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 *Amicus Curiae* of U.S. Justice Foundation, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Institute on the Constitution, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

U.S. Justice Foundation, Gun Owners Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Public Advocate of the United States and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

Some of these *amici* have filed *amicus curiae* briefs in the following recent cases challenging the Affordable Care Act, including four filed in this Court:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, 656 F.3d 253 (4th Cir. 2011).[2]

- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, No. 11-420, On Petition for *Certiorari* (Nov. 3, 2011).[3]

- Dept. of Health and Human Services v. Florida (consolidated with NFIB v. Sebelius, 567 U.S. __, 132 S.Ct. 2566 (2012).[4]

- Conestoga Wood Specialties v. Sebelius, 573 U.S. ___, 134 S.Ct. 2751 (2014).[5]

- King v. Burwell, 576 U.S. ___, 135 S.Ct. 2480 (2015).[6]

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[2] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus.pdf.

[3] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus_SC.pdf.

[4] http://www.lawandfreedom.com/site/health/DHHSvFlorida_Amicus.pdf.

[5] http://www.lawandfreedom.com/site/constitutional/Conestoga%20Wood%20Amicus%20Brief.pdf.

[6] http://www.lawandfreedom.com/site/constitutional/King%20Del%20Berg%20Amicus%20Brief.pdf.

SUMMARY OF ARGUMENT

Yet again, this Court has before it an important constitutional challenge to the Affordable Care Act ("ACA"). Although the courts below unanimously rejected the Petitioner's claim that the process by which ACA was enacted violated the Origination Clause of Article I, Section 7, the judges were deeply divided over the meaning of the Clause. This deep division, if not resolved by this Court, will leave uncertainty as to what Congressional procedures to impose taxes the Origination Clause permits. That alone justifies granting this Petition. But there is a more urgent reason for this Court to grant this Petition — the government, and all of the judges of the courts below have so misapprehended the rule that "all bills for raising revenue shall originate in the House," as to render it a dead letter, as the government essentially has urged. This Court should not allow the Origination Clause and the timeless principle undergirding it — to restrict Congress' taxing power to the People's representatives — to be relegated to some constitutional ash heap based on the inconsistent and deeply flawed opinions below.

It is the foundational principle of "no taxation without representation" that lies at the very heart of the Origination Clause. Birthed just over 800 years ago in the 1215 Magna Carta, that principle is embedded in the proposition that governments may not, without the consent of the people or their elected representatives, levy a tax on the people, depriving them of their property. Throughout its 800-year history, the English, and then the Americans, worked

into the very structure of their governments safeguards against money bills being enacted into law by a legislative process that was not fully responsive to the will of the people.

It is against this historic background that the present Origination Clause must be construed. Because the House of Representatives is comprised of members directly elected by the people every two years, it is the more representative of the two congressional bodies. Thus, the Origination Clause **mandates** that all bills for raising revenue begin in the House. By mandating this procedural order, the Constitution imposes upon the House a fiduciary relationship with the electorate — a "trust" — that if not honored could result in defeat at the polls. By contrast, the members of the Senate, answerable to the electorate only every six years, are only **permitted** to act, and even then only to "propose or concur with Amendments," to revenue initiatives of the House. The House is assigned the primary role; the Senate, only a secondary role.

With respect to the ACA, it is readily understood that the roles of the House and the Senate were reversed in this case. The House initiated a modest bill, six pages long, providing a benefit for first-time house buyers. The Senate gutted that bill, pouring in over 2,700 pages, overhauling completely the nation's health insurance industry and imposing billions of taxes, raising billions in new revenue.

In order to find this process to be consistent with the Origination Clause, the group of concurring judges

below ruled that, because the primary purpose of the Senate bill was to regulate the health insurance industry, and not to raise revenue, then the Origination Clause does not apply. The other group of dissenting judges below dismissed this reasoning as nonsensical in light of the billions of dollars in new taxes contained in the bill. Nevertheless, these dissenting judges found ACA to be compliant with the Origination Clause on the ground that, by vesting in the Senate the power to amend the Clause endowed the Senate with total discretion to replace and substitute its own bill for that of the House. Both groups of judges are profoundly wrong, defiant not only of the Origination Clause's text, but also disregarding the Clause's purpose to implement the historic underlying principle of no taxation without representation.

STATEMENT

As one oft-cited law professor has written: "[E]veryone knows that the Affordable Care Act ["ACA"] was passed via a sneaky subterfuge designed to get around the requirements of the Origination Clause"[7]:

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[7] T. Burrus, "No Taxation Without Representation: How a Fundamental American Principle is a Technicality to the New York Times," Forbes (May 21, 2014) http://www.forbes.com/sites/trevorburrus/2014/05/21/no-taxation-without-representation-how-a-fundamental-american-principle-is-a-technicality-to-the-new-york-times/.

> The Senate took a House bill giving tax credits to first-time home buyers, "amended" it to empty it of all content except for the bill number, and then filled it back up with the 2700 pages that would become the [ACA]. By doing this the Senate purportedly "complied" with the Origination Clause.[8] [*Id.*]

As Petitioner Sissel points out in his Petition, the House bill was only "six pages long ... and ... did not increase taxes, levy any new tax, or relate in any way to health insurance." Petition for Writ of Certiorari ("Sissel Pet.") at 3. However, as the Petition also points out, the Senate substitute "includes at least 20 new taxes, together estimated to generate at least $500 billion annually for the general treasury of the federal government." *Id.* at 5.

Petitioner's claim that ACA violated the Origination Clause was rejected by the three-judge panel below, ruling that ACA "was not a bill for raising revenue" because the measure's "primary purpose" was not to raise money for the government, but to "overhaul the nation's health insurance industry." *See also* Sissel v. U.S. Dept. of Health and Human Services, 760 F.3d 1, 8-10 (D.C. Cir. 2014). From this ruling, Sissel filed a petition for rehearing *en banc*, which was denied. Sissel v. U.S. Dept. of Health and Human Services, 799 F.3d 1035 (D.C. Cir. 2015).

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[8] "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."

In their opinion concurring in the order denying Sissel's petition for a rehearing *en banc*, Circuit Judges Rogers, Pillar, and Wilkins justified the panel decision solely on "binding Supreme Court precedent." *Id.* at 1036 (Rogers, Pillar, and Wilkins concurring). That precedent, the concurring judges observed, reveals that "[t]he Supreme Court has never found an Origination Clause violation," because the Court has held in three cases "spanning more than a century," that the Clause applies only to those bills whose "primary purpose" is to "rais[e] revenue for the general Treasury." *Id.* Compelled by this "purposive reading" of the Origination Clause, the three concurring judges concluded that the panel decision must stand, in light of the ACA's revenue-raising provisions, which were "plainly designed to expand health insurance coverage ... not to raise revenue for the general operations of government." *Id.* at 1035-36.

In response to this concurrence, and dissenting from the court's order denying the petition for rehearing *en banc*, Circuit Judges Kavanaugh, Henderson, Brown, and Griffin vigorously disagreed with the panel's reading of Supreme Court precedent. *Id.* at 1057-60. Additionally, the dissenters took issue with the concurrence's "purposive" reading of the Origination Clause text. *Compare id.* at 1055-56 *with id.* at 1044-48. Further, the dissenters noted, "[a]s a practical matter ... while courts can sometimes identify the various purposes of a law, it is extremely difficult for a Court to identify *one* predominant purpose." *Id.* at 1054. Thus, the dissenters concluded that the panel was:

> wrong in a way that, if followed, would **degrade** the House of Representative's **constitutional prerogative** to originate revenue-raising bills. Sissel's en banc petition says it well: "The panel's 'purposive approach' all but guts the Origination Clause by effectively enabling the Senate to originate tax bills that might have some broader social purpose." [*Id.* at 1060 (Kavanaugh, *et al.*, dissenting) (emphasis added).]

Ironically, however, the dissenters have demonstrated no such concern that their own reading of the Senate's power to amend a revenue-raising bill would include the power to gut the House bill, and substitute its own revenue-raising bill, just as surely degrades the House's constitutional power to originate revenue-raising bills. *Id.* at 1062.

There is a more serious constitutional concern than this — one that escaped the attention of both the dissenting and the concurring judges to the order denying Sissel's petition for a rehearing. The Origination Clause confers no power upon either house of Congress to change the constitutional process by which "bills for raising revenue" become law. Both the concurring and dissenting opinions miss this point, believing that the Origination Clause permits Congress to enact into law of any revenue-raising bill in accordance with the procedural rules, without regard for the text or for the principle underpinning the Origination Clause — "no taxation without representation." For it is that principle that animated the founders to lodge the power to originate revenue-

raising bills in the House, not the Senate, because the House of Representatives was "more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings." *See* 2 The Founders' Constitution, Records of the Federal Convention, Item # 7 at 376 (P. Kurland & R. Lerner, eds., Univ. Chi. Press: 1987).

ARGUMENT

I. THE ORIGINATION CLAUSE OF ARTICLE I, SECTION 7 RESTS SQUARELY UPON THE ANCIENT PRINCIPLE OF NO TAXATION WITHOUT REPRESENTATION.

In his dissenting opinion to the petition for a rehearing *en banc* below, Circuit Judge Kavanaugh observed that the Origination Clause should be read in light of the fact that the drafters "had just fought a war for independence fueled by outrage at taxation without representation." Sissel, 799 F.3d. at 1051 (Kavanaugh, dissenting). But the 18th century connection between the Origination Clause and the no-taxation-without-representation principle was not, as Judge Kavanaugh suggests, simply a matter of visceral outrage. *Id.* Nor, as Judge Kavanaugh suggests, can the link between the Clause and the principle be fully explained by reference to the familiar refrain[9] that "the power to tax involves the power to destroy." *Id.* Rather, as Justice Story recounts in his Commentaries, the underlying principle of the

[9] McCulloch v. Maryland, 17 U.S. 316, 431 (1819).

Origination Clause is that, because the money supplied to the government is "raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves." 2 J. Story, Commentaries on the Constitution, § 871 (1833), reprinted in 2 The Founders' Constitution, Item 13 at 386.

Instead of bestowing "prerogative" power to raise revenue, the Origination Clause was designed as a safeguard to secure the innate power in the people, as evidenced by the following exchange involving James Madison on the floor of the House on May 15, 1789:

> Mr. White. The Constitution, having authorized the House of Representatives alone to originate money bills, places an important **trust** in our hands, which, as their protectors, we ought not to part with. I do not mean to imply that the Senate are less to be trusted than this house; but the Constitution, no doubt for wise purposes, has given the **immediate representatives of the people** a control over the whole government in this particular, which, **for their interest**, they ought not to let out of their hands.
> Mr. Madison. The Constitution places the power in the **House** of originating money bills. The principal reason why the Constitution had made this distinction was, because they were **chosen by the people**, and supposed to be the best acquainted with their interest 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; that so they might **revert more frequently to the mass of the people**. [House of Representatives, Duties, Annals 1:65, 2 The Founders' Constitution, Item 11 at 385 (emphasis added).]

Before Story and the advent of the United States Constitution in 1787, Blackstone wrote in his Commentaries that:

> with regard to taxes: it is the antient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them.... The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the **body of the people**, and therefore it is proper that **they alone should have the right of taxing themselves**. [1 Blackstone's Commentaries, 2 The Founders' Constitution, Item 2 at 374.]

This is not the language of legislative discretion, but of fidelity and duty, legally binding upon the people's representatives.

A. The Origination Clause Precludes Taxation by Legislative Discretion.

Eight hundred years ago this past June 15, the Magna Carta planted the seedbed in which the

people's right not to be taxed without representation sprouted and grew. Modestly, but forthrightly, the Magna Carta declared the people free from the imposition of any "scutage[10] ... in our kingdom except by the common council of our kingdom." *See* Magna Carta Section 12 reprinted in Sources of our Liberties at 14 (R. Perry & J. Cooper, eds., ABA Found.: Rev. Ed. 1978) ("Sources"). Eighty-two years later, the principle was confirmed and enlarged in the 1297 Confirmatio Cartarum, in which the King promised that "from henceforth [he] shall take such manner of aids, tasks, nor prises, but by the common assent of the realm." Sources at 31.

Three hundred thirty years would go by before the people would once again rally against "prerogative taxation" under the reigns of James I (1603-25) and Charles I (1625-49), revived by the 1628 Petition of Right, "'the second Great Charter of the liberties of England' and 'the first great official interpretation of Magna Carta since the time of Edward III.'" Sources at 62-63. By this petition, the House of Commons pressed King Charles I to give up all claims of sovereign prerogative, and on June 7 of that year "the king called the Commons before him, had the petition [of right] read, and the clerk pronounced the words of approval, ... let **right** be done as is desired." Sources at 69 (emphasis added).

Foremost amongst the rights declared was: "[t]hat no man [may] hereafter be compelled to make or yield

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[10] Webster's 1828 Dictionary defines "scutage" to be a "tax."

any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament." 1628 Petition of Right in Sources at 75. Having elevated the no-taxation-without-representation principle to the legal status of a right or liberty of Englishmen, the 1628 Petition led to the 1689 English Bill of Rights, "[t]he fourth clause ... spoke the final word in the long contest between English kings and their subjects on the question of the power of the king to raise money without the consent of Parliament." Sources at 227. The Fourth Clause read: "That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament ... is **illegal**." 1689 Bill of Rights reprinted in Sources at 246 (emphasis added).

Seventy-five years later, the American colonists would take this principle and extend it to revenue-raising bills enacted by the English Parliament, opposing the effort to impose "stamp duties on all legal documents, newspapers, pamphlets, college degrees, almanacs, liquor licenses, playing cards, and dice." Sources at 262-63. "[T]he Stamp Act was denounced by John Adams as a violation of Magna Carta, and its provisions were cited in support of the principle 'no taxation without representation.'" Sources at 10.

The town of Boston led the way. Under instructions penned by Samuel Adams, the Massachusetts General Court was urged to "protest the measure," calling "the act an annihilation of the right to govern and tax conferred on the colony by its charter, and a blow at the privileges which the colonists held in common with all British subjects." Sources at 264. James Otis prepared a memorial,

asserting that, as "British subjects, the colonists had the right to make local laws and tax themselves. Otis soon followed this with his famous pamphlet ... argu[ing] that Parliament had no absolute powers of taxation and that acts of Parliament contrary to the law of nature were void." Sources at 264. One year later, Patrick Henry entered the fray, presenting seven resolutions to the Virginia House of Burgesses, and alleging, in part, "that under the British constitution taxes could be levied only by the people or their representatives [and] that the General Assembly ... had the 'sole and exclusive' right to levy taxes." Sources at 265.

In short, the two Adamses, Otis, and Henry said that it was no more the prerogative of the English Parliament to levy a tax on the American people than the prerogative of the king. Thus, the Stamp Act Congress of 1765 resolved that "the only representatives of the people of these colonies, are persons chosen therein by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures." Resolutions of the Stamp Act Congress of 1765 (reprinted in Sources at 270.

As repeated by the First Continental Congress in its 1774 Declaration and Resolves:

> That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances,

> cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in **all cases of taxation** and internal polity.... [*See* Declaration and Resolves of the First Continental Congress, Sources at 287 (emphasis added).]

As understood and applied by America's founders, this principle "**exclud[ed] every idea of taxation ...** for raising a revenue on the subjects, in America." *Id.* at 287-88 (emphasis added). Thus, the 1776 Declaration of Independence forcefully stated: "[The king] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation ... [f]or imposing taxes on us without our consent." *See* Declaration of Independence (Sources at 320).

B. The Origination Clause Imposes a Specific and Distinct Constitutional Obligation upon the House.

In his opinion from the order of the court below denying Sissel's petition for a rehearing *en banc*, dissenting Judge Kavanaugh minimized the significance of the Origination Clause, asserting that "[t]his case is not *Marbury v. Madison* redux."[11] Sissel,

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[11] In earlier ACA litigation, Justice Scalia discussed the purpose of the Origination Clause. "Taxes have never been popular, see,

799 F.3d at 1064. Few cases are, but the Clause does bring forth a question that goes to the heart of the American constitutional republic, wherein those who are elected to office are the servants of the people, not their masters.[12] Every elected and appointed federal official in this nation rules not by personal prerogative, but by law. To that end, the people of the United States exercised their "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness...." Marbury v. Madison, 5 U.S. 137, 176 (1803). "[A]s the authority, from which they proceed, is supreme ... they ... organize[] the government, and assign[] to different departments, their respective powers [and] establish certain limits not to be transcended by those departments." *Id.* Hence, "[t]he powers of the legislature are defined, and limited; and that those

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e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they 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. The Federalist No. 58 'defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.' *United States* v. *Munoz-Flores*, 495 U.S. 385, 395, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990)." NFIB v. Sebelius, 567 U.S. ___, 132 S.Ct. 2566, 2655 (2012) (Scalia, J., dissenting).

[12] Matthew 20:25-26. "You know that the rulers of the Gentiles lord it over them, and their great men exercise authority over them. It is not this way among you, but whoever wishes to become great among you shall be your servant."

limits may not be mistaken, or forgotten, the constitution is written." *Id.*

By Article I, Section 1 of the Constitution, the People established the legislative department of the United States government, "consist[ing] of a Senate and House of Representatives." By Article I, Section 8, Clause 1, the People authorized the legislative department "[t]o lay and collect Taxes, Imposts and Excises." Like the exercise of all of the other enumerated powers, the People prescribed in Article I, Section 7, Clause 2, the process by which such exercise of power may become law. But, unlike the exercise of any other legislative power, the specific way that "[a]ll Bills for raising Revenue" shall become law — they must "originate in the House of Representatives," and the Senate may only "propose or concur with Amendments as on other Bills." As for the exercise of legislative power regarding any other subject, the process which the two houses of Congress employ to "pass" a bill is subject to the discretion of the rules of each of the two bodies, bound only by Article I, Section 7, Clause 2.

Paraphrasing Chief Justice John Marshall's opinion in Marbury: "To what purpose [is the power to raise revenue] limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Marbury at 176. Paraphrasing the Chief Justice's answer: "The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts

allowed, are of equal obligation." *Id.* There is, Chief Justice Marshall concluded, "no middle ground[:] The constitution is either a superior, paramount law, **unchangeable by ordinary means**, or it is on a level with ordinary legislative acts, and like other acts, is **alterable when the legislature shall please** to alter it." *Id.* at 177 (emphasis added).

According to the concurring judges in the court below, a bill that would otherwise qualify as a revenue-raising bill, no matter how much revenue will be raised, may be altered at the sole discretion of Congress by simply attributing to the bill some primary nonrevenue purpose related to the taxes being proposed, and presto — the Origination Clause does not apply. *See* Sissel, 799 F.3d at 1040. As the dissenting judges point out, it "is true of most legislation" that it has "purposes other than raising revenue [and that] virtually every tax has the dual purposes of raising revenue and influencing behavior." *Id.* at 1054.

Indeed, King George III averred that the 1765 Stamp Act had a nonrevenue purpose in that it would not only "augment the public revenues," but would "unite the interests of the most distant possessions of the crown, and to encourage and secure their commerce with Great Britain." But King George III's effort to justify the Stamp Act on the ground that it was a levy designed to achieve purposes other than the raising of revenue fell on deaf ears. Sources at 263. And rightfully so. As the 1780 Massachusetts Constitution forbade, "[n]o ... tax ... ought to be ... levied, under any **pretext** whatsoever...." Sources at

377 (emphasis added). Permitting Congress to proffer, as primary, a non-revenue-raising purpose opens a constitutional pathway big enough for a Mack truck to drive through. Although the concurring judges below contend that their purpose inquiry is justified by the textual insertion of the word "for" between "bills" and "raising revenue," Webster's 1828 Dictionary instructs us that the primary sense of "for" meant "to go towards," so that the Origination Clause might well be read "bills going towards raising revenue."

C. The Power of the Senate to Amend Revenue-Raising Bills Does Not Include Gut and Replace.

As right as the dissenting judges were to reject the purposive analysis of the panel decision, they were terribly wrong about "Congress's long standing practice ... to permit Senate amendments of exactly the kind at issue here, in which the Senate essentially guts the House bill and replaces the House language with Senate language." Sissel, 799 F.3d at 1062. This practice, the dissenters asserted, was justified by a self-serving Senate Report[13] stating that, "[w]hen 'a bill for raising revenue has originated in the House, no limitation is placed by the Constitution upon the power of the Senate to amend it.... The exclusive prerogative of the House of Representatives in relation to such bills is simply to *originate* them.'" *Id.* In effect, the Senate Report considers that the power of the House to originate bills for raising revenue is a

[13] S. Rep. No. 42-146 at 3. Sissel, 799 F.3d at 1062.

power in name only, and may be trumped by the Senate's liberal "germaneness requirements" which themselves are requirements in name only. *See id.* at 1060-61. If true, this is the very kind of reasoning that increasingly persuades the American citizenry that "written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." Marbury at 177.

The actual text of the Origination Clause contemplates that Senate action be responsive to a House bill for raising revenue. Thus, the text permits the Senate to "propose or concur" — not to replace or substitute — "with Amendments as on other Bills." The Clause thus invites the Senate to play a secondary role in the raising of revenue, correcting or rectifying, not initiating or introducing. After all, the Origination Clause **mandates** that bills for raising revenue originate in the House, and only **permits** Senate amendments. Applying the rule that a "textually permissible interpretation that furthers rather than obstructs" the Origination Clause's purpose is favored, the permissive role of the Senate should be subordinated to the mandatory role of the House. *See* A. Scalia & B. Garner, Reading Law at 63 (West: 2012) ("The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered.").

In the view of the dissenting judges, the concluding 13 words of the Origination Clause — "but the Senate may propose or concur with Amendments as on other Bills" — was determinative in reaching their conclusion that the "gut and replace" approach taken here by the U.S. Senate was constitutionally

sanctioned. *See* Sissel at 1061-3. Believing "gut and replace" to be sanctioned, they concluded that the panel had reached the right decision, but for the wrong reason. However, even though appellate courts have been known to allow panel decisions based on faulty logic to stand, surely that notion could not apply to a constitutional case of this import. *See* Sissel, at 1049-50. Thus, having found the panel's decision to be flawed, the dissenters had no obligation to address whether there was another basis on which the panel's outcome could be upheld, and their analysis should be viewed as no more than gratuitous.

Moreover, although the dissenters purport to base the view they adopt solely on the meaning of those concluding 13 words, they never bothered to analyze the text. They never considered the meaning to the Founders of the word "Amendments" and whether it would encompass the modern "gut and replace" practice.[14] One would think this to have been central to any textual analysis, but the dissenting judges skipped over a search for the meaning of that central constitutional word, instead finding support for their position in the later rules and practices of Congress.

A recent article sheds important light on this central textual issue. Professor Robert G. Natelson explains that the Founding-era meaning of "Amendment" was a noun corresponding to the verb "amend" which is defined "in the sense of to 'correct' or 'make better.'" R. Natelson, "The Founders'

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[14] *See* Sissel Pet at 30 n.10.

Origination Clause and Implications for the Affordable Care Act," 38 HARV. J.L. & PUB. POL'Y 629, 657 (Spring 2015). His review of both British and American practice was that "the overwhelming majority [of amendments] worked only modest changes," and he "found no amendments that altered the subject matter of an original motion." *Id.* at 660-61. Professor Natelson discussed the connection between the definition of "amendment" and notions of "germaneness," discussed at length by the dissenting judges (Sissel at 1061-64) and the petitioner (Sissel Pet. at 27-33), but Professor Natelson's historical review of germaneness, does not change the original meaning of "Amendment" in the constitutional text at the time. And one must conclude from Professor Natelson's survey that the Founders had no familiarity with any definition of "Amendment" by which "gut and replace" would constitute an "Amendment."[15]

Context also demands that the Senate's amendment powers under Article I, Section 7, Clause 1 be so limited. Otherwise, the process by which revenue-raising bills become law would be virtually no different from the process by which any bill becomes law. *See* Sissel Pet. at 29-30. That being the case,

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[15] Unfortunately, by the end of his article Natelson drifts away from the centrality of the meaning of the Origination Clause to develop a conclusion not grounded in the textual analysis he develops. Natelson speculates that "Founding-Era courts" would have ruled that the true constitutional offense of the ACA was that the Senate impermissibly added regulatory measures to a House tax bill. Natelson at 706-08.

then Article I, Section 7, Clause 1 would be meaningless. However:

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.... Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.... [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).]

CONCLUSION

Since the enactment of the Affordable Care Act in March 2010, various reviewing courts have labored in order to save it from a finding of constitutional infirmity. In doing so, they have fashioned several creative legal rationales to support the ACA which have caused many to question these decisions as outcome-driven.[16]

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[16] Two Supreme Court Justices who reportedly were not as concerned about law as the outcome of cases were Chief Justice Earl Warren and Chief Justice Charles Evans Hughes. Chief Justice Warren wanted "rulings that reflected what was best for the country, sometimes without worrying over legal technicalities or precedent. 'He'd say, "cut through the law".'" Stuart Pollak, former Law Clerk to Chief Justice Earl Warren, as quoted in Philip Shenon, A Cruel and Shocking Act: The Secret History of the Kennedy Assassination at 278 (Henry Holt & Co.: 2013).

From the outset, the Affordable Care Act has been plagued with its share of smoke and mirrors. The man described as the "Obamacare architect" revealed that the ACA's complex redistribution of wealth was designed to prevent the Congressional Budget Office from scoring the bill as a tax: "If CBO scored the mandate as taxes, the bill dies."[17]

Accordingly, Congress predicated ACA's individual mandate not as a tax, but as a penalty based on the Commerce Clause: "The individual responsibility requirement provided for in this section ... is commercial and economic in nature, and substantially affects **interstate commerce**...." 42 U.S.C. § 18091 (emphasis added). Congress laid out the effects on interstate commerce in 10 different points, and even cited this Court's decision in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) to support its assertion "that insurance is interstate commerce subject to Federal regulation." *Id*.

Ever flexible before this Court, the government supported the individual mandate as an appropriate exercise under either the Commerce Clause or the taxing power or both. *See generally* HHS v. Florida

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Justice William O. Douglas quoted Chief Justice Hughes as telling him "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." W.O. Douglas, The Court Years, 1939-1975 at 8 (Random House 1980).

[17] *See* A. Roy, Forbes.com, "ACA Architect: 'The Stupidity of the American Voter' Led Us to Hide Obamacare's True Costs from the Public" (Nov. 10, 2014).

(No. 11-398), Brief for Petitioners (minimum coverage provision). That brief explained how the individual mandate "is fully integrated into the tax system, will raise substantial revenue, and triggers only tax consequences for non-compliance," and that this "Court has never held that a **revenue-raising provision** bearing so many indicia of taxation was beyond Congress's taxing power." *Id.* at 52-53 (emphasis added).

Ultimately, a majority of this Court rejected Congress's assertion of power under the Commerce Clause, but upheld the ACA only under the taxing power, which was never asserted by Congress. NFIB v. Sebelius, 132 S.Ct. at 2591, 2600. In a similar vein, earlier this year this Court determined that, contrary to the clear language of the statute, a Federal Exchange is an Exchange established by a state. *See* King v. Burwell, 576 U.S. ___, 135 S.Ct. 2480 (2015).[18]

Now that all judges below have determined that the Origination Clause can be readily circumvented, this Court should grant the petition for a writ of certiorari in order to review the matter for itself and not leave standing the flawed and inconsistent opinions of the courts below.

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[18] The public's confidence in the integrity of this Court has dropped to its lowest level in 15 years. Gallup, "Disapproval of Supreme Court Edges to New High" (Oct. 2, 2015) http://www.gallup.com/poll/185972/disapproval-supreme-court-edges-new-high.aspx.

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