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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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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 ("PPACA") imposes "[a] tax on going without health insurance." *Nat'l Fed'n of Indep. Bus. 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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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Framers created a federal republic, in which the federal government is one of limited, enumerated powers, and that separation of powers is

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

at the heart of the U.S. Constitution. In order to achieve those goals, the Framers required that revenue-generating bills, like the Patient Protection and Affordable Care Act ("PPACA"), originate in the House of Representatives, which contains the immediate representatives of the people.

Since its creation in 1977, MSLF has argued for the proper interpretation of the Constitution to ensure a limited and ethical federal government. To that end, MSLF has participated as *amicus curiae* in this Court's two previous cases interpreting the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"); *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

SUMMARY OF ARGUMENT

This Court should grant the Petition because the decision of the D.C. Circuit conflicts with the language and purpose of the Origination Clause and the relevant decisions of this Court that interpret the Clause. *See* Supreme Court Rule 10(c). The Framers included the Origination Clause in the Constitution as a vital check on the Federal Government's ability to tax and raise revenue. The "power to tax involves . . . a power to destroy," *M'Culloch v. State*, 17 U.S. 316, 327 (1819), and, thus, the Framers limited how Congress could pass revenue raising bills.

Specifically, the Framers required that all bills for raising revenue originate in the House of Representatives. The House of Representatives is the more democratic house of Congress, where its members are more numerous than the Senate's members, serve shorter terms, and represent a proportionate amount of constituents, rather than being proportioned equally amongst the States. This makes the House of Representatives the immediate representatives of the people. The Senate, in contrast, is designed to represent the interests of the states each Senator represents. Thus, the Framers believed that the House of Representatives was the body best equipped to represent the will of the people on the important matter of raising revenue.

Although the Seventeenth Amendment led to the direct election of Senators, it did not fundamentally alter the purpose behind the Origination Clause. When ratifying the Amendment, Congress recognized that Senators would still primarily represent the interests of the states they represent, while Representatives would remain the representative body of the people. Furthermore, the Seventeenth Amendment did not change the other critical differences between the House and the Senate, *i.e.*, the fact that Representatives serve a shorter term and represent a proportional amount of people. Thus, the House of Representatives remains the most democratic body of Congress and is in the best position to reflect the will of the people. Accordingly, the Origination Clause remains a vital check on the power of the federal government today.

Despite the importance of the Origination Clause, the D.C. Circuit issued a judgment that essentially nullifies its requirements. As this Court has previously held, bills that levy taxes that raise revenue to support the government generally are subject to the Origination Clause. *United States v. Munoz-Flores*, 495 U.S. 385, 397-98 (1990); *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897). In *NFIB*, this Court clearly ruled that the PPACA's individual mandate was a tax passed pursuant to Congress's taxing power. Despite this Court's clear interpretation of the PPACA, the D.C. Circuit held that it was not a bill for raising revenue because Congress had another purpose in passing the Act. *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 8 (D.C. Cir. 2014), *adhered to on denial of reh'g*, No. 13-5202, 2015 WL 6472205 (D.C. Cir. Aug. 7, 2015). Congress's other purpose is irrelevant, however, because many taxes have a purpose beyond raising revenue. The relevant inquiry is whether the PPACA levies taxes, which it surely does. Accordingly, this Court should grant the Petition to ensure that the Origination Clause remains a vital check on the federal government's power to raise taxes.

ARGUMENT

I. THE ORIGINATION CLAUSE IS A VITAL CHECK ON THE FEDERAL GOVERNMENT'S POWER TO TAX AND RAISE REVENUE.

A. The Framers Intended For Only The Immediate Representatives Of The People To Have The Power To Propose Taxing And Spending Bills.

The Origination Clause of the U.S. Constitution provides "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." U.S. Const. art. I, § 7, cl. 1. The purpose of the Origination Clause was to ensure that the "power of the purse" was in the hands of the most representative body of Congress:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse. . . . This power over the purse may, in fact, be regarded as the most complete and effective weapon with which any constitution can arm the immediate representatives of the people. . . .

Federalist No. 58, at 359 (Madison) (Clinton Rossiter ed., 1961).

The history of the Origination Clause demonstrates the importance of the Clause to the Constitutional framework eventually adopted by the Framers.

From almost the beginning of the Constitutional Convention, the power to propose taxing bills was placed in the more representative house of the legislature. In fact, the Origination Clause was a crucial component of the "Great Compromise" that set out the structure and representation of the two houses of Congress. On July 5, 1787, the Committee working on the issue of the new federal legislature submitted to the Convention their general recommendations for the Congress:

> 1. That, in the first branch of the legislature, each of the states now in the Union be allowed one member for every forty thousand inhabitants of the description reported in the 7th resolution of the committee of the whole house; that each state not containing that number shall be allowed one member; that all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch.
>
> 2. That in the second branch of the legislature, each state shall have an equal vote.

1 *Debates on the Federal Constitution* 194 (Jonathan Elliot ed., 1836).

As the Constitutional Convention continued, many delegates reaffirmed the importance of giving the House of Representatives the power to propose taxing and revenue bills. *See* Forrest McDonald & Michael Mendle, *The Historical Roots of the Originating Clause of the U.S. Constitution: Article I, Section 7*, 27 Modern Age 275, 279-80 (Summer/Fall 1983) (discussing the history of the Origination Clause at the federal convention). As Elbridge Gerry of Massachusetts stated, "Taxation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses. In short the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills." James Madison, *Notes of Debates in the Federal Convention of 1787*, *reprinted in* 2 *The Records of the Federal Convention of 1787* at 275 (Max Farrand ed., Yale University Press 1911) (hereinafter "*Records of the Federal Convention*"). Simply put, the Framers' "experience verified the utility of restraining money bills to the immediate representatives of the people." *Id.* at 278 (statement by John Dickinson of Delaware).

The concerns of the advocates of the Origination Clause eventually won out, and the delegates adopted the language in the Constitution. One aspect that changed was the ability of the Senate to "propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7, cl. 1. This addition, however, did not alter the fundamental purpose of the Origination

Clause. In fact, Madison rejected the argument from Anti-Federalists that the "propose or concur" language authorized the Senate to, in effect, propose revenue raising bills. *See* Virginia Convention Debates, 14 June 1788, *reprinted in* 10 *The Documentary History of the Ratification of the Constitution* 1268 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, & Margaret A. Hogan eds., Digital Edition 2009). During the ratification debates in the Virginia Legislature, Madison stated that "the first part of the clause is sufficiently expressed to exclude all doubts" about the requirements of the Origination Clause.[2] *Id.* at 1268. Instead, the purpose of the "propose and concur" language was to allow the Senate to remove irrelevant language from revenue bills to prevent the House of Representatives from "compel[ing] the Senate to concur, or lose the supplies." *Debates, Resolutions and Other Proceedings of the Convention*

[2] Furthermore, if the Origination Clause authorizes the Senate to, in effect, propose revenue bills, then its requirement would be meaningless and it would be unable to achieve its objective of ensuring that the representatives hold the power of the purse. Priscilla Zotti & Nicholas Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th Century to the 21st Century*, 3 British J. Am. Legal Studies 71, 106 (Spring 2014) ("If there were no germaneness requirement, then the Origination Clause would be wholly superfluous."); *cf. United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992) ("settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect."); *see also* Petition at 27-33.

of the Commonwealth of Massachusetts, 126 (Oliver & Munroe 1808) (statement by Theophilus Parsons).

The Framers gave the "immediate representatives" the power of the purse as a check on the power of the federal government. Although the Senate has some power to concur and amend revenue bills, the ultimate power over revenue bills is with the House of Representatives. James Madison, in a speech to the newly formed House of Representatives on May 15, 1789, summed up the purpose of the Origination Clause:

> The constitution . . . places the power in the House of originating money bills. The principal reason . . . was, because [its members] were chosen by the People, and supposed to be best acquainted with their interests, and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People.

3 *Records of the Federal Convention* at 356. Accordingly, this Court should grant the Petition to effectuate the Framers' intent to limit the power to propose revenue bills.

B. The Purpose Of The Origination Clause Has Not Changed Since The Ratification Of The Constitution.

Although the method of electing Senators has changed since the ratification of the Constitution, the fundamental aspects of Congress's makeup remains unchanged. The House of Representatives remains the "immediate representatives of the people" and that house remains best suited to originate taxing and revenue bills. Thus, the Origination Clause remains as vital today as when the Constitution was originally passed.

In 1913, the states ratified the Seventeenth Amendment to the United States Constitution which provides, *inter alia*, that "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote." U.S. Const. amend. XVII. The Seventeenth Amendment altered how Senators were chosen, from being appointed by the state legislatures to a direct election by the people.

"[O]ne of the key reasons for the passage of the Seventeenth Amendment[was] the need to remove from the state legislatures the burden of selecting United States Senators, a process each state legislature had to undergo at least twice every six years." *Trinsey v. Com. of Pa.*, 941 F.2d 224, 229 (3d Cir. 1991). The selection of Senators was a time-consuming and burdensome duty of the legislatures, which overshadowed any other aspect of a state's legislative session:

> It is believed that one of the great advantages to be gained by a change of the mode of electing Senators is that of leaving the State legislatures free and unembarrassed to attend to that legislation which the interests of the State require. It is frequently true that a senatorial election not only pushes aside all matters of local interest, in so far as the election of members to the legislature is concerned, but that it also occupies not only weeks, but sometimes months, or the entire session of the legislature, to the great detriment of the State's public business. Not only is legislation which ought to be had not had, public interests which ought to be cared for are not cared for, but charges of bribery arise and scandal attaches to the entire lawmaking department of the State.

S. Rep. No. 961, 61st Cong., 3d Sess., 13 (1911). Thus, the primary purpose of the Seventeenth Amendment was not to fundamentally alter the structure of Congress. In fact, as stated by the Committee on the Judiciary, the Senate remained primarily the representatives of the States:

> The Senators of a State would be just as thoroughly representative of the State if elected by the people as they are when elected by the legislature. . . . This amendment does not propose in any way to interfere with the fundamental law save and except the method or mode of choosing the Senators.

Id. at 4-5.

Accordingly, the Senate remains the representatives of the State and the House of Representatives remains the representatives of the people. *See* Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1371-72 (2001) ("A change in the method of selecting Senators, however, should not be confused with a change in the constitutional duties assigned to the Senate . . . [the Seventeenth Amendment] did nothing to alter the unique role of the Senate itself under the lawmaking procedures prescribed elsewhere in the Constitution."). Although the Congressmen of both houses are now directly elected, the representatives of the House of Representatives are more numerous, serve shorter terms, and represent a proportionate amount of constituents. These characteristics make the House of Representatives the more democratic house and the house most responsive to the desires of the people. Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 Yale J. Int'l L. 1, 41 (2013) (These characteristics ensure that "Representatives are more immediately and directly accountable to their constituents, who can effectuate a change in representation frequently. The Senate, by contrast, is more insulated from popular opinion.").

Accordingly, the purpose of the Origination Clause is not diminished with the direct election of Senators. Because the House of Representatives remains more immediately accountable to, and more representative of, the will of the people, Representatives remain in a better position to reflect that will

when proposing Revenue Bills. Rebecca M. Kysar, *The "Shell Bill" Game: Avoidance and the Origination Clause*, 91 Wash. U.L. Rev. 659, 667 (2014) ("The Framers hoped these characteristics would further ensure that the House would design revenue policy in a manner that was closest to the people's wishes."); Zotti & Schmitz, 3 Brit. J. Am. Legal Stud. at 133 ("The original indirect election of Senators was cited as one among several reasons why the House was more appropriate than the Senate for proposing taxing measures. However, all other 'aristocratic' characteristics of the Senate (term lengths, non-proportional representation, non-local representation, etc.) remain the same today.").[3] Thus, even after the ratification of the Seventeenth Amendment, "[tax increases] must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off." *NFIB*, 132 S. Ct. at 2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Ensuring that Congress complies with the Origination Clause "help[s] protect individual liberty – in this instance, by ensuring that only those representatives

[3] Furthermore, the original "Great Compromise" plan further demonstrates that the direct election of representatives in the House is not a necessary component for placing the taxing power in that branch of Congress. The plan did not specify how Senators would be chosen, only that each state would get an equal number of Senators. 1 *Debates on the Federal Constitution* 194.

closest to the people can initiate legislation to wrest money from the people." *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1052 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing *en banc*). Accordingly, this Court should grant the Petition because this case presents an important federal question about the proper interpretation of the Origination Clause.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE D.C. CIRCUIT'S JUDGMENT RENDERS THE ORIGINATION CLAUSE MEANINGLESS.

This Court should grant the Petition because, as demonstrated above, the Origination Clause is a critical component of the Constitution. The D.C. Circuit's judgment, however, frustrates the purpose of the Clause and renders the provisions meaningless. Indeed, "[t]he panel opinion sets a constitutional precedent that is too important to let linger and metastasize." *Sissel*, 799 F.3d at 1050 (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

As this Court has stated, all tax bills are presumptively designed to "raise[ ] revenue to support the government generally," *Munoz-Flores*, 495 U.S. at 397-98, and, thus, are presumptively subject to the Origination Clause requirement. In *NFIB*, this Court held that the PPACA's individual mandate was passed pursuant to Congress's taxing authority. *NFIB*, 132 S. Ct. at 2595. Thus, the PPACA is

presumptively subject to the Origination Clause requirement.

In *Munoz-Flores*, this Court also stated that the limits of the Origination Clause do not apply to bills that "create[ ] a particular governmental program and . . . raise revenue to support that program." *Id.* Specifically, this Court held that a monetary assessment on defendants convicted of federal misdemeanors was not a "bill for raising revenue" because receipts did not go into the general treasury, but into a special fund earmarked for compensating and assisting federal crime victims. *Munoz-Flores*, 495 U.S. at 398; *see also Millard v. Roberts*, 202 U.S. 429, 437 (1906) (Bill for raising funds for railway stations did not need to originate in House because "the moneys provided to be paid to the railroad companies are for the exclusive use of the companies, 'which is a private use, and not a governmental use.'"); *Twin City Bank*, 167 U.S. at 202 ("revenue bills are those that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." (citing Joseph Story, 1 *Commentaries on the Constitution of the United States* § 880 (1833)). This case is distinguishable from this Court's previous cases because the PPACA does not create a particular government program and then raise revenue to support that program.

The PPACA levies taxes on those that do not purchase health insurance and the revenues collected from those taxes are collected by the IRS and go into the general treasury. 26 U.S.C. § 5000A(g); *NFIB*, 132

S. Ct. at 2594 (comparing the shared responsibility payment tax to a tax on "earning income"). The tax is paid into the Treasury when individuals file their tax returns, and the amount is based on "such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* Accordingly, because this money is not earmarked to finance or defray the cost of any particular government program, this case is distinguishable from this Court's previous Origination Clause cases.

The D.C. Circuit, however, went above and beyond this Court's previous holdings and created a new rule that renders the Origination Clause meaningless. Instead of simply recognizing that the PPACA levies a tax and, thus, the Constitution required it to originate in the House of Representatives, the court instead held that Congress's purpose in levying a tax was the dispositive factor in deciding whether a bill must originate in the House of Representatives. *Sissel*, 760 F.3d at 8. The purpose, however, is irrelevant because every tax has some purpose beyond raising revenue. *NFIB*, 132 S. Ct. at 2596 ("Every tax is in some measure regulatory."). The relevant question is whether the bill levies "taxes, in the strict sense of the word," *Twin City Bank*, 167 U.S. at 202, which the PPACA clearly does. *NFIB*, 132 S. Ct. at 2595.

Under the D.C. Circuit's reasoning, all Congress has to do is identify some other purpose of a tax, and the bill creating that tax is no longer a bill for raising revenue. This holding is unprecedented and essentially eliminates the Origination Clause from the Constitution

because it allows Congress to circumvent the requirement that revenue bills originate in the House of Representatives. *Sissel*, 799 F.3d at 1054 (Kavanaugh, J., dissenting from denial of rehearing *en banc*) ("[N]o case or precedent of which I am aware has said that a regulatory tax – that is, a tax that seeks in some way to influence conduct – is exempt from the Origination Clause merely because such a tax also has a purpose of encouraging or discouraging certain behavior."). This Court should grant the Petition because the D.C. Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10(c).

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Dated this 25th day of November 2015.

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