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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Congressional Budget Office estimated that the Senate-crafted Patient Protection and Affordable Care Act would raise more than $220 billion in new federal tax revenue over a ten-year period. Is such a measure a "bill for raising revenue" that must originate in the House of Representatives pursuant to Article I, Section 7?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the structural limitations on the exercise of power our Founders built in to the constitutional design of the federal government to protect liberty and self-government. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing the design of government in the Constitution and in particular the structural limits on the exercise of power including, *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550 (2014); *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012); and *Bond v. United States*, 131 S.Ct. 2355 (2011).

The Center's experience in litigation focused on the Constitution's structural limits on the different branches of government will assist the Court in this case. As outlined below, the Origination Clause was meant as a limit on congressional power and was de-

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given notice amicus's intent to file at least 10 days prior to the filing of this brief and all parties have consented to the filing of this brief. Petitioner filed a blanket consent and the consent from respondent has been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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 Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

signed to protect individual liberty and self-government. This Court has the authority, and the obligation, to enforce this provision of the Constitution in the same manner as any structural limit on power.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act was drafted by the Senate and then "amended" into a bill with a House of Representatives bill number. The Congressional Budget Office termed this process as "an amendment in the nature of a substitute," meaning that nothing of the original House measure survived. Letter from Douglas Elmendorf, Director of the Congressional Budget Office to the Honorable Harry Reid, November 18, 2009, at 1. The Congressional Budget Office estimated that this new Act would raise more than $220 billion in new tax revenue over a ten-year period. *Id*. at 2 n.1. On its face, this significant revenue aspect of the measure makes it a bill for raising revenue pursuant to Article I, Section 7.

The Origination Clause is not a prerogative of the House of Representatives that House members can waive. Instead, it is a structural limitation on the power of Congress. It requires bills that raise new taxes originate with representatives that will soon face the voters in an election. The clause imposes a political liability on House members responsible for proposing new taxes just before they must stand for reelection.

This Court should grant review in this case to establish that the judiciary has the power (and the duty) to enforce the "finely wrought and exhaustively considered procedure" limiting the power of Congress. These limitations were meant to protect individual

liberty and self-government and the ratifiers did not grant Congress the authority to alter its own power.

REASONS FOR GRANTING REVIEW

I. The Design of Government in the Constitution Includes Structural Limitations on the Exercise of Power in Order to Protect Individual Liberty and Self-Government.

The Federalist and Anti-Federalist both recognized that in a republican form of government, the legislative power would tend to predominate, so careful attention had to be paid to structure the legislative power to minimize the risk of abuse. *The Federalist No. 51*, at 322 (Madison) (Rossiter ed., 1961). To equalize power between the executive power and the more dominant legislative power, the new Constitution divided the legislature into two branches, imposed different terms of office for the members of each branch, and gave distinctly different powers to each.

The bicameral structure was imposed to provide "enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *I.N.S. v. Chadha*, 462 U.S. 919, 57 (1983). If the authority granted to the Legislature is not restrained, James Wilson noted during the Constitutional Convention, "there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches." *Id.* at 949 (quoting James Wilson from the records of the Federal Constitutional Convention) (citation omitted).

A key point in creating a bicameral legislature was to avoid what the drafters of the Constitution had just revolted against, an accumulation of power in a

non-representative entity. *See The Federalist No. 22*, *supra* at 151-52 (Hamilton) (explaining that one legislative body would create a tyranny antithetical to the purposes of the Constitution). The bicameral system, and its attendant division of power between the distinct branches of the legislature, is evidence of the greater scheme deliberately and painstakingly devised by the Founders' that the legislative process in Congress is "exercised in accord with a single, finely wrought and exhaustively considered procedure." *Chadha*, 462 U.S. at 951. The division effectively "[rendered the separate branches], by different … principles of action, as little connected with each other as the nature of their common functions . . . will admit." *The Federalist No. 51*, *supra* at 322-23 (Madison).

Bicameralism was not the only procedural mechanism used to limit the means by which legislative power would be exercised. The Constitution also contains "explicit and unambiguous provisions [that] prescribe and define the respective functions of the Congress . . . in the legislative process." *Chadha*, 462 U.S. at 945. Thus, the House has exclusive power of impeachment, but only the Senate may hold the trial and vote to convict. U.S. Const. Art. I, § 2, cl. 5, § 3 cl. 6. Similarly, "[t]he exclusive privilege of originating money bills [belongs] to the house of representatives." *The Federalist No. 66*, *supra* at 404 (Hamilton). Each of these provisions was designed to check power in order to protect liberty and enhance self-government. While the Senate was given a sufficient permanency to tend to those matters as required ongoing attention, *The Federalist No. 63*, *supra* at 384 (Madison), the House was designed to be closer to the people with

short terms and proportional representation. *The Federalist No. 53*, *supra* at 335 (Madison).

The Framers granted Congress the power to tax, but purposefully limited that power with a series of other constitutional provisions, both as to its objects and its means. Indeed, of all the powers of Article I, perhaps none is more specific and regulated by other provisions of the constitution than the taxing power. With respect to its objects, Congress may only tax for specific purposes: to "pay the debts and provide for the common defence and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 929 (Melville M. Bigelow ed., 5th ed. 1994). And even when it is pursuing those authorized purposes, the means that can be employed by Congress are also limited. Congress is required to apportion taxes according to population, as determined by the decennial census. U.S. Const. art. I, § 9, cl. 4. Congress cannot tax any articles exported from any state. U.S. Const. art I., § 9, cl. 5. And Congress cannot levy taxes unless they originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1.

These provisions work together to limit a power that the framers feared would otherwise be too broad and too susceptible to abuse. And the limitations were viewed as vitally important to the freedom and security of our new country, part of the overall plan that no one branch of government could yield too much power.

II. The Origination Clause Is a Critical Component of Structural Limitation on Congress's Power.

This Court has long recognized that Congress's powers are "limited and defined." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution defines those powers and further defines the manner of their execution. *See Chadha*, 462 U.S. at 951 (noting that requirements of bicameralism and presentment "serve essential constitutional functions"). Procedures set down in the Constitution for exercise of Congressional power were deliberately structured to produce "conflicts, confusion, and discordance" as a means of assuring "full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Efficiency was not the goal in this design. *Free Enterprise Fund v. Pub. Accounting Board Oversight Bd.*, 561 U.S. 477, 499 (2010). No matter how inefficient, "the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S., at 951; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). Because the design is to check power, it comes as no surprise that neither Congress nor the President can waive these constitutionally mandated procedures. *Chadha*, 462 U.S., at 999 n. 13.

The failure to follow this "finely wrought procedure" is the issue in this case. The Constitution grants no power to the House of Representatives to approve treaties or advise and consent on Officers of the United States. Similarly, the Senate has no power to enact a bill of impeachment, nor does it have

the power to propose the imposition of tax. When congressional action is predicated on its power to impose a tax under Article I, section 8, clause 1, the Constitution imposes a requirement that the taxing measure originate in the House of Representatives. In assigning the obligation (and political liability) to "originate" bills for raising revenue to the House of Representatives, the Framers were guided by their experiences with the British Crown and early state constitutions.

James Wilson noted that the purpose of the Origination Clause was to force those representatives who proposed new taxes to face election "more frequently" and thus give the citizens better control over the power of the new federal government. *See* James Wilson, The Legislative Department, Lectures on Law 1791, works 1:423-25, *reprinted in* PHILLIP B. Kurland & RALPH LERNER, eds., 2 THE FOUNDERS' CONSTITUTION 385 (1981) (emphasis added). While the House holds the "power of the purse" the fact that House members must stand for reelection immediately after proposing new taxes illustrates that this is no privilege of power.

Those ratifying the new Constitution well understood these arguments. There was no question that the Origination Clause was meant to vest power in the House and largely remove it from the Senate, so to check the power through immediate political accountability. *See Valerius*, Virginia Independent Chronicle, January 23, 1788, reprinted in 8 DOCUMENTARY HISTORY, 316; *Cassius IV*, Massachusetts Gazzette, December 18, reprinted in 5 DOCUMENTARY HISTORY 480; *Albany Federal Committee: An Impartial Address*, April 20, 1788, reprinted in 21 DOCUMENTARY

HISTORY 1391; *Judge Sumner, Massachusetts Convention Debate*, January 22, 1788, reprinted in 6 DOCUMENTARY HISTORY 1298. This was quite deliberate, tied to the nature of the House of Representatives as distinct from that of the Senate.

There is also no doubt that this was seen as a limit on the power of Congress to enact taxes. The *entire* House of Representatives must stand for reelection biennially. U.S. Const. art. I, § 2, cl. 1. This frequency of elections affords the voters an ultimate check on the actions of its representatives. James Madison wrote that because a common interest between the people and the government was essential to protect liberty, it was just as essential that the House should be immediately dependent upon the people, and "[f]requent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." *The Federalist No. 52, supra* at 327 (Madison). It was, and still is, important for Representatives to have an intimate knowledge and acquaintance with their constituents, and one of those areas which most requires local knowledge is taxation. *The Federalist No. 56, supra* at 346-47 (Madison). By checking the power to originate new or increased taxes with the combined effect of frequent elections and the intimate relationship of the people and its Representatives, the Founders created a system which "nourishes freedom and in return is nourished by it." *Id.*

As future Supreme Court Justice and Pennsylvania delegate at the Federal Convention James Wilson said to the Pennsylvania Ratifying Convention, "The two branches will serve as checks upon each other; they have the same legislative authorities, except in

one instance. *Money bills must originate in the House of Representatives.*" James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 4, 1787) (emphasis added), *reprinted in* 2 FOUNDERS' CONSTITUTION, *supra* at 397. The judgment reflected in the Constitution is that the Senate cannot have the power to originate revenue measures because that body is too insulated from the people. Congress and the President have no power to change this structure on their own. Just as they cannot agree to give Congress power to veto executive decisions or control expenditures after the appropriation has been approved, *Chadha*, 462 U.S. at 955; *Bowsher*, 475 U.S. at 733-34, they cannot agree to dispense with the Origination Clause. Each branch of government "must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Chadha*, 462 U.S. at 955.

That did not happen in this case. The entire text of the Patient Protection and Affordable Care Act originated in the Senate. The only part of the measure that came from the House was the bill number. This was a "substitution," not an amendment.

The House cannot waive the provisions of the Origination Clause any more than the entire Congress can waive the requirements of Bicameralism or the Presentment Clause. The purpose of the Origination Clause to force the members of the House of Representatives, all of whom will face the voters in two years or less, to carry the responsibility for proposing new taxes. This requirement was meant to limit Congress's power to impose new taxes. It certainly should apply to a measure that proposes to raise hundreds of billions of dollars in new taxes over the next decade.

CONCLUSION

The Origination Clause is a structural limit on the power of Congress. This Court should grant review in this case to enforce this important structural limit.

DATED: November, 2015.

Respectfully submitted,

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