No. 13-5202

In the United States Court of Appeals for the District of Columbia Circuit

MATT SISSEL,
Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, AND WEST VIRGINIA AS AMICI CURIAE SUPPORTING REHEARING EN BANC

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STATEMENT OF INTEREST OF AMICI CURIAE

The question presented in this case is whether the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), must comply with the Origination Clause of the United States Constitution. That Clause 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 Origination Clause protects vital state interests by requiring that tax bills originate in the House of Representatives and thus ensures that federal tax decisions will be made in the first instance by the legislators who are closest to the people.[1] Without the assurance of the Origination Clause, many of the States at the Constitutional Convention of 1787 would not have agreed to cede power to (and share sovereignty with) the new federal government. And the amici States have continuing interests in ensuring that the Origination Clause is faithfully and vigorously enforced.

Today, no less than in 1787, the House should wield the power of the purse because it remains more connected to the people. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) ("*NFIB*") (Scalia, J., dissenting) ("[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

[1] The amici States submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). In light of Circuit Rule 35(f), the amici States have separately filed a motion for leave to file this brief.

their next election, which is never more than two years off."). National and state economies are intimately related, and States have an interest in their residents being assessed only those federal taxes that are constitutional and reasonable.[2] The Origination Clause furthers that interest by embodying a "classical model" of passing revenue legislation that ensures careful congressional scrutiny of new tax laws. *See* Michael W. Evans, *"A Source of Frequent and Obstinate Altercations": The History and Application of the Origination Clause*, 105 TAX NOTES, Nov. 2004, *available at* http://www.taxhistory.org/thp/readings.nsf/ArtWeb/8149692C128846EF85256F5F000F3D67?. Furthermore, the States often participate in federal programs and receive federal funds, and States therefore have an interest in the smooth and efficient functioning of the federal government. The Origination Clause fosters a healthy relationship between the two houses of Congress by providing the House with the power to originate tax bills — an important balance to the Senate's unique powers.

Finally, the amici States of Texas, Alabama, Arizona, Florida, Idaho, Kansas, Nebraska, South Carolina, and South Dakota were petitioners in the cases consolidated with and decided by *NFIB*, 132 S. Ct. 2566, which is largely dispositive of the constitutional question presented here.

[2] According to the Congressional Budget Office ("CBO"), the ACA contains more than $1 trillion in new taxes. *See* Letter from Douglas M. Elmendorf, Dir. of the CBO, to the Hon. John Boehner, Speaker of the House at 3 (July 24, 2012) (attached as Ex. D).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is uncontested that the ACA passes constitutional muster *only* if it is construed as a tax statute and *only* if it complies with all of the constitutional requirements for tax statutes. *See NFIB*, 132 S. Ct. at 2601, 2598. Because the ACA can exist solely as a tax statute, it must comply with the Origination Clause, and its noncompliance with that clause is a justiciable question. *See United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990). The panel nevertheless upheld the ACA on the theory that it is not a "Bill[] for raising Revenue" subject to the Origination Clause. *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 7 (D.C. Cir. 2014). As far as our research reveals, this decision would make the ACA the first statute in the history of the United States that Congress could pass only by relying on its taxing power and without satisfying the Origination Clause. That result would render meaningless a provision that formed the foundational compromise of the Constitutional Convention of 1787, and it would allow the federal government to enact a $1 trillion tax statute in open defiance of the Framers' principal check on "Bills for raising Revenue." The Court should grant the petition for rehearing en banc.

ARGUMENT

I. THE ORIGINATION CLAUSE PLAYS A VITAL CONSTITUTIONAL ROLE

The Framers were keenly aware that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The Framers put that boundless and potentially destructive power into the hands of the House of

Representatives, on the theory that its members "were chosen by the people, and supposed to be the best acquainted with their interest and ability." 1 ANNALS OF CONG. 65 (1789) (Joseph Gales ed., 1834). Without the Origination Clause, large and powerful States like Virginia and New York likely would not have agreed to the "Great Compromise," which gave States proportional representation in the House and equal representation in the Senate. *See* Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1, 2 (2013). The Origination Clause thus lies at the heart of the very existence of the Constitution and our bicameral Congress.

Yet the Origination Clause is not merely an artifact of the Founding. The clause continues to play a vital role in our constitutional system, and federal courts are duty-bound to enforce it. *See, e.g.*, *Munoz-Flores*, 495 U.S. at 397 ("A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny . . . than would be a law passed in violation of the First Amendment."). Correlatively, federal courts must interpret the Origination Clause to impose *meaningful* limits on Congress. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (rejecting result of "a meaningless and formalistic rule" (internal quotation marks omitted)).

II. THE DISTRICT COURT'S DECISION RENDERS MEANINGLESS THE ORIGINATION CLAUSE

A. The ACA Violates The Original Meaning Of The Clause

The ACA illustrates the precise ills that the Origination Clause was intended to prevent. H.R. 3590, as originally introduced, was called the "Service Members Home

Ownership Tax Act of 2009." *See* Ex. A. It was six pages long, and it gave certain tax breaks to home-owners serving in the military. *See id.* The House passed the bill, and the enrolled version was eight pages long. *See* Ex. B. About one month later, the Senate struck every single word of H.R. 3590, deleted any reference to members of the military or home-ownership tax breaks, and substituted a 2,074-page "amendment" that we now know as the ACA. *See* Ex. C.

Insulated from the more-immediate political accountability facing members of the House, the ACA's supporters in the Senate then brokered a series of quid-pro-quo deals that would blush the cheeks of the Origination Clause's framers. *See, e.g.*, Dana Milbank, *Looking Out for Number One (Hundred Million)*, WASH. POST, Dec. 22, 2009, at A2. In contravention of the Framers' plan, public scrutiny and blame for the ACA fell on the Senate instead of the more-politically-accountable House.[3] That is the exact opposite of what the Origination Clause was supposed to do.

B. The District Court's Justifications For Upholding The ACA Are Mistaken

Against the original and longstanding meaning of the Origination Clause, the district court upheld the ACA because, according to the district court, (1) the ACA should not be considered a tax statute because its "purpose" is not to levy taxes; and

[3] Major newspapers attributed the ACA primarily to the Senate, not to the House. *See, e.g.*, Noam N. Levey & Janet Hook, *Democrats Step up Efforts to Swiftly Pass Health Bill*, L.A. TIMES, Mar. 16, 2010, at A1 ("Senate healthcare bill"); Robert Pear & David M. Herszenhorn, *Pelosi Predicts House Will Pass Health Care Overhaul in Next 10 Days*, N.Y. TIMES, Mar. 13, 2010, at A12 ("Senate health bill"); Beth Healy, *"Cadillac" Tax on Hatchback Care?*, BOS. GLOBE, Jan. 15, 2010, Business, at 5 ("Senate's health overhaul bill").

(2) the Senate can "gut-and-amend" a House-originated tax bill without offending the Origination Clause. The panel agreed with (1) and did not reach (2). Both justifications are meritless.

1. The ACA is a tax statute

Courts cannot avoid the Origination Clause by pretending that the ACA is not a tax statute. In *NFIB*, a five-justice majority agreed that the ACA exceeded Congress's power under the Commerce Clause. *See* 132 S. Ct. at 2591 (opinion of Roberts, C.J.), 2643 (joint dissent by Scalia, Kennedy, Thomas, and Alito, JJ.). A different five-justice majority upheld the statute *only* under Congress's power to tax. *Id.* at 2600. We are aware of no case that supports construing a statute as a tax to save it from one constitutional attack and as not a tax to save it from another.[4] And it is precisely because the ACA is a tax that *NFIB* requires invalidating it here; as the Supreme Court emphasized, "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, *any tax must still comply with other requirements in the Constitution*," *id.* at 2598 (emphasis added) — including the Origination Clause.

[4] It is true that *NFIB* construed the ACA as a tax under Congress's constitutional taxing power and as not a tax under the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"). *See* 132 S. Ct. at 2594. But *NFIB* explained that there is nothing inconsistent about that because "[i]t is up to Congress whether to apply the [AIA] to any particular statute, so it makes sense to be guided by Congress's choice of label on that question." *Id.* Because Congress chose to label the ACA's "shared responsibility payment" as a "penalty," the Court concluded that it was not a "tax" under the AIA. *Id.* at 2582-83. But Congress's label "does *not* . . . control whether an exaction is within Congress's constitutional power to tax." *Id.* at 2594 (emphasis added). When it comes to Congress's constitutional authority to enact a tax, the Court instead looks at the underlying "substance and application" of the statute. *Id.* at 2595 (internal quotation marks omitted). It would be surpassing strange to hold that the "substance and application" of the ACA changes based on the type of constitutional challenge mounted against it.

The district court and the panel tried to avoid *NFIB* and the Origination Clause by asserting that the Supreme Court's precedents required them to focus solely on the "purpose" of the ACA. *See* 951 F. Supp. 2d 159, 167-68 (D.D.C. 2013); 760 F.3d at 8. They claim that, under the Supreme Court's Origination Clause doctrine, the ACA is not *really* a tax statute if it has a non-tax "purpose" and any revenue raised is "merely incidental to the main object or aim of the challenged measure." *Id.* But any law that is constitutional *only* as a tax must be a "Bill[] for raising Revenue," because no other enumerated power permits an alternative purpose. Not one of the cases cited by the district court or the panel addresses the question presented here — namely, whether Congress could act exclusively pursuant to its taxing power and nonetheless avoid the Origination Clause's strictures. Instead, in all of these cases, Congress had another, independent, and non-tax basis for passing the law at issue.[5]

The panel was apparently undaunted by the prospect of going beyond all precedent in its effort to restrict the Origination Clause's reach. 760 F.3d at 9 ("All

[5] *See United States v. Norton*, 91 U.S. 566, 568-69 (1875) (implying that postal money-order act is not a revenue law under Origination Clause); *Twin City Nat'l Bank of New Brighton v. Nebecker*, 167 U.S. 196 (1897) (National Bank Act of 1864; authorized by the Commerce Clause); *Millard v. Roberts*, 202 U.S. 429 (1906) (laws pertaining to District of Columbia railroads; authorized by the Commerce Clause and art. I, § 8, cl. 17); *Munoz-Flores*, 495 U.S. 385 (Victims of Crime Act of 1984; authorized by the Commerce Clause and Congress's plenary authority over aliens); *see also* Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After* NFIB v. Sebelius, 17 TEX. REV. L. & POL. 203, 233 (2013) (noting that Origination Clause does not apply where penalty is "an adjunct to a statute imposed under a different enumerated power"). Several courts of appeals have held that laws were not "Bills for raising Revenue," but again, these laws were not passed solely pursuant to Congress's taxing power. *See Sperry Corp. v. United States*, 925 F.2d 399 (Fed. Cir. 1991) (Iran Claims Settlement Act); *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983) (Agriculture Act of 1949); *Bertelsen v. White*, 65 F.2d 719 (1st Cir. 1933) (section 23 of the Merchant Marine Act).

Sissel has demonstrated is that the [ACA's] mandate does not fall squarely within the fact patterns of prior unsuccessful Origination Clause challenges, not that his challenge should succeed."). According to the panel, "some exercises of the taxing power are not subject to the Origination Clause." *Id.* But when — as with the ACA — Congress cannot enact a statute using other enumerated powers, it necessarily must fall back on its broader authority to impose taxes. *See NFIB*, 132 S. Ct. at 2600 (noting "the breadth of Congress's power to tax is greater than its power to regulate commerce"). While Congress's taxing power is substantively broader than its commerce power, the former is nonetheless subject to all of the procedural safeguards that the Constitution imposes on taxes. *See id.* at 2598.

In short, as far as the amici States are aware, no federal appellate court ever has held that a law authorized solely by Congress's taxing power need not originate in the House of Representatives. And this Court should not be the first.

2. The Senate's "gut-and-amend" practice would gut the Origination Clause

The Senate cannot avoid the Origination Clause by taking a six-page House bill like H.R. 3590, striking every single word, inserting a $1 trillion tax statute spanning 2,074 pages, and then claiming that the bill "originated" in the House. *Compare* Ex. A, *with* Ex. C. Congress's historical practice confirms that gut-and-amend violates the Origination Clause. For example, in 1872, the House passed a 32-word bill repealing a tax on tea. *See* 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1489, at 950 (1907). The Senate gutted

the bill and "amended" it by adding a 20-page overhaul of the tax code. *Id.* Consistent with a century of precedent, the House fiercely protested the Senate's transgression of the Origination Clause. Then-Representative James A. Garfield explained:

> If there had been no precedent in the case, I should say that a House bill relating solely to revenue on salt could not be amended by adding to it clauses raising revenue on textile fabrics, but that all the amendments of the Senate should relate to the duty on salt. To admit that the Senate can take a House bill consisting of two lines, relating specifically and solely to a single article, and can graft upon them in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the Constitution which we are now, considering, and may rob the House of the last vestige of its rights under that clause.

Id. And Garfield won the battle; the Senate's proposed overhaul died on the vine.

The Senate cannot propose just any amendment, and it is a justiciable legal question whether any Senate amendment is germane to the House-originated bill. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911); *accord* 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 (2014) ("If there were no germaneness requirement, then the Origination Clause would be wholly superfluous."). Indeed, if the Senate could gut the House's tax on salt and "amend" it with a tax on textiles, then the Origination Clause would be a mere paper tiger. *See* 2 A. HINDS, *supra*, § 1489 at 950 (statement of Rep. Garfield). That conclusion applies *a*

fortiori to the Senate's effort to gut an eight-page bill on military servicepersons' home-buyer credits and "amend" it with a 2,000-page healthcare tax.

* * *

At bottom, the question in this case is whether the Origination Clause has any meaning. Given its constitutional provenance, its centrality to the Founding, and its undeniable import for over two centuries, the answer must be yes. And given that the federal courts are obligated to adjudicate claims under the Origination Clause, federal courts must give *meaningful* effect to the constitutional provision — rather than reading it, as the defendants would, to be a "meaningless and formalistic rule." *Ring*, 536 U.S. at 604. If the Origination Clause means anything, it must mean that the ACA is unconstitutional.

CONCLUSION

The Court should grant the petition for rehearing en banc and reverse the district court's judgment.

Respectfully submitted.

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