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 U.S. REPRESENTATIVE TRENT FRANKS, CHAIRMAN OF THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE, AND 45 OTHER MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Congressman Trent Franks is Chairman of the House Judiciary Subcommittee on the Constitution and sponsor of H. Res. 392, declaring that the 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") was violated by the passage of the Patient Protection and Affordable Care Act ("ACA"). Chairman Franks held a hearing on the Origination Clause on April 29, 2014. He and his 45 co-*amici*[2] and co-sponsors of H. Res. 392 all have an institutional interest in preserving the exclusive power of the House to originate "Bills for raising Revenue," like the ACA. Congressman Franks and his co-*amici* filed *amici* briefs in this case below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*), this Court upheld the penalty imposed under the individual mandate of the ACA as a "tax." In doing so, however, Chief Justice Roberts, for the Court, issued this important caveat: "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other

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[1] This brief is filed with the written consent of all the parties through letters of consent on file with the Clerk. All counsel of record received timely notice of *amici's* intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or its counsel made a monetary contribution intended to fund its preparation or submission.

[2] Congressional co-*amici* are listed in the Appendix.

requirements in the Constitution." *Id.* at 2598. One of the "other requirements" is, of course, the Origination Clause that requires that such taxes must originate in the House of Representatives.[3] In an unprecedented opinion, the D.C. Circuit ruled that ACA, designed to raise $473 *billion* in revenues through some 17 tax provisions, is not a "Bill[] for raising Revenue" under the Origination Clause because ACA's "primary purpose" was not to raise revenue but to improve health care and health insurance coverage. Petitioner App. ("PA") A-16-18.

This case raises an issue of exceptional importance—the separation of powers embodied in the Origination Clause—that merits review. As the dissent from denial of *en banc* review below put it, "The panel opinion sets a constitutional precedent that is too important to let linger and metastasize." PA C-34. The Fifth Circuit, in a related Origination Clause case, recognized that "the underlying merits of this appeal present issues of exceptional importance."[4]

The history of the Origination Clause, its purpose, and a proper reading of the relevant Supreme Court decisions, early federal court opinions, and State court decisions that interpreted their respective State Constitution Origination Clauses, all demonstrate that the court below fundamentally erred in devising

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[3] *Cf. United States v. Butler*, 297 U.S. 1, 69 (1936) ("resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible").

[4] *Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015), petition for certiorari filed November 12, 2015 (No. 15-622).

this novel "primary purpose" test.[5] If allowed to stand, the "cornerstone" of the Great Compromise of 1787 could easily be rendered a dead letter simply by the Senate labeling any revenue raising bill with a regulatory "primary purpose."

While the dissent properly concluded that the ACA is indeed a bill for raising revenue, it unfortunately and mistakenly concluded that the Senate could "gut and replace" a non-germane House bill (which does not even raise any revenue). That sweeping view of the scope of the Senate's amendment power under the Origination Clause would similarly eviscerate its meaning and be contrary to the historic understanding of the Senate's power, as even the panel recognized, and thus is a further reason why review by this Court is warranted.

The Origination Clause is not a relic so easily subverted and discarded, either by the panel's narrow view of what is a "revenue raising" bill or the dissent's expansive view of the Senate's amendment power, but a key Constitutional separation-of-powers provision upon which the Founders insisted to ensure that bills that raise taxes originate in that body of Congress closer to the People, the House of Representatives.

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[5] *See generally* Priscilla Zotti & Nicholas Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BR. J. AM. LEG. STUDIES 71 (2014) (Zotti & Schmitz).

ARGUMENT

I. THE D.C. CIRCUIT DECISION EVISCERATES THE EXCLUSIVE POWER OF THE HOUSE TO ORIGINATE "ALL BILLS FOR RAISING REVENUE," THEREBY THREATENING THE SEPARATION OF POWERS

In an unprecedented opinion, the court below concluded that what originated as the "Senate Health Care Bill" and raises $473 billion in taxes is subject to the Origination Clause "only if its *primary purpose* is to raise general revenues. . . ." PA A-16 (emphasis in original). The panel's concoction of its "hitherto unknown 'primary purpose' test"[6] is not, as the panel below suggested, "embodied in Supreme Court precedent." PA A-13. Rather, "[*i*]*t is immaterial what was the intent behind the statute*; it is enough that the tax was laid, and the probability or desirability of collecting any taxes is beside the issue."[7] If the unprecedented "primary purpose" test is allowed to stand, the Senate could easily circumvent the Origination Clause by ascribing another regulatory or legislative "purpose" to any revenue raising bill, thereby rendering the Origination Clause a dead letter.[8]

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[6] Steven Willis and Hans Tanzler IV, *The Wrong House: Why 'Obamacare' Violates The U.S. Constitution's Origination Clause*, Washington Legal Foundation Critical Legal Issues Working Paper Series, No. 189, p. 34 (Jan. 2015).

[7] *Hubbard v. Lowe*, 226 F. 135, 137 (S.D.N.Y. 1915), appeal dismissed, 242 U.S. 654 (1916) (emphasis added).

[8] Two of this Court's decisions that the D.C. Circuit relied on for its "primary purpose" rule cautioned against adopting any such categorical approach: "What bills belong to that class [of revenue bills under the Origination Clause] *is a question of such*

As Circuit Judges Kavanaugh, Henderson, Brown, and Griffith noted in their dissent from the denial of *en banc* review, "[t]he panel opinion sets a constitutional precedent that is too important to let linger and metastasize." PA C-34. These judges properly observed that, "the Act imposed numerous taxes to raise revenue. Lots of revenue. $473 *billion* in revenue over 10 years. It is difficult to say with a straight face that a bill raising $473 billion in revenue is not a 'Bill for raising Revenue.'" *Id.* at 33-34 (emphasis in original). Having concluded that the panel opinion's primary purpose test "to exempt the $473 billion Affordable Care Act from the Origination Clause is a textbook example of missing the forest for the trees" (PA C-56), the dissenting judges nonetheless wrongly concluded that "the relevant Supreme Court case law forecloses the germaneness requirement advanced by Sissel" (PA C-61), and, notwithstanding the Senate's "gut and replace" amendment, the "Affordable Care Act originated in the House." PA C-62.

Left unchecked by this Court, both the D.C. Circuit's novel construction of the Origination Clause and the dissenting opinion would blur the clear separation of powers drawn by the Origination Clause and would invite the Senate, as envisioned by our Founders, to "hatch their mischievious projects, for their own purposes, and have their money bills ready cut &

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magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (emphasis added); *Millard v. Roberts*, 202 U.S. 429, 436 (1906) (quoting *Nebeker*).

dried . . . ."[9] The interest of the people in the Origination Clause as a bulwark of liberty would thus be imperiled.

The Origination Clause embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. Without its guarantee in the 1787 Convention and ensuing ratification debates, our Constitution would not exist, at least not in its present form: the restriction of the Senate from originating taxes was the "cornerstone of the accommodation"[10] of the Great Compromise of 1787 which satisfied the necessary number of states to ratify the Constitution. As such, the way ACA was enacted not only violates the House of Representatives' prerogatives under the Origination Clause, but more importantly does great violence to two of America's most foundational principles: the separation of powers within a national government of limited powers; and the guarantee of no taxation without representation.

Aside from the district court and D.C. Circuit panel opinions below, no American court has ever allowed taxes enacted into law in this manner and on this scale to become the law of the land. Doing so now would wholly disregard and effectively nullify the plain letter and spirit of the Origination Clause.

The intra-branch separation of powers issue in this case is no less important to protecting liberty than either the inter-branch separation of powers at the federal level or the separation of powers between the

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[9] James Madison, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 443 (New York, Norton & Co. Inc., 1969).

[10] *Id*. at 290.

national government and the States under the Tenth Amendment, which this Court vigorously protected in striking down the State Mandate Medicaid provisions of the ACA in *NFIB, supra*.[11]

As Justice Thurgood Marshall, speaking for the Court in its most recent Origination Clause decision, explained:

> This Court has repeatedly emphasized that "the Constitution diffuses power, the better to secure liberty." (internal quotes and citation omitted)
>
> * * *
>
> What the Court has said of the allocation of powers among branches is no less true of such allocations *within* the Legislative Branch. . . . As James Madison said in defense of [the Origination] Clause: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). *Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.*

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[11] In striking down the State Mandate provision ACA by a vote of 7-2, the *NFIB* Court cited more than 20 times *New York v. United States*, 505 U.S. 144 (1992), which in turn relied *on United States v. Butler, supra*.

United States v. Munoz-Flores, 495 U.S. 385, 394-95 (1990) (second emphasis added). The exceptional importance of protecting this prerogative of the House is particularly acute where, as in the case of the rushed passage of the ACA,[12] one political party controlled both Houses of Congress. This control made any "blue slip" procedure by which a member of the minority may question the constitutional legitimacy of any Senate "gut and replace" amendment to a House bill a futile exercise.[13]

II. THE D.C. CIRCUIT'S "PURPOSIVE" TEST CONFLICTS WITH THE FRAMERS' INTENT, HISTORICAL PRACTICE, AND THE OPINIONS OF THIS COURT, LOWER FEDERAL COURTS, AND STATE COURTS

In denying the petition for rehearing *en banc*, the court below stated that "[b]ecause the Supreme Court has instructed us how to decide Origination Clause questions, this case presents no occasion for a comprehensive historical inquiry." PA C-29. While the lower court admittedly discussed some of the history surrounding the Origination Clause, *amici* submit that this case certainly deserves "a comprehensive historical inquiry" by this Court. Such an historical inquiry is particularly critical since this Court's Origination Clause jurisprudence, purportedly

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[12] As then Speaker Pelosi infamously exhorted her colleagues, "We have to pass the Bill so that you can find out what is in it" (https://www.youtube.com/watch?v=hV-05TLiiLU).

[13] Even if the opposition party to which *amici* belong had the power to defeat the ACA "because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments." 495 U.S. at 395.

relied on by the court below, unfortunately lacks such historical inquiry. Rather, that jurisprudence consistently and primarily rely on "Justice Story's views [which] form the basis of controlling precedent in this court and in the Supreme Court." PA C-30. But as *amici* argued below and will demonstrate *infra*, Justice Story's views, fully quoted and properly understood, support Petitioner's and *amici's* reading of the Origination Clause.

A. The History Of The Origination Clause

The dissenting judges correctly observed that, "[i]t is difficult to say with a straight face that a bill raising $473 billion in revenue is not a "Bill for raising Revenue." PA C-34. The panel opinion's "primary purpose" test "to exempt the $473 billion Affordable Care Act from the Origination Clause is a textbook example of missing the forest for the trees." PA C-56. Moreover, the "primary purpose" test is not supported by the history of the Origination Clause; quite the opposite is true.

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause.[14] With its origins in the Magna Carta, the Commons of England fought to preserve and strengthen this right for 500 years before the principle was firmly solidified by the late 17th Century in English Parliamentary custom. No principle's neglect has been as responsible for undermining the legitimacy of English speaking governments as the neglect by kings, legislatures, and courts alike of the Origination principle.

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[14] *See generally* Zotti & Schmitz, *supra*.

The principle of imposing taxation only by the immediate representatives of the people was so firmly rooted in the English tradition, that its implementation on the American side of the Atlantic was nearly universal in colonial and early state legislatures.

Where Royal charters did not explicitly guarantee the early American colonists this prerogative, they seized it. Under the various names of "House of Delegates," "Burgesses," "Commons," or "Representatives," the colonists' lower houses—those closest to the people—were commonly vested with the exclusive right of originating taxes.

Our Founders—often the same individuals who worked to draft the state constitutions with Origination Clauses—enshrined this central procedural limitation on governmental power to originate "Bills for raising Revenue" in Article 1, §7, of our current Constitution.

The lower court's fixation on the preposition "for" in the Origination Clause ("Bills for raising Revenue") to support its "purposiveness" test is a crabbed and historically inaccurate understanding of the clause. The Colonists thought that anything that taxed them at all for any reason was a "money bill" and therefore subject to origination restrictions. All but one of the first 13 States included an Origination Clause provision in their respective constitutions, and only one of those pre-ratification constitutions had a "purpose" reference. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the federal clause:

> No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, *under any pretext whatsoever*, without the

> consent of the people, or their representatives in the legislature. * * * * All *money bills* shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.[15]

More compelling, by deleting the words "for purpose of revenue" in the final version of the Origination Clause, the Framers appear to have decided that the term "money bills" was a synonym for "bills for raising money" without the limiting "*for the purpose* of revenue" clause.[16]

B. Early Lower Federal Court Decisions

Early federal judicial opinions further demonstrate the Framers intended a broad meaning of "Bills for raising Revenue." For example, in *United States ex rel. Michael v. James*, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875), the court opined:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, *either directly or indirectly*, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return. . . . It is this feature which characterizes bills for raising revenue. They draw money from the citizen; *they give no direct equivalent in return*. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

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[15] Mass. Const. Art. XXIII & Art. VII (emphasis added).

[16] Madison NOTES, *supra*, at 442.

Id. at 578 (emphasis added); *cf*. *Hubbard v. Lowe*, 226 F. at 137 ("It is immaterial what was the intent behind the statute; it is enough that the tax was laid."). Even congressional supporters of ACA concede that the history of the clause demonstrates that it was intended by the Framers to be broadly construed.[17]

C. Early State Court Decisions

In addition to the federal district court in *Hubbard v. Lowe, supra*, at least two State courts have struck down state bills for raising revenue under almost identical Origination Clause language in their respective State Constitutions. For example, in *Perry County v. Selma Railroad*, 58 Ala. 546, 1877 WL 1433 (Ala.) (1877), the Supreme Court of Alabama struck down a State Senate-originated act "To amend an act entitled an act to establish revenue laws for the State of Alabama" under the Origination Clause of the Alabama Constitution of 1868, which, like its federal counterpart, provides "that all bills for raising revenue shall originate in the house of representatives, but the

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[17] "[T]he Origination Clause, in its final form, provided for an expansive category of bills that would need to originate in the House –that, all "bills for raising revenue," even those that *did not have as their purpose* the raising of revenue. . . ." Brief *Amici Curiae* of Congressman Sandy Levin, *et al.*, at pp. 10-11 (July 17, 2014) (emphasis added) filed in *Hotze v. Burwell, supra*. Senator Harry Reid, the chief sponsor of the "Senate Health Care Bill" (http://www.reid.senate.gov/press_releases/reid-unveils-senate-health-care-bill#.U2KlLcsU9lb) would certainly be surprised to learn that the ACA is not a bill for raising revenue inasmuch as he intentionally took what he mistakenly thought was a House revenue raising bill and then replaced it with the ACA and its half trillion dollars in new taxes in a sleight-of-hand maneuver he thought complied with the Senate amendment provision of the Origination Clause.

senate may amend or reject them as other bills." *Id*. at *7.

In its ruling, the Alabama Supreme Court explained:

> We think the only safe rule for interpreting clauses in the Constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that when it is affirmatively shown by legal evidence that in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law. . . . These provisions clearly show that the law we are considering *was one to raise revenue*; and as the bill originated in the Senate, it is unconstitutional, and never had a legal existence. We must, therefore, dispose of these cases, as if that statute had never been attempted to be enacted.

Id. at *8 (emphasis added).

The Alabama Supreme Court was not hung up on the preposition "for" as was the court below; rather, it gave the phrase "all bills for raising revenue" its intended and natural meaning. *See also Thierman v. Commonwealth*, 123 Ky. 740, 97 S.W. 366, 368-69 (Ky. App. 1906) ("Mr. Justice Story, in *United States v. Mayo*, 26 Fed. Cas. 1231 [(C.C. Mass. 1813)], thus lays down the rule for determining a revenue bill: 'The true meaning of revenue laws in these clauses is such laws as are made for the direct and avowed purpose of creating and securing revenues or public funds for the services of the government' . . . . [I]n the case before us, the only construction that can be given the act in question is that it is an act for revenue, pure and

simple; and, originating, as it did, in the Senate, it was passed in violation of the plain provision of the Constitution.").

In 1882, the Court of Appeals of Kentucky addressed the meaning of Justice Story's reference to permissible "incidental" taxes as opposed to "taxes in the strict sense of the word" to clarify, as *amici* discuss further *infra*, that "user fees" in that case that "incidentally" raise revenue where "sums collected . . . from the litigant or persons for whom the services may be rendered *are in consideration of such services*, and those sums are not, in the strict sense, taxes levied on the citizen any more than increased postage is a tax levied on the sender of mail matter." *Commonwealth v. Bailey*, 81 Ky. 395, 1883 WL 7851, p. 4 (Ky. App. 1882) (emphasis added). Such fees are in sharp contrast to the taxes imposed for raising general revenues like the ACA.[18]

In every plain English language sense of the word both today and in 1789, ACA is a bill for raising revenue that "originated" in the Senate as Senator

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[18] *See* "Examination of Dr. Franklin before the House of Commons" relative to the Repeal of the American Stamp Act in 1766, in William Temple Franklin, MEMOIRS OF THE LIFE AND WRITING OF BENJAMIN FRANKLIN, p. xli (1818):

> Q. But is not the post-office, which they have long received, a tax as well as a regulation?
>
> A. No; the money paid for the postage of a letter is not of the nature of a tax; it is merely a *quantum meruit* for a service done. . . . They would certainly object to it, as an excise is unconnected with any service done, and is merely an aid; which they think ought to be asked of them, and granted by them, if they are to pay it; and can be granted for them by no others whatsoever, whom they have not empowered for that purpose.

Reid's self-described "Senate Health Care Bill." The only part of ACA that originated in the House was the House bill number H.R. 3590 – a chamber-specific bill designator that did not even exist in the early Congresses.[19]

D. The Court of Appeals Decision Is Inconsistent With Decisions Of This Court And Miscites Justice Story's *Commentaries*

As noted, the lower court's reliance on this Court's few Origination Clause cases, which instead of being based on historical practice and the intent of the Framers and Ratifiers, primarily rely on "Justice Story's views [which] form the basis of controlling precedent in this court and in the Supreme Court." PA C-30. But as *amici* argued below and demonstrate here, that heavy reliance on Justice Story as the definitive authority on the Origination Clause is seriously misplaced since all of the Supreme Court cases citing Story consistently fail to cite and discuss his complete statement on the subject, which supports Petitioner and *amici's* reading of the Clause.

Thus, the lower court relies primarily upon this Court's decision in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), and on Justice Story's *Commentaries* describing what constitutes a bill for raising revenue. PA C-30. That reliance is misplaced.

In *Munoz-Flores*, this Court was considering whether a nominal $25 assessment levied on persons convicted of federal crimes was a "Bill for raising Revenue." 495 U.S. at 385. The Court concluded that the assessment provision was not a "Bill for raising

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[19] *See* Zotti & Schmitz, *supra*, at 103, n. 111.

Revenue" because the fines were earmarked for a special Victims Fund rather than the General Treasury, and that only "incidentally" *if* there were any excess funds in the account and *if* those funds were deposited in the General Treasury, that fact alone would not subject the assessment provision to the Origination Clause. *Id.* at 399.

The D.C. Circuit panel seriously misconstrued the adverb "incidentally" used in *Munoz-Flores* in two major respects. First, the panel interpreted "incidentally" not as *Munoz* meant, namely, any excess revenue in a relatively small amount that may by happenstance or "incidentally" exceed the cap on the Victims Fund, and which such "surplus" may be deposited in the General Treasury. In fact, no "such an excess in fact materialize[d]." *Id.* at 399. Rather, the panel below transformed the adverb "incidentally" to mean "incidental to," in the sense of being "connected with" or "related to" the underlying subject matter of the legislative program. Second, by doing so, the panel below impermissibly held that since all of the taxes in the ACA were "incidental to" the underlying purpose of that law—even though all the taxes raised by the law are deposited in the General Treasury—then *mirable dictu*, all these taxes were not "revenue raising" subject to the Origination Clause. The Founders would be alarmed by this radical rule that could so easily eviscerate the Origination Clause.

The panel's confusion may have arisen from its recitation of the oft-repeated but miscited quote from Justice Story in *Munoz-Flores* and prior cases that the Origination Clause applies "to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills *for other purposes*, which may *incidentally* create revenue." 2 Joseph Story,

Commentaries on the Constitution of the United States, Sec. 877 (emphasis added). However, the ACA does indeed levy taxes in the "strict sense of the word." More importantly, the very next sentence of Story's quote that is repeatedly omitted in these few Origination Clause cases explains very clearly what he means by "bills for other purposes, which may incidentally create revenue":

> No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them *might incidentally* bring, revenue into the treasury.

Id. (emphasis added). The Founders were not worried about these kinds of incidental revenue raising measures, which can be favorably compared to "user fees."[20] The nominal assessments in *Munoz-Flores* are akin to such "user fees" to be remitted by convicted criminals who (mis)use the criminal justice system; however, the $476 *billion* in taxes levied in ACA as general revenues, including those imposed on persons like Petitioner for *not* purchasing health insurance, are not.

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[20] *See, e.g.*, Benjamin Franklin MEMOIRS, *supra*, discussing Franklin's *quantum meruit* example with respect to paying for postage stamps.

E. The House Bill Was Not A Bill For Raising Revenue

As noted, the dissent incorrectly concluded that the Senate's "gut and amend" procedure satisfied the Senate's amendment power under the Origination Clause. But that conclusion presupposes that the original House bill was a "Bill for raising Revenue." It was not.

The Service Members Home Ownership Tax Act of 2009 (SMHOTA), H.R. 3590, was intended to *reduce* taxes by providing a tax credit to certain veterans who purchase houses. *See* PA D. The dissenting judges below mistakenly suggest that SMHOTA "contained revenue raising provisions." PA C-58, n. 10. There were no "revenue raising" provisions in SMHOTA. The bill provided for "tax credits" to veterans who purchase homes, a provision which reduces revenue, not raises it. Furthermore, as Section 6 of SMHOTA, entitled "TIME FOR PAYMENT OF CORPORATE ESTIMATE TAXES," makes clear, the corporate tax-related provision was merely a withholding modification that does not raise revenue or tax rates, but merely collects a small amount more than may otherwise be due, which amount may be refunded or adjusted once the corporation files its annual return.[21]

In short, because H.R. 3590 was not a bill for raising revenue, this Court—should it grant review and rule that the ACA does raise revenue subject to the Origination Clause—need not plumb the depths of the scope of the Senate amendment power under the clause. Instead, the Senate revenue raising

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[21] *See Baral v. United States*, 528 U.S. 431, 436 (2000) ("Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.").

"amendment" would have to stand alone as originating in that body, and thus violates the Origination Clause.

F. Even If The Original H.R. 3590 Were A Bill For Raising Revenue, The "Senate Health Care Bill" Was An Impermissible Substitute Amendment

Even if H.R. 3590 were a bill for raising revenue, the conversion of that House bill into a "shell bill" by means of a total substitution of its text with the non-germane text of the "Senate Health Care Bill," was not a permissible "amendment" as our Founders understood that term, as even the panel recognized, contrary to the conclusion of the dissent. PA C-62. Moreover, this elevation of form over substance is contrary to how even the Senate has heretofore exercised its power to amend "Bills for raising Revenue." Any Senate amendment to a House bill that has the effect of raising revenue must be "germane to the subject-matter of the [House] bill,"[22] not just to one small provision in that bill as the dissent wrongly assumed. The historical practice of determining "germaneness" as well as Supreme Court precedent does not support the dissent's novel expansion of the Senate's limited amendment power.

The House has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framer's wrote the Origination Clause, it was clear that the scope of permissible amendments "as on other Bills"—regardless of whether or not the bill was for raising revenue—did not include amendments that

[22] *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911).

were not germane to the subject matter of the bill.[23] This was the established standard when the Founders during the Constitutional Convention penned the words "the Senate may propose or concur with Amendments as on other Bills."[24] In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress. Whatever later internal parliamentary practices that may have been adopted regarding the power of the Senate to amend House bills of whatever topic by non-germane "gut and replace" proposals, that subsequent practice surely cannot amend the Origination Clause with regard to what the Framers and the Continental Congress intended and was the legislative practice at the time. Accordingly, the courts must look only at that practice as it determines the scope of the Senate amendment power with respect to revenue raising bills such as the ACA. Put another way, the First Congress would never believe that the hard fought Origination Clause could be so easily circumvented by the Senate proposing a "gut and replace" amendment imposing huge taxes on its citizenry.

After the Constitution was ratified, under our newly established bicameral legislature, and designed as it was to prevent creative usurpations of the House's

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[23] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States §1072 (U.S.GPO, 1899) (*quoting* Continental Congress rule that "No new motion or question or proposition shall be admitted under color of amendment as a substitute for a [pending bill] until [the bill] is postponed or disagreed to.").

[24] *See* Zotti & Schmitz at 104-14.

right to "first ha[ve] and declare"[25] all new tax laws, the House insisted that any Senate amendments altering new tax measures must be germane to the subject matter of the original house revenue bill, not just that the word "tax" appears somewhere in the House bill. Indeed, this is the most direct and logical method to ensure that the Senate does not usurp the House's taxing power. The House's definition of this standard as applied to all legislative amendments has historically been quite clear and practicable:

> When, therefore, it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject *different from that under consideration*. This is the test of admissibility prescribed by the express language of the rule.[26]

The Supreme Court in *Flint v. Stone Tracy*, *supra*, followed this historical practice and rule, finding that the Senate's replacement of just one clause (the inheritance tax) among hundreds of other tax provisions in the Payne Aldrich Tariff Act with a corporate excise tax of equivalent revenue raising value was "germane to the subject-matter of the [House] bill, and not beyond the power of the Senate to propose."[27] The dissent below ignored the context of this germaneness rule to the point of rendering it wholly meaningless. The Senate's modest and

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[25] *See* 75 Thomas Bacon, *The Laws of Maryland* ch. XXV, 37-38 (1765).

[26] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, §5825 (1907) (emphasis added).

[27] 220 U.S. at 143.

germane amendment sanctioned in *Flint* is substantially different, both qualitatively and quantitatively, from the Senate's wholesale "gut and replace" of H.R. 3590 with the Senate Health Care Bill that became ACA. The two cases stand as polar opposites on any conceivable spectrum of germaneness.

Moreover, the dissent incorrectly supported its mistaken view that *Flint* does not require a germaneness test by relying on "*Rainey's* later rejection of just such a requirement." PA C-62. *See* Cert. Petition at 28-29.

The House has historically enforced the germaneness standard with respect to all legislative amendments, both revenue and non-revenue bills alike, since its earliest days. Moreover, the constitutional issue before this Court only concerns Senate modifications that convert a totally unrelated House measure, revenue raising or not, to a new and massive revenue raising bill. The Origination Clause provides the rule of legislative procedure in those cases. The internal procedural rules of either chamber cannot circumvent this constitutional requirement.

The Senate's practice that its amendments to House bills need not be germane cannot possibly serve as the basis of the protection of the People's rights. It is totally at odds with normal Parliamentary procedure, both now and more importantly at the time that the Framers granted the Senate the power to amend "as on other Bills." This "paltry right of the Senate to propose alterations in money bills"[28] must be viewed, as discussed *supra*, in the light of how such

[28] Letter from James Madison to George Washington (Oct. 18, 1787), *in* 10 *The Papers of James Madison Digital Edition* 196 (J.C.A. Stagg ed., Univ. of Va. Press, 2010).

amendments were made, "as on other Bills," *at the time* of the Constitution's ratification. Neither the Framers nor the First Congress would have countenanced the wholesale manner in which the "Senate Health Care Bill" replaced the House Bill, and nor should this Court.

As the authors of the exhaustive historical research on the Origination Clause concluded, "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."[29]

CONCLUSION

What is most alarming and dangerous about this case, is that the Senators knew exactly what they were doing in circumventing the Origination Clause. As explained by Senator Reid's own Senior Health Counsel: "[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn't more complicated than that."[30] From the perspective of these *amici* Members of the House of Representatives, it could not have been more contrary to the letter and spirit of the Origination Clause than that.

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[29] Zotti & Schmitz at 106-07.

[30] E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to John Cannan (Apr. 21, 2011, 3:25 p.m.), in John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105:2 Law Library Journal, 131, 153, n.176 (2013).

For the foregoing reasons and those stated by Petitioner, this Court should grant the Petition.

Respectfully submitted,

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November 25, 2015

APPENDIX

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U.S. Rep. Trent Franks' Congressional Co-*Amici*

1. Rep. Brian Babin
2. Rep. Joe Barton
3. Rep. Rob Bishop
4. Rep. Marsha Blackburn
5. Rep. Jim Bridenstine
6. Rep. Mo Brooks
7. Rep. Steve Chabot
8. Rep. K. Michael Conaway
9. Rep. John Culberson
10. Rep. Ron DeSantis
11. Rep. Jeff Duncan
12. Rep. John Duncan
13. Rep. John Fleming
14. Rep. Paul Gosar
15. Rep. Bob Gibbs
16. Rep. Louie Gohmert
17. Rep. Andy Harris
18. Rep. Jody Hice
19. Rep. Tim Huelskamp
20. Rep. Walter B. Jones, Jr.
21. Rep. Jim Jordan
22. Rep. Steve King
23. Rep. Doug LaMalfa

24. Rep. Doug Lamborn
25. Rep. Bob Latta
26. Rep. Thomas Massie
27. Rep. Mark Meadows
28. Rep. Markwayne Mullin
29. Rep. Randy Neugebauer
30. Rep. Steve Pearce
31. Rep. Robert Pittenger
32. Rep. Bill Posey
33. Rep. David P. Roe
34. Rep. Todd Rokita
35. Rep. Matt Salmon
36. Rep. Mark Sanford
37. Rep. David Schweikert
38. Rep. Marlin A. Stutzman
39. Rep. Tim Walberg
40. Rep. Mark Walker
41. Rep. Randy K. Weber, Sr.
42. Rep. Brad R. Wenstrup
43. Rep. Lynn A. Westmoreland
44. Rep. Rob Wittman
45. Rep. Ted S. Yoho