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 TEXAS, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, SOUTH CAROLINA AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

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), was enacted in compliance 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

[1] Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. Sup. Ct. R. 37.4.

interests by requiring that tax bills originate in the House of Representatives and thus ensuring that federal tax decisions will be made in the first instance by the legislators who are closest to the people. At the Constitutional Convention of 1787, the Origination Clause played a key role in convincing many of the states to cede power to (and share sovereignty with) the 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 be the legislative body that initiates the power of the purse because it is most connected to the people. *See generally Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) ("*NFIB*") (joint dissent by Scalia, Kennedy, Thomas, and Alito, JJ.) ("[Tax increases] must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off.").

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*

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[2] As the dissenting opinion below noted, the ACA "imposes a vast array of taxes," raising "$473 billion over 10 years." *Sissel v. U.S. Dep't of Health & Human Servs.,* 799 F.3d 1035, 1059 (2015).

Source of Frequent and Obstinate Altercations": The History and Application of the Origination Clause, 105 Tax Notes (Nov. 29, 2004).[3] The Origination Clause also 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.

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 2598; *id.* at 2601 (opinion of Roberts, C.J.). Because the ACA can only exist as a tax statute, it must comply with the Origination Clause, and whether it does is a justiciable question. *See United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990). The court of appeals 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). Amici are unaware of any other statute in our nation's history that Congress could pass only by relying on its taxing power without satisfying the Origination Clause. That result would trivialize a provision that anchored the foundational compromise of the Constitutional Convention of 1787, and it would allow the federal government to enact a multi-hundred-billion dollar tax statute in open defiance of the Framers' principal check on "Bills for raising

[3] Available at http://www.taxhistory.org/thp/readings.nsf/ArtWeb/8149692C128846EF85256F5F000F3D67?.

Revenue." The Court should grant the petition for certiorari.

I. The Origination Clause Plays a Vital Constitutional Role.

The Framers were keenly aware that "the power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). They put that expansive and dangerous power into the hands of the House of Representatives, on the theory that its members "were chosen by the People, and supposed to be best acquainted with their interests and ability." 1 Annals of Cong. 361 (1789) (Joseph Gales ed., 1834). As the four dissenters from the denial of en banc rehearing noted below, "the Origination Clause was an integral part of the Framers' blueprint for protecting the people from excessive federal taxation." *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1050 (D.C. Cir. 2015) (Kavanaugh, J.).

The injustices of the King's taxes gave the Framers a profound understanding of the power of the purse, and they were at pains to ensure that such power resided as close as possible to the people:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the

> sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government[.] This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 399 (James Madison) (M. Walter Dunne ed., 1901). The Framers feared that, if the less-accountable Senate could originate tax laws, Senators would "hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Rep." James Madison, Notes of Debates in the Federal Convention of 1787, at 443-44 (Ohio Univ. Press. 1966) (footnote omitted).

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); 2 The Records of the Federal Convention of 1787, at 514 (Max Farrand ed., Yale Univ. Press 1911) ("[M]embers from large States set great value on this privilege of originating money bills."). The Origination Clause assured large States that the House—where

large States would enjoy relatively greater influence—would be an adequate counterweight to the Senate. Kysar, *Tax Treaties*, *supra*, at 8 & n.24; *see also* J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L.J. 165, 171 (1987) ("Without the reposing of the revenue power in the House, the Senate would most likely have not been granted the appointment and treaty powers."). And the Origination Clause was the principal form of "compensation" that the small States gave "to large states in consideration for their acquiescence in the state-based, rather than proportional, composition of the Senate." Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 422 (2004).

Without the Origination Clause, the Constitution might not have been adopted. As then-Congressman James A. Garfield said, "it was the pivot on which turned the first great compromise of the Constitution, and the chief consideration on which the last was settled." Cong. Globe (appendix) 41st Cong., 3d Sess. 265 (1871) (statement of Rep. Garfield); *see also* Jonathan Rosenberg, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 Nw. U. L. Rev. 419, 423 (1983) ("Several delegates thought the House's exclusive privilege to originate revenue bills to be so critical that they were willing to jeopardize the entire Convention rather than surrender on the issue."). The Origination Clause was thus crucial to the very existence of the Constitution and our bicameral Congress. *See Hotze v. Burwell*, 784 F.3d

984, 999 (5th Cir. 2015) (observing that the Origination Clause "was critical to the Framers and ratifiers of the Constitution").

Nor is the Origination Clause merely an artifact of the Founding. It remains true that the House is better suited to wield the power of the purse because it is more accountable to the people. *See NFIB*, 132 S. Ct. at 2655 (joint dissent by Scalia, Kennedy, Thomas, and Alito, JJ.) ("[Tax increases] must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off"); Kysar, *Tax Treaties*, *supra*, at 41 ("Representatives are more immediately and directly accountable to their constituents, who can effectuate a change in representation frequently. The Senate, by contrast, is more insulated from popular opinion."); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 Buff. L. Rev. 633, 661 (1986) ("Although Senators are now chosen by direct election, the major factors cited by Madison remain as true today as they were in 1787: representation in the House is by population, the House contains more members, and its members return more frequently to the people for approval at the polls.").

In short, the Origination 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."). Were the Origination Clause reduced to a "meaningless and formalistic rule," *Ring v. Arizona*, 536 U.S. 584, 604 (2002), one of the Constitution's key structural provisions would be vitiated.

II. The Court of Appeals' Decision Effectively Nullifies the Origination Clause.

A. 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." It was six pages long, and it gave certain tax breaks to home-owners serving in the military. 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 massive "amendment" that we now know as the ACA. Pub. L. No. 111-148, 124 Stat. 119 (2010).

Insulated from the more-immediate political accountability facing members of the House, the ACA's supporters in the Senate then brokered a series of deals that acquired nicknames like the "Louisiana Purchase," the "Cornhusker Kickback," and "U Con." *See, e.g.*, Dana Milbank, *Looking Out for Number One (Hundred Million)*, Wash. Post, Dec. 22, 2009. In contravention of the Framers' plan, public scrutiny and blame for the ACA

fell on the Senate instead of the more-politically-accountable House.[4] That is the exact opposite of what the Origination Clause was supposed to do.

The process of the ACA's enactment violates not just the original understanding of the Clause, but also the longstanding views of both houses of Congress:

> The precedents and practices of the House apply a broad standard and construe the House's prerogatives broadly to include any "meaningful revenue proposal." This standard is based on whether the measure in question has revenue-affecting potential, and not simply whether it would raise or lower revenues directly. As a result, the House includes within the definition of revenue legislation not only direct changes in the tax code, but also any fees paid to the government that are not payments for a specific service, and any change in import

[4] 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. 15, 2010 ("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 ("Senate health bill"); Beth Healy, *"Cadillac" Tax on Hatchback Care?*, Bos. Globe, Jan. 15, 2010 ("Senate's health overhaul bill").

> restrictions, because of the potential impact on tariff revenues. The precedents of the Senate reflect a similar understanding.

James V. Saturno, Cong. Research Serv., RL31399, The Origination Clause of the U.S. Constitution: Interpretation and Enforcement (2011). Whatever else might be said about the ACA, it certainly constitutes a "meaningful revenue proposal." Both the original meaning of the Origination Clause and its historical understanding in both houses of Congress condemn the ACA as unconstitutional.

B. The district court nevertheless found no constitutional violation, concluding that (1) the ACA should not be considered a tax statute because its "purpose" is not to levy taxes; and (2) the Senate can "gut-and-replace" a House-originated tax bill without offending the Origination Clause. The D.C. Circuit panel adopted the first of these justifications, but criticized the second. By contrast, the four dissenters from denial of rehearing en banc adopted the second justification, but emphatically rejected the first. The correct view is that both of these justifications are meritless.

1. Courts cannot avoid the Origination Clause by suggesting 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.); *id.* at 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.

Amici are aware of no case that supports construing a statute as a tax to save it from one constitutional attack and as a non-tax to save it from another.[5] 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—including the Origination Clause.

The district court and the D.C. Circuit panel tried to avoid *NFIB* and the Origination Clause by asserting that this Court's precedents required them to focus solely on the "purpose" of the ACA. *See Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159, 167-68 (D.D.C. 2013); 760 F.3d at 8. They claimed that, under this Court's Origination Clause doctrine, the ACA is not really a tax statute if it has a non-tax "purpose" and any

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[5] *NFIB* construed the ACA as a tax under Congress's constitutional taxing power and as a non-tax under the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"). 132 S. Ct. at 2594. But *NFIB* reasoned that this was permissible 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 statute. *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). That "substance and application" remains the same, regardless of what type of constitutional challenge is mounted against the ACA.

revenue raised is "merely incidental to the main object or aim of the challenged measure." *Id.* As demonstrated by the petition as well as Judge Kavanaugh's dissenting opinion below, this approach is unworkable, easily evaded, and in conflict with the governing precedents. *See* Pet. 9-20. In particular, there is no support for exempting from the Origination Clause a statute—like the ACA—which raises general revenues. *See* Pet. 10; *Sissel*, 799 F.3d at 1054 (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("No case or precedent of which I am aware has said that a law that raises revenues for general governmental use is exempt from the Origination Clause merely because the law has other, weightier, non-revenue purposes.").[6]

In addition, any law that is constitutional *only* as a tax must necessarily be a "Bill[] for raising Revenue," because no other enumerated power supplies an alternative purpose. In other words, the ACA is indisputably a "'bill[] to levy taxes in the strict sense of the words'"—and even the court of appeals panel in this case acknowledged that such bills are subject to the Origination Clause. *Sissel,* 799 F.3d at 1048 (Rogers, Pillard and Wilkins, JJ., concurring in the denial of rehearing en banc); (quoting 2 Joseph Story, *Commentaries on the Constitution* § 877, at 343 (1833)). Not one of the cases cited by the district court or the panel addresses the question presented here—namely, whether Congress could act

[6] *See Sissel*, 760 F.3d at 9 (panel opinion acknowledging that this case "does not fall squarely within the fact patterns of prior unsuccessful Origination Clause challenges").

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.[7]

In this case, however, Congress could enact the ACA *only* by falling 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 the 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. And as far as amici are aware, prior to this case no federal appellate court ever had held that a law authorized solely by Congress's taxing power need not originate in the House of Representatives. As the dissenters below correctly noted, the panel's radical new approach "alters the longstanding balance of power between the House and Senate, and ultimately affects individual liberty." *Sissel,* 799 F.3d at 1064-65. This Court should step in to

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[7] *See 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 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").

prevent this serious error from "linger[ing] and mestatasiz[ing]." *Id.* at 1065.

2. The Senate cannot avoid the Origination Clause by taking a narrow House bill like H.R. 3590, striking every single word, inserting an enormous, unrelated tax statute spanning over 2000 pages, and then claiming that the bill "originated" in the House.[8] Such an approach is surely convenient for the Senate—and it may even be favored by certain members of the House, who do not relish the political accountability that comes with originating tax bills. *See* Rebecca M. Kysar, *The "Shell Bill" Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. 659, 691 (2014) (claiming that twentieth-century House members sometimes did not object to the Senate's violations of the Origination Clause); 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, 107 (2014). But the political expediency of this gut-and-replace approach does not make it constitutional.

As this Court has explained, the Senate is limited to making *germane* amendments to revenue bills that originated in the House. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911). This requirement is firmly supported by historical practice. For example, in 1872, the

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[8] This attempt to comply with the Origination Clause demonstrates that "the Senate itself understood that the Act was a revenue-raising bill and that the Origination Clause therefore applied to the Act." *Sissel*, 799 F.3d 1035, 1057 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *see id.* at 1050.

House considered a resolution declaring that, under the Origination Clause, the Senate was not entitled to gut a bill repealing a tax on tea and replace it with an extensive overhaul of the tax code. *See* 2 Asher C. Hinds, Precedents of the House of Representatives of the United States § 1489, at 950 (1907). Then-Representative James A. Garfield explained:

> It is clear to my mind that the Senate's power to amend is limited to the subject-matter of the bill. That limit is natural, is definite, and can be clearly shown. … 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. The resolution passed by a vote of 153-9. *Id.* at 950-51.

The germaneness requirement is necessary to prevent the Origination Clause from becoming "wholly superfluous." Zotti & Schmitz, *The Origination Clause*, *supra*, at 106. 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 ACA.

Accordingly, while the dissenters below took the position that "the Senate may amend House-originated revenue bills without limit," the members of the original panel wisely declined "to tread on such infirm ground." *Sissel,* 799 F.3d at 1036 (Rogers, Pillard and Wilkins, JJ., concurring in the denial of rehearing en banc). As those judges observed, such an approach "may be contrary to congressional practice, or, relatedly, be perceived as judicial endorsement of treating the Origination Clause as empty formalism." *Id.*

Indeed, even the dissent acknowledges that one could "understandably" believe that "allowing the Senate to exercise such a broad amendment power over revenue-raising bills greatly diminishes the force of the Clause and makes the Origination Clause unimportant." *Id.* at 1063.[9] The dissent tries to rehabilitate its position by noting that "first-mover authority" still gives the House some sort of advantage over the Senate. *Id.* But as the article cited by the dissent acknowledges, this advantage is "intangible" and "of uncertain magnitude." Vermeule, *The Constitutional Law of Congressional Procedure*, *su-*

[9] Notably, the dissenters' discussion of the Origination Clause does not closely analyze the original meaning of the term "Amendments," and whether it can encompass the sort of complete replacement seen here. *Sissel,* 799 F.3d at 1061-62; *see* Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 Harv. J.L. & Pub. Pol'y 629, 705 (2015) (suggesting that both supporters and opponents of the Constitution in the ratification debates acknowledged that "Amendments" was "a limited concept").

pra, at 424-25. It is implausible that such a tenuous benefit could have anchored the Great Compromise and induced the large States to agree to equal representation in the Senate. As the dissent below acknowledges, the Clause "was so central to the founding blueprint" that some Framers believed the Constitution would fail without it. *Sissel*, 799 F.3d at 1051-52. No interpretation that even arguably "makes the Origination Clause unimportant," *id.* at 1063, can be correct.

Moreover, the import of the Origination Clause is not limited to enhancing the power of the House vis-à-vis the Senate. In addition to "act[ing] as a counterbalance to the powers secured to the small states in the Senate," the Clause "served the interests of the people by securing a prominent role for the directly elected house, which was also subject to proportional representation and more frequent elections, in setting revenue policy." Kysar, *Tax Treaties*, *supra,* at 9-10; *see also Sissel*, 799 F.3d at 1051 (dissent noting that the origination power was given to the House primarily because its members were chosen by the people, were acquainted with their interests, and were subject to more frequent elections). The dissent does not explain how this *accountability* function of the Origination Clause can be served if tax bills originated by the more accountable chamber can be simply deleted and replaced with entirely unrelated tax bills drafted by the less accountable chamber. In short, the dissenters' approach shortchanges the Origination Clause just as profoundly as the panel opinion.

* * *

At bottom, the question in this case is whether the Origination Clause still carries any force. Given its constitutional provenance, its centrality to the Founding, and its undeniable import for over two centuries, the answer must be yes. And if the Origination Clause is more than a "meaningless and formalistic rule," *Ring*, 536 U.S. at 604, the ACA is unconstitutional.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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