No. 15-543

In the Supreme Court of the United States

MATT SISSEL, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under 26 U.S.C. 5000A, a provision originally enacted in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, individuals generally must maintain qualifying health coverage or make a payment to the Internal Revenue Service. The question presented is whether the enactment of Section 5000A was consistent with the Origination Clause of the Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, Cl. 1.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 760 F.3d 1. The opinions respecting the denial of rehearing en banc (Pet. App. C1-C66) are reported at 799 F.3d 1035. The opinion of the district court (Pet. App. B1-B30) is reported at 951 F. Supp. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2014. A petition for rehearing was denied on August 7, 2015 (Pet. App. C1-C66). The petition for a writ of certiorari was filed on October 26, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119, included three "interlocking reforms designed to expand coverage in the individual health insurance market." *King* v. *Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act adopted nondiscrimination rules requiring insurers to accept every individual who applies for coverage and prohibiting them from "charging higher premiums on the basis of a person's health." *Id.* at 2486; see 42 U.S.C. 300gg to 300gg-4. Second, the Act created a system of subsidies "to make insurance more affordable" for low and middle-income Americans. *King*, 135 S. Ct. at 2487; see 26 U.S.C. 36B; 42 U.S.C. 18071, 18081, 18082. Third, the Act adopted a minimum coverage provision that "generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service" (IRS). *King*, 135 S. Ct. at 2485; see 26 U.S.C. 5000A.

Congress deemed Section 5000A's minimum coverage provision "essential to creating effective health insurance markets" under the Affordable Care Act's other reforms. 42 U.S.C. 18091(2)(I). In the absence of that financial incentive to maintain health coverage, the Act's nondiscrimination rules would encourage people to "wait to purchase health insurance until they needed care." *Ibid.* That phenomenon, known as "adverse selection," would force insurers "to increase premiums to account for the fact that, more and more, it [would be] the sick rather than the healthy who were buying insurance." *King*, 135 S. Ct. at 2485. The ultimate result would be a "death spiral" in the insurance markets. *Id.* at 2486. To avoid that outcome,

Congress adopted Section 5000A and the Act's system of subsidies to "minimize * * * adverse selection and broaden the health insurance risk pool," thereby "lower[ing] health insurance premiums" and stabilizing the insurance markets. 42 U.S.C. 18091(2)(I); see *King*, 135 S. Ct. at 2486-2487.

2. The bill that became the Affordable Care Act originated as H.R. 3590, a tax measure passed by the House of Representatives in October 2009. See H.R. 3590, 111th Cong., 1st Sess. (as passed by the House, Oct. 8, 2009); Pet. App. D1-D5. In December 2009, the Senate amended the House-passed bill by striking the text after the enacting clause and substituting the text of the Affordable Care Act. 155 Cong. Rec. 33,108 (2009). The Senate then passed H.R. 3590 as amended. 155 Cong. Rec. 33,169-33,170 (2009). The House agreed to the Senate's amendments in March 2010. 156 Cong. Rec. 4444-4445 (2010). The President signed the Affordable Care Act into law on March 23, 2010. 124 Stat. 119.

A week later, the President signed the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029, a separate statute amending many provisions of the Affordable Care Act. Among other things, HCERA modified Section 5000A by changing the formula for calculating the payment owed by individuals who fail to maintain health coverage. HCERA § 1002(a), 124 Stat. 1032. HCERA originated in the House, and the House-passed bill was materially identical to the statute as ultimately signed into law. H.R. 4872, 111th Cong., 2d Sess. (as passed by the House, Mar. 21, 2010).[1]

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[1] The Senate amended H.R. 4872 by striking two minor provisions unrelated to the Affordable Care Act, and the House then

3. Petitioner alleges that he does not have or want health coverage and that he is not eligible for an exemption from the minimum coverage provision. Pet. App. A3-A4. He filed this suit asserting, as relevant here, that the enactment of Section 5000A violated the Origination Clause of the Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Art. I, § 7, Cl. 1.

The district court dismissed petitioner's complaint, holding that his claim failed on two independent grounds. Pet. App. B1-B30. First, the court held that Section 5000A was not a bill for raising revenue within the meaning of the Origination Clause because the revenue it creates is incidental to its primary purpose of expanding health coverage. *Id.* at B14-B19. Second, the court held that even if Section 5000A had been a bill for raising revenue, its enactment complied with the Origination Clause because it was part of a Senate amendment to a House-originated revenue bill. *Id.* at B19-B29.

4. The court of appeals affirmed. Pet. App. A1-A18. The court explained that this Court's Origination Clause decisions have long held that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Id.* at A12 (quoting *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897)). That standard, the court held, "necessarily leads to the conclusion that Section 5000A * * * is not a 'Bill for

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agreed to those amendments. See John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Libr. J. 131, 166-167 (2013).

raising Revenue' under the Origination Clause." *Id.* at A13 (brackets omitted). The court explained that although the minimum coverage provision can be expected to "generate substantial revenues," those funds "are a byproduct of the Affordable Care Act's primary aim," which is "to induce participation in health insurance plans." *Id.* at A14. Because the court held that Section 5000A was not a bill for raising revenue, it had "no occasion" to address the district court's alternative holding that the provision was properly enacted as part of a Senate amendment to a House-originated revenue bill. *Id.* at A11-A12.

5. The court of appeals denied rehearing en banc. Pet. App. C1-C66. No judge suggested that petitioner's Origination Clause claim had merit, but some judges disagreed about the ground on which it fails.

a. Judges Rogers, Pillard, and Wilkins, the members of the original panel, concurred in the denial of rehearing en banc to reiterate their view that Section 5000A was not a bill for raising revenue. Pet. App. C3-C32.

b. Judge Kavanaugh, joined by Judges Henderson, Brown, and Griffith, dissented. Pet. App. C33-C66. Judge Kavanaugh agreed that "the Affordable Care Act complied with the Origination Clause" and he thus concluded that "the panel opinion reached the right bottom line." *Id.* at C33-C34. But he would have granted rehearing en banc to "rule for the Government" on a different ground. *Id.* at C35. In his view, the Affordable Care Act was a bill for raising revenue, but its enactment comported with the Origination Clause because it was a Senate amendment to a House-originated revenue bill. *Id.* at C57-C62.

ARGUMENT

Petitioner renews his contention (Pet. 7-34) that the enactment of Section 5000A violated the Origination Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision by this Court or another court of appeals. To the contrary, this Court has never invalidated an Act of Congress under the Origination Clause, and it reversed the lone court of appeals decision to have done so. This case presents no occasion to break new ground. Twelve judges have considered petitioner's claim, and none accepted it. Given that unanimity on the proper result, the disagreement among some members of the court of appeals over the reason why petitioner's claim fails does not warrant this Court's review. And this case would be a particularly poor vehicle in which to take up an Origination Clause challenge to the process by which the Affordable Care Act was enacted because Section 5000A was amended by HCERA, a subsequent statute that originated in the House. The petition should be denied.

1. The court of appeals correctly held that Section 5000A was not a bill for raising revenue.

a. The Origination Clause provides that "[a]ll 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. In his influential treatise, Justice Story explained that the "history" and "practical construction" of the Clause "abundantly prove[] * * * that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." 2 Joseph Story, *Commen-*

taries on the Constitution of the United States § 877, at 343 (1833). This Court has long embraced Justice Story's view, repeatedly holding that the Origination Clause does not apply to "bills for other purposes, which may incidentally create revenue." *United States* v. *Munoz-Flores*, 495 U.S. 385, 397 (1990) (citation omitted); see *Millard* v. *Roberts*, 202 U.S. 429, 436 (1906) (same); *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897) (same); *United States* v. *Norton*, 91 U.S. 566, 569 (1876) (same).

In *Norton*, the Court held that a statute establishing a postal money order system did not implicate the Origination Clause even though it provided that "[a]ll moneys received from the sale of money-orders" and "all fees received for selling them" were "'to be deemed and taken to be money in the treasury of the United States.'" 91 U.S. at 568 (citation omitted).[2] The Court explained that "'[b]ills for raising revenue'" are "such laws 'as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.'" *Id.* at 569 (quoting *United States* v. *Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755) (Story, J.)). And it held that the statute at issue did not satisfy that standard because its purpose was to establish a money order system, not to raise revenue. *Id.* at 567-569.

Applying the same test in *Nebeker*, the Court held that a statute imposing a tax on the notes of national banking associations was not revenue-raising. 167 U.S. at 202. The Court explained that the "main pur-

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[2] *Norton* involved the interpretation of the statutory phrase "revenue laws of the United States," but the Court grounded its analysis in Origination Clause principles. 91 U.S. at 568-569 (citation omitted).

pose that Congress had in view was to provide a national currency" and that the "tax was a means for effectually accomplishing" that purpose. *Id.* at 203. Similarly, *Millard* held that a bill providing for the taxation of property in the District of Columbia to fund railroad facilities in the District was not a bill for raising revenue because the taxes were "but means to the purposes provided by the act." 202 U.S. at 437.

Most recently, *Munoz-Flores* upheld a statute requiring persons convicted of federal crimes to pay monetary assessments that were used to fund programs for the benefit of crime victims. 495 U.S. at 398. The Court began by reiterating that "revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Id.* at 397 (citation omitted). The Court then held that the challenged assessment was plainly valid under *Nebeker* and *Millard*, which had "interpreted this general rule to mean that a statute that creates a particular program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bill for raising Revenue' within the meaning of the Origination Clause." *Id.* at 397-398 (brackets omitted). The Court acknowledged that a small portion of the funds raised by the assessment provision at issue in *Munoz-Flores* could go to the "general Treasury," but it concluded that any such sums were "'incidental' to that provision's primary purpose," which was funding programs for crime victims. *Id.* at 399 (brackets omitted).

This Court's precedents thus instruct that the Origination Clause inquiry is governed by the "primary purpose" of the challenged statutory provision.

Munoz-Flores, 495 U.S. at 399. If that purpose is raising revenue, the bill must originate in the House. But "[w]here the main purpose of the act is other than raising revenue, it is not subject to challenge under the [O]rigination [C]lause." *United States* v. *King*, 891 F.2d 780, 781 (10th Cir. 1989).

b. Applying that standard, the court of appeals correctly held that the Affordable Care Act's minimum coverage provision was not a bill for raising revenue. Pet. App. A11-A18. Section 5000A "generally requires individuals to maintain health insurance coverage or make a payment to the IRS." *King* v. *Burwell*, 135 S. Ct. 2480, 2486 (2015). Congress expressly set forth the purpose of that requirement in the Act itself: It creates a financial incentive for individuals to obtain insurance, thereby "significantly increasing health insurance coverage" with the aim of stabilizing the insurance markets and "achiev[ing] near-universal coverage" of all Americans. 42 U.S.C. 18091(2)(D) and (I). Congress's goal thus was not to raise revenue from Section 5000A payments; it was to encourage individuals to obtain insurance so that they *do not make* those payments. "Successful operation of the Act would mean *less* revenue from Section 5000A payments, not more." Pet. App. A14.

Section 5000A will, of course, "raise considerable revenue" in the form of payments from those individuals who opt not to obtain insurance. *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2596 (2012) (*NFIB*). It is also true that "every tax is in some measure regulatory" insofar as it "interposes an economic impediment to the activity taxed as compared with others not taxed." *Ibid.* (brackets and citation omitted). But Section 5000A is not a revenue-raising

measure with incidental effects on conduct. Instead, as this Court has recognized, "it is plainly designed to expand health insurance coverage." *Ibid.*; see 42 U.S.C. 18091(2). The revenue raised is incidental to the "main purpose that Congress had in view," *Nebeker*, 167 U.S. at 203, and the court of appeals was therefore correct to hold that the requirement that a person maintain health coverage or make a payment to the government was not a bill for raising revenue within the meaning of the Origination Clause.[3]

c. Petitioner does not deny that the purpose of Section 5000A is to encourage individuals to maintain minimum coverage, and that it therefore was "plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. He also acknowledges that this Court has repeatedly adopted Justice Story's

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[3] Petitioner asserts (*e.g.*, Pet. 13-14, 20) that the court of appeals erred by considering the purpose of the Affordable Care Act "as a whole" rather than Section 5000A in isolation. In fact, the court concluded that neither Section 5000A itself nor the Act as a whole had the primary purpose of raising revenue. See, *e.g.*, Pet. App. A14 ("[T]he aim of the shared responsibility payment [in Section 5000A] is to encourage everyone to purchase insurance; the goal is universal coverage, not revenues from penalties.") (citation omitted); *id.* at A17-A18 ("[W]here, as here, * * * a provision's revenue-raising function is incidental to its primary purpose, the Origination Clause does not apply.") (citation omitted). The court concluded that even when Section 5000A is viewed alone, its primary purpose is not raising revenue because the requirement that individuals maintain health coverage or make a payment to the IRS was designed to and does serve primarily to expand coverage, not to fund the government. *Id.* at A13-A14. This Court's Origination Clause decisions, moreover, have also examined the particular provisions challenged as part of the broader acts in which they were included. See *Munoz-Flores*, 495 U.S. at 398-400; *Millard*, 202 U.S. at 437; *Nebeker*, 167 U.S. at 203.

statement that the Origination Clause does not apply to "bills for other purposes, which may incidentally create revenue." *Munoz-Flores*, 495 U.S. at 397 (citation omitted). But petitioner asserts (Pet. 19-20 n.6) that those words "should not be regarded as authoritative." Echoing Judge Kavanaugh, petitioner instead maintains that *Munoz-Flores*, *Millard*, and *Nebeker* should be treated as establishing a narrow and atextual "exception to the Origination Clause" that "only applies when an assessment creates a specific program and generates income to fund that specific program." Pet. 27; see Pet. 7-20; Pet. App. C50-C56.

Each of the decisions on which petitioner relies, however, expressly adopted Justice Story's reading of the Origination Clause and grounded its holding in the conclusion that raising revenue was "'incidental' to [the challenged] provision's primary purpose." *Munoz-Flores*, 495 U.S. at 399 (brackets omitted); see *Millard*, 202 U.S. at 437 (taxes were "but means to the purposes provided by the act"); *Nebeker*, 167 U.S. at 203 (tax was "a means for effectually accomplishing" the "main purpose that [C]ongress had in view"). "[N]one of [those decisions] was resolved on the grounds proposed by" petitioner. Pet. App. C6.

Petitioner relies (Pet. 9-10) on the Court's statement in *Munoz-Flores* that "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bill for raising Revenue.'" 495 U.S. at 398 (brackets and citation omitted). Petitioner reads that statement to mean that any statute that creates any revenue not dedicated to a "particular governmental program" must originate in the House.

But that is not what the Court said. To the contrary, the Court made clear that the quoted statement was simply one application of the "general rule" that a bill directed at other purposes may "'incidentally create revenue'" for the Treasury without implicating the Origination Clause. *Id.* at 397-398 (quoting *Nebeker*, 167 U.S. at 202). Nothing in *Munoz-Flores* suggested that the "general rule" repeatedly endorsed by this Court's decisions is *limited* to bills funding specific government programs.

A requirement that the challenged provision be dedicated to funding a specific program is even more difficult to reconcile with *Nebeker*. The statute at issue there raised far more money than was necessary to support the currency program it created and "placed no restriction" on how those excess funds were to be spent. Pet. App. C8-C9; see *Nebeker*, 167 U.S. at 198-199. That statute would be invalid under the approach petitioner proposes, yet this Court had no difficulty sustaining it. The Court was also careful to emphasize that it was unnecessary to make "any general statement" about the limits of the Senate's power to originate bills that incidentally create revenue; instead, the Court found it "sufficient" to state that the challenged law was "clearly not a revenue bill." 167 U.S. at 202.[4]

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[4] In the courts below, petitioner argued that Section 5000A is necessarily a bill for raising revenue because this Court upheld it as an exercise of Congress's power to "lay and collect Taxes." U.S. Const. Art. I, § 8, Cl. 1; see *NFIB*, 132 S. Ct. at 2593-2600. The court of appeals correctly rejected that argument, explaining that "the taxing power is often, very often, applied for other purposes than revenue." Pet. App. A15 (brackets and citation omitted); see *NFIB*, 132 S. Ct. at 2596. Petitioner does not renew his taxing-power argument in this Court.

Here, the minimum coverage provision in Section 5000A is integral to the operation of the Affordable Care Act's program for expanding health coverage because it creates a financial incentive for individuals to maintain such coverage. Section 5000A was "plainly designed" for that specific purpose, *NFIB*, 132 S. Ct. at 2596, not to raise revenue. Indeed the successful operation of Section 5000A would serve to *decrease* payments to the government. Those features of Section 5000A demonstrate that any revenue it creates is incidental to its primary purpose, whether or not that revenue is in turn used to fund programs expanding health coverage in other ways.

d. Again echoing Judge Kavanaugh, petitioner observes (Pet. 5, 13-15) that apart from Section 5000A, other provisions of the Affordable Care Act will generate substantial revenues for the federal government. Pet. App. C41-C42. But as the members of the panel explained, those other provisions are not at issue here. "[O]nly [Section 5000A] was alleged as the basis for the Origination Clause claim in this case." *Id.* at C14. Petitioner's complaint challenged only that requirement, C.A. App. 12-14; the materials he submitted to establish Article III standing concern only that requirement, Pet. App. A5-A8; and he has never alleged that he is injured by any other provision of the Act. The court of appeals correctly focused on the minimum coverage provision, holding that "Section 5000A of the Affordable Care Act is not a 'Bill for raising Revenue.'" *Id.* at A13 (brackets omitted); see *id.* at A18. No claim that the inclusion of *other* provisions in the Act violated the Origination Clause is properly before the Court.

2. Even if Section 5000A were a bill for raising revenue, its enactment complied with the Origination Clause because, as Judge Kavanaugh explained, it was part of a Senate amendment to a House-originated revenue bill. Pet. App. C57-C62. In this case, therefore, the disagreement between the panel and Judge Kavanagh over the proper interpretation of "Bills for raising Revenue" is entirely academic.

a. Although the first half of the Origination Clause requires "[a]ll Bills for raising Revenue" to originate in the House, the second half gives the Senate broad power to "propose or concur with Amendments as on other bills." U.S. Const. Art I, § 7, Cl. 1. "The language permitting Senate amendment of revenue bills was critical * * * to the Constitutional Convention," and its inclusion "was a deliberate and considered decision at Philadelphia." Pet. App. C59 (Kavanaugh, J.); see *id.* at C59-C60.

Here, the bill that became the Affordable Care Act originated in the House as a tax measure, H.R. 3590. As Judge Kavanaugh explained, the House-passed bill "modified the first-time homebuyer tax credit for service members, increased the pre-payment amount for corporate taxes, and increased the tax penalty for failing to file certain corporate tax returns." Pet. App. C58 n.10; see *id.* at D1-D6 (text of H.R. 3590 as passed by the House). All of the bill's provisions amended the Internal Revenue Code, and the bill as passed by the House was projected to "raise significant revenue." *Id.* at C58 n.10; see *ibid.* ("[T]he House bill here was clearly revenue-raising.") (emphasis omitted).

Consistent with the procedure contemplated in the Origination Clause, the Senate exercised its authority to "propose or concur with Amendments" by amend-

ing H.R. 3590 to substitute the text of the Affordable Care Act. 155 Cong. Rec. at 33,108. The Act then became law after the House voted to "concur in the Senate amendments to H.R. 3590." 156 Cong. Rec. at 4444; see p. 3, *supra*.

b. Petitioner objects to the scope of the Senate's amendments, emphasizing (Pet. 27-33) that the Senate struck the text of the House bill. Petitioner concedes (Pet. 30 n.10) that what he calls "gut-and-replace" amendments are "a longstanding legislative practice with regard to *non-revenue* bills." He nonetheless insists that the Senate has less power to amend a House-originated revenue bill, asserting (Pet. 27-33) that such amendments must satisfy some undefined "germaneness requirement." As Judge Kavanaugh explained, that argument is refuted by the text of the Origination Clause, by this Court's precedent, and by settled congressional practice. Pet. App. C57-C62.

First, the Origination Clause grants the Senate precisely the same power to amend revenue bills as it has to amend all other bills. The Clause provides that "the Senate may propose or concur with Amendments *as on other Bills*." U.S. Const. Art. I, § 7, Cl. 1 (emphasis added). "There is no general germaneness requirement when the Senate amends other House bills. It follows that there is no germaneness requirement when the Senate amends revenue bills. 'As on other Bills' means 'As on other Bills.'" Pet. App. C58-C59 (Kavanaugh, J.).

Second, this Court's precedent "forecloses the germaneness requirement advanced by [petitioner]." Pet. App. C61 (Kavanaugh, J.). In *Rainey* v. *United States*, 232 U.S. 310 (1914), the Court rejected an Origination Clause challenge based solely on the fact

that the challenged tax was a Senate amendment to a House-originated revenue bill: "It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. *That is sufficient*." *Id.* at 317 (emphasis added). The Court ruled out any further germaneness inquiry, explaining that "it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill." *Ibid.*

Petitioner's germaneness argument rests on a misunderstanding of this Court's pre-*Rainey* decision in *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911). There, the Senate amended a House-originated revenue bill by substituting a corporation tax for an inheritance tax. *Id.* at 142-143. In rejecting an Origination Clause challenge, this Court stated that the Senate amendment "was germane to the subject-matter of the bill." *Id.* at 143. "But the *Flint* Court did not draw any legal conclusions from that description." Pet. App. C62 (Kavanaugh, J.). And particularly given the context, the Court's statement cannot be read to engraft a content-based restriction on Senate amendments to House-originated revenue bills. "Although a corporate income tax is germane to an inheritance tax insofar as they are both taxes, the similarities end there." *Id.* at B27. At most, therefore, *Flint* requires only that "both the original House bill and the Senate amendment be revenue-raising in nature." *Id.* at B28.[5]

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[5] Petitioner is mistaken to suggest (Pet. 28-29) that *Rainey* was overruled by *Munoz-Flores*. In *Munoz-Flores*, the Court held that Origination Clause claims are justiciable, see 495 U.S. at 389-397, an issue the Court had reserved in *Rainey*, see 232 U.S. at 317. But *Munoz-Flores* concluded that the provision at issue was not a

Third, petitioner's argument contradicts long-established congressional practice. For example, the Senate's first manual of parliamentary procedure, written by Thomas Jefferson, expressly approved substitution amendments, explaining that "[a] new bill may be ingrafted, by way of amendment, on the words, 'Be it enacted,' &c." Thomas Jefferson, *A Manual of Parliamentary Practice, for the Use of the Senate of the United States* § 35, at 97 (3d ed. 1813) (citation omitted). And in 1872, the Senate emphasized that "[t]he Constitution does not prescribe what amendments, or limit the extent of the amendments which the Senate may propose" to a bill for raising revenue. S. Rep. No. 146, 42d Cong, 2d Sess. 3 (1872); see Pet. App. C59-C62 (Kavanaugh, J.).

Consistent with that understanding, Congress has enacted a number of important tax statutes following the Senate's invocation of its broad amendment power to strike the entire text of a House-passed revenue bill and substitute different revenue-raising measures. Those statutes include the "major revisions of the Internal Revenue Code in the Tax Reform Act of 1986, [Pub. L. No. 99-514], 100 Stat. 2085." *United States* v. *Carlton*, 512 U.S. 26, 28 (1994); see also, *e.g.*, American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97–248, 96 Stat. 324. On petitioner's view, all of those laws would be invalid.

c. The Senate's broad amendment power does not, as petitioner contends (Pet. 30), render the Origination Clause ineffectual. "[T]he House's first-mover

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bill for raising revenue, and it thus did not address the scope of the Senate's amendment power at all—much less impose the sort of germaneness requirement that *Rainey* explicitly foreclosed.

authority still gives it substantial control over tax legislation." Pet. App. C63 (Kavanaugh, J.). And the House routinely defends its prerogative to originate revenue bills through a process called "blue slipping," whereby "[o]ffending bills and amendments are returned to the Senate through the passage in the House of a House Resolution." H.R. Rep. No. 708, 111th Cong, 2d Sess. 93 (2011). Any Member of the House may offer such a resolution, and in the 111th Congress alone, the House returned six Senate bills and amendments it deemed improper. See H.R. Res. 1653, 111th Cong., 2d Sess. (2011). The Senate, too, has established procedures that allow Senators to raise Origination Clause objections. See James V. Saturno, Cong. Research Serv., RL 31399 *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* 10 (2011). Notably, however, no such objection was raised by any Senator or Representative at any point during the lengthy and vigorous congressional debates over the Affordable Care Act.[6]

3. The decision below does not conflict with any decision by another court of appeals. No other circuit has addressed the merits of an Origination Clause challenge to the Affordable Care Act.[7] More general-

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[6] The House Resolution cited by petitioner's amici was introduced years after the fact. See Franks Amicus Br. 1 (citing H.R. Res. 392, 114th Cong., 1st Sess. (as introduced July 29, 2015)).

[7] One other district court has rejected such a challenge. *Hotze* v. *Sebelius*, 991 F. Supp. 2d 864, 878-885 (S.D. Tex. 2014). On appeal, the Fifth Circuit ordered the plaintiffs' claims dismissed for lack of jurisdiction and thus did not reach the merits. *Hotze* v. *Burwell*, 784 F.3d 984, 1000 (2015), petition for cert. pending, No. 15-622 (filed Nov. 12, 2015). In addition, a separate Origination Clause challenge to Section 5000A is pending in the United States District

ly, petitioner does not cite *any* circuit court decision finding a violation of the Origination Clause, and the government is aware of only one—the Ninth Circuit decision this Court reversed in *Munoz-Flores*. See *United States* v. *Munoz-Flores*, 863 F.2d 654, 661 (1988), rev'd, 495 U.S. 385 (1990).

a. Petitioner asserts (Pet. 22-25) that the court of appeals' holding that Section 5000A was not a bill for raising revenue conflicts with decisions by several other courts of appeals. But those decisions uniformly *rejected* Origination Clause challenges. Most of them involved the same monetary assessment ultimately upheld in *Munoz-Flores*. Consistent with this Court's subsequent decision, those courts concluded that the fact that the assessment raised funds for specific victim-assistance programs was *sufficient* to establish that "any revenue collected is merely incidental to the act's purpose." *United States* v. *Ashburn*, 884 F.2d 901, 904 (6th Cir. 1989).[8] But those decisions did not

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Court for the Eastern District of New York. *Bank* v. *HHS*, No. 15-cv-431 (filed Jan. 28, 2015).

[8] See *United States* v. *Tholl*, 895 F.2d 1178, 1182-1183 (7th Cir. 1990); *United States* v. *Herrada*, 887 F.2d 524, 527-528 (5th Cir. 1989), cert. denied, 495 U.S. 958 (1990); *United States* v. *Simpson*, 885 F.2d 36, 40-44 (3d Cir. 1989), cert. denied, 495 U.S. 958 (1990); see also *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 427-428 (5th Cir. 1999) (applying the same reasoning to a different assessment imposed to fund a particular program), cert. denied, 530 U.S. 1210, cert. granted, 530 U.S. 1213, cert. denied, 530 U.S. 1223, cert. dismissed, 531 U.S. 975 (2000). Petitioner also cites (Br. 22-23) *Armstrong* v. *United States*, 759 F.2d 1378 (9th Cir. 1985), but in that case there was no dispute that the primary purpose of the challenged statute was raising revenue. *Id.* at 1380-1381. Instead, the question was whether the Origination Clause permitted the Senate to amend a House bill *lowering* taxes by substituting an amendment *raising* taxes. *Id.* at 1381. The court approved

state—much less hold—that the use of funds to support such a specific program is *necessary* to establish that a provision's revenue-creating effects are incidental to its primary purpose.

Petitioner also asserts (Pet. 21) that the decision below conflicts with two decisions rendered by single judges in 1915 and 1875. Such a conflict would not provide a basis for certiorari. Sup. Ct. R. 10. In any event, no conflict exists. In the first case, *Hubbard* v. *Lowe*, 226 F. 135 (S.D.N.Y. 1915), the parties were in "agreement" that the challenged statute was "a revenue bill within the constitutional meaning" and the court proceeded on that "assum[ption]." *Id.* at 137. The only question was whether, consistent with the Origination Clause, *the House* could amend a Senate-originated non-revenue bill by striking "everything after the enacting clause" and substituting a revenue-raising amendment. *Id.* at 138. The court rejected that procedure, explaining that the bill originated in the Senate even though the House replaced the entirety of its text. *Id.* at 138-141.[9]

Hubbard thus stands for the proposition that, for purposes of the Origination Clause, substitution amendments like the one used to pass the Affordable Care Act do not alter the identity of the Chamber from which a bill originated. And the court also expressly recognized the Senate's broad authority to

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that procedure, explaining that "[t]he term 'Bills for raising Revenue' does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating* to taxes." *Ibid.*

[9] The government appealed the district court's decision, but this Court dismissed the appeal after Congress reenacted the challenged tax in a bill that originated in the House. See *Lowe* v. *Hubbard*, 242 U.S. 654 (1916).

amend House-originated revenue bills: "The Senate * * * , having full power to amend a revenue bill, has from the beginning originated taxes by inserting them in House legislation. The practice and the power is now well settled." 226 F. at 139. Accordingly, as the district court observed, *Hubbard* confirms the validity of the Affordable Care Act, and petitioner's challenge is "completely at odds with that case's substance." Pet. App. B21 n.13.

Petitioner's second case is *United States ex rel. Michels* v. *James*, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875) (No. 15,464). As petitioner observes (Pet. 21), *Michels* stated that bills for raising revenue include all laws that "draw money from the citizen" and "give no direct equivalent in return." *Id.* at 578. But that test would have invalidated the laws upheld in *Nebeker* and *Munoz-Flores*—a point that *Munoz-Flores* recognized in expressly rejecting the contention "that any bill that provides for the collection of funds is a revenue bill unless it is designed to benefit the persons from whom the funds are collected." 495 U.S. at 400. In light of that holding by this Court, the 140-year-old statement in *Michels* on which petitioner relies does not reflect a proper or authoritative interpretation of the Origination Clause.

b. Petitioner asserts (Pet. 30-33) that Judge Kavanaugh's conclusion that the Affordable Care Act was a permissible Senate amendment to a House-originated revenue bill conflicts with decisions of other circuits. Again, he is mistaken. Judge Kavanaugh concluded that so long as the Senate amends a House-originated revenue bill, the Origination Clause imposes no additional germaneness requirement. Pet. App. C57-C58. Other courts of appeals

have reached the same result, and have applied that rule even where, as here, the Senate "struck the entire text of the bill after the enacting clause." *Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163, 164, 167-168 (5th Cir. 1985) (*Concerned Taxpayers*), cert. denied, 476 U.S. 1151 (1986); accord *Armstrong* v. *United States*, 759 F.2d 1378, 1381-1382 (9th Cir. 1985); *Wardell* v. *United States*, 757 F.2d 203, 205 (8th Cir. 1985).

Petitioner notes (Pet. 30-31) that some courts have described the requirement that the original House bill be revenue-raising as one of "germaneness." But consistent with *Rainey* and *Flint*, those decisions indicate that nothing more is required than "that both the amendment and the amended portion address revenue collection." *Concerned Taxpayers*, 772 F.2d at 168; see *Armstrong*, 759 F.2d at 1382 (amendments are permissible so long as they are germane to "revenue collection"); *Harris* v. *IRS*, 758 F.2d 456 (9th Cir. 1985) ("The Act originated in the House as * * * as a revenue bill, and remained as such following substantial amendment by the Senate."); *Wardell*, 757 F.2d at 205 (amendments are permissible as long as the amended bill "remain[s] a revenue bill") (citation omitted). Petitioner cites no decision invalidating a Senate amendment on germaneness grounds, and no decision articulating a germaneness requirement that would preclude the Senate amendment at issue here.

4. Petitioner thus identifies no sound reason for this Court to take up his challenge to the enactment of Section 5000A—much less to hold, for the first time in our Nation's history, that an Act of Congress violated the Origination Clause. Congress itself, which obviously has deeply rooted experience in the legislative

process and in enforcing the Origination Clause, found no defect here. The House did not invoke its established "blue-slipping" procedure to return the Senate's amendment, and indeed no Member of Congress objected to the bill on Origination Clause grounds. See p. 18, *supra*. Every judge to consider petitioner's claim has now rejected it, and the disagreement among some over the proper reason for rejecting it does not merit this Court's review. Cf. *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030 (2011) ("This Court reviews judgments, not statements in opinions.") (brackets and citation omitted).

This Court's review is unwarranted for the additional reason that petitioner is not subject to the version of Section 5000A that was originally enacted in the Affordable Care Act. Shortly after the Act's passage, Congress enacted HCERA, which amended Section 5000A to change the amount of the payment owed by individuals who fail to maintain health coverage. HCERA § 1002(a), 124 Stat. 1032.[10] HCERA originated in the House and was subject to only minor amendments in the Senate. See p.3 & n.1, *supra*.

Because Congress has amended Section 5000A through a procedure that unquestionably complied with the Origination Clause, petitioner would not be entitled to relief even if he were correct that the orig-

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[10] The payment required under Section 5000A is equal to either a flat dollar amount or a percentage of household income, whichever is greater. 26 U.S.C. 5000A(c). The amount of the payment is also capped at the national average premium for health plans providing a certain level of coverage. 26 U.S.C. 5000A(c)(1)(B). HCERA amended Section 5000A by, among other things, decreasing the flat dollar amounts and increasing the percentages of income, resulting in reduced liability for some individuals and greater liability for others. HCERA § 1002(a), 124 Stat. 1032.

inal enactment of that provision in the Affordable Care Act was improper. Having never found a violation of the Origination Clause, this Court has never had occasion to consider the relevance of a properly enacted amendment to a provision that was claimed to have been initially adopted in violation of the Clause. But such an amendment should be deemed sufficient to cure any violation because it reflects congressional ratification of the challenged provision through a procedure that complies with the Origination Clause. And that conclusion would be particularly appropriate where, as here, a subsequent House-originated bill changes the method for calculating the challenged payment.[11] At a minimum, the complications introduced by HCERA's amendment to Section 5000A would make this case a poor vehicle in which to take up the proper interpretation of the Origination Clause.

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[11] Cf. U.S. Pet. for Cert. at 3 & n.1, 10-11, *Munoz-Flores*, *supra* (No. 88-1932) (acknowledging that the Ninth Circuit's decision finding an Origination Clause violation in the 1984 enactment of the assessment statute at issue in *Munoz-Flores* would not affect the imposition of assessments in future misdemeanor cases because the provision governing misdemeanors "was amended in December 1988" to alter the amount of the assessment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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