No. 14-20039

IN THE
United States Court of Appeals
for the Fifth Circuit

STEVEN F. HOTZE, M.D.; BRAIDWOOD MANAGEMENT, INC.,

Plaintiffs-Appellants,

v.

SYLVIA MATHEWS BURWELL, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB J. LEW, SECRETARY, DEPARTMENT OF TREASURY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston

BRIEF *AMICI CURIAE* OF CONGRESSMAN SANDY LEVIN, RANKING MEMBER, HOUSE WAYS & MEANS COMMITTEE, AND SENATOR RON WYDEN, CHAIR, SENATE FINANCE COMMITTEE, IN SUPPORT OF APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE
OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: July 17, 2014

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

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INTEREST OF *AMICI CURIAE*[1]

Representative Sander M. "Sandy" Levin was elected to the U.S. House of Representatives in 1982 to represent the 9th Congressional District of Michigan. Rep. Levin is the Ranking Member of the House Ways and Means Committee, and was Chairman of the Committee from 2010 to 2011. The Ways and Means Committee has jurisdiction over all matters related to tax, trade, and entitlement spending, including Social Security, Medicare, welfare, and unemployment compensation. Relevant to this case, "blue slip" resolutions, by which members of the House raise Origination Clause objections, are almost always proposed by a member of the House Ways and Means Committee (often the chair of the Committee), although any member may propose a resolution.

Senator Ronald Lee "Ron" Wyden was elected to the U.S. House of Representatives in 1980 and to the U.S. Senate in 1996, representing the State of Oregon. He is the current Chairman of the U.S. Senate Committee on Finance. The Senate Finance Committee has jurisdiction over all matters related to taxes and revenue measures more generally, including the provisions of the Patient Protection and

[1] The parties have consented to the filing of this brief. *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Affordable Care Act (the "ACA") challenged here.[2]

Based on their experience and Committee leadership roles in Congress, *amici* are familiar with the ACA and the process by which it was enacted. *Amici* are also familiar with congressional procedures and practices, both in general and specifically related to the Origination Clause, U.S. Const. art. I, § 7, cl. 1. *Amici* have an interest in ensuring that the Origination Clause is applied in a manner that is consistent with constitutional text and history, as well as settled practice, in order to preserve the specific prerogatives of the House of Representatives and the Senate and maintain the constitutionally prescribed balance of power between the two Houses.

Amici submit this brief to support Secretary Burwell's argument that the provisions of the ACA challenged in this lawsuit satisfy the requirements of the Origination Clause. As *amici* know from their involvement in the enactment of the ACA, these challenged provisions were part of a Senate amendment to H.R. 3590, the Service Members Home Ownership Tax Act of 2009. H.R. 3590 was a revenue-raising bill that originated in the House as required by the Origination Clause, and the Senate's amendment of that bill was consistent with the Senate's power under the Origination Clause to "propose or concur with Amendments as on other

[2] At the time the ACA was enacted, Senator Max Baucus was Chairman of the Senate Finance Committee, and Senator Wyden was a member of the Committee.

Bills." As *amici* also know from their involvement in the enactment of the ACA, no member of Congress used the long-standing and regularly employed procedures that members of both the House and Senate can use to raise an objection on Origination Clause grounds. *Amici* believe that the failure of any member of Congress to use these procedures confirms what *amici* know based on their own extensive experience in Congress: the challenged provisions completely satisfy the requirements of the Origination Clause.

SUMMARY OF ARGUMENT

In 2010, Congress enacted the Patient Protection and Affordable Care Act, a landmark law dedicated to achieving widespread, affordable health care. Two provisions of the statute are particularly critical to that goal. First, the ACA requires individuals who are not otherwise exempted from the law's coverage to maintain "minimum essential coverage" or, in the alternative, to pay "a penalty with respect to such failures." 26 U.S.C. § 5000A. Second, and similarly, if a large employer has at least one employee who would qualify for a tax credit or cost-sharing reduction through purchase of an insurance plan on the individual market, the employer will be assessed a payment unless it "offer[s] its full-time employees . . . the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan." *Id.* § 4980H.

Plaintiffs claim that Sections 5000A and 4980H violate the Origination Clause of the Constitution, which 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, cl. 1. This claim is plainly wrong. Sections 5000A and 4980H were, in fact, amendments to H.R. 3590, a House-originated bill for raising revenue, and they thus comply fully with the requirements of the Origination Clause. Indeed, had any member of the House believed that these provisions of the ACA violated the Origination Clause, he or she could have used the longstanding "blue slip" process to object to the bill on that ground. None did. Similarly, had any Senator believed that these provisions of the ACA violated the Origination Clause, he or she could have raised a point of order on that ground. That no one did confirms what *amici* know from their own experience: the challenged provisions of the ACA satisfy the requirements of the Origination Clause.[3]

When the Framers gathered in Philadelphia in 1787 to draft the new national charter, they debated at length the precise balance of power that should exist be-

[3] In rejecting Plaintiffs' claims, the district court first held that Sections 5000A and 4980H are not "Bills for raising Revenue" and thus do not trigger the requirements of the Origination Clause, but it also held that, even assuming the challenged provisions are "Bills for raising Revenue," their enactment met the requirements of the Origination Clause. RE 31-32, 37-38 (ROA.263-64, 269-70). This brief is focused only on the second ground of the district court's opinion—that the Origination Clause requirements for revenue-raising bills were met for Sections 5000A and 4980H.

tween the House of Representatives and the Senate. The Origination Clause was critical to the balance that was struck, giving the important prerogative to propose bills that would affect the national treasury to the House of Representatives, but ensuring that the Senate would retain broad power to amend such legislation. Throughout our nation's history, the Senate has exercised this power, at times striking in whole the text of bills that originated in the House and replacing the stricken language with new text, and the Supreme Court has recognized that the Senate has a broad power to amend bills consistent with the requirements of the Origination Clause.

The enactment of the challenged provisions of the ACA was consistent with the Origination Clause's requirements because the ACA originated in the House as H.R. 3590, the Service Members Home Ownership Tax Act of 2009, and was subsequently amended by the Senate to become the ACA. H.R. 3590 was plainly a revenue-raising bill within the meaning of the Origination Clause because it was a tax bill that would have raised revenue for the government. Although the Senate struck all of the text of H.R. 3590 except its enacting clause and replaced that language with the text of the ACA, that amendment was consistent with the careful balance the Framers struck in the Origination Clause when they provided that the Senate could "propose or concur with Amendments as on other Bills."

Indeed, the House has historically guarded its prerogatives under the Origination Clause through the "blue slip" resolution process, which allows any member to object to a bill that the member views as inconsistent with the requirements of the Origination Clause. Yet no member raised a blue-slip objection to the ACA. Similarly, no member of the Senate used that chamber's procedure for formally enforcing the Origination Clause, which would have entailed raising a point of order on the Senate floor. While the absence of any formal contemporaneous objection by members of Congress may not be dispositive of the constitutional question, it does further support the argument that the ACA satisfies the requirements of the Origination Clause. If this Court concludes that it has jurisdiction to hear the merits of Plaintiffs' claims, the judgment of the district court should be affirmed.

ARGUMENT

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, cl. 1. As the text and history of the Constitution make clear, this provision was intended to strike a delicate balance between the two houses of Congress, giving the House of Representatives, the body that would most directly represent the people, the exclusive authority to propose legislation affecting the nation's purse strings, while also ensuring

that the Senate retained the right to amend such legislation just as it could amend other bills.

In the more than 200 years since the Constitution was adopted, both houses have recognized and respected this delicate balance struck by our nation's founders. The Senate has properly exercised its constitutional authority to amend revenue-raising bills, but when it has contravened the House's prerogative by attempting to originate such bills itself, the House has zealously defended its constitutionally-granted authority, most often by using a "blue slip" resolution—a resolution, printed on blue paper, informing the Senate that the House believes the Senate's bill or the Senate's amendment to a House non-revenue bill infringes upon the House's constitutional prerogative to originate bills for raising revenue and that, accordingly, the House refuses to consider the Senate bill.

The challenged provisions of the ACA satisfy the Origination Clause because the bill containing these provisions originated in the House of Representatives, and the Senate's amendment of that bill was simply an exercise of its explicit authority under the Origination Clause to "propose or concur with Amendments as on other Bills." Indeed, the fact that no member of the House used the blue slip process or otherwise indicated any opposition to the bill on Origination Clause grounds during enactment of the ACA confirms that the challenged provisions are consistent with the Origination Clause's requirements.

I. The Challenged Provisions of the ACA Were Enacted Pursuant to the Requirements of the Origination Clause

A. The Constitution Vests the House with Sole Authority To Propose Bills for Raising Revenue, While Retaining the Senate's Authority to Amend As With All Other Bills

The notion that the responsibility for raising revenue should rest with the organ of government most directly accountable to the people, so as to prevent arbitrary and oppressive taxation, has roots dating back to fourteenth-century England. 1 William Blackstone, *Commentaries* 168-69 (explaining why revenue bills were required to originate in the elected House of Commons); *see* Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. 659, 665-66 (2014) (same). Following this tradition, when the colonies declared their independence from England (in large part because of the unjustness of the taxes imposed under British rule), many of the colonies incorporated into their constitutions origination clauses that codified the English rule. Jonathan Rosenberg, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 Nw. U.L. Rev. 419, 422 (1983); *see* J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L.J. 165, 168 n.13 (1987).

By the time the Framers convened in Philadelphia to draft our national charter, the belief that the authority to propose revenue bills should rest exclusively with the body most directly accountable to the people was deeply held. As El-

bridge Gerry of Massachusetts explained, "it was a maxim, that the people ought to hold the purse-strings." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 113, 441 (Adrienne Koch ed., 1966). Benjamin Franklin agreed that "money affairs" should "be confined to the immediate representatives of the people." *Id*. at 306; *see* 3 The Records of the Federal Convention of 1787, at 356 (Max Farrand ed., 1911) ("The principal reason [for the Origination Clause] was, because [the House's members] were chosen by the People, and supposed to be acquainted with their interests, and ability."); 2 The Records of the Federal Convention of 1787, at 275 ("Taxation & representation are strongly associated in the minds of people, and they will not agree that any but their immediate representatives shall meddle with their purses."). Indeed, the desire to codify this principle in the new national charter was so important to some delegates that "they were willing to jeopardize the entire Convention rather than surrender on the issue." Rosenberg, 78 Nw. U.L. Rev. at 423.

Despite the importance many attached to the Origination Clause principle, the need for the provision—and its specific parameters—were nonetheless the subject of considerable dispute at the Convention, in large part because it was a key provision in the contentious debate between large and small states about the respective powers of the House of Representatives and the Senate. Rosenberg, 78 Nw. U.L. Rev. at 419. As originally proposed, the Origination Clause would have

provided that "[a]ll money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate." 5 The Debates in the Several States of the Adoption of the Federal Constitution 129 (Jonathan Elliot ed., 1861) ("Elliot's Debates"). But withdrawing power from the Senate so completely drew strong opposition, notably from James Madison. *See, e.g.*, Madison, Notes of Debates in the Federal Convention of 1787, at 113.

Ultimately, the delegates appointed a committee to attempt to forge a compromise, and the version of the Origination Clause that would be written into our enduring Constitution then began to take shape. In its final form, the Origination Clause departed from earlier proposals in two critical respects. First, it applied to all "bills for raising revenue," regardless whether the bill was "for the purpose of revenue." 5 Elliot's Debates, at 510. Second, it gave the Senate the broad power to amend revenue-raising bills that originated in the House just as it could amend other bills. Indeed, the version of the Clause that was adopted "broaden[ed] the [Senate's] amendment power" beyond that of some earlier proposals that would have given the Senate a more modest amendment power. Kysar, 91 Wash. U.L. Rev. at 670; 5 Elliot's Debates at 510.

In short, the Origination Clause, in its final form, provided for an expansive category of bills that would need to originate in the House—that is, all "bills for raising revenue," even those that did not have as their purpose the raising of reve-

nue—but it also granted to the Senate an expansive power to amend such bills, just as the Senate could amend other legislation. After the Constitution was sent to the States for ratification, James Madison explained the importance of the Origination Clause in the Federalist Papers:

> The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They in a word hold the purse; that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most compleat 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.

Madison also discussed the importance of the Clause at the Virginia ratifying convention, explaining that, even though critics noted that the "Senate could strike out every word of the bill, except the word *Whereas*, or any other introductory word, and might substitute words of their own," 3 Elliot's Debates at 377 (William Grayson), the Clause nonetheless kept the nation's purse strings in the hands of the people's most direct representatives because the House was free to reject the Senate's amendments to revenue bills. As Madison explained it, "When a bill is sent with proposed amendments to the House of Representatives, if they find the

alterations defective, they are not conclusive. The House of Representatives are the judges of their propriety . . . ." *Id.*

Thus, both halves of the Origination Clause were critical to the careful balance the Framers struck, and the Framers expected that the House and Senate would both act to preserve the institutional prerogatives they were granted under the Clause. As the next Section demonstrates, that is exactly what they have done.

B. Affirmed by Practice and Precedent, The House and the Senate Have Fulfilled Their Constitutionally Prescribed Roles Under the Origination Clause

"All Bills for raising Revenue shall originate in the House"

As Madison's words make clear, the Founders expected the House to zealously defend its constitutionally granted authority as the holders of the nation's purse. Throughout history, the House has done just that, principally by using the blue slip process to inform the Senate that the House believes the Senate's bill infringes upon the House's constitutional prerogative to originate bills for revenue. *See* James V. Saturno, Cong. Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 9 (2011).[4]

[4] The House can, of course, use other means to dispose of an unwanted bill from the Senate. The Committee of the Whole House can pass a similar bill instead, as it did in the 91st Congress. H.R. Rep. No. 112-556 at 102 (2012). Or the Committee on Ways and Means can report a bill to the House, which upon approval will then be sent to the Senate, as it did in the 93rd Congress. *Id.*

As Ranking Member and former Chair of the House Ways and Means Committee, *amicus* Representative Levin is very familiar with the blue slip process and how members of the House can use it to identify and prevent violations of the Origination Clause. If a member believes that the Senate has sent the House a bill that violates the Origination Clause, he or she may offer a resolution that states that "in the opinion of the House, [the bill] contravenes the first clause of the seventh section of the first article of the Constitution of the United States."[5] Once the resolution is proposed, the Ways and Means Committee will determine whether to move it to the entire House floor. If it does move the resolution to the floor, it is considered privileged and thus will be addressed immediately, before all other motions except those to adjourn. House Rule IX, cl. 2(a)(1). The entire House then votes, usually by voice, and if the House passes the resolution, it is sent to the Senate, and the House takes no further action on the legislation. Over a 14-year period from 1987 to 2001, the House of Representatives successfully passed 28 blue slip

[5] Although blue slip resolutions are almost always proposed by a member of the House Ways and Means Committee (often the chair of the committee), any member can propose such a resolution. For example, on July 16, 1999, the House passed H. Res. 249, a blue slip proposed by Representative Rob Portman, to return S. 254 to the Senate on the ground that it would affect customs revenues. And on October 24, 2000, the House passed H. Res. 645, proposed by Representative Phil Crane, to return the Bear Protection Act of 1999 to the Senate, again on the ground that it would affect customs revenues. Though both Representative Portman and Representative Crane served on the Ways and Means Committee, neither was its Chair. Indeed, from 1989-2000, 60% (12 of 20) blue slip resolutions that passed the House were proposed by someone other than the Chair of the Ways and Means Committee. H.R. Rep. No. 112-556, at 93-100.

resolutions, an average of two per year. H.R. Rep. No. 111-708, at 99-100 (2011). In some years it has passed as many seven such resolutions. *Id.* Indeed, the House of Representatives passed six blue slip resolutions during the 111th Congress alone. In sum, members of the House have not hesitated to zealously protect the House's Origination Power.[6]

"[T]he Senate may propose or concur with Amendments"

As detailed above, the Origination Clause confers on the House of Representatives the important power to propose all revenue-raising bills, but it allows the Senate the broad power to amend such bills. From the Founding onward, this broad power has been understood to include the power to replace the bulk of the text of a House-originated bill with new text. As Thomas Jefferson explained in the manual of parliamentary practice he wrote for the Senate in 1801, "Amendments may be made so as totally to alter the nature of the proposition[.] . . . A new bill may be ingrafted, by way of Amendment, on the words 'Be it enacted,' &c." Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate*

[6] Although the policing role played by the Senate generally focuses on the right to amend conferred by the second half of the Clause, *see infra* at 14-16, it, too, has the power to object to bills that it believes have not been properly proposed in accordance with the Origination Clause. This is typically done in the form of a point of order made against a bill or amendment during debate on the Senate floor. *See, e.g.*, 147 Cong. Rec. S6582 (daily ed. June 21, 2001) (point of order made by Senator Baucus against a tax amendment to an original Senate bill on the ground that "the amendment would affect revenues on a bill that is not a House-originated revenue bill"); *id.* (sustaining point of order by vote of the Senate).

of the United States § 35, at 97 (1813). The "strike and replace with a substitute" form of amendment is common in both the House and the Senate. Further, in the Senate, unlike in the House, amendments need not be germane or even relevant to the subject of the bill being amended (with some important exceptions, such as when cloture has been invoked or the Senate is considering a budget reconciliation bill). *Compare* Floyd M. Riddick & Alan S. Fruman, *Riddick's Senate Procedure* 854 (1992) ("[t]he Senate does not have a general rule requiring that amendments be germane to the measure to which they are proposed"), *with* House Rule XVI:7 ("[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment").

The Senate has continued to follow Jefferson's practice guide, repeatedly using the procedure of striking out the text of a House bill for raising revenue and substituting new text. For example, in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), a tax increase signed into law by President Reagan, the Senate replaced the entire text of the House bill except for its enacting clause, H.R. Rep. No. 97-760 (1982). As this Court recognized in *Texas Association of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163 (5th Cir. 1985), that amendment was "within the range of amendments permitted by the origination clause." *Id.* at 168; *see Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (upholding the Tax Equity and

Fiscal Responsibility Act of 1982 despite the fact that the Senate amendment replaced the "entire text of the House bill except for its enacting clause"). As this Court explained, the Supreme Court's decision in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), recognized that the Senate has broad power to amend revenue-raising bills consistent with the requirements of the Origination Clause. *Texas Ass'n*, 772 F.2d at 168 (*Flint* upheld "the Senate's substitution of a corporation tax for a House-drafted inheritance tax"); *see Flint*, 220 U.S. at 143 ("perceiv[ing] no reason" why such an amendment would not be constitutional). Thus, the only possible limitation on the Senate's power is an exceedingly modest one, that is, that "both the amendment and the amended portion address revenue collection." *Texas Ass'n*, 772 F.2d at 168.[7]

Thus, precedent affirms what the text of the Origination Clause and settled practice make clear: the Senate has broad authority to amend revenue-raising bills that originate in the House consistent with the requirements of the Origination Clause.

[7] *Amici* agree with the district court that "[t]here can be no dispute that, generally speaking, the Senate is not limited by a germaneness requirement in amending House-originated legislation," and thus "it is likely that the Origination Clause does not impose a 'germaneness' requirement either." RE 35 (ROA.267). *Amici* nonetheless recognize that this Court's precedents impose a very modest subject matter limitation on amendments made to revenue raising bills.

C. The Challenged Provisions of the ACA Originated in the House and Were Properly Amended by the Senate

Against the backdrop of the clearly delineated roles of the House and Senate established by our nation's Founders in the Constitution, it is clear that the challenged provisions of the ACA were enacted in accordance with the requirements of the Origination Clause. The Affordable Care Act originated in the House of Representatives as H.R. 3590, the Service Members Home Ownership Tax Act of 2009. The House-passed version of H.R. 3590 was plainly a revenue-raising bill within the meaning of the Origination Clause, and the Senate's amendment of that bill was within its constitutionally delegated authority, as understood from the time of the Founding to the present.

1. ACA Sections 5000A and 4980H Were Amendments to H.R. 3590, Which Was A Revenue-Raising Bill Originating in the House.

The bill that eventually became the Affordable Care Act originated as H.R. 3590, and H.R. 3590 was plainly a bill for "raising Revenue" within the meaning of the Origination Clause. In the Origination Clause, the "term 'Bills for raising Revenue' does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating* to taxes." *Armstrong*, 759 F.2d at 1381; *see* Saturno, CRS, *The Origination Clause of the U.S. Constitution*, at 4. As this Court recognized in *Texas Association*, "all contemporary courts have adopted the construction apparently given it by Congress, i.e., 'relating to revenue.'" 772 F.2d at 166; *see id.* (citing

cases). This understanding is consistent with historical practice: the House and the Senate have long agreed that "a bill for raising revenue may be a bill to increase or diminish existing rates." S. Rep. No. 42-146, at 5 (1872).[8]

There can be no question that H.R. 3590 "relate[d] to taxes." *Armstrong*, 759 F.2d at 1378. Its enacting clause provided that it would "amend *the Internal Revenue Code of 1986* to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees." ROA.183-88 (emphasis added); *see* H.R. 3590 IH (Sept. 17, 2009). Sections 2 and 3 pertained to tax credits, section 4 addressed the calculation of gross income, section 5 dealt with tax returns, and section 6 addressed estimated tax payments. As the court below concluded, "the entirety of that bill concerned revenue." RE 37 (ROA.269)

Moreover, even under a more narrow understanding of the Origination Clause, H.R. 3590 was a revenue raising bill. Although some provisions of the bill would have extended tax credits, section 5 of the bill would have increased the

[8] This is, in part, because tax reductions are sometimes enacted with the hope that they will increase revenues. Indeed, as this Court has recognized, "[t]he same bill may have an effect of increasing revenue under certain economic conditions and decreasing revenue under others." *Texas Ass'n*, 772 F.2d at 166. Further, there is no simple test for distinguishing between revenue bills based on whether they raise or lose revenue. The methodology for measuring the revenue effect of legislation is complex and sometimes controversial. For example, there has been a decades-long, and unresolved, debate about this issue in the context of the tax treatment of capital gains, and there has been an intense recent debate about the revenue effect of proposals to reduce tax rates on U.S. companies' "repatriated" foreign earnings.

penalty for failing to file a partnership or S corporation return, and section 6 would have increased corporate estimated tax payments for the third quarter of 2014. H.R. 3590 IH §§ 5-6. In fact, the Joint Committee on Taxation estimated that H.R. 3590 would increase revenue by $86 million over a five-year period. U.S. House, Joint Committee on Taxation, *Estimated Revenue Effects of HR 3590, the "Service Members Home Ownership Tax Act of 2009," Scheduled for Consideration by the House of Representatives on October 7, 2009* (JCX-40-09), October 6, 2009.

Thus, there is simply no question that H.R. 3590 was a revenue raising bill. Plaintiffs' assertions to the contrary blink at reality.

2. The Senate's Amendment of H.R. 3590 To Create Sections 5000A and 4980H Was Consistent With Its Authority Under the Origination Clause.

The Senate amended H.R. 3590 by striking the text, save for the enacting clause, and replacing it with the text of the ACA. As the Secretary explains, Plaintiffs' *amici*—but not Plaintiffs themselves—assert that the Senate's power under the Origination Clause did not permit this amendment. Appellees' Br. 27. If the Court considers this assertion properly before it, the argument should be rejected. As discussed above, it is well established by constitutional text, history, and precedent that the Senate may strike nearly all of a House bill, save the enacting clause, and substitute new text. *See supra* at 14-16.

Similarly, Plaintiffs' *amici* argue that the Senate's amendment of H.R. 3590 was not "germane." Again, to the extent the Court even considers this argument, it

should be rejected based on constitutional text, historical practice, and precedent. In the Senate, again, there is no general requirement that amendments be germane to the matter being amended. Indeed, the Senate itself has considered whether there is a special germaneness requirement that somehow implicitly applies to amendments to House-originated revenue measures and concluded that there is not.

In 1879, the House passed a bill modifying various laws regarding internal taxation, and the Senate Finance Committee, to which the House-passed bill was referred, reported a version of the bill that made further amendments along the same lines. When the bill came to the Senate floor, Senator Stanley Matthews offered an amendment imposing new duties on tea and coffee. Another Senator made a constitutional point of order, arguing that "the amendment seeks to originate a revenue bill bearing upon external taxation . . . and as it is proposed as an amendment to an internal-revenue bill it is not germane to the bill." 8 Cong. Rec. 1478 (1879). Senator Matthews disagreed. He said,

> This is a revenue bill; it is a bill to raise money by taxation. That I understand to be the definition of a revenue bill; and such bills by the Constitution . . . must originate in the House of Representatives. This bill originated in that House, and is here for consideration and for amendment. We are not obliged either by the Constitution or by any rules of order to adopt or reject that bill as it is sent to us. We have a right to discuss it; we have a right to amend it; and we have a right to amend it in any particular in which we see fit to amend it, limited only by our own rules.

Id. A short time later in the debate, Senator Matthews turned to those rules. He

asked, "Where is the rule . . . which prohibits me from moving an amendment to a bill when the amendment is not germane? Is there any such rule? I have not heard of any; the Senator does not quote any; there is not any; and the senior members of the Senate all unite in the declaration that there is not any." *Id.* at 1480.

The point of order was put to a vote and rejected. *Id.* at 1482. The Senate thus expressly rejected the argument that a Senate amendment to a House revenue bill must be germane to the House bill.

Further, as the district court recognized, even assuming there is some germaneness requirement, "[b]oth *Flint* and *Texas Association of Concerned Taxpayers* adopted 'a very loose conception of germaneness,'" and the ACA plainly satisfies that test because "both versions of the bill concerned revenue." RE 36, 37 (ROA.267). As just discussed, the "entirety" of H.R. 3590 concerned revenue, RE 37 (ROA.269), and the ACA also addressed revenue by imposing a tax when certain requirements were not met. Tellingly, no member of the Senate raised a point of order objecting to the amendment of H.R. 3590.

Thus, just as this Court rejected an Origination Clause challenge in *Texas Association* even though the Senate "struck the entire text of the bill after the enacting clause and replaced it with a massive tax-increasing proposal," thereby replacing the House bill's tax *cut* with a tax *increase*, 772 F.2d at 164, the Court should reject the arguments made by Plaintiffs' *amici*.

II. The Fact That the House Did Not Use the Blue Slip Process To Object Further Confirms that the Challenged Provisions of the ACA Do Not Violate the Origination Clause

As discussed above, the House has vigorously defended its prerogatives under the Origination Clause through well-established practices and procedures, chiefly the use of the "blue slip" resolution. During the 111th Congress alone, the House of Representatives passed six blue slip resolutions, including one objecting to a provision that would have established that health care provided by the Secretary of Veterans Affairs constituted minimum essential coverage. H.R. Rep. No. 111-708, at 93-94 (2011). Indeed, this Congress used blue slips more than any from 1983-2002 except one. *Id.* at 93-100.

Despite this well-established practice of using blue slips to object to bills that violate the Origination Clause, neither Plaintiffs nor their *amici* point to a single member of the House having filed a blue slip resolution in reference to the ACA at the time it was considered by Congress.[9] Indeed, the best they can do is point to a resolution introduced three years *after* the bill was passed. H.R. Res. 153, 113th Cong., introduced on April 12, 2013. As noted above, *any* member of the House could have filed a blue slip resolution at the time the ACA was consid-

[9] Jack M. Balkin, *The Right Strikes Back: A New Legal Challenge for Obamacare*, *The Atlantic* (Sept. 17, 2012), *available at* http://www.theatlantic.com/national/archive/2012/09/the-right-strikes-back-a-new-legal-challenge-for-obamacare/262443/ (last accessed May 30, 2014).

ered. *See supra* at 12-14.[10] The reason that none did is simple: no one at the time—not even those who vigorously opposed the ACA—understood the House's prerogatives under the Origination Clause to be threatened by the Senate-amended bill.

In short, as *amici* know from their extensive experience and leadership roles in Congress, the failure of any member of the House to file a blue slip resolution confirms what the application of constitutional text, history, and precedent show: Sections 5000A and 4980H were enacted consistent with the requirements of the Origination Clause. *See United States v. Munoz-Flores*, 495 U.S. 385, 410 (1990) (Scalia, J., concurring) ("[w]e should no more gainsay Congress' official assertion of the origin of a bill than we would gainsay its official assertion that the bill was passed by the requisite quorum").

[10] Because any member could have filed a blue slip resolution, it is irrelevant that *amicus* Rep. Levin, a Democrat and supporter of the ACA, was Chairman of the Ways and Means Committee at the time the ACA was enacted. It is also irrelevant that the resolution might not have passed. In 1982, for example, after Congress passed TEFRA, a bill that massively overhauled the Internal Revenue Code, a representative in the House filed a blue slip resolution that was voted down by the full House. Medina, 23 Tulsa L.J. at 179. After this failure, the House attempted another resolution to send the bill back to the Senate, but this one failed as well. *Id.*

CONCLUSION

For the foregoing reasons, *amici* respectfully request that if the Court reaches the merits of the case, it affirm the judgment of the district court.

Respectfully submitted,

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Dated: July 17, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,047 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 17th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on July 17, 2014.

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

Executed this 17th day of July, 2014.

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