that the tax the PPACA imposes on people who do not buy insurance is not a "bill for raising revenue." The Supreme Court has at times distinguished between taxes that are subject to the Origination Clause and tax-like penalties that are not, *see, e.g., Munoz-Flores*, 495 U.S. at 399-400, but the *NFIB* decision places Section 5000A squarely within the first category, because that section is not a penalty assessment for enforcing compliance with a statute passed under any other enumerated power.

The Origination Clause precedents recognize two classes of tax laws: those that raise revenue and are subject to the Origination Clause, as in *Flint*, 220 U.S. at 142, or *Hubbard*, 226 F. at 137-38, and those that are "bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897). In the latter class of cases, Congress imposes a tax not to raise revenue but to enforce a statute passed under *some other enumerated power*, typically

the Commerce Clause, and the Origination requirement does not apply. *Cf. Rodgers*, 138 F.2d at 994-95. But where a tax is imposed only as an exercise of the tax clause, and not as an adjunct to a regulation of commerce, or the exercise of some other enumerated power, then it is a tax for raising revenue subject to the Origination Clause.

In *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984), for example, the court found that the challenged tax was designed to enforce a regulation of interstate commerce: "to reduce overproduction of milk and shift some of the financial burden of the price support program. Accordingly, the dairy amendment bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power." Likewise, in *Mulroy v. Block*, 569 F. Supp. 256, 262 (N.D.N.Y. 1983), *aff'd*, 736 F.2d 56 (2d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), the tax was used as a "means of regulating commerce," and was therefore not subject to the Origination Clause. So, too, in *Nebeker*, 167 U.S. at 202, and *United States v. Norton*, 91 U.S. 566 (1875), the taxes were imposed in order to enforce compliance with regulations of interstate commerce—*i.e.*, statutes creating a postal money order system and a national currency. In *Millard v. Roberts*, 202 U.S. 429 (1906), the tax at issue was designed to enforce compliance with a law regulating railroads in the District of Columbia, pursuant to Congress' Article I, section 8, clause 12 power over the District. *See id.* at 434 n.1. And in *Munoz-Flores*, the Supreme Court ruled that the exaction was not a tax for raising revenue, but a penalty that was part of a program established under Congress' law-enforcement powers. 495 U.S. at 398.

In other words, the Origination Clause does not apply to taxes that are used as penalties or fees to enforce or maintain programs that are engaged in pursuant to some other constitutionally enumerated power—to "penalty assessments" which "are analogous to fines" and therefore "not

taxes." *Ashburn*, 884 F.2d at 904. But where Congress imposes a tax solely under its taxing power, as in this case, that tax must originate in the House of Representatives.

As the Sixth Circuit explained in *Rodgers*, "[t]here is a marked distinction between taxation for revenue . . . and the imposition of sanctions by the Congress under the commerce clause." *Id.* at 994. While Congress' power to regulate commerce "is the power to prescribe the rules by which commerce is to be governed and the Congress is at liberty to adopt any method which it deems effective to accomplish the permitted end," including enforcement penalties, the separate power to tax "is a congressional power specifically mentioned and described in the Constitution, but always in connection with the subject of the revenue for the support of the government generally." *Id.* at 994-95. Although *Rodgers* dealt with the Direct Taxes Clause rather than the Origination Clause specifically, it held that the Constitution's various limits on the taxing power "relate[] solely to taxation generally for the purpose of revenue only, and not impositions made incidentally under the commerce clause." *Id.* at 995. The exaction at issue in that case "ha[d] for its object the fostering, protecting and conserving of interstate commerce . . . . Revenue may incidentally arise therefrom, but that fact [did] not divest the regulation of its commerce character and render it an exercise of the taxing power." *Id.* For that reason, the provisions of the Constitution limiting Congress' power to tax were inapplicable. *Id.* But given the *NFIB* Court's conclusion that Section 5000A is not a penalty designed to regulate commerce, but is instead an exercise of the taxing power alone, this exception to the Origination Clause cannot apply. *See NFIB*, 132 S. Ct. at 2598 ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.").

The *NFIB* Court ruled that Section 5000A(a) was not enacted pursuant to the Commerce or Necessary and Proper Clauses, but rested solely on Congress' power to lay and collect taxes. *See*,

e.g., *id.* at 2598 ("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.").[8] In denying that Section 5000A imposes a penalty, the Court emphasized the distinction found in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922), between taxes that raise revenue and incidentally affect individual behavior and those taxes that are really "penalt[ies] with the characteristics of regulation and punishment." *Id.* It concluded that Section 5000A(b) was a tax only, and *not* a penalty to enforce regulatory non-compliance. *See* 132 S. Ct. at 2595, 2599-2600, 2662. In *Drexel Furniture*, the Court found that Congress had passed a law "in the name of a tax which on the face of the act is a penalty," 259 U.S. at 39; in *NFIB*, the Court found the reverse: that "what is called a 'penalty' here may be viewed as a tax." 132 S. Ct. at 2596.

It follows, therefore, that the exception to the Origination Clause for taxes that are only "fines" or "penalties" for enforcing regulations of commerce cannot apply. If, as *NFIB* held, Section 5000A is *not* a penalty accessory to a regulation of commerce, but instead rests solely on Congress' tax power, then it is not exempt from the Origination Clause as the statutes in *Mulroy*, *Nebeker*, and other cases were.

The conclusion that the tax in Section 5000A is a revenue-raising tax for purposes of the Origination Clause is strengthened by the fact that, as the government asserts, Congress made no "reference to the revenue it would generate." MTD at 10. In *Munoz-Flores*, the Supreme Court concluded that the assessment was not a tax because it was a component of a discrete program, enacted pursuant to Congress' enumerated powers, which specified precisely how the revenues

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[8] The *NFIB* Court's decision to uphold Section 5000A(b) as a tax cannot dispose of Sissel's allegation that this tax is invalid for violating the Origination Clause. That question was not raised, briefed, or argued in *NFIB*. *See United States v. Mitchell*, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered.").

collected would be disbursed. 495 U.S. at 398-99. Here, by contrast, moneys collected from those who do not buy insurance go into the general treasury for Congress to spend as it sees fit—just like any other tax. *Cf. New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) ("'Taxes are imposts levied for the support of the Government, or for some special purpose authorized by it. . . . The form of procedure cannot change their character'." (quoting *Meriwether v. Garrett*, 102 U.S. 472, 513-14 (1880) (Field, J., concurring)).

It is true that the tax in PPACA has an effect on individual conduct, as the *NFIB* Court recognized. *See* 132 S. Ct. at 2596 ("[T]axes that seek to influence conduct are nothing new."). But this does not exempt the PPACA tax from the Origination Clause's requirements. On the contrary, the Court noted that "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution." *Id.* at 2598. The Court went on to determine that the tax was not a direct or capitation tax. It would not have engaged in this analysis if the tax in Section 5000A were merely a "penalty assessment[]" or "fine[]," *Ashburn*, 884 F.2d at 904, since the prohibitions against direct or capitation taxes—like the Origination Clause—only apply to bills for raising revenue. *Rodgers*, 138 F.2d at 995. Nor did the *NFIB* Court regard the "tax citizens may lawfully choose to pay in lieu of buying health insurance," 132 S. Ct. at 2597, as designed solely for the purpose of requiring people to buy insurance. On the contrary, it noted that some four million people would choose not to purchase insurance, and that Congress regarded this as "tolerable." *Id.* This distinguishes Section 5000A from the law invalidated in *Drexel Furniture*, which was an attempt to use the Tax Clause solely to control individual behavior. *See id.* at 2595.

Since Section 5000A is a tax, and not an enforcement mechanism for a regulation of interstate commerce, the Origination Clause applies. Sissel has stated a cause of action for which relief can be granted, and the motion to dismiss must be denied.

CONCLUSION

The motion to dismiss should be *denied.*

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I electronically filed the foregoing PLAINTIFF MATT SISSEL'S OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Theodore Hadzi-Antich
THEODORE HADZI-ANTICH