No. 15-543

IN THE
Supreme Court of the United States

MATT SISSEL,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVS., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, CITIZENS' COUNSEL FOR HEALTH FREEDOM, AND INDIVIDUAL PHYSICIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID P. FELSHER
Counsel of Record
488 MADISON AVE.
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

QUESTIONS PRESENTED

1. The Senate bypassed the Origination Clause and used its "delete and replace" process to introduce The Patient Protection and Affordable Care Act, a bill expected to raise revenue of about one-half trillion dollars. Is the House's acquiescence to the "delete and replace" process an unratified Amendment to the Constitution which violates Article V?
2. Should the Court revisit the "Enrolled Bill Doctrine" because the word "originate" has different meanings under the Origination and Presentment Clauses?

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians, a national association of physicians, and a nationwide organization of patients and physicians who support health freedom for patients and physicians. *Amici* file this brief to assist the Court in deciding whether or not to grant *certiorari* to determine if the Individual Mandate Exaction ("IMX"), which was enacted under the power of Congress "To lay and

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[1] This brief is filed with the blanket consent of the Petitioner and the written consent of the Respondents. Those consents are filed with the Clerk of this Court. Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel make a monetary contribution to the preparation or submission of this brief.

collect Taxes, Duties, Imposts and Excises" ("Taxing Power" or "Power of Congress To Tax"), U.S. CONST. art. I, Sec. 8, cl. 1, failed to comply with the Origination Clause, *id.* at Sec. 7, cl. 1.

Since 1943, *Amicus* Association of American Physicians and Surgeons ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief).

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to protect patient healthcare choices and patient privacy.

Amicus Robert L. Pyles, M.D., privately practices psychiatry and psychoanalysis in the Boston area. He has held a variety of leadership positions with organized medicine and psychiatry, locally, nationally, and internationally.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have studied the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("Reconciliation Act"), in general, and the IMX, in particular. Specifically, Congress failed to abide by the first clause of Section 7 of Article I of the Constitution when it enacted 26 U.S.C. §5000A's IMX under its power to tax. *See* U.S. CONST. art. I, sec. 7, cl. 1 ("Origination Clause") ("All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills."); *see also National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"). Considering that the adoption of the Origination Clause was the most hotly debated provision during the 1787 Constitutional Convention and the fulcrum upon which the Constitution was drafted and ratified,[2] the attempted congressional end-run around the Origination Clause deserves the Court's immediate attention.

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[2] *See* Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. 659 (2014); Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 Yale J. of Int'l L. 1 (2013) ("*Tax Treaties*"); Tessa L. Dysart, *The Origination Clause, The Affordable Care Act, and Indirect Constitutional Violations,* 24 Corn. J. of L. & Public Policy 451, 484-85, 491 (2015) ("*Dysart*").

PREAMBLE

Simply stated: any Senate-originated tax measure is an affront to the Constitution. "[T]he Senate was never intended to write taxes and was explicitly forbidden from doing so in the Constitution." Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Brit. J. Am. Leg. Studies 71, 134 (2014) (*"Zotti-Schmitz"*).

PRELIMINARY STATEMENT

The IMX in Section 5000A of Title 26 was created by Sections 1501(b) and 10106(b) of ACA and amended by Section 1002(a) of the Reconciliation Act.

This case is of exceptional importance. The Senate struck every word from the House-passed bill.

Although the dissenters from the denial of rehearing *en banc* concluded that ACA actually complied with the Origination Clause, they strongly believed "the panel opinion upsets the ***longstanding balance of power between the House and the Senate regarding the initiation of tax legislation***." Appendix to Petition for Writ of Certiorari ("*PetApp*") at C34-C35 (emphasis added). The dissenters said "[i]t is therefore our duty here to assess whether the Affordable Care Act complied with the Origination Clause." *Id*. at C41. They believed the Panel had shirked its responsibility.

SUMMARY OF REASONS

Amici urge the Court to begin its analysis by focusing on the non-existence in the Senate of the House-passed bill, HR3590, entitled the Service Members Home Ownership Tax Act of 2009 ("SMHOTA"). Specifically, *Amici* ask the Court to consider the following:

First, the House may not cede any of its unique powers to the Senate and, conversely, the Senate may not cede any of its unique powers to the House unless an article V amendment has been ratified by 38 States. *See* Reason I, *infra.*

Second, the "purposive test" used below is not consistent with the text of the Origination Clause insofar as a tax bill is *per se* a "Bill for raising Revenue" considering the Origination Clause and the Taxing Clause sit in *pari materia* as the first clauses in sections 7 and 8 of Article I. *See* Reason II, *infra.*

Third, even if the Court does not reject the "purposive test," *NFIB* and the text of Section 8 of Article I foreclose all purposes of the Individual Mandate Exaction other than the Power of Congress To Tax. *See* Reason III, *infra.*

Fourth, the "Enrolled Bill Doctrine" should be revisited because the definitions of the word "originate" in the Origination Clause and in the Presentment Clause are not the same. *See* Reason IV, *infra.*

REASONS FOR GRANTING THE WRIT

ACA was introduced and passed in the Senate through a "delete and replace" process. Granting *certiorari* provides the Court an opportunity to revisit Origination Clause jurisprudence. Specifically, the Court should address the standard used to determine the originating chamber when the Senate completely replaces a House-passed Bill for raising Revenue.[3]

It is imperative for the Court to recognize and correct Origination Clause violations. Failure to comply with the Constitution is never an option. *See generally Clinton v. City of New York*, 524 U.S. 417 (1998) (regarding Presentment Clause); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (regarding Presentment Clause); and *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

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[3] *Amici* prefer the phrase "delete and replace" over the phrase "gut and amend." The former phrase more accurately reflects what the Senate actually did. *See Dysart*, 24 Corn. J. of L. & Public Policy at 454 n.14.

I. REALLOCATION OF HOUSE AND SENATE POWERS *INTER SESE* REQUIRES AN ARTICLE V AMENDMENT.

"[T]here are fundamental issues with Senate originated tax measures that strike at our Constitution's basic theory of representation and the taxing power." *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 133. That theory is reflected in the Origination Clause which is the fulcrum of the Constitution and its ratification. The Origination Clause expresses the Founders' compromise solution regarding the linkage of taxation and representation. Hearing on "The Original Meaning of the Origination Clause" before the U.S. House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice, 113th Cong., 2d Sess. 15 (April 29, 2014) (Testimony of Nicholas M. Schmitz) ("[T]he history of the Origination Clause reveals a deliberate constitutional 'check and balance' under which nobody in the federal government except the direct representatives of the people in this House … can constitutionally propose federal laws under the taxing power of Congress").

By latching onto the House-passed version of HR3590, *i.e.* the SMHOTA, striking the bill's contents, and replacing those contents with the Senate's own words, the Senate admitted that ACA is a "Bill for raising Revenue." **No other explanation is plausible or even possible.** The Senate struck the entirety of the House-passed bill. Not a single word remained after the phrase "be it enacted." Because the Senate passed a completely new bill, it originated ACA. It did not amend SMHOTA.

In short, it is a fundamental constitutional principle that the House and the Senate may not reallocate their powers *inter sese.* Only the People may do that – through an Article V Amendment. *See, e.g.*, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 837 (1995); *Clinton v. City of New York*, 524 U.S. at 449.

Under the Constitution, the Senate is denied the power to originate such a tax bill. As explained below, the inclusion of the Origination Clause was indispensable to reaching the Great Compromise of 1787 and to ratifying the Constitution. The Origination Clause lies at the heart of the Constitution and cannot be ignored. *See Reason I-A, infra.*

There is no question that the IMX is a tax. This Court said so. In *NFIB*, this Court held that the IMX was enacted under the Power of Congress To Tax. 132 S. Ct. at 2608. In deciding that the IMX was enacted under the Power of Congress To Tax, Justice Roberts observed that the IMX is "found in the Internal Revenue Code and enforced by the IRS," "is paid into the Treasury by 'taxpayer[s]' when they file their tax returns," and the payment "amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* at 2594 (brackets in original).

A. The Origination Clause Is The Constitution's Fulcrum.

It must never be forgotten that the Origination Clause is the fulcrum upon which the Constitution was ratified and powers were distributed between the federal government and the States, and between the two chambers of Congress.

Taxes played an essential role in the shaping of our nation by kindling the American Revolution. Kysar, *Tax Treaties*, 38 The Yale J. of Int'l L. at 2; *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 81-85. The Constitution would not have been adopted but for the inclusion of the Origination Clause. In fact, the House's power to originate tax bills, like the Senate's power to ratify treaties and to confirm Presidential appointments, was critical to attaining the Great Compromise of 1787:

> **"[T]he House's power under the Origination Clause was perceived as so important that bestowal of the rest of the Senate's powers relating to executive appointment, treaty-making, impeachment, and presidential elections was necessary to reach a final agreement** …. So understood, the Origination Clause served two purposes. First, the Origination Clause acted as a counterbalance to the powers secured to the small states in the Senate. Second, the Origination Clause served the interests of the people by securing a prominent role for the directly elected house, which was also subject to proportional representation and more frequent elections, in setting revenue policy."

Kysar, *Tax Treaties*, 38 The Yale J. of Int'l L. at 9-10 (emphasis added, footnote omitted).

Given the lengths to which the Founders attempted to preserve the independence of and between the House and the Senate, this Court should not overlook

how the 111th Congress and President violated the Origination Clause.[4]

The founders considered the independence of the House and Senate to be of paramount importance to the structure of the Constitution. It is evident throughout Article I. The Bicameral,[5] Rules,[6] and Presentment[7] Clauses contemplate a two-chamber Congress, while other provisions in Article I authorize independent actions by the House and Senate.

In addition to specifying different term lengths, the Constitution provides that members of the Senate and the House represent different geographic constituencies, have different modes of election, and have different requirements for holding office. U.S. CONST. art. I, §§ 2&3 and amend. XVII. The Constitution further differentiates the House from the Senate by assigning different powers and responsibilities to each chamber.[8] *See id.* art. I, § 2, cl. 5 (House has sole power to impeach); *id.* art. I, § 3, cl. 6 (Senate has sole power to conduct a trial following an impeachment by the House); *id.* art. I, § 5, cl. 1 (each house judges the

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[4] *Amici* also believe that the IMX violates the Presentment Clause because Sections 1501(b) and 10106(b) of ACA were presented jointly to the President, as part of the same bill. *See* Brief of *Amici Curiae* Association of American Physicians and Surgeons, *et al.* in Support of Petitioners in *Liberty University v. Lew*, 16-24 (Docket No. 13-306).

[5] U.S. CONST. art. I, sec. 1.

[6] U.S. CONST. art. I, sec. 5, cl. 2.

[7] U.S. CONST. art. I, sec. 7, cl. 2.

[8] "[W]hen the Framers intended to authorize either [chamber] to act alone…" or to exercise some unique power, "they narrowly and precisely defined the procedure for such action." *Chadha*, 462 U.S. at 955.

elections, returns and qualifications of its own members); *id.* art. I, § 5, cl. 2 (each house determines its own rules); *id.* art. II, § 2, cl. 2 (Senate ratifies Treaties and confirms Presidential appointments); *id.* art. II, § 1, cl. 3 and amend. XII (House contingently votes for President); *id.* amend. XIV, § 2 (recalibrates formula used to determine how Representatives are to be apportioned among the several states); *id.* art. V (two-thirds vote of both houses may propose a constitutional amendment); and *United States v. Munoz-Flores*, 495 U.S. 385, 394-95 (1990). It is important, therefore, for the Court to consider whether the balance between the Senate and the House has been altered, or at least ignored, in order to enact ACA. *Amici* firmly believe the only way to convert the House-originated SMHOTA bill into the Senate-originated ACA bill was to ignore the House-Senate relationship specified in the Constitution.

B. The House's Failure To Exercise Its Origination "Prerogative" Is Judicially Cognizable.

Respondents cannot argue that the House waived its Origination "prerogative." The House's failure to object to and stop the Senate's introduction of ACA is an irrelevancy. In fact, Congress has recognized "[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 a law passed in violation of the First Amendment." James V. Saturno, Congressional Research Service, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, at 12 (Mar. 15, 2011) ("*CRS Report*")

(citing *Munoz-Flores*, 495 U.S. at 397). The Supreme Court explained:

> "Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments … ***Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review…*** In 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 392-93 (emphasis added).

The four judges dissenting from the denial of a rehearing *en banc* also concluded that a violation of the Origination Clause is judicially cognizable. *PetApp* at C41.[9]

In particular, the dissenters could not fathom how the panel concluded that ACA was not a "Bill for raising Revenue." They said "[i]t is difficult to say with a straight face that a bill raising $473 billion in reve-

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[9] Eleven judges considered the petition to rehear the case *en banc*. They were split into three separate camps. Four of the eleven judges on the circuit dissented. *PetApp* at C33-C66. Although the seven remaining judges voted to deny the petition, the only signatories on the concurring opinion were the three judges of the original panel. *PetApp* at C3–C32 ("*Concurring Opinion*"). The remaining four non-dissenting judges did not endorse the *Concurring Opinion*. They were silent.

nue is not a 'Bill for raising Revenue.'" *PetApp* at C34. More than half a century ago, Senator Dirksen said: "[a] billion here, a billion there and pretty soon you are talking about real money." "Senator Everett McKinley Dirksen Dies" (Sept. 7, 1969), available at http://www.senate.gov/artandhistory/history/minute/Senator_Everett_Mckinley_Dirksen_Dies.htm. This case involves considerably greater amounts of money. The Origination Clause should not be so easily nullified.

While each house is free to waive its own internal rules, violations of the Origination Clause may not be waived by the House of Representatives and are enforceable by the Court. At least one commentator has said: "the Court can strike down a bill in violation of the Origination Clause even though the House has chosen to waive its origination privilege or has improperly found a bill to be outside of the clause's reach." Kysar, *Tax Treaties*, 38 The Yale J. of Int'l L. at 11 (footnotes omitted). The Origination Clause is a strict constitutional requirement. Even calling the Origination Clause a "privilege" or "prerogative" of the House grossly distorts and understates the Clause's importance.

C. Because HR 3590 Ceased To Exist The Instant the Senate Struck The Entirety Of The House's Language, It Is Appropriate For This Court To Consider The Propriety Of The "Delete And Replace" Process For Tax Bills.

On October 7, 2009, the SMHOTA was introduced in the House of Representatives.[10] It was assigned

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[10] The contents of SMHOTA may be found in *PetApp* D.

bill number HR 3590. HR 3590 was very short and consumed only a mere half-page of the Congressional Record. 155 Cong. Rec. H10550 (Oct. 7, 2009). SMHOTA unanimously passed the House the next day (416-0, Roll No. 768). 155 Cong. Rec. H11126-11127 (Oct. 8, 2009). SMHOTA included a tax credit for some members of the armed services who bought homes. Upon passage, the House sent the SMHOTA to the Senate.

On November 19, 2009, the Senate introduced the bill entitled "Patient Protection and Affordable Care Act" as an alleged amendment in the nature of a substitute for HR 3590 (Senate Amendment No. 2786). 155 Cong. Rec. S11607 *et seq*. (Nov. 19, 2009) ("strike all after the enacting clause and insert: [all of ACA]") (emphasis added).[11]

After considerable debate, the alleged amendment was passed by the Senate (60-39, Rollcall Vote No. 396) on December 24, 2009. 155 Cong. Rec. S13981.

Amici refer to the Senate-passed bill as HR 3590* to distinguish it from the House-passed SMHOTA (*i.e.* HR 3590),[12] and the Senate's transformation of the one-page House-passed bill, 155 Cong Rec.

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[11] As explained below, the phrase "strike all" is the key to understanding that ACA cannot be considered an amendment of HR 3590 because HR 3590 ceased to exist.

[12] *Amici* respectfully use an asterisk to distinguish the Senate's bill from the House's bill and to draw an analogy between an unprecedented increase in home run production during the period between 1998 and 2001 on the one hand, and the Senate's transformation of the one-page House-passed bill, 155 Cong. Rec. H10550, into the Senate's massive tome on the other hand, 155 Cong. Rec. H11607 *et seq*. *See* Tom Verducci, *Is Baseball in the Asterisk Era?*, Sports Illustrated (March 15, 2004).

H10550, into the Senate's opus, 155 Cong. Rec. S11607 *et seq*.

The Senate-passed HR 3590* differs markedly from the House-passed SMHOTA. First, the Senate completely obliterated the House's language. Second, the Senate removed the short title of the SMHOTA and replaced it with its own short title: Patient Protection and Affordable Care Act. Third, the Senate-passed bill was approximately 532.21 times the length of the House-passed bill (an increase of 53,121 percent).[13] Fourth, originally the House voted unanimously to pass SMHOTA but later passed the Senate-passed HR 3590* by only seven votes (219-212, Roll No. 165), 156 Cong. Rec. H2153 (Mar. 21, 2010). Only the bill's number, HR 3590, was retained by the Senate.

Having passed both Houses of Congress, HR 3590* became the law known as the Patient Protection and Affordable Care Act on March 23, 2010 upon the President's signature. 124 Stat. at 1024.

The phrase "strike all" is not ambiguous in any way. It means that nothing was left from the House bill to amend. The House bill ceased to exist. One hundred percent of the words of HR 3590* are those of the Senate. The word "amend" suggests a change or improvement rather than a total replacement or substitution. At the instant the Senate struck "all after the enacting clause," there was only a vacuum left to amend. Thus, the passage of HR 3590* by the Senate should be deemed an act of "origination". *See*

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[13] *Zotti-Schmitz*, 3 Brit. J. Am. Leg. Studies at 106-07 (Authors observed HR 3590*' contained 380,000 words while SMHOTA contained 714 words). This is a ratio of 532.21 to 1.

Timothy Sandefur, *So It's a Tax, Now What? Some of the Problems Remaining After NFIB v. Sebelius*, 17 Tex. Rev. of Law & Politics, 203, 231 n.181 (2013) ("Notably, the Senate's own rules deem a gut-and-amend substitute to be a new bill, and treat it as though it were a Senate-initiated bill.") (internal citation omitted).

D. An Article V Amendment Must Be Ratified Before The House May Cede Origination Power To The Senate.

Concerns of encroachment and aggrandizement of legislative power, as well as the abdication of legislative power by Congress, are central to this Court's separation of powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'"). Granting a petition for a writ of *certiorari* is not just appropriate where one branch of the Federal government encroaches upon the province of another branch. It is also appropriate to preserve the independence of the two chambers from each other, especially where one chamber of Congress encroaches upon the province of the other chamber. Revisions of that that nature and magnitude require an Article V Amendment ratified by three-fourths of the States, *i.e.* 38 States. *U.S. Term Limits*, 514 U.S. at 837; *Clinton v. City of New York*, 524 U.S. at 449.

It has been said "[t]he fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liber-

ty at peril." *NFIB*, 132 S. Ct. at 2677 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ, dissenting). Now it is up to this Court to maintain that fragmentation of power, as implemented through the Origination Clause.

> But the separation of powers does not depend on the views of individual Presidents, see *Freytag v. Commissioner*, 501 U.S. 868, 879-880, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York v. United States*, 505 U.S. 144, 182, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). The President can always choose to restrain himself in his dealings with subordinates. ***He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own***.

Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 497 (2010) (emphasis added).

The problem with permitting any congressional tax legislation which violates the Origination Clause to stand is that the unconstitutional statute binds successor Congresses. It changes the default setting from the absence of a tax to a default setting of the presence of that tax.

II. THE "PURPOSIVE TEST" IS IMPROPER BECAUSE ANY TAX, DUTY, IMPOST, OR EXCISE BILL IS *PER SE* A BILL FOR RAISING REVENUE.

The Panel used a "purposive test" to conclude that the IMX was not a "Bill for raising Revenue." *PetApp* at A12-A18. The members of the Panel reiterated that position in their Concurring Opinion. *PetApp* at C3-C32. In contrast, *Amici* contend the Origination Clause applies *per se* to any bill for a "Tax, Duty, Impost or Excise" because the Origination Clause and the Taxing Clause sit in *pari materia*.

What is particularly troublesome about the "purposive test" is that:

> it provides the Senate a blank check to originate any and all taxes it can couch as necessary to execute some other enumerated power. In theory, under this standard the entire federal budget and all receipts of the IRS could be designed and controlled through Senate originated bills. So long as the bills are compartmentalized and written to execute purposes other than revenue rising. Every tax could be labeled a "revenue offset" to the appropriation's purpose contained in the Senate bill. This would circumvent and nullify any substantive meaning of Article I, §7 of the Constitution.

Zotti-Schmitz, 3 Brit. J. Am. Leg. Studies at 131.

The words "originate" and "all" impose a vital constraint upon Congress: only the House of Representatives may initiate the set of bills specified in article I, Section 8. The Origination Clause and

the Taxing Clause, found in Sections 7 and 8, respectively, sit in *pari materia*. Members of Congress have recognized this as well. Brief of *Amici Curiae* U.S. Representatives Trent Franks *et al*. in Support of Appellants Seeking Reversal in *Sissel v. U.S. Dep't of Health & Human Servs.,* No. 13-5202, 17 (D.C. Cir.) ("Moreover, *amici* submit that the Origination Clause should be read in *pari materia* with Article I, section 8, clause [1], the power "to lay and collect taxes, duties, imposts, and excises.").

The Framers attached great importance to funding the federal government. That is why a tax-related clause initiates both sections 7 and 8 of article I. *Amici* observe the Origination Clause is followed by the Presentment Clause which prescribes the general procedure used to enact federal statutes. Similarly, *Amici* observe in Section 8, the power "To lay and collect" is followed by the other Congressional powers specified in the remaining clauses of Section 8. U.S. CONST. art. I, sec. 8, cls. 2-18. Given this parallel structure, *Amici* conclude the phrase "Bills for raising Revenue" refers *per se* to the set of bills that include any Tax, Duty, Impost, or Excise. Because the IMX falls within that set,[14] it is subject to the Origination Clause.

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[14] *See NFIB*, 132 S. Ct. at 2608 ("Our precedent demonstrates that Congress had the power to impose the [Individual Mandate] exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax").

III. IF THE COURT DOES NOT REJECT THE "PURPOSIVE TEST," THEN IT MUST CONCLUDE THAT THE SOLE PURPOSE OF THE INDIVIDUAL MANDATE EXACTION IS "TO TAX" – OTHER PURPOSES ARE FORECLOSED BY *NFIB* AND THE LANGUAGE OF ARTICLE I, SECTION 8.

The Origination Clause begins with the word "[a]ll". U.S. CONST. art. I, §7, cl. 1. Because the Founders used the word "all", the judiciary is precluded from creating or interpreting any exception to the Origination Clause. The Clause applies to each and every Tax, Duty, Impost, and Excise provision, regardless of whether such provision constitutes the entire bill or is merely a single provision within a much larger bill. *See Twin City Bank v. Nebeker*, 167 U.S. 196, 202-03 (1897) ("There was no **purpose** by the Act or **by any of its provisions**, to raise revenue ….") (emphasis added).

The Constitution sets forth the powers of Congress in Section 8 of Article I. Not only did this Court hold in *NFIB* that the IMX was enacted under the Power of Congress To Tax, but the Court also held that the IMX was ***not enacted*** under either the Commerce Clause or the Necessary and Proper Clause. *NFIB*, 132 S. Ct. at 2591, 2593. Furthermore, the IMX was not enacted under any of the fifteen other clauses in section 8 of article I which specify the powers of Congress. They are not remotely relevant. *See* U.S. CONST. art. I, sec. 8, cls. 2, 4-17.

Because clauses 2 to 18 of Article I, Section 8 are foreclosed from consideration, the Court must con-

clude that the only purpose to which the IMX is referable is the Power of Congress To Tax. Statutes enacted under that enumerated power require compliance with the Origination Clause.

IV. The "Enrolled Bill Doctrine" Should Be Revisited Because The Word "Originate" Has Different Meanings In The Origination Clause And In The Presentment Clause

There is no question this case presents a very real and substantial issue regarding "origination." Here, the Senate struck the entirety of the House's language as well as the bill's title when the Senate passed ACA. This requires the Court to determine whether passage of the Senate's version "originated" a new bill or merely "amended" the House's version.

Normally, when the Court is asked to determine where a federal law "originated", the Court does not look beyond the record of law's enrollment lodged with the Secretary of State. *CRS Report* at 10-11; and *Munoz-Flores*, 495 U.S. at 408-10 (Scalia, J., concurring). In this case, the Court should look beyond the bill's number. In considering ACA, the Senate removed every vestige of the House-originated bill but for the bill's number. One cannot conclude that ACA originated in the House without stretching the meaning of the word "originate" well beyond recognition. Judicial review is essential to clarifying the meaning of the words "originate" and "amend". This undertaking is well worth the Court's time. Those words separate the power of the House from the power of the Senate.

It is apparent from the Constitution's language, structure, and history that, as used in the Origination Clause, the word "originate" provides an absolute constraint on which chamber may "originate' the particular set of bills specified in the first clause of article I, section 8, *i.e.* the House of Representatives. Furthermore, the use of the word "originate" in the Origination Clause can be distinguished from its use in the Presentment Clause. The latter Clause explicitly directs and sequences actions that are to be taken by the President and both chambers after the veto of a bill. Nothing is left to chance. The President returns the bill to the originating chamber. The Presentment Clause could have required the President to return an objectionable bill to either chamber or to both chambers. Instead, the Framers provided for **sequential reconsideration** based upon the House of "origin".

While there are no private interests at stake when Congress wrongly designates the chamber of origin in connection with a Presentment Clause violation, private interests are seriously affected by an Origination Clause violation that is not enforced by the House of Representatives. While the House of Representatives has been vigilant in protecting its "origination" power, it has failed to do so here. Consequently, and perhaps quite uncomfortably, the Court now must ask itself the following question: May the Court protect the "People" when the House fails to guard its "origination" power?

CONCLUSION

In enacting the IMX, both chambers of Congress and the President condoned a transfer of the House's origination power from the House to the Senate. As recognized in *Clinton* and *U.S. Term Limits,* revisions of that nature and magnitude require a constitutional amendment. Perhaps the 111th Congress and the President found it advantageous to ignore the Origination Clause and to tie the hands of future Congresses and Presidents. This Court lacks that luxury.

Granting *certiorari* is critically needed to prevent the House and the Senate from redistributing their constitutionally assigned powers *inter sese*.

Respectfully submitted,

DAVID P. FELSHER
Counsel of Record
488 MADISON AVENUE
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

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