No. 10-1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL G. ANDERSON; JENNIFER R. BOYER;
WILLIAM COLLITON, M.D.;
RICHARD P. DELANEY, M.D.; GAETANO
MOLINARI, M.D.; RICHARD LORIA, M.D.;
LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.;
EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.;
and RONALD USCINSKI, M.D.,

Plaintiffs-Appellants,
v.

BARACK HUSSEIN OBAMA, in his official capacity
as President of the United States,

Defendant-Appellee.

On Appeal From an Order of the
United States District Court for the District of Maryland

APPELLANTS' MOTION FOR RECONSIDERATION OF COURT'S ORDER DENYING MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL, REPLY TO APPELLEE'S OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL, AND OPPOSITION TO CROSS-MOTION TO DISMISS APPEAL

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Appellants hereby submit their Motion for Reconsideration of the Court's Order of August 30, 2010, denying Appellants' Motion for Temporary Injunction Pending Appeal, their Reply to Appellee's Opposition to Appellants' Motion for Temporary Injunction Pending Appeal, and their Opposition to Appellee's Cross-Motion to Dismiss Appeal. There has not been a smokescreen like this since the Lucky Strike commercials of black and white television. The Government deploys its smokescreen by making a frivolous motion to summarily dismiss this appeal without briefing on the merits or oral argument, by ignoring the fact that Appellants have federal taxpayer standing to raise their Origination Clause challenge, and by largely squeezing Appellee's substantive response to the merits of Appellants' Origination Clause challenge into a single footnote (Opp., p. 10 n. 4). That smokescreen cannot hide, however, that Appellants are likely to succeed on the merits, i.e., that the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (hereinafter "the PPACA") **originated** in the Senate as a revenue raising bill, and that the equities weigh heavily in favor of the issuance of **Temporary Injunctive Relief**. It is respectfully proffered therefore that the Court should reconsider its Order denying the motion for temporary injunction pending appeal and do what the people look to the court to do -- be their Captains Courageous!

I. Appellants Have Shown A Likelihood Of Success On The Merits.

A. The PPACA Is A Revenue Raising Bill That Originated In The Senate.

The attempted bypass of the Origination Clause by the party in power is worse than a smokescreen; it is a transparent sham. They took a bill that originally passed the House to assist with affordable housing for returning servicemen (which was unopposed). It had absolutely nothing to do with health care. They then sent it over to the Senate where it was gutted (leaving only the bill number at the top and deleting everything after the words "Be it resolved:" and then inserted the 2,000-plus page health bill (**pretending it had originated in the House,** a transparent attempt to avoid compliance with the Origination Clause). This is child's play, but it turns out to be devilish mischief for the cathedral of American medicine which has been shaken to its foundations. The Government argues that the House version of H.R. 3590, the Service Members Home Ownership Tax Act of 2009, was a "Bill for raising Revenue" because it "contained provisions that increased some revenue-raising provisions of the Internal Revenue Code and decreased others." (Opp., p. 10, n. 4.) The Government fails to acknowledge that the principal purpose of H.R. 3590, as it passed in the House, was enactment of a program of financial assistance in the form of tax breaks for service members and

that the bill only incidentally raised revenue to pay for that program. Under binding Supreme Court precedent (which the Government fails to address), such a bill is not one to raise revenue to which the Origination Clause applies. *See United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) ("[A] statute that creates a particular government program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bill for raising Revenue' within the meaning of the Origination Clause."); *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906); *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) ("revenue bills . . . are not bills for other purposes which may incidentally create revenue").

The Government cites the Ninth Circuit's decision in *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) for the proposition that revenue-raising bills refer not just to "laws increasing taxes, but [also] . . . to all laws *relating to* taxes." (Emphasis added.) This view, that the Origination Clause applies to "revenue related" bills, not just revenue-raisers, has not been adopted either by the Supreme Court or this Court. It directly conflicts with the interpretation of other lower courts addressing origination clause challenges under both the federal and state constitutions. *See, e.g.*, *Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (bill that diminishes revenue of the government is not a bill to raise revenue under

the Origination Clause); *Baines v. New Hampshire Senate President*, 152 N.H. 124, 876 A.2d 768 (2005) (addressing challenge under origination clause in New Hampshire Constitution; "*[r]aising revenue*, in the context of the origination clause, *implies that the purpose of a measure must be to increase revenue for the support of Government* through the operation of the taxing power"[1]) (emphasis added); *Mobil Oil Corp. v. Greenwich Twp.*, 22 N.J. Tax 1, 2004 N.J. Tax LEXIS 3172517, *9 (N.J. Tax Ct. 2004) (rejecting challenge under origination clause in New Jersey Constitution; act that was not intended to raise revenue and that anticipated some property that was previously taxed would be exempt was not a bill to raise revenue). More importantly, it conflicts with the Supreme Court's decision in *Munoz-Flores*, decided five years after *Armstrong*. *Munoz-Flores* held that a bill does not qualify as one for raising revenue unless "Congress contemplated the possibility of a substantial excess" of revenue that would go to the Treasury. *Munoz-Flores*, 495 U.S. at 399.

Even if it could be said that *Armstrong* survives *Munoz-Flores*, *Armstrong* is distinguishable. *Armstrong* involved an Origination Clause challenge to the Tax Equality and Fiscal Responsibility Act of 1982 ("TEFRA"), which has been described by this Court as a "comprehensive tax reform bill." *Doe v. Chao*, 306

[1] Quoting T. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 53 Buff. L. Rev. 633, 666 (1986).

F.3d 170, 191 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004). By contrast, the House version of H.R. 3590 created a single program of tax breaks for service members, to be paid for by incidental revenue increases, and is therefore much closer to the statutes creating government programs with incidental revenue increases held not to constitute revenue bills in *Nebeker*, *Millard*, and *Munoz-Flores*.

The Government further argues that, even if H.R. 3590 was not a "Bill for raising Revenue," the PPACA "as enacted clearly would not be such a bill either," citing *Nebeker* and *Millard*. (Opp., p. 10 n. 4.) Unlike the bills at issue in those cases which only "incidentally" created revenue, the PPACA was designed and intended to increase revenue to a very substantial extent over and above the monies needed to fund the health insurance reform programs created thereby – specifically to create an excess ***of over $100 billion*** – to be used for federal deficit reduction purposes and thus to support Government generally. It can hardly be said that over $100 billion[2] is "incidental." Thus, the PPACA, as substituted for the House version of H.R. 3590, was a revenue-raising bill that originated in the Senate.

Nor was the Senate substitute at all germane[3] to the House version of H.R.

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[2] The late Senator Everett Dirksen once said, "A billion here, a billion there, pretty soon it adds up to real money." Even taking into account inflation, over $100 billion still adds up to a very substantial amount of "real" money, not "incidental" chump change, as the Government would have it.

[3] "Germane" means "closely akin", "having a close relationship." Webster's

3590. The Government nonetheless argues that inquiry into whether the Senate substitute was germane and therefore constituted a proper amendment to the House bill is barred by the enrolled bill doctrine first announced by the Supreme Court in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). (Opp., p. 10, citing *Rainey v. United States*, 232 U.S. 310, 317 (1914).) The Supreme Court, however, has specifically held that the enrolled bill doctrine does not apply to Origination Clause challenges. *Munoz-Flores*, 495 U.S. at 391 n. 4 ("Where, as here, a constitutional provision [, i.e., the Origination Clause,] is implicated, *Field* does not apply."); D. Sandler, *Forget What You Learned In Civics Class: The "Enrolled Bill Rule" and Why It's Time To Overrule Field v. Clark*, 41 Colum. J. L. & Soc. Probs. 213, 229 (2007) (the Court in *Munoz-Flores* "found the enrolled bill rule to be inapposite" to Origination Clause challenges).

The Government's reliance on *Armstrong* is again misplaced: the Ninth Circuit in that case found that the Senate amendments to TEFRA, "while far-reaching and extensive, were 'germane to the subject matter of the bill [reform of the income tax system], and not beyond the power of the Senate to propose.'" *Armstrong*, 759 F.2d at 1382, quoting *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911). By contrast, the Senate substitute of the PPACA, a massive health care

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Third International Dictionary 951 (1976).

reform bill, was not in the least germane to the House bill, which involved entirely unrelated tax breaks for service members.

In their answer, Defendant-Appellee conveniently overlooks making any mention of **PLAINTIFF JENNIFER R. BOYER**, who was added to Appellants' Second Amended Complaint as an additional Plaintiff below. **JENNIFER R. BOYER'S** 'standing' as a legitimate Plaintiff is subsumed in her affidavit filed in the District Court below, which states in pertinent part as follows:

"I am 24 years old. I have spent countless hours in high school and college preparing myself for the challenge of medical school and a career as a physician. I wanted to become a doctor so I could counsel and treat patients on a professional level, with the hope that every once in a while I could change, improve and even save people's lives."

"I received an offer of admittance to medical school in the spring of 2009. I deferred my acceptance and have spent almost a year analyzing the cost of my dream against the benefit. The average medical school student will acquire nearly $200,000 in debt over four years of rigorous coursework. Additionally, medical students willingly trade four years of their young lives for the vast knowledge required to effectively treat patients."

"Until this past year, I would have gladly taken on the debt and the workload necessary to fulfill my dream because the relationships that doctors develop with their patients over an entire career are invaluable. But --Obama's health care plan will make doctors nothing more than a name on a list of providers. The level of care doctors are able to provide will be limited to the allowed services on government-funded health insurance plans."

"At this point, I ask myself, 'Why should I take on the debt, make the personal sacrifices, and spend the time to become a physician? I will most likely end up as a subordinate, catering to someone else's ideas.' Honestly, in this political climate, I think it makes more sense to become a Physician's Assistant.

I could still see patients and impact lives, but I can reach that point in less than half the time with less than half the debt and only a fraction of the headaches."

"Obama's decision to tackle health care reform so quickly and WITH SO LITTLE THOUGHT TO THE FUTURE OF AMERICA'S DOCTORS is taking away many of the incentives that drive bright, young students to pursue a career in medicine. Such a decision should not be made lightly because it could have a DRASTIC IMPACT ON THE FUTURE OF MEDICINE." /s/Jennifer R. Boyer (emphasis supplied)

JENNIFER wrote these words **HERSELF**. In his rush to play politics with **AMERICAN MEDICINE,** Barack Hussein Obama is about to lose the next generation of the 'brightest and the best' desiring to go into the practice of medicine. The current generation of doctors will not always be around. They will leave their stethoscopes and operating instruments behind. But what can be said of the hands that will take them up?

Curiously, the indubitable standing of **JENNIFER BOYER** (a potential 'doctor to be') is entirely overlooked by the President and his attorneys as they seek to denigrate the standing of Plaintiff-Appellants, asking that they, their case, their appeal and their Motion for **Temporary Injunction** be denied and dismissed summarily in accord with the iron-fisted will of this current Chief Executive.

B. Plaintiffs-Appellants Have Taxpayer Standing.

The Government's argument that the remaining physician Appellants have suffered no injury in fact totally ignores, among other matters, the allegations of

the proposed Second Amended Complaint that Appellants are federal taxpayers. Appellants have alleged a legally cognizable injury under the test for federal taxpayer standing set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). Under that test, "taxpayers do have standing to question the constitutionality of congressional appropriations if they can demonstrate both a logical link between their status as taxpayers and the challenged legislation and a nexus between their taxpayer status and the claimed constitutional infringement." *Harrington v. Schlesinger*, 528 F.2d 425, 457 (4th Cir. 1975), citing *Flast v. Cohen*.

In this case, Appellants, as federal taxpayers, (see Affidavit of Richard P. Delaney attached hereto as Exhibit A and Affidavit of Ronald Uscinski attached hereto as Exhibit B) can show a logical link between their status as taxpayers and the challenged PPACA, because the additional taxes levied and the additional appropriations made by that legislation, if it is enforced and fully implemented, will inevitably increase the amount of federal taxes that each of the Appellants will be required to pay in future years. In addition, Appellants can demonstrate a nexus between their taxpayer status and the claimed constitutional infringement, i.e., the violation of the Origination Clause of Article I, Section 7, since the purpose of the Origination Clause was to act as a check on Congress' power to tax and spend by ensuring that any revenue raising bill originate in the more representative body of

Congress, namely the House of Representatives, rather than in the Senate.

That federal taxpayers have standing to assert Origination Clause challenges can be seen from the fact that "private taxpayers have been found to have standing to challenge the constitutionality of TEFRA under the Origination Clause[.]" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 & n. 51 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *disapproved on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997), citing *Armstrong v. United States*, (S.D. Cal. Sep. 3, 1983) and *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dism'd*, 734 F.2d 14 (6th Cir. 1984); *see also Schlick v. United States*, 1984 U.S. Dist. LEXIS 23313, *5 (N.D. Ill. Sept. 25, 1984) (No. 83 C 6335) ("The many courts which have ruled on the constitutionality of TEFRA [under the Origination Clause] have recognized private taxpayers' standing and have attempted to resolve the issue."). Even before TEFRA, "private taxpayer plaintiffs have asserted claims under the Origination Clause[.]" *Moore v. United States House of Representatives*, 553 F. Supp. 267, 272 (1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *disapproved on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997), citing *Rainey*, *Flint*, *Millard*, *Nebeker*, *Bertelsen*, and *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dism'd*, 242 U.S. 654 (1916).

It makes no difference to Appellants' taxpayer standing that many of the

taxes imposed by the PPACA "will not take effect for several years." (Opp., p. 7.) As this Court has recognized, "[c]ourts have left . . . no doubt that threatened injury to [the plaintiff] is injury in fact." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* ["*Gaston Copper*"], 204 F.3d 149, 160 (4th Cir. 2000) (en banc). "The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III requirements." *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Friends of the Earth, Inc. v. Laidlaw Envt'l Services*, 528 U.S. 167, 180-181, 185-186 (2000). "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Gaston Copper*, 204 F.3d at 160 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

"Threats or increased risk thus constitutes cognizable harm." *Gaston Copper*, 204 F.3d at 160. *Accord*, *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004) ("a concrete *risk* of harm to [the plaintiffs] . . . is sufficient for injury in fact") (emphasis added); *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2000) ("a credible *threat* of harm" constitutes "actual injury") (emphasis added); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001)

("evidence of a credible *threat* to the plaintiff's physical well being from airborne pollutants" sufficient to satisfy injury in fact requirement) (emphasis added); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-1235 (D.C. Cir. 1996) (incremental increase in risk of forest fire is sufficient for standing purposes).

Appellants are currently under the threat of increased taxes, due to the anticipated future imposition of the specific taxes levied by the PPACA. Appellants are further subject to a concrete risk of additional federal taxes being imposed on them to defray the expenditures called for by the PPACA if, as is likely, Congress underestimated the cost of the health care reform measures enacted as part of the PPACA. These threats or concrete risks of harm are sufficient for injury in fact in full satisfaction of Article III standing requirements.

As for the Anti-Injunction Act, that act prohibits "suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). First, the Act does not preclude a federal taxpayer suit to enjoin the enforcement and implementation those portions of the PPACA that do not involve the assessment and collection of the taxes imposed by that legislation. Secondly, while the Anti-Injunction Act applies to Origination Clause challenges

to the assessment or collection of federal taxes, there is an exception to its application if the two-prong test of *Enochs v. Williams Packing & Navigation Co.*, 310 U.S. 1, 7 (1962) is met. Specifically, "[t]he plaintiff must show both that he faces irreparable injury such that equity jurisdiction exists and that the government has no chance of ultimately prevailing on the merits of the dispute." *Graham v. United States*, 573 F. Supp. 578, 851 (E.D. Pa. 1983).

As shown above, the Government has no chance of ultimately prevailing on the Origination Clause issue, particularly since the substitution by the Senate of the PPACA for the House version of H.R. 3590 was clearly not germane to the subject matter of the House bill. Secondly, Appellants face irreparable injury to the basic right guaranteed by the Origination Clause, namely that "the people ought to hold the purse strings," 1 *Journal of the Federal Convention* 158 (E.H. Scott ed. 1894), by requiring that revenue raising bills be originated in the house of Congress that is closer to those subject to the taxing power. If Appellants are forced to wait for many years, until after they have paid taxes under the PPACA and then filed an action for a tax refund, before challenging the constitutionality of the taxes so levied and collected under the Origination Clause, the value of their right to hold the purse strings will be greatly and irretrievably eroded, if not entirely dissipated. This irreparable harm includes the fact that such a long delayed response to a

violation of the Origination Clause will have little or no deterrent effect and thus will most certainly encourage further transgressions of the requirement that the "branch of the national legislature most representative of the people – the House of Representatives – [must] take the political initiative of taking more money from the people through taxation." Jipping, 53 Buff. L. Rev. at 648.

Turning to the wording of Defendant-Appellee's answer, the President, through his counsel, says in the first sentence of his opposition to Plaintiff-Appellants' Motion for Temporary Injunction Pending Appeal: "Plaintiff-Appellants ask this court to enjoin as unconstitutional a federal statute **ENACTED** by Congress . . . " (emphasis supplied).

It is respectfully proffered that to say this bill was properly **"ENACTED"** by Congress would be equivalent to saying that a major change affecting the entire student body of a high school was properly enacted by the student government where the proposal was taken before the student government with much arm twisting and back-locker-room wheeling dealing and then brought to a final vote of the student government after the ordinary and accepted rules for voting upon such a proposal were bent and/or ignored entirely in order to exact the wishes of one strong person who, knowing he lacked the votes to get his proposal through the student government the **PROPER** way, was determined to **have his**

way because **HE KNEW WHAT WAS BEST FOR THE ENTIRE SCHOOL!!**

Such was the strength of this one defiant person in the adult world who currently occupies the White House **DETERMINED** that he and he alone knew what was best for the **AMERICAN PEOPLE**. He wasn't asking them (Massachusetts had shouted him down) he was **TELLING THEM**, and this Senate measure which **ORIGINATED** in the Senate was rammed through the House **without a S I N G L E bipartisan vote!!!**

If allowed to stand, our children and grandchildren and their posterity will surely question how this came about on our watch to begin with and why it was allowed to stand! History records many such ironfisted acts in the past of one man rising to power and managing to have his way with an entire people. Charisma is always part of it, but there is an elusive, mischievous component that we really don't have words for truly. These are questions for the historians and sociologists and social psychologists to answer someday.

Our children and grandchildren will someday ask: "How could the **ORIGINATION CLAUSE** have been ignored, and once ignored, why was the fact that it had been ignored allowed to stand?" They will ask: "Was the matter brought before the court? Was it immediately enjoined?" The first answer is yes, the matter having been brought before the court by these preeminent physicians.

The second answer awaits the final response of the court. The future school books have yet to be written, and prayerfully these young students of the future will read that the court, following initial passage of ObamaCare under circumstances that defied the Constitution, breathed new life into that parchment known as our Constitution by their ruling restoring **balance** and **constitutional order**!

One has to wonder what our Founding Fathers would have to say about all this. Their first question might possibly be: "Why was it allowed to get this far to begin with?"

At Page 8 of Defendant-Appellee's opposition in the first sentence of numbered paragraph 2, they state: "Plaintiffs' suit is also barred by the well-established principle that the courts lack the authority to enjoin the president in performance of his **OFFICIAL** (emphasis supplied) duties." If by "official duties" they mean to include threatening to move the Strategic Air Command out of the State of Nebraska, where it employs 10,000 people, unless Nebraska State Senator Ben Nelson would agree to become the 60th filibuster-proof vote to carry out the Chief Executive's ironfisted will -- if this is to them an "official act" of a proper president, we are witnessing yet another example of the arrogance and aloofness of this current occupant of the White House who places himself above the **PEOPLE** and their Constitution.

C. This Court Can Issue Injunctive Relief Against Subordinate Executive Officials Under The All Writs Act, 28 U.S.C. § 1651(a).

The Government attempts to distinguish *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001) on the grounds that it "concerned a suit against the United States rather than against the President alone in his official capacity." (Opp., p. 8 n. 3.) This is a distinction without a difference. As the Eleventh Circuit recognized, this Court can, pursuant to its powers under the All Writs Act, 28 U.S.C. § 1651(a), issue "commands," i.e., injunctive relief, against subordinate executive officials, even though they were not parties to the original action. *Made in the USA Foundation*, 242 F.3d at 1310 n. 25. Furthermore, while "the only defendant in this action is the President of the United States" (Opp., p. 8), Appellants specifically expressed a willingness to join subordinate executive officials, if necessary, but the District Court denied Appellants' motion for leave to amend without affording Appellants the opportunity to join the appropriate subordinate officers.

II. The Balance Of Harms Tips In Favor Of Issuing A Temporary Injunction Pending Appeal.

The Government argues that temporarily enjoining the PPACA "would

result in immediate harm to citizens who benefit from the provisions that take effect this year." (Opp., p. 12.) A temporary injunction, however, could be fashioned to operate prospectively only, thereby protecting citizens who have already received benefits, or who otherwise have obtained vested rights, under the PPACA. *See Lemon v. Kurtzman*, 411 U.S. 192, 197-199 (1973) (expanding doctrine of non-retroactivity to all constitutional law cases). Prospectively, on the other hand, it remains true that "a revenue bill of Senate origin [is] a nullity," *Hubbard v. Lowe*, 226 F. at 140, that "confers no benefits; . . . imposes no duties; . . . affords no protection; . . . creates no office; . . . [and] is in legal contemplation, as inoperative as though it had never been passed." *See Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Thus, a temporary injunction would not cause any legally cognizable harm to citizens.

Counterbalanced against this lack of legal cognizable harm to citizens is the very real, irreparable, and ongoing harm to the constitutional right guaranteed by the Origination Clause, namely the right of "the people . . . to hold the purse strings," 1 *Journal of the Federal Convention* 158 (E.H. Scott ed. 1894), by requiring that "Bills to raise Revenue" originate in the branch of the Congress that is more responsive to the will of the people – the House of Representatives. As demonstrated above, Appellants' constitutional arguments, far from being

"tenuous" (Opp., p. 13), in fact demonstrate a strong likelihood of success. The public interest, which the Government fails to address, also favors issuance of a temporary injunction to remedy this constitutional violation. Consequently, the balance of harms tips decidedly in favor of the issuance of temporary injunctive relief.

III. The Appeal Should Not Be Summarily Dismissed.

The Government points to no rule of court, statute, or case law that allows this appeal to be summarily dismissed without full briefing on the merits or oral argument. This Court's decision in *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997), provides no support for the Government's motion, as the Court in that case did not grant a motion to summarily dismiss the appeal, but rather *after full briefing on the merits of the appeal and oral argument*, 105 F.3d at 904, concluded that the district court's order correctly dismissed the case for lack of standing, and, accordingly, dismissed the appeal. The remedy in this Circuit for a frivolous appeal, moreover, is a Rule 38 motion for sanctions, not summary dismissal. *See* FRAP 38. The Government's cross-motion to dismiss is without any legal foundation.

Furthermore, as discussed above, Appellants have Article III standing as

federal taxpayers to assert their claims under the Origination Clause, and those claims are not "wholly insubstantial." (Opp., p. 13.) A constitutional claim is wholly insubstantial "only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them [wholly] insubstantial[.]" *See Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (emphasis added), quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973). As more fully set forth above and in their original motion for a temporary injunction pending appeal, Appellants' Origination Clause claims have substantial merit and deserve a fully hearing by this Court.

CONCLUSION

In view of the arguments made and authorities set forth above and in their original motion, Plaintiffs-Appellants respectfully request that their Motion for Reconsideration of the Court's Order of August 10, 2010 denying Appellants' motion for a temporary injunction pending appeal be granted, that an Order be entered enjoining the Defendant President and/or his subordinates from taking any further action to enforce or implement any of the provisions of the PPACA pending the resolution of this appeal and the issuance of the Court's mandate, and

that the Appellee's Cross-Motion to Dismiss Appeal be denied.

Respectfully submitted,

/s/R. Martin Palmer
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Certificate of Service

I, R. Martin Palmer, do hereby certify that a true and correct copy of the foregoing motion, reply and opposition has been electronically served on this1st day of September, 2010, on the following counsel for Defendant-Appellee:

Eric Fleisig-Greene
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/s/R. Martin Palmer
R. Martin Palmer

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; JENNIFER BOYER; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10-1951
BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,	:	**AFFIDAVIT OF RICHARD P. DELANEY**
Defendant-Appellee.	:	

Richard P. Delaney makes the following affidavit in support of Plaintiffs-Appellants' Motion for Reconsideration of the Court's Order of August 30, 2010 denying Plaintiffs-Appellants' Motion for Temporary Injunction Pending Appeal and in opposition to the Defendant-Appellee's Cross-Motion to Dismiss Appeal:

1. I am a Plaintiff-Appellant in the above referenced appeal and a duly licensed physician and federal taxpayer who resides in Silver Spring, Maryland.

2. I am currently a General Practitioner with an active family practice of over fifty (50) years.

3. I am married and file federal income taxes jointly with my spouse, and I

have an annual adjusted gross income of more than $250,000, and thus I anticipate having to pay the additional, federal Medicare taxes that have been imposed and levied by the Obamacare legislation, also known as the Patient Protection and Affordable Care Act, which additional Medicare taxes are due to take effect under the provisions of that Act in 2013.

4. I further anticipate that, because the cost of the Obamacare legislation is likely to rise far beyond that estimated by Congress at the time of its passage, there will likely be an increase in the other federal taxes I am obligated to pay in order to cover this additional cost of the Obamacare legislation.

I, Richard P. Delaney, being first duly sworn on oath according to law, deposes and says that he has read the foregoing Affidavit by him subscribed and that the matters stated herein are true to the best of his information, knowledge, and belief.

Executed on September 1, 2010.

/s/_____
Richard P. Delaney

Subscribed and sworn to before me this 1st day of September, 2010.

/s/ Melanie L. Port_____
Notary Public

My Commission Expires: 4/21/12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; JENNIFER R. BOYER; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10-1951
BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,	:	**AFFIDAVIT OF RONALD USCINSKI**
Defendant-Appellee.	:	

Ronald Uscinski makes the following affidavit in support of Plaintiffs-Appellants' Motion for Reconsideration of the Court's Order of August 30, 2010 denying Plaintiffs-Appellants' Motion for Temporary Injunction Pending Appeal and in opposition to the Defendant-Appellee's Cross-Motion to Dismiss Appeal:

1. I am a Plaintiff-Appellant in the above referenced appeal and a duly licensed physician and surgeon and a federal taxpayer who resides in Great Falls, Viginia.

2. I am currently a Senior Surgeon with the U.S. Public Health Service, and an Assistant Professor in the Department of Neurological Surgery, Georgetown University and George Washington University.

3. I am married and file federal income taxes jointly with my spouse, and I have an annual adjusted gross income of more than $250,000, and thus I anticipate having to pay the additional, federal Medicare taxes that have been imposed and levied by the Obamacare legislation, also known as the Patient Protection and Affordable Care Act, which additional Medicare taxes are due to take effect under the provisions of that Act in 2013.

4. I further anticipate that, because the cost of the Obamacare legislation is likely to rise far beyond that estimated by Congress at the time of its passage, there will likely be an increase in the other federal taxes I am obligated to pay in order to cover this additional and excess cost of the legislation.

I, Ronald Uscinski, being first duly sworn on oath according to law, deposes and says that he has read the foregoing Affidavit by him subscribed and that the matters stated herein are true to the best of his information, knowledge, and belief.

Executed on September 1, 2010.

/s/_____
Ronald Uscinski

Subscribed and sworn to before me this 1st day of September, 2010.

/s/ Melanie L. Port____
Notary Public
My Commission Expires: 4/21/12