No. 13-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Matt Sissel,

***Plaintiff-Appellant*,**

v.

United States Department of Health and Human Services, et al.,

***Defendants-Appellees*.**

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

MOTION OF HOUSE MAJORITY LEADER KEVIN MCCARTHY, HOUSE MAJORITY WHIP STEVE SCALISE, AND THE JUDICIAL EDUCATION PROJECT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

This motion and enclosed *amici curiae* brief are filed on behalf of House Majority Leader Kevin McCarthy and House Majority Whip Steve Scalise, the second- and third-ranking members in the United States House of Representatives, as well as the Judicial Education Project ("JEP"). D.C. Circuit Rule 35(f) provides that *amicus* briefs filed in support of rehearing *en banc* are not permitted absent an invitation from the Court. Counsel for *amici* has consulted with counsel for the parties and both the appellants and appellees consent to this motion. The House Majority Leader, House Majority Whip, and JEP thus respectfully seek leave to file the enclosed *amici curiae* brief in support of the appellant's petition for rehearing *en banc*.

As senior members of House leadership, *amici* McCarthy and Scalise have an unparalleled interest in safeguarding their Chamber's constitutionally prescribed role as the only organ of government with the power to initiate legislation that increases taxes on the people. JEP is dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers and educating citizens about these constitutional principles. As explained in the proposed brief, the panel decision eviscerates the Origination Clause, and thus effectively eliminates the House of Representatives' role as the protector of the purse. The Court should grant leave to file the attached *amici curiae* brief in light of the House leadership's unique obligation to protect the institutional prerogatives of the branch of government they lead. In a substantially similar appeal currently pending in the Fifth Circuit, House leadership

and JEP were granted leave to participate as *amici*. *See* Brief of Eric Cantor, Kevin McCarthy, and JEP as *Amici*, *Hotze v. Sebelius*, No. 14-20039 (5th Cir. May 15, 2014).

1. This case presents a constitutional challenge to the Affordable Care Act under the Origination Clause of the Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. In rejecting the challenge, the panel majority held that the Clause does not apply to tax increases that are either regulatory in and of themselves, or embedded in larger bills with regulatory objectives. *See* Op. at 13, 15. As explained in the enclosed *amici curiae* brief, that ruling, if left undisturbed, would render the Origination Clause a virtual dead letter.

2. The House Majority Leader and House Majority Whip have a unique stake in the question presented. On its face, the Origination Clause reserves the power to originate tax increases—the power over the purse—to the People's House. As senior House leaders, *amici* McCarthy and Scalise have a compelling interest and special incentive to protect the House's institutional prerogatives under the Constitution. Moreover, the perspective of these senior congressional officials would be helpful to the Court in assessing the importance of the question presented. After all, while the separation of powers is ultimately designed to protect individual liberty, the Origination Clause furthers that objective by vesting specific powers exclusively in the House. Accordingly, a full consideration of the affected interests in this case should include the views of the House, as represented here by its senior leadership.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion for Leave to File an *Amici Curiae* Brief in Support of Rehearing *En Banc*.

Dated: October 9, 2014

Respectfully submitted,

/s/ Gregory G. Katsas
Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of October 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 9, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

No. 13-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Matt Sissel,

***Plaintiff-Appellant*,**

v.

United States Department of Health and Human Services, et al.,

***Defendants-Appellees*.**

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

BRIEF FOR HOUSE MAJORITY LEADER KEVIN MCCARTHY, HOUSE MAJORITY WHIP STEVE SCALISE, AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 27(a)(4), the House Majority Leader, House Majority Whip, and Judicial Education Project certify as follows:

Parties and Amici

All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Appellant's Petition for Rehearing *En Banc*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, I hereby certify that I am aware of no corporation, association, joint venture, partnership, syndicate, or other similar entity that is a party to this suit or of any such entity that has a financial interest in the outcome of this litigation; that no *amicus curiae* on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any *amicus curiae* on this brief.

Dated: October 9, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

GLOSSARY iv

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY 1

ARGUMENT 3

I. Bills That Impose New Taxes To Fund General Governmental Operations Are "Bills For Raising Revenue." 3

II. If Anything Is A Bill For Raising Revenue, The ACA Is. 5

CONCLUSION 7

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES

M'Culloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 1

NFIB v. Sebelius,
132 S. Ct. 2566 (2012) 4, 5, 6

**Rural Cellular Association v. FCC*,
685 F.3d 1083 (D.C. Cir. 2012) 4, 5, 6, 7

Sonzinsky v. United States,
300 U.S. 506 (1937) 6

**Twin City Bank v. Nebeker*,
167 U.S. 196 (1897) 2, 3, 4, 5

**United States v. Munoz-Flores*,
495 U.S. 385 (1990) 4, 5, 6, 7

United States v. Sanchez,
340 U.S. 42 (1950) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 7, cl. 1 1

STATUTES

Communications Act 4, 7

Pub. Law No. 111-148, § 5000B, 124 Stat. 119 (2010) 5

Pub. Law No. 111-148, § 9001, 124 Stat. 119 (2010) 5

Pub. Law No. 111-148, § 9008, 124 Stat. 119 (2010) 5

*Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES
(continued)

Page(s)

Pub. Law No. 111-152, § 1402, 124 Stat. 1029 (2010) 5

Victims of Crime Act of 1984 .... 6, 7

OTHER AUTHORITIES

Fed. R. App. P. 29(c)(5) 1

Joseph Story, *Commentaries on the Constitution of the United States* § 880 .... 2, 3

The Federalist No. 58, at 359 (Clinton Rossiter ed., 1961) 1, 3

GLOSSARY

ACA	Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010

INTEREST OF THE *AMICI CURIAE*[1]

As two of the most senior members of House leadership, *amici* have an unparalleled interest in safeguarding their Chamber's constitutionally prescribed role as the only body of government with the power to initiate tax increases. The Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers and educating citizens about these constitutional principles.

INTRODUCTION AND SUMMARY

The power to tax—to take private property by force—has long been recognized as "the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The Framers carefully limited that power by confining the origination of tax increases to the People's House. The Origination Clause provides that "[a]ll bills for raising Revenue shall originate in the House of Representatives." Art. I, § 7, cl. 1. As James Madison explained, the House "alone can propose the supplies requisite for the support of government," a "power over the purse [that] may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." *The Federalist* No. 58, at 359 (Clinton Rossiter ed., 1961). The Origination Clause thus embodies one of the Constitution's most fundamental structural protections in defense of individual liberty.

[1] No person or entity other than *amici* or its counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission. Fed. R. App. P. 29(c)(5).

The panel decision would all but eradicate this bedrock protection. That decision exempts a 2000-page bill replete with numerous tax increases from the Clause by reducing the bill into a single, non-taxing "paramount aim." Op. at 13. But omnibus legislation is the norm. If every tax increase enveloped by regulatory provisions or objectives were exempt from the Origination Clause, then the Clause would be wholly ineffective. And if the ACA's imposition of 20 new taxes to raise hundreds of billions of dollars is not a "bill for raising Revenue," then nothing is.

The courts have long taken a narrow view of what constitutes a "bill for raising revenue," but even the most miserly interpretation of that phrase encompasses bills like the ACA that "levy taxes in the strict sense of the word." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA imposes taxes on investment income, taxes on medical devices, taxes on "Cadillac" healthcare plans, and so on. In concluding that the ACA is *not* a "bill for raising revenue," the panel ignored the obvious point that 2000-page bills have multiple purposes—*one* of which, in the ACA's case, was plainly to raise revenue. And as the Supreme Court long-ago explained, the dispositive question is whether "*any*" of an act's "provisions" are intended "to raise revenue to be applied in meeting the expenses or obligations of the Government." *Nebeker*, 167 U.S. at 203 (emphasis added). Under the Supreme Court's settled rule, the ACA is thus a "bill for raising revenue" subject to the Origination Clause.

Rehearing *en banc* is necessary to review a flawed decision that conflicts with

both the Supreme Court's and this Court's precedent and that will, if permitted to stand, upend the balance of power in Congress. The panel decision strips the House of Representatives of its "power over the purse," *see The Federalist* No. 58, at 359, and does so in the jurisdiction that possesses venue over the entire federal government. This case thus presents *both* an intra-circuit conflict *and* a question of exceptional importance. Rehearing *en banc* is amply warranted.

ARGUMENT

The Supreme Court has long held that "Bills for raising Revenue" "are those that levy taxes in the strict sense of the word." *Nebeker*, 167 U.S. at 202 (citing 1 Joseph Story, *Commentaries on the Constitution of the United States* § 880). The ACA satisfies that definition: many of its provisions impose new taxes, the revenues from which go to fund general operations of government. The panel's contrary holding—that the ACA is *not* a "bill for raising revenue," because its "primary aim" is "to increase the number of Americans covered by health insurance and decrease the cost of healthcare"—has no basis in the Constitution or the decisions of any court. *See* Op. at 13 (citation omitted).

I. Bills That Impose New Taxes To Fund General Governmental Operations Are "Bills For Raising Revenue."

The Supreme Court has made clear that any bill imposing new taxes to fund general government operations qualifies as a "bill for raising revenue" under the Origination Clause. As the Court explained in its most recent decision construing the

Clause, a "statute that creates a particular governmental program and that raises revenue to support that program, *as opposed to a statute that raises revenue to support Government generally*, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) (emphasis added). The Court thus made clear what bills *are* "bills for raising revenue" (any bill "that raises revenue to support Government generally"), and what bills are *not* (any bill "that creates a particular governmental program and that raises revenue to support that program"). *Id.; see also Nebeker*, 167 U.S. at 202. In other words, "the Constitution requires tax increases to originate in the House of Representatives." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

The panel adopted a contrary rule in holding that the ACA was not a "bill for raising revenue" because its revenue-raising features were "incidental," Op. at 16, to the "primary aim" of "induc[ing] participation in health plans," *id.* at 13. But as the Supreme Court explained in *Munoz-Flores*, tax-increasing bills are *always* "bills for raising revenue," *unless* "'[t]here was *no* purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.'" 495 U.S. at 398 (quoting *Nebeker*, 167 U.S. at 203) (emphasis added). And this Court likewise explained in *Rural Cellular Ass'n v. FCC* , 685 F.3d 1083 (D.C. Cir. 2012), that the Communications Act would not violate the Origination Clause (as interpreted by the agency), because *that* act "clearly funds *only*" the relevant

governmental program "and *not* the Government generally." *Id.* at 1090 (emphases added). The panel decision cannot be reconciled with these binding decisions.

II. If Anything Is A Bill For Raising Revenue, The ACA Is.

The ACA itself strikingly demonstrates the breadth of the panel's ruling—and its reduction of the Origination Clause to virtually nothing. The ACA imposes some 20 new taxes, each of which raises revenue that goes into the Treasury's general coffers.[2] Each of these new taxes is sufficient to make the ACA a "bill for raising revenue" under longstanding precedent, *see, e.g.*, *Nebeker*, 167 U.S. at 203 (test is whether "the act" or "any of its provisions" raises revenue), because none of the new taxes were enacted to fund "a particular governmental program." *Munoz-Flores*, 495 U.S. at 398. Rather, all are collected by the Internal Revenue Service and paid into the general account of the United States Treasury, as the Government itself stressed in successfully defending the individual mandate to buy health insurance as a mere "tax" on remaining uninsured. *See NFIB*, 132 S. Ct. at 2593-94 (Roberts, C.J.).

The panel held that the ACA is nonetheless *not* a "bill for raising revenue," because, it reasoned, only legislation with the "*primary purpose*" of raising "general

---

[2] Examples include: a new 3.8 percent surtax on investment income earned in households making at least $250,000, *see* Pub. Law No. 111-152, § 1402, 124 Stat. 1029, 1061 (2010); a new 40% excise tax on comprehensive, so-called "Cadillac," health insurance plans, Pub. Law No. 111-148, § 9001, 124 Stat. 119, 848 (2010); a new excise tax on indoor tanning salons, *id.* § 5000B, 124 Stat. at 872-73; and a new "annual fee on branded prescription pharmaceutical manufacturers and importers," *id.* § 9008, 124 Stat. at 859.

revenues," Op. at 15, counts under the Clause. And according to the panel, the "paramount aim" of the ACA is not to raise taxes, but to force individuals to buy health insurance. *See id.* at 13. The $4 billion in tax revenues raised from individuals who choose to remain uninsured is thus simply an irrelevant "by-product of the [ACA's] primary aim to induce participation in health insurance plans." *Id.*

This turns the Constitution on its head. *All* taxes are to some extent regulatory, as the Supreme Court explained in *NFIB*. *See* 132 S. Ct. at 2596. Yet under the panel decision, the *more* regulatory any particular tax may be, the *less* likely the Origination Clause is to apply at all. The panel thus would make the Clause entirely inapplicable to the very taxes *most* threatening to individual liberty—those where the Government is using its taxing power not only to tax, but also to destroy. *See, e.g.*, *United States v. Sanchez*, 340 U.S. 42 (1950) (tax on marijuana); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (tax on sawed-off shotguns). That gets things precisely backwards.

Not surprisingly, no precedent from the Supreme Court or this Court supports the panel's decision. To the contrary, both the Supreme Court and this Court have held that the dispositive inquiry is whether there was a "'purpose by the act or by *any of its provisions* to raise revenue to be applied *in meeting the expenses or obligations of the Government*.'" *Munoz-Flores*, 495 U.S. at 398 (quoting *Nebeker*, 167 U.S. at 203) (emphases added); *see also Rural Cellular*, 685 F.3d at 1090. Like the Origination Clause itself, past decisions contain no exception for broad-based bills, and *certainly* no

exception for taxes with regulatory objectives.

Munoz-Flores confirms as much. That case involved the Victims of Crime Act of 1984, which "established a Crime Victims Fund . . . as a federal source of funds for programs that compensate and assist crime victims." 495 U.S. at 398. If the analysis were merely a question of a statute's "primary purpose," the Court would have upheld the Victims of Crime Act by simply noting that its primary purpose was to benefit crime victims. But the Court did not do that. Rather, it analyzed each potential taxing provision and found that none of them was intended to raise general revenues for the Government; rather, each was "passed as part of a particular program to provide money for that program." *Id.* at 399.

This Court's decision in *Rural Cellular* is similar. It performed a provision-by-provision analysis, and concluded that none of the provisions funds general government operations, before concluding that the Origination Clause was inapplicable. *See* 685 F.3d at 1090. Essential to this Court's analysis was its determination that "[t]he Communications Act . . . clearly funds *only* the High-Cost Universal Service Support Program and not the Government generally." *Id.* (emphasis added). Neither decision even suggests, much less holds, that the Origination Clause is inapplicable to omnibus bills or to regulatory taxes.

Because the panel's contrary holding contradicts binding precedent, and renders virtually nugatory the House's power of the purse, this Court should grant rehearing *en banc*.

CONCLUSION

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

Dated: October 9, 2014

Respectfully submitted,

/s/ Gregory G. Katsas
Gregory G. Katsas
James M. Burnham
Matthew R. McGuire
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of October 2014, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 9, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas

Counsel for Amici Curiae *House Majority Leader, House Majority Whip, and JEP*

ADDENDUM

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 27(a)(4), the House Majority Leader, House Majority Whip, and Judicial Education Project certify as follows:

Parties and Amici

All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Appellant's Petition for Rehearing *En Banc*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, I hereby certify that I am aware of no corporation, association, joint venture, partnership, syndicate, or other similar entity that is a party to this suit or of any such entity that has a financial interest in the outcome of this litigation; that no *amicus curiae* on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any *amicus curiae* on this brief.

Dated: October 9, 2014

/s/ Gregory G. Katsas
Gregory G. Katsas