NO. 13-5202

In the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATT SISSEL,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Beryl A. Howell, District Judge

BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases

References to related cases appear in the Brief for Appellant.

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CORPORATE DSCLOSURE STATEMENT

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CERTIFICATIONS

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

Additionally, pursuant to Circuit Rule 29(d), amici curiae certify that diligent effort has been made to gather other amici in a single brief to avoid repetition of argument, but determined that the arguments being made by other proposed amici were distinct and did not readily lend themselves to consolidation into a single brief.

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STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellant.

GLOSSARY OF ABBREVIATIONS

Patient Protection and Affordable Care Act, Pub. L. No. 11-148, §§ 9001, et seq. ("PPACA")

U.S. Const., art. I, Sec. 7, cl. 1 ("Origination Clause")

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INTEREST OF AMICUS

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute. Its mission is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, balanced between separate branches of government, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional structure of federal power, including *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012); *Sisney v. Reisch*, 130 S.Ct. 3323 (2010); *Bond v. United States*, No. 12-158 (S.Ct., pending); and *United States v. Morrison*, 529 U.S. 598 (2000), before the Supreme Court, and *Rancho Viejo, LLC v. Nortion*, 323 F.3d 1062 (D.C. Cir. 2003), before this Court. The Center believes the issue before the Court in this matter is one of special importance to the principle of maintaining the structural limits imposed by Article I of the Constitution upon the separate branches of Congress. These structural limits were essential to preventing an abusive exercise of power by any one branch of government and

include the limitation that revenue measures originate in the House of Representatives.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (hereinafter "PPACA") is a Senate-originated measure that was upheld by the Supreme Court only as an exercise of Congress's power under Article I, section 8, clause 1 "to lay and collect taxes." *NFIB*, 132 S.Ct. at 2594-96. The "individual mandate" at issue in *NFIB* was expected to raise as much as $36 billion dollars,[1] and the PPACA as a whole includes nearly a half-trillion dollars in new federal revenues. *See* Pub. L. No. 111-148 §§ 1513, 9001-9017. Although the Constitution does give Congress power to enact new taxes, it vests the power to initiate revenue-raising legislation solely with the House of Representatives. U.S. Const. Art. I, § 7, cl. 1. The "Origination Clause" was one of the key structural checks and balances built into the constitutional structure, designed to place the important but potentially dangerous power of the purse in the body most directly accountable to the people, the House of Representatives.

[1] Congressional Budget Office Letter to Senate Majority Leader Harry Reid, pg. 6 (November 18, 2009) ("CBO Letter") (available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf).

The only part of the PPACA that originated in the House was the bill number. In every sense of the term, the series of new taxes it imposed originated in the Senate, not the House. The complete "gut and amend" process that was utilized by the Senate in crafting the ACA cannot properly be deemed an "amendment" of the kind envisioned by the Origination Clause, without completely rendering the Origination Clause a dead letter. And even were such a "gut and amend" process to be deemed a valid "amendment," only amendments to House bills "raising revenue" meet the requirements of the Origination Clause. Because the original H.R. 3590 bill introduced in and adopted by the House of Representatives was not a bill "raising revenue," no amendment to the bill introduced by the Senate to "raise revenue," no matter how small the amount, would be constitutionally permissible.

ARGUMENT

I. The Constitution Protects Individual Liberty by Separating Power Between the Branches of Government.

If there was any point of agreement between the Federalist and Anti-Federalists during the debates over the ratification of the Constitution, it was the necessity of heeding Montesquieu's warning the governmental power must be separated between different branches of government. *See, e.g.*, Brutus I, New York Journal, October 18, 1787, *reprinted in* John P. Kaminski, *et al.*, eds., 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 110 (2009)

("DOCUMENTARY HISTORY"); Alexander Hamilton, Convention Debates, July 12, 1788, *reprinted in* 22 DOCUMENTARY HISTORY 2158; Brutus, Virginia Independent Chronicle, May 14, *reprinted in* 9 DOCUMENTARY HISTORY 799. They also recognized that in a republican form of government, the legislative power would tend to predominate, so careful attention had to be paid to structure the legislative power to minimize the risk of abuse. *The Federalist No. 51*, at 322 (Madison) (Rossiter ed., 1961). To equalize power between the executive power and the more dominant legislative power, the new Constitution divided the legislature into two branches, imposed different terms of office for the members of each branch, and gave distinctly different powers to each.

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

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

representative entity. *See The Federalist No. 22*, *supra* at 151-52 (Hamilton) (explaining that one legislative body would create a tyranny antithetical to the purposes of the Constitution). Concerns about this system were spiritedly debated by the delegates at the Federal Convention, and the eventual compromise that the House was representative of the people and the Senate was representative of the States further supports the Founders' belief in the efficacy of bicameralism. *See Chadha*, 462 U.S. at 950-51. The bicameral system, and its attendant division of power between the distinct branches of the legislature, is evidence of the greater scheme deliberately and painstakingly devised by the Founders' that the legislative process in Congress is "exercised in accord with a single, finely wrought and exhaustively considered procedure." *Id.* at 951. The division effectively "[rendered the separate branches], by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit." *The Federalist No. 51*, *supra* at 322-23 (Madison).

But bicameralism was not the only procedural mechanism used to limit the means by which legislative power would be exercised. The Constitution also contains "explicit and unambiguous provisions [that] prescribe and define the respective functions of the Congress . . . in the legislative process." *Chadha*, 462 U.S. at 945. Thus, the House has exclusive power of impeachment, but only the Senate may hold the trial and vote to convict. U.S. Const. Art. I, § 2, cl. 5, § 3 cl. 6.

Similarly "[t]he exclusive privilege of originating money bills [belongs] to the house of representatives." *The Federalist No. 66*, *supra* at 404 (Hamilton). Each of these provisions was designed to check power in order to protect liberty. While the Senate was given a sufficient permanency to tend to those matters as required ongoing attention, *The Federalist No. 63*, *supra* at 384 (Madison), the House was designed to be closer to the people with short terms and proportional representation. *The Federalist No. 53*, *supra* at 335 (Madison).

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

5. And Congress cannot levy taxes unless they originate in the House of Representatives. U.S. Const. art. I, § 7, cl. 1.

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

II. The Origination Clause Is A Critical Component of Separation of Powers and of the Limited Government Design of the Constitution.

The Supreme Court has long recognized that Congress's powers are "limited and defined." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution defines those powers and further defines the manner of their execution. *See Chadha*, 462 U.S. at 951 (noting that requirements of bicameralism and presentment "serve essential constitutional functions"). Procedures set down in the Constitution for exercise of Congressional power were deliberately structured to produce "conflicts, confusion, and discordance" as a means of assuring "full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Efficiency was not the goal in this design. *Free Enterprise Fund v. Pub. Accounting Board Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010). No matter how inefficient, "the power to enact statutes may only

"be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S., at 951; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). Because the design is to check power, it comes as no surprise that neither Congress nor the President can waive these constitutionally mandated procedures. *Chadha*, 462 U.S., at 999 n. 13.

The failure to follow this "finely wrought procedure" is the issue in this case. The Supreme Court decisions in *Chadha* and *Clinton* involved the requirements of presentment and bicameralism—the general procedural requirements for the exercise of the vast majority of Congress's lawmaking powers. In one special case, however, the Constitution imposes an additional, special procedure. When congressional action is predicated on its power to impose a tax under Article I, section 8, clause 1, merely following the requirements of bicameralism and presentment is not enough. The Constitution imposes a further requirement that the taxing measure originate in the House of Representatives, for reasons grounded both in history and in the institutional structure of the Congress.

A. The decision to vest the "Power of the Purse" in the House of Representatives was informed by historical example.

In assigning the power to "originate" bills for raising revenue to the House of Representatives, the Framers were guided by their experiences with the British Crown and early state constitutions. As Joseph Story noted, the Origination Clause is borrowed from the English House of Commons. 1 STORY, COMMENTARIES, *supra*

at § 874; *see also* 1 JAMES WILSON, LEGISLATIVE DEPARTMENT, LECTURES ON LAW 322-24 (1791), reprinted in 2 FOUNDERS' CONSTITUTION, *supra* at 402.

Since 1689, the English House of Commons had held the exclusive right to manage all revenues. English Bill of Rights, sec. 4, 1 W.&M., 2d sess., c.2, 16 Dec. 1689; *See* ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS 390 (1st ed. 1935). This privilege is rooted in the idea that only the people, through their elected representatives, should have the authority to raise taxes. 2 STORY, COMMENTARIES, *supra* at § 871. In comparison, the English House of Lords was a permanent hereditary body, created at the pleasure of the king, and thus more liable to influence by the crown. *Id.* "The privilege of the House of Commons to initiate money bills furnished the best security against the oppressions of the crown and aristocracy." *Id.* at § 573.

The authors of early state constitutions sought a similar protection for the people against potential oppressions by the state executive and the upper house of the state legislature. By 1790, eight state constitutions had a bicameral legislature, and seven had lower house Origination Clauses.[2] And while six of these allowed

[2] Del. Const. of 1776; Md. Const. of 1776; Mass. Const. of 1780; N.H. Const. of 1776; N.H. Const. of 1784; N.C. Const. of 1776; Pa. Const. of 1790; S.C. Const. of 1790; Va. Const. of 1776, *reprinted in* FRANCIS NEWTON THORPE, THE FEDERAL

the upper house to make amendments to bills raising revenue, Virginia categorically prohibited senate amendments.[3]

B. The Origination Clause debate in the federal convention confirms that the Senate's power to "amend" revenue bills was a limited one.

These historical examples formed the backdrop of discussion at the Constitutional Convention. The initial proposal was to vest the House of Representatives with *sole* control over the origination of money bills, depriving the Senate even of the power to amend. MAX FARRAND, ED., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 524 (Jul5 5, 1787) ("That all Bills for raising or appropriating money . . . shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch"). The founders believed that "[t]axation and 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." James V. Saturno, Cong. Research Serv., RL31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* at 2 (2011) (citation omitted). But the disagreement over the mode of representation that led to the great compromise by which representation in the House would be based on population

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AND STATE CONSTITUTIONS ("THORPE"), 1:562; 3:1692-93; 3:1892; 4:2452; 4:2462; 5:2788; 5:3094; 6:3260; 7:3816 (1909).

[3] Va. Const. of 1776, *reprinted in* 7 THORPE 3816.

while that of the Senate would be based on an equal representation of the States, resulted also in a modification of the initial proposal for the Origination Clause. *See, e.g.*, Statement of Rufus King, in Farrand, 2 *Records of the Federal Convention* 514 (Sept. 5, 1787). The Senate was given some power to propose amendments to revenue bills, but the ultimate authority over *origination* of revenue bills remained exclusively with the House of Representatives.

As a result of this debate and compromise, the Origination Clause protects the people's immediate interests to control the representatives proposing new and increased taxes, and provided for a limited input by the Senate through the power to make amendments. James Madison elaborated on the purpose of the Origination Clause as follows:

> The principal reason why the Constitution had made this distinction was, because [the members of the House] 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.

PHILLIP B. KURLAND & RALPH LERNER, eds., 2 THE FOUNDERS' CONSTITUTION 385 (1981) (emphasis added) ("FOUNDERS' CONSTITUTION"). During debate in the Virginia Ratifying Convention, Madison also explained the purpose for the Senate's more limited authority to make amendments, noting that depriving the Senate of any ability to make amendments to revenue bills would simply force rejection of each

such bill until the House passed a version that satisfied the Senate. *Id.* at 384. Thus each branch was assigned a specific role to play in the legislation of revenue bills that suited the overall structure commanded by Article I, but primary responsibility for exercising the "power of the purse" was vested with the House.

These arguments were well understood by those ratifying the new Constitution. There was no question that the Origination Clause was meant to vest power in the House and largely remove it from the Senate. *See Valerius*, Virginia Independent Chronicle, January 23, 1788, reprinted in 8 DOCUMENTARY HISTORY, 316; *Cassius IV*, Massachusetts Gazzette, December 18, reprinted in 5 DOCUMENTARY HISTORY 480; *Albany Federal Committee: An Impartial Address*, April 20, 1788, reprinted in 21 DOCUMENTARY HISTORY 1391; *Judge Sumner, Massachusetts Convention Debate*, January 22, 1788, reprinted in 6 DOCUMENTARY HISTORY 1298. This was quite deliberate, tied to the nature of the House of Representatives as distinct from that of the Senate.

The *entire* House of Representatives must stand for re-election biennially. U.S. Const. art. I, § 2, cl. 1. This frequency of elections affords the voters an ultimate check on the actions of its representatives. James Madison wrote that because a common interest between the people and the government was essential to protect liberty, it was just as essential that the House should be immediately dependent upon the people, and "[f]requent elections are unquestionably the only policy by which

this dependence and sympathy can be effectually secured." *The Federalist No. 52, supra* at 327 (Madison). It was, and still is, important for Representatives to have an intimate knowledge and acquaintance with their constituents, and one of those areas which most requires local knowledge is taxation. *The Federalist No. 56, supra* at 346-47 (Madison). By checking the power to originate new or increased taxes with the combined effect of frequent elections and the intimate relationship of the people and its Representatives, the Founders created a system which "nourishes freedom and in return is nourished by it." *Id.*

Senators, on the other hand, hold longer terms of office at six years and are reelected on a staggered basis so that only one third of the Senate seats are up for election every two years. U.S. Const. art. I, § 3, cl. 2; U.S. Const. amend. XVII. Senators sit for longer terms in order to provide a check on the House and avoid the pitfalls of a unicameral system. *See The Federalist No. 62, supra* at 378 (Madison) ("Another advantage accruing from this ingredient in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation."). Further, the Senate, as part of a bicameral system, was supposed to portray stability to the outside world in addition to the internal stability provided by a bicameral check on the House. Externally, instability "forfeits the respect and confidence of other nations, and all the advantages connected with national character." *Id.* at 380. This, along with the provision that the Senate was given the power to advise and

consent on treaties, is evidence that the Senate was initially seen as the branch of Congress better suited to oversee those aspects of running a government that are best managed if somewhat removed from the people. *See* U.S. Const. art. II, § 2, cl. 2; *see also The Federalist No. 64*, *supra* at 390-96 (Jay) (illustrating the need for stability in foreign policy making and the role a longer tenured Senate plays in that policy).

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

authority until that delegation is legislatively altered or revoked." *Chadha*, 462 U.S. at 955.

III. The Affordable Care Act Violates the Origination Clause.

A. The Affordable Care Act is a "Bill Raising Revenue."

The "individual mandate" provision of the Affordable Care Act alone is estimated to generate $4 billion per year by 2017. *NFIB*, 132 S. Ct. at 2594; Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 30, 2010). The total tax take from all of the new taxes in the Act was estimated at nearly $500 billion over the period of 2010-19. CBO Letter, at 6. The plan was for revenue to exceed the total cost of the any changes enacted by the new law. The projected additional revenue, described as deficit reduction, totaled $130 billion. *Id*. at 1.

In other words, at its core, this law is a revenue measure designed to raise nearly one-half trillion dollars over the next decade and generate a net increase in tax collections over entitlement and service payments of $130 billion. Indeed, after holding that the ACA exceeded Congress's power under the Commerce Clause, the Supreme Court *upheld* the ACA only because, in the Court's view, it could be construed as an exercise of Congress's taxing power. *NFIB*, 132 S.Ct. at 2594-96. Significantly, though, Chief Justice Roberts noted in his controlling opinion for the Court that "any tax must still comply with other requirements in the Constitution."

NFIB, 132 S.Ct. at 2598, 2600. The key "other requirement" at issue is the Origination Clause, of course, and this tax neither originated in the House nor does it meet any of the exceptions that the Supreme Court has recognized from the clear command of the Origination Clause.

B. The Affordable Care Act did not "Originate" in the House.

The Affordable Care Act was introduced in the Senate in November 2009 by way of an "amendment" to House Resolution 3590. That bill, which had been unanimously passed by the House a few months before, called for an amendment to the Internal Revenue Code to modify the first-time homebuyers' credit for armed forces members and certain other federal employees. *See* 155 Cong. Rec. H9729-01 (Sept. 17, 2009); *see also* 155 Cong. Rec. H11126-01 (Oct. 8, 2009). Soon thereafter, H.R. 3590 was placed on the Senate calendar. 155 Cong. Rec. S10333-06 (Oct. 13, 2009). The Senate, however, took no action on the measure in the form or substance received from the House. Instead, all of the provisions that were voted on by the House were deleted; only the bill number was retained. In place of the House-originated proposal for tax credits for military personnel (that is, a bill that *reduced* rather than increased revenue), the Senate inserted the entire Patient Protection and Affordable Care Act. 155 Cong. Rec. S11607-03 (Nov. 19, 2009). The Senate's actions were placed in the record as, "Strike out all after the enacting

clause and insert: [the entire Act]." *Id*. (Senate amend. 2786). Nothing of this massive tax measure originated in the House of Representatives.

The central feature of the Senate-originated measure is a tax imposed on individuals who decline to purchase health insurance. 26 U.S.C. § 5000A. There is no debate that this tax, sometimes referred to as the "individual mandate," was the controlling purpose of the Senate proposal. Pub. L. No. 111-148 § 1501(2)(C) (expressing the "individual mandate" tax as the key feature of the law); *NFIB*, 132 S. Ct. at 2580.

The "individual mandate" was expected to raise as much as $36 billion dollars,[4] but the ACA as a whole includes nearly a half-trillion dollars in new federal revenues. *See* Pub. L. No. 111-148 §§ 1513, 9001-9017. The employer mandate is expected to raise another $30 billion in new taxes over ten years, and the ACA contains many other taxes as well. See PPACA § 9015, pgs. 2000-03 ($86 billion in taxes on additional hospital insurance for high-income taxpayers); PPACA § 9010, pgs. 1986-93 ($60.1 billion in taxes on health insurance providers); PPACA § 9001, pgs. 1941-56 ($32 billion excise tax on high-cost employer sponsored health coverage); PPACA § 9008, pg. 1971 ($22.2 billion in taxes on prescription drug manufacturers); PPACA § 9002, pg. 1957 ($5 billion in taxes for over-the-counter medicine for Health Savings Accounts and Flexible Spending Accounts); PPACA §

[4] CBO Letter, at 6.

1907, pg. 2,397 ($2.7 billion in taxes on indoor tanning services); PPACA § 9005, pg. 1959 ($1.4 billion in taxes on Health Savings Account withdrawals). These are just a few of the new federal taxes imposed by the Senate "amendment" to H.R. 3590.

Although the Constitution does give Congress power to enact new taxes, it vests the power to initiate revenue-raising legislation solely with the House of Representatives: "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 Affordable Care Act does not fit within any of the exceptions to the Origination Clause that have been recognized by the Supreme Court. The taxes imposed by the ACA are for general revenue and not tied to any specific new program, for example. *Cf. United States v. Munoz-Flores*, 495 U.S. 385, 397-401 (1990); *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906); *Twin City Nat'l Bank of New Brighton v. Nebeker*, 167 U.S. 196, 202-03 (1897). Unlike in *Munoz-Flores* where the funds raised were to be paid into a specific fund, the individual mandate tax and other tax increases are deposited directly in the Treasury—there are no restrictions on expenditures or special fund limitations. *Compare Munoz-Flores*, 495 U.S. at 398-99, with Pub. Law. No. 11-148, §§ 9001-17. Likewise, the "individual mandate" tax is paid into the Treasury by individuals when they file their

tax returns and enforced by the IRS "in the same manner as taxes." *NFIB*, 132 S. Ct. at 2594. The funds are not dedicated to health care, health insurance, or any specific purpose. The Senate-originated "individual mandate" tax law produces the "essential feature" of a tax because it generates revenue for the Government. *Id*. The PPACA could therefore not have been introduced in the Senate *ab initio*.

Nor was the PPACA a mere "amendment" to a bill that did originate in the House, as permitted by the Origination Clause. It was not remotely germane to the subject matter of the original House bill, as is required for the amendment to be a valid Origination Clause amendment. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (upholding a Senate amendment to a House tax bill because it "was germane to the subject-matter of the bill"). More fundamentally, the only part of H.R. 3590 that originated in the House was the bill number. In every sense of the term, therefore, the massive tax increases imposed by the Affordable Care Act originated in the Senate, not the House.

If the Senate's "amendment" to H.R. 3590 is constitutional, the Origination Clause is effectively meaningless. The Senate is empowered to propose amendments to revenue bills originating in the House. U.S. Const. art. I, Sec. 7, Cl. 1. If the Senate can simply gut non-revenue bills they receive from the House of Representatives, and insert $500 billion of new taxes, the Origination Clause has lost all effect.

The Framers intended amendments to revenue bills in the Senate to mean only "slight modifications" to make the legislation palatable for passage. 1 STORY, COMMENTARIES § 874 The compromise to allow slight amendments by the Senate allayed objections that the Senate could not correct errors of any sort. Statement of George Mason, in Farrand, 2 *Records of Federal Convention* 273 (Aug. 13, 1787). James Madison objected to a proposal by John Randolph to prevent the Senate from proposing amendments that would either "increase or diminish the sum to be raised," contending that the Senate's amendment authority should allow it "to *diminish* the sums to be raised." Farrand, 2 *Records of the Federal Convention* at 275-76. Joseph Story, too, described the Senate's amendment authority as allowing the Senate to make "slight[] modifications" as might be "required . . . to make [the bill] either palatable or just," in order to avoid the "inconvenience" that, if no amendments were permissible, would compel the Senate to reject the bill "although an amendment of a single line might make it entirely acceptable to both houses." 1 STORY, COMMENTARIES, *supra* at § 874.

The $500 billion of new federal revenue adopted by the Senate in the form of a "gut and amend" amendment to an unrelated House bill goes well beyond any "slight modification" of the sort envisioned by the founders. Respondents maintain the Senate merely "amended" H.R. 3590. They are too modest. All of the provisions that passed the House in H.R. 3590 were deleted—only the bill number was retained.

In place of the House-originated proposal for tax credits for veterans—not a bill "raising revenue"—the Senate inserted the Senate-originated tax measure styled as the Patient Protection and Affordable Care Act. 155 Cong. Rec. S11607-03 (Nov. 19, 2009). The Senate's actions were placed in the record as, "Strike out all after the enacting clause and insert: [the entire Act]." *Id.*

The only degree of connection between the House and Senate versions of H.R. 3590 is the bill number. All 2,409 pages of the bill, and a half-trillion dollars in new government revenue, originated in the Senate. If allowed to stand, the Senate will be empowered to originate any revenue in the form of an "amendment" to any unrelated House Resolution.

C. Even if one can view the Senate's "gut and amend" process as a mere "amendment," H.R. 3590 was not a "Revenue" bill.

Even if the Senate's complete "gut and amend" procedure can be viewed as a mere "amendment" to a bill actually introduced in the House, it was not an amendment to a Revenue Bill, as the Origination Clause requires. The original H.R. 3590 was simply not a "Bill[] for raising Revenue."

H.R. 3590, as introduced and originally passed in the House of Representatives, was called "The Service Members Home Ownership Tax Act of 2009." It involved a provision of the Internal Revenue Code providing for the recapture of first time homebuyer tax credits when a buyer subsequently sold within

three years the home for which the credits had been claimed, a provision that worked a particular hardship on military personnel whose deployment necessitated a sale of a home within the three-year recapture window. The original H.R. 3590 eliminated that recapture penalty for military personnel and certain other federal employees in the foreign and intelligence services. It did not "raise revenue," but instead prevented the recapture of a credit already provided for. In other words, the principal section of the bill had the effect of *reducing* tax revenues, not increasing them.

Two other minor provisions of the bill offset that reduction so that it would not be deemed a spending increase for purposes of budgetary rules. One increased penalties—not taxes—for failure to file partnership or S Corporation tax returns from $89 to $110, and the other accelerated by a half a percentage point the amount the *estimated* tax payments due by corporate tax filers during the course of the tax year. H.R. 3590, §§ 5 and 6. Neither provision increased taxes—the kind of revenue increases that trigger the Origination Clause. *See, e.g.*, *United States v. Ashburn*, 884 F.2d 901, 904 (6th Cir. 1989) (fines are not taxes for purposes of the Origination Clause). Moreover, the Service Members Home Ownership Tax Act of 2009 was described as "deficit neutral," Rep. Green, 155 Cong. Rec. E2459-03, 2009 WL 3188904 (Cong.Rec., Oct. 6, 2009), and "fully paid for," Rep. Tanner, 155 Cong. Rec. H10550-01 (Oct. 7, 2009). The district court's suggestion below that the original House Bill increased corporate taxes and was therefore already a bill

"raising revenue" that triggered both the requirement that it originate in the House and the ability of the Senate to add additional revenue measures by way of "amendment" was therefore erroneous. *See* D.Ct. op. at 22 (contending that the original House Bill increased corporate taxes).

CONCLUSION

The Affordable Care Act, which raises a half-trillion dollars of new revenue for the federal government, is unconstitutional because it originated in the Senate, not in the House of Representatives, the "people's House." The Origination Clause, like the other structural provisions in the Federal Constitution, was designed to protect the liberty of the people from abusive exercises of power by government. The awesome power of the purse is particularly apt for abuse, so the Constitution vests the power to originate all bills "raising revenue" with the House of Representatives, the branch of government that is most directly and immediately accountable to the people. The parliamentary maneuvering that the Senate engaged in to originate nearly a half trillion in new taxes, by the simple sleight-of-hand that it was merely "amending" a completely unrelated House bill, cannot be allowed to stand if the Origination Clause is going to have any ongoing vitality.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because:

This brief contains 5,560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2013, I caused copies of the original brief to be delivered via electronic mail through the Court's electronic filing system. I further certify that on the 13th day of November, 2013, at the clerk's request, I caused copies of the foregoing brief, corrected from the original only to eliminate "*passim*" from the table of authorities, to be delivered via electronic mail through the Court's electronic filing system.

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