No. 15-543

In The Supreme Court of the United States

MATT SISSEL,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER SUPPORTING PETITIONER

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November 2015

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QUESTIONS PRESENTED

The Constitution provides that "all Bills for raising Revenue" must "originate in the House of Representatives," but it allows the Senate to "propose or concur with Amendments" to revenue-raising bills originated by the House. Art. I, § 7. Among many other taxes, the Patient Protection and Affordable Care Act (the PPACA) imposes "[a] tax on going without health insurance." *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2599 (2012). The PPACA did not originate in the House, but in the Senate, which erased the entire text of a House-passed bill relating to a different subject and replaced it with what became the PPACA. Petitioner alleges that enactment of the PPACA violated the Origination Clause. The Court of Appeals dismissed, ruling, over a lengthy dissent, that because the PPACA's "primary purpose" was to overhaul the nation's health insurance market, it was not a "Bill[ ] for raising Revenue" subject to the Origination Clause.

The questions presented are:

(1) Is the tax on going without health insurance a "Bill[ ] for raising Revenue" to which the Origination Clause applies?

(2) Was the Senate's gut-and-replace procedure a constitutionally valid "Amend[ment]" pursuant to the Origination Clause?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

The Beacon Center is a Tennessee non-profit policy center that advocates for limited government, free market solutions, and the protection of private property rights from unconstitutional government actions. Under the Origination Clause, "all bills raising Revenue" must originate in the House of Representatives. The Senate's obliteration of an unrelated House Bill to pass the Affordable Care Act is unrecognizable as an "amendment" of a bill originating in the House. The Senate's contortions are an admission

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici*'s intention to file this brief at least 10 days prior to the due date. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

that this was a bill to raise revenue and had to be postured as if it had originated in the House. The Affordable Care Act contains many taxes and is largely enforced by the Internal Revenue Service. The raising of revenue, in many forms, to pay for the gargantuan cost of reforming one-sixth of our economy is as important as the healthcare and insurance provisions.

This case is of particular interest to both SLF and the Beacon Center because both organizations are dedicated to seeing that a lawful legislative process is a constitutional precondition preceding the enactment of laws.

SUMMARY OF ARGUMENT

This case presents an important question of constitutional law that implicates a fundamental part of the Founders' grand bargain on the nature and scope of congressional power and the relationship between Congress and the American people. This Court should grant review and use this case to establish standards for the adjudication of Origination Clause challenges that are consistent with both the need to limit the scope of the exceptions to its text and history and a reasonable degree of deference to the Legislative Branch.

Those standards might begin with reaffirming the Court's conclusion that Origination Clause challenges

are justiciable. *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

The standards might also include reiterating that the test for determining whether revenue raised by a statute is incidental or is not focuses on the relationship between the revenue raised and the specific purpose to which it is put. *Munoz-Flores*, 495 U.S. at 398-401. Because the text of the Origination Clause does not contain a limitation for incidental revenue-raising provisions, any such prudential exception should be cabined by requiring such a specific and identifiable connection between the revenue and the discrete program. The Court of Appeals required only a general purpose, and that interpretation leaves the Origination Clause toothless.

Finally, the text of the Origination Clause and the pertinent history strongly suggest that any exceptions to the scope of the Origination Clause should be narrowly construed. In addition to requiring a connection between the revenue raised and a "discrete governmental program," *id*. at 400, a test for germaneness should also be established.

Because the Court of Appeals did not apply these standards, the Court should reverse its decision and remand this case with instructions to apply the Court's standards correctly.

ARGUMENT

I. Introduction.

This case arises from the enactment of the Patient Protection and Affordable Care Act (the PPACA), Pub. Law 111-148, 124 Stat. 119-1025 (2010), and its interaction with this Court's decision in *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012). After this Court held that the individual mandate provision, 26 U.S.C. § 5000A, requiring individuals to either acquire health insurance or pay a penalty was "[a] tax on going without health insurance," *NFIB*, 132 S. Ct. at 2599, attention turned to the PPACA's origination.

In October 2009, the House of Representatives unanimously passed the six-page Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Cong. (2009) which was designed to reduce taxes for military personnel by providing a tax credit to certain veterans who purchased homes.

The bill went into the Senate, where it was gutted and replaced, coming out as the PPACA. The Senate stripped H.R. 3590 of its entire text and substituted 2,074 pages of healthcare and tax legislation that included the individual mandate, 16 additional specifically denominated revenue-raising provisions, and a host of regulatory provisions. The effect of the revenue provisions collectively was the enactment of one of the largest tax increases in American history, imposed on the entire population, with revenues of some $486 billion anticipated. In addition, significant

provisions of the PPACA are codified in the Internal Revenue Code, and significant portions of the PPACA are administered and enforced by the Internal Revenue Service.

The Senate passed the resulting law, without an affirmative vote from any Republican member, using the reconciliation process, which allowed for passage with a bare majority rather than the 60 votes customarily required for legislation to proceed to a vote in the Senate. The reconciliation process is intended to be used for bills significantly affecting revenue, spending, budgeting, etc. The House then passed the Senate bill, which bore not the slightest resemblance to the House bill whose number it bore, without an affirmative vote from any Republican member.

Since March 23, 2010, when the President signed the PPACA, we have been learning about what is in it, as then-House Speaker Nancy Pelosi said could only be done once it was passed.

This case asks whether the Senate's gutting of the House version of H.R. 3590, leaving only its bill number, and the subsequent replacement of its text with what became the PPACA, complies with the Origination Clause of the Constitution.

II. This Court should reaffirm its conclusion that Origination Clause cases are justiciable.

In 1990, the Court rejected the contention that Origination Clause challenges present nonjusticiable political questions. *United States v. Munoz-Flores*, *supra*. In so doing, the Court considered a number of arguments in support of nonjusticiability and found them wanting. Those arguments should not gain persuasiveness with time. Instead, the reasoning behind *Munoz-Flores* should remain valid today.

In *Munoz-Flores*, the Court first rejected the Government's contention that the case should be deemed nonjusticiable because judicial review would "express 'a lack . . . of respect' for the House of Representatives." 495 U.S. at 390 (*quoting* Br. for United States at 10). The Government suggested that the House could take care of itself. The Court reasoned that "disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Id*. (emphasis in original). In addition, even when Congress considers the constitutionality of a proposed law before voting on it, its consideration "does not foreclose subsequent judicial scrutiny of the law's constitutionality." *Id*. at 391.

Moreover, the Court noted that it has resolved cases presenting separation of powers questions even though, in many such cases, "the branch whose power

has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so." *Id*. at 393 (*citing Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983)). It explained, "[i]n short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." *Munoz-Flores*, 495 U.S. at 393.

The Government also contended that the Court should stay out of the case because Origination Clause challenges "do[ ] not significantly affect individual rights," but, rather, that considering them would entail disrespect for the House of Representatives. The Court first noted that "the asserted lack of a connection between the constitutional claim and individual rights" was not part of the political question calculus. *Id*. at 392. It then disagreed with the Government's premise, pointing out that at its core, "the Constitution diffuses power the better to secure liberty." *Id*. at 394 (*quoting Morrison*, 487 U.S. at 697 (Scalia, J., dissenting)). For that reason, the Court observed, it has "repeatedly adjudicated separation-of-powers claims brought by people acting in their individual capacities." *Id*. It makes no difference whether the issue involves the allocation of powers among the branches of government or, as here, within one of them. Either way, "[p]rovisions for the separation of

powers within the Legislative Branch are . . . not different in kind from provisions concerning relations between the branches, [because] both sets of provisions safeguard liberty." *Id*. at 395.

Moreover, in the case at bar, it is impossible to imagine a statute that has more of an effect on individual rights than the PPACA, amply justifying this Court's consideration of the claims in this case.

Third, the Court rejected the Government's contention that it was impossible to devise judicially manageable standards for adjudicating Origination Clause claims. As it observed, "[s]urely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges." *Id*. at 396. This is particularly true here, where a Senate bill completely unrelated to the bill that originated in the House has been thrust into law by a manipulative process that admits by the procedure used to pass it that it was a bill to raise revenue.

Finally, the Court rejected the views advanced by Justices Stevens and Scalia in their opinions concurring in the *Munoz-Flores* judgment. Justice Stevens, joined by Justice O'Connor, suggested that "a bill that originated unconstitutionally may nevertheless become an enforceable law if passed by both Houses

of Congress and signed by the President." *Id*. at 401 (Stevens, J., concurring in the judgment). Justice Scalia relied on the fact that the enrolled bill stated that it originated in the House of Representatives.

The Court responded that, even if Justice Stevens were right, "we would not agree with his conclusion that no remedy is available for a violation of the Origination Clause." *Id*. at 397 (majority). It explained that *every* law passed by both houses and signed by the President remains subject to judicial scrutiny. The Court noted, "[a] law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." *Id*.

As for Justice Scalia's concerns, the Court distinguished *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), on which he relied. The majority explained that the enrolled bill rule might apply so long as there was the "absence of any constitutional requirement binding Congress[.]" *Munoz-Flores*, 495 U.S. at 391 n.4. In that case, "'[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision is implicated, *Marshall Field* does not apply." *Id*. (*quoting Marshall Field*, 143 U.S. at 672).

In short, the Court's conclusion that Origination Clause challenges are justiciable rests on its consideration and rejection of a number of arguments that the Government made to the contrary. The Court's conclusion was valid in 1990, and it should be reaffirmed today.

III. The Court of Appeals' reliance on the "purpose" of the PPACA is inconsistent with this Court's decisions.

A. This Court's decisions limit the range of incidental exceptions to the text of the Origination Clause to those that show a link between a specific governmental program and the revenue raised under the bill.

In *Munoz-Flores*, the Court concluded that 18 U.S.C. § 3103, which calls for the imposition of a monetary "special assessment" on any person convicted of a federal misdemeanor offense was not a "Bill[ ] for raising Revenue" that violated the Origination Clause. 495 U.S. at 387. However, its reasoning does not turn on the purpose of the bill alone, but rather on the relation between the bill's purpose and the revenue it raised. The Court's test is more restrictive than that employed by the Court of Appeals below, which was in error.

More particularly, the Court noted that the general rule that revenue bills must originate in the House does not apply to those that incidentally raise

revenue.[2] It explained that it has "interpreted this general rule to mean that 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 the Government generally, is not a "'Bill[ ] for raising revenue"' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 397-98 (emphasis added). The assessments provided for in the Victims of Crime Act of 1984, which was at issue in *Munoz-Flores*, allowed for "a federal source of funds for programs that compensate and assist crime victims." *Id*. at 398.

Significantly, the Court incorporated *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897), and *Millard v. Roberts*, 202 U.S. 429 (1906), into its analysis even though their statutory goals were broader. As for *Nebeker*, the Court noted, "[d]espite its label, '[t]he tax was a means for effectually accomplishing the great object of giving to the people a currency. . . . There 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.'" *Munoz v. Flores*, 495 U.S. at 398 (*quoting Nebeker*, 167 U.S. at 203). Likewise, in *Millard*, the property taxes imposed were "but means to the purposes provided by the act." *Id*. (*quoting Millard*, 202 U.S. at

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[2] As noted below, the text of the Origination Clause does not admit of such an exception for incidental revenue raising. This Court's decisions, however, appear to do so, in effect altering the Constitution, which *amici* do not concede is appropriate.

437). That statutory purpose was to support railroad projects.

Therefore, as the Court noted in *Munoz-Flores*, "[a]s in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program." *Id*. at 399. And, while the funds generated from the special assessment, that were in excess of $100 million, were to go into the general Treasury, "there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize." *Id*. In other words, the revenue raised was intended to match the corresponding expenditures.

B. The test employed by the Court of Appeals does not require the funds generated by the mandate to bear any relationship to a specific program.

In its decision on rehearing *en banc*, the panel members who wrote to justify their decision relied on what they saw as this Court's "purposive approach." *Sissel v. Dep't of Health & Human Services*, 799 F.3d 1035 (D.C. Cir. 2015). It explained that it saw this Court's decisions as establishing that "the variable controlling whether a statutory provision falls within the ambit of the Origination Clause is whether raising revenue for the general Treasury is that provision's primary purpose." *Id*. at 1036. Because the primary purpose of the PPACA "was to overhaul the national healthcare system, not to raise revenue," *id*.

at 1040, the Court of Appeals thought it did not matter that the revenues generated by the individual mandate (and the 16 other revenue generating provisions for that matter) originated in the Senate.

This reading of the statute's primary purpose is at odds with the admonition in *Munoz-Flores* that the funds must support a "discrete governmental program" to escape the Origination Clause. 495 U.S. at 400. The funds generated by the individual mandate go into the general Treasury, and the Court of Appeals nowhere points to a specific use for them. In order to be "incidental" and escape the Clause, the statute should have to both "creat[e] a discrete governmental program and provid[e] sources for its financial support." *Id.*

First, the PPACA is far more than a "discrete governmental program." It covers one-sixth of the nation's economy, and its effects have rippled throughout. Healthcare professionals and insurance companies have gone out of business; employers have changed fulltime workers to part-time workers in response to an inscrutable regulatory provision; employers have limited their hiring so as not to have more than a certain number of employees and thereby stay out of the PPACA's coverage; people have lost their insurance coverage and healthcare professionals that they "liked" and previously trusted; people, families, and companies have been required to procure coverage that they do not need or want and to spend money on healthcare that they want and need for other purposes (discretionary or not). These effects can hardly be

considered tailored in the way that this Court's decisions call for to avoid the Origination Clause.

In addition, the funds generated by the revenue provisions in the PPACA can hardly be deemed incidental. In *Munoz-Flores*, the Court observed, "[f]our percent of a minimal and infrequent excess over the statutory cap" which is allocated to the general Treasury "is properly considered 'incidenta[l].'" 495 U.S. at 399. The Court of Appeals below decided that, because the tax in *Nebeker* raised "substantial general revenues," some $95 million more than the program's expenses, was still "incidental[ ]," *Sissel*, 799 F.3d at 1038-39, raising lots of money from Senate-originated taxes is not unconstitutional. This extrapolation should not be allowed to stand. The amount of funds at issue in *Nebeker* pale in comparison to the money generated by the PPACA, which is in the hundreds of billions. The PPACA calls for one of the largest tax increases in American history.

Because the Court of Appeals did not link a discrete governmental program to the revenue generated, or require the revenue to be dedicated to support the program, this Court should remand this case to require it to do so.

C. The Senate's gut-and-replace procedure is inconsistent with the text and history of the Origination Clause.

The Origination Clause textually requires "[a]ll Bills for raising Revenue" to "originate in the House

of Representatives" and allows the Senate to "propose or concur with Amendments as on other bills." U.S. Const., art. I, Sec. 7, cl. 1. By its terms, "*all* Bills" does not permit exceptions even for incidental amounts of funds or by reference to overarching legislative purposes. *Cf.* Zotti, Priscilla H.M. and Schmitz, Nicholas M., *The Origination Clause: Meaning, Precedent & Theory from the 12th to the 21st Century*, 3 Brit. J. Am. Legal Stud. 71, 100 (2014) ("Zotti & Schmitz") ("Considering [Alexander] Hamilton's and Webster's [1828 American Dictionary] use of the word 'revenue,' it should be no surprise that the public would have understood revenue bills as those that tax in all the various forms of taxation. Additionally, it made no difference whether there was some intended legislative purpose or government program for the tax revenues."). It is highly noteworthy that the Origination Clause says "revenue," not "tax." Obviously, revenue is a broader, unequivocal term. The expansive scope of the text suggests that, if any exceptions are allowed, they should be narrowly construed.

At the Constitutional Convention, moreover, the evolution of the Origination Clause was part of the grand bargain between the large and small states regarding the structure of the legislative branch. Benjamin Franklin proposed that, in exchange for the smaller states being given equal representation in the Senate, the Senate would be restricted "generally in all appropriations and dispositions of money to be drawn out of the general treasury. . . ." James Madison, *Notes on the Debates in the Federal Convention of*

1787, 227 (New York, Norton & Co., Inc. 1969). That proposal and the ensuing debate reflected the fundamental understanding that the House of Representatives would be closer and more responsive to the people than the Senate, which would be selected by the state legislatures. Senators would also serve far longer terms than Representatives, who would be elected every two years and thus would be more answerable to the people. "[O]ne of the most persuasive arguments for retaining some sort of Origination Clause was purely pragmatic and popular. The Convention was mindful of the looming difficulties of ratification." Zotti & Schmitz, at 97.

Additionally, several colonial and early state constitutions contained origination clauses or, in the alternative, specified that bills could originate in either house of their legislatures. For example, the Massachusetts Constitution of 1780 provided:

> All money bills shall originate in the house of representatives, but the senate may propose or concur with amendments, as all other bills.

Mass. Const. art. VII, ch. I, pt. II (1780), *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm. The Virginia Constitution of June 29, 1776, whose introductory language is very similar to that of the Declaration of Independence, provided:

> All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of

> the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.

Va. Const. (1776) *available at* http://www.nhinet.org/ccs/docs/va-1776.htm. Thus, the distinction between revenue bills and all other kinds of bills was in the conscious minds of the Founders, and the inclusion of the Origination Clause was very intentional. The Founders meant what they said and said what they meant.

Balancing the House's power of origination with a Senate power of amendment was not meant to open the door to gut-and-replace. Instead, it was meant "to alleviate fears that an aggressive House of Representatives might abuse an absolute origination prerogative on money bills by forcing the Senate to accept or refuse non-monetary statutes without their normal ability to amend or originate them." Zotti & Schmitz, at 96; *see also id*. at 116 ("The Senate's power to amend revenue raising bills was added not as a compromise to those seeking to empower the Senate on taxing measures but as a means to avoid a disingenuous House of Representatives that might force the Senate to accept or refuse non-revenue related measures tacked onto revenue raising bills.").

Here, the purpose of the Origination Clause – to preclude abuse by the House – has been stood on its head. This Court should not tolerate abuse of the House by the Senate by allowing it to "amend" a bill to the extent that all that is left of it is the bill

number. Indeed, even if there are permissible minor exceptions to the mandate in the Origination Clause, those exceptions should not be allowed even to approach what the Senate, with complicity by members of one party in the House, has done in the passage of the PPACA.

The gut-and-replace procedure is also inconsistent with the Founders' understanding of the power to amend. In British parliamentary practice, the term "amend" meant to "correct" or to "make better." *See* Natelson, Robert C., *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 Harv. J. L. & Pub. Pol'y 629, 657 (2015) ("Natelson"). Even where "[u]se of the term 'amend' . . . strayed from the word's connection to 'mend,' . . . in parliamentary practice it still bore a sense different from complete erasure or repeal." *Id*. at 662. As Natelson observes, many of the Founders "knew something" of British parliamentary procedure and usage, and they likely took that knowledge and understanding into account when debating and drafting constitutional provisions. *Id*. at 646.[3] The Founders were extraordinarily erudite people, and many were educated in the law. Imbued with a sense

[3] Natelson points to incidents in which key language was replaced through an amendment, but states that "*complete* substitutes – the gutting of a bill and replacement with new language – may have been unknown" in parliamentary practice. Natelson, at 661 (emphasis in original). Neither he nor Daniel Smyth, an independent researcher, found any complete substitutes in their review of the sources. *Id*.

of the historic importance of the document they were drafting, and having fought a revolution partly for the cause of "no taxation without representation," they would not have used a well-understood term in a way that turned it on its ear.

As noted above, the Senate's power to amend House-originated revenue-raising bills was meant to give it a means of stripping out "non-germane provisions that the House might otherwise tack on to revenue bills." Zotti & Schmitz, at 105. In this case, it is the Senate that "tacked" monstrously non-germane provisions onto a House revenue-raising bill. This suggests that, at the very least, a germaneness standard should be incorporated into the doctrine of allowing limited exceptions to the Origination Clause. In their commentary, Zotti & Schmitz note:

> If there were no germaneness requirement, then the Origination Clause would be wholly superfluous, and furthermore the word "amend" in the Clause certainly does not mean "replace" in any dictionary of plain English.

Id. at 106.

This Court should not allow the Origination Clause to become a dead letter. Instead, it should use this case to establish standards consistent with the heretofore limited exceptions to the Clause's operation and give effect to the fact that the Clause says, "*all* bills."

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus brief, this Court should grant the petition for writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand for further proceedings.

Respectfully submitted,

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November 2015

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