No. 14-350

**IN THE**
**Supreme Court of the United States**

ASS'N OF AMERICAN PHYSICIANS & SURGEONS, INC.; ALLIANCE FOR NATURAL HEALTH USA,
*Petitioners*,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, IN HER OFFICIAL CAPACITY, *ET AL.*,
*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

# BRIEF OF CITIZENS' COUNCIL FOR HEALTH FREEDOM AND INDIVIDUAL PHYSICIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

"[T]he history of the Origination Clause reveals a deliberate constitutional "check and balance" under which nobody in the federal government except the direct representatives of the people in this House … can constitutionally propose federal laws under the taxing power of Congress". *Hearing on "The Original Meaning of the Origination Clause" before the U.S. House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice*, 113th Cong., 2d Sess. 15 (April 29, 2014)(Testimony of Nicholas M. Schmitz). The questions presented are:

1. After the House passed the Service Members Home Ownership Tax Act, the Senate struck the entirety of that bill and substituted its own unrelated bill, known as ACA. Did ACA originate in the House or Senate?

2. The Origination Clause and first clause of article I, section 8, sit in *pari materia.* Is a bill for a tax, duty, impost or excise *per se* a "Bill for raising Revenue"?

3. Is the Origination Clause a prerogative of the House or is it a judicially enforceable constraint upon the House and Senate?

4. Does the Individual Mandate Exaction violate the Sixteenth Amendment because it contains a triply embedded definition of "poverty line" that depends on a census?

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici curiae* ("*Amici*") are individual physicians and a nationwide organization of patients and doctors who support health freedom for patients and doctors. *Amici* file this brief in support of Petitioners.

*Amicus* Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to protect patient healthcare choices and patient privacy.

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Those consents are filed concurrently with this brief.

*Amicus* Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

*Amicus* Mark J. Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

*Amicus* Robert L. Pyles, M.D., privately practices psychiatry and psychoanalysis in the Boston area. He has held leadership positions with organized medicine and psychiatry locally, nationally and internationally.

*Amicus* Graham Spruiell, M.D., is a psychoanalyst and forensic psychiatrist who has a private practice in Wellesley, Massachusetts.

*Amici* have studied the introduction, passage and implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).

This brief focuses on the failure of Congress to abide by the Constitution's Origination Clause and Sixteenth Amendment when it enacted 26 U.S.C. §5000A's Individual Mandate Exaction ("IMX"). These matters deserve the Court's immediate attention[2].

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[2] *Amici* agree with Petitioners' conclusion that the IMX violates the Origination Clause. However, *Amici's* conclusion is reached through a separate path, as explained below.

## HISTORICAL STATEMENT

It must never be forgotten that the Origination Clause is the fulcrum upon which the Constitution was ratified and powers were distributed among the Branches, between the federal government and the States, and between the two chambers of Congress. During a Congressional debate in 1872, then Congressman James A. Garfield[3] recounted the history of the Origination Clause:

> "I am quite sure that the House cannot overrate the importance of the issue raised by the sending of that bill to this House. I will only ask attention for a few moments to two or three points in relation to this question. In the first place, I beg the House to remember that ***the place which this clause of the Constitution occupies in our Constitution is of the utmost importance***.
>
> Twice during the constitutional Convention of 1787 ***the whole system hinged upon the exclusive right of the House to originate revenue bills***. Twice the determination of that single point settled the question whether the Constitution should be made or not. Before the Convention had been in session one month this subject was introduced, and it was kept in the eye of the fathers of the Constitution almost every day from that time till the final adjustment of the Constitution. On the 5th of July, 1787, when the framers had been at work more than six months, the proceedings were brought to a dead lock on the question of the equality of the States in the Senate; the larger States saying they would never consent to

[3] Later, the 20th President.

> allow the smaller States an equal voice with themselves in the Senate unless in return for that great grant it should also be granted to the larger States that their Representatives in the lower House should have the exclusive right to originate money bills. Of such importance was the right to originate money bills regarded that to secure it the other question was given up, and the States were all allowed an equal voice in the Senate, the large and the small – Delaware to be equal to New York; Rhode Island to Pennsylvania – and this was granted as an equivalent for the exclusive right to originate money bills in the popular branch.
>
> And when that first great compromise of the Constitution was settled upon that basis, ***the whole system came near being unhinged again by throwing out this clause***. At last, when it was demanded that the Senate should have the exclusive right to ratify treaties, to try impeachments, and to confirm nominations, it was said, "The Senate shall never have that right, unless you restore the exclusive right to originate money bills in the House." The clause was then restored and kept in the Constitution as it now stands."

42 Cong. Globe, 42d Cong., 2d Sess. 2106 (1872) (Statement of Rep. James Garfield)(emphasis added). This history is as relevant today as it was in the 1870s and 1780s.

## PRELIMINARY STATEMENT

This case provides a perfect opportunity for the Court to revisit its Origination Clause jurisprudence because the House's bill ceased to exist the instant the Senate struck the entirety of the House's language.

## CHRONOLOGY

On October 7, 2009, the bill entitled "Service Members Home Ownership Tax Act of 2009" ("SMHOTA") was introduced in the House of Representatives. It was assigned bill number HR 3590. HR 3590 was very short and consumed less than a single page of the Congressional Record. 155 Cong. Rec. H10550 (Oct. 7, 2009). SMHOTA unanimously passed the House the next day (416-0, Roll No. 768) 155 Cong. Rec. H11126-11127 (Oct. 8, 2009). SMHOTA included a tax credit for some members of the armed services who bought homes. Upon passage, the House sent the SMHOTA to the Senate.

On November 19, 2009, the Senate introduced the bill entitled "Patient Protection and Affordable Care Act" as an alleged amendment in the nature of a substitute for HR 3590 (Senate Amendment No. 2786). 155 Cong. Rec. S11607 *et seq*. (Nov. 19, 2009). After considerable debate, the alleged amendment was passed by the Senate (60-39, Rollcall Vote No. 396) on December 24, 2009. 155 Cong. Rec. S13981.

*Amici* refer to the Senate-passed bill as HR 3590* to distinguish it from the House-passed SMHOTA (*i.e.* HR 3590). *Amici* respectfully use an asterisk to distinguish the Senate's bill from the House's bill and to draw an analogy between an unprecedented increase in home run production during the period between 1998 and 2001 on the one hand,[4] and the Senate's transformation of the one-page House-passed bill, 155 Cong Rec. H10550, into the Senate's massive tome on the other hand, 155 Cong. Rec. S11607 *et seq*.

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[4] *See e.g.* Tom Verducci, *Is Baseball in the Asterisk Era?* Sports Illustrated (March 15, 2004).

The Senate-passed HR 3590* differs markedly from the House-passed SMHOTA. First, the Senate completely obliterated the House's language. Second, the Senate removed the short title of the SMHOTA and replaced it with its own short title: Patient Protection and Affordable Care Act. Third, the Senate-passed bill was approximately 532.21 times the length of the House-passed bill (an increase of 53,121 percent)[5]. Fourth, originally the House voted unanimously to pass SMHOTA but later passed the Senate-passed HR 3590* by only seven votes (219-212, Roll No. 165), 156 Cong. Rec. H2153 (Mar. 21, 2010). Fifth, the Senate completely changed the subject matter of the bill, from one involving a tax credit for members of the armed services to one involving healthcare reform. Only the bill's number, HR 3590, was retained by the Senate.

Having passed both houses of Congress, HR 3590* became the law known as the Patient Protection and Affordable Care Act on March 23, 2010 upon the President's signature. 124 Stat. at 1024.

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[5] Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Brit. J. Am. Leg. Studies 71, 106-07 (2014)(Authors observed HR 3590*'s 380,000 words versus SMHOTA's 714 words).

## SUMMARY OF ARGUMENT

*Certiorari* is appropriate. The IMX is void, *i.e.* non-existent, based upon the failure of Congress to abide by the Constitution's strict lawmaking requirements. The first clause of article I, section 7, *i.e.* the Origination Clause, prevents the Senate from originating revenue bills, including tax bills. U.S. CONST. art. I, §7, cl. 1. Because a violation of the Origination Clause in effect ignores the fence between the power of the House and the Senate and redistributes the powers of the two chambers *inter sese* (without using the Article V process), *certiorari* is especially appropriate. *Amici* also believe that because the IMX contains an embedded definition of "poverty line" which depends on a census, the IMX violates the Sixteenth Amendment.

ACA is extremely long and complicated. Thus, many fine and conscientious members of the House and Senate did not recognize that the Origination Clause and the Sixteenth Amendments were violated by the enactment of the IMX. The Court must recognize and correct those violations because failure to comply with the Constitution is not an option. *See generally Clinton v. City of New York*, 524 U.S. 417 (1998)(regarding Presentment Clause).

Compliance with the Origination Clause and the Sixteenth Amendment cannot be and were not waived or conceded by the Petitioners because those arguments determine if the IMX validly exists.

## REASONS FOR GRANTING THE PETITION

Failure to comply with the Constitution's strict lawmaking requirements renders any law void *ab initio*. Any non-compliant law must be declared unconstitutional, regardless of its merits and regardless of whether the law was passed by a single vote or by unanimous vote in both chambers. By granting the petition, the Court may protect the People by protecting Congress from itself.

### I. BECAUSE COURTS HAVE INDEPENDENT POWER TO DETERMINE IF A LAW EXISTS, ORIGINATION CLAUSE AND SIXTEENTH AMENDMENT VIOLATIONS MAY AND SHOULD BE RAISED *SUA SPONTE*.

It has been a long-standing principal of statutory construction that when a court is asked to construe a law, it has authority to determine if that law exists. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-447 (1993)("*USNB*"). "There can be no estoppel in the way of ascertaining the existence of a law." *South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877). Furthermore, "a court may consider an issue 'antecedent to … and ultimately dispositive of' the dispute before it, ***even an issue the parties fail to identify and brief***." *USNB*, 508 U.S. at 447 (emphasis added, internal citations omitted).

> " '[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law,' … even where

> the proper construction is that a law does not govern because it is not in force."

*USNB*, 508 U.S. at 446 (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). Furthermore, the failure of litigants to argue the legal issues correctly does not render an appellate court powerless to address those issues properly:

> "Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility."

*Forshey v. Principi*, 284 F.3d 1335, 1357 n.20 (Fed. Cir. en banc), *cert. denied*, 537 U.S. 823 (2002) (internal citation omitted). Indeed, appellate review of the proper law prevents misapplication of the law, injustice, and construction of hypothetical laws[6].

Furthermore, Congress has recognized "[a] law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment." *CRS Report for Congress: The Origination Clause of the U.S. Constitution:*

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[6] *Cf. Davis v. United States*, 512 U.S. 452, 464 (1994)(Scalia, J., concurring)("But the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and ***there are times when prudence dictates the contrary***….")(citation omitted)(emphasis added). This is such a time.

*Interpretation and Enforcement* 12 (Mar. 15, 2011) ("*CRS Report*")(citing *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990)). The Supreme Court explained:

> "Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments … Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review… In short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question."

*Munoz-Flores*, 495 U.S. at 392-93.

Thus, *Amici* believe it is appropriate for the Court to consider that Congress, in enacting the IMX, failed to comply with the Origination Clause[7] and Sixteenth Amendment[8], regardless of whether those arguments were waived by the Petitioners or not.

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[7] *See* Argument II, i*nfra.*

[8] *See* Argument III, *infra.*

## II. IT IS APPROPRIATE TO ADDRESS THE ORIGINATION CLAUSE BECAUSE IT IS AN IMPORTANT ISSUE LEFT OPEN IN *NFIB*.

"Even 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." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2598 (2012)("*NFIB*"). In *NFIB*, the Court did not, however, analyze every tax-related clause. Indeed, a majority of the Court focused on the direct taxation clause, *id.* at 2598-2599, not addressing the Origination Clause. However, Justices Scalia, Kennedy, Thomas, and Alito did recognize that the "Constitution requires tax increases to originate in the House of Representatives … 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." 132 S.Ct. at 2655 (Opinion of Justices Scalia, Kennedy, Thomas, and Alito, dissenting)("*NFIB-SKTA*")(recalling "The Federalist No 58 'defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue'").

Since compliance with the entire Constitution is required, but a majority of the Court did not address the Origination Clause in *NFIB,* the Court can and should consider that issue now. Because an Origination Clause violation negates the existence of the IMX, it should have been addressed by both courts below. Instead those courts treated the argument as having been waived or conceded by the

Petitioners. In treating the Origination Clause argument in this way, the District Court said: "The Court declines to address this argument since plaintiffs waived it by failing to assert in their complaint or opposition to the motion to dismiss, even though defendants argued in their motion to dismiss that the provisions are justified under Congress's taxation power." Pet. App. 36a. The Court of Appeals agreed. It said: "[t]he district court was therefore perfectly reasonable in applying the standard rule inferring concession from gaps in a plaintiff's opposition to a motion to dismiss." Pet. App. 6a. Because courts have an independent duty to determine if a law validly exists, the issue can never be conceded. And, even if the Petitioners had "conceded" it, the issue may be raised by the Court *sua sponte*.

### A. Because The Origination Clause And The Taxing Clause Sit In *Pari Materia*, Any Tax Bill Is A "Bill For Raising Revenue"

According to the language and structure of article I, the use of the words "originate" and "all" impose a vital constraint upon Congress: only the House of Representatives may initiate the set of bills specified in article I, section 8. The Origination Clause and the power "To lay and collect", found in sections 7 and 8, respectively, sit in *pari materia*. Indeed, members of Congress have articulated this as well. Brief of *Amici Curiae* U.S. Representatives Trent Franks *et al*. in Support of Appellant Seeking Reversal in *Sissel*

*v. U.S. Dep't of Health & Human Servs.,* 17 (Docket No. 13-5202, D.C. Cir.)("Moreover, *amici* submit that ***the Origination Clause should be read in pari materia with Article I, section 8, clause [1], the power "to lay and collect taxes, duties, imposts, and excises***.")(emphasis added).

The Framers attached an enormous importance to funding the federal government. Consequently, a tax-related clause initiates both sections 7 and 8 of article I. *Amici* observed the Origination Clause is followed by the Presentment Clause which prescribes the general procedure used to enact federal statutes. Similarly, *Amici* observed, the power "To lay and collect" is followed by the other Congressional powers specified in the remaining clauses of section 8. U.S. CONST. art. I, §8, cls. 2-18. Given this parallel structure, it follows that the phrase "Bills for raising Revenue" refers *per se* to any bill for a tax, duty, impost, or excise. Because ACA contains the IMX which already has been held to be a tax, *NFIB*, 132 S. Ct. at 2598 ("Our precedent demonstrates that Congress had the power to impose the [Individual Mandate] exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax"), ACA must originate in the House.

### B. Because The Word "All" In The Origination Clause Precludes Exceptions, The Impact Of A Tax Bill On Federal Revenue Is Completely Irrelevant And Invites "Junk Economics" To Be Used In Court, Congress And By The President.

The Origination Clause begins with the word "[a]ll". U.S. CONST. art. I, §7, cl. 1. Because the Framers used the word "all", the judiciary is preclud-

ed from creating or interpreting any exception to the Origination Clause. As explained in Argument II-A, *supra*, the Clause applies to each and every tax, duty, impost, and excise provision. This is true, regardless of whether such provision constitutes the entire bill or is merely a single provision within a much larger bill. *See Twin City Bank v. Nebeker*, 167 U.S. 196, 202-03 (1897)("There was no purpose by the act or ***by any of its provisions***, to raise revenue to be applied in meeting the expenses or obligations of the government")(emphasis added).

Because the definition of the word "all" is not in dispute, the Court should adopt its plain meeting[9]. "All" means "the total entity or extent of: …." *The American Heritage Dictionary of the English Language* 33 (William Morris, ed., 1979).

*Amici* believe the Senate's power to "amend" a House-originated Revenue bill cannot be construed so broadly that the Senate is permitted to strike the entirety of the bill's language and title without running afoul of the Origination Clause. Such a broad construction creates a loophole so large that it, in effect, eliminates the Origination Clause. To be able to enact the IMX as a tax, Congress surely blurred the line separating a Senate-originated bill from a House-originated bill. The Origination Clause establishes a firm and bright line, rather than a fuzzy standard. *See generally*, *Kyllo v. United States*, 533 U.S. 27, 40 (2001). By granting the petition, the Court will have

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[9] *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992)("When the words of a statute are unambiguous … judicial inquiry is complete")(internal citations and quotation marks omitted). *Amici* extend this principle to the words of the Constitution itself.

the opportunity to parse the Origination Clause's language and to set forth a non-fuzzy standard for the House, Senate, President, and lower courts to follow.

Because tax, duty, impost, and excise bills *per se* are "Bills for raising Revenue", it is not necessary to examine the purposes behind ACA and the IMX nor to project whether federal revenue will be increased, decreased, or left unchanged by the IMX.

Moreover, projecting changes in federal revenue is a notoriously difficult task which could involve the use of "junk economics" by the Court, Congress or President. Junk economics, like junk science, does not belong in any branch. *See e.g.*, Peter W. Huber, *Junk Science in the Courtroom*, 26 Val. U. L. Rev. 723 (1992)(adapted from Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom*(1991)); and Paul A. Samuelson, *Economics* 263 (10th ed. 1976) ("Statisticians and economists cannot yet make accurate forecasts. Their guesses occasionally turn out to be quite wrong"). Even before he served as our nation's first Treasury Secretary, Alexander Hamilton understood the folly of anticipating increased revenues based on an extrapolation of an increased duty rate. He warned the People that revenues actually could be reduced by an increase in duty rate. "If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds." *The Federalist* No. 21, at 142-143 (A. Hamilton)(C. Rossiter, ed. 1961)[10].

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[10] Like investors who purchase stocks, bonds, commodities, *etc.*, members of Congress can be "irrationally exuberant" regarding the projections of federal revenues to be generated from a par-

In short, the requirements of the Origination Clause must be met regardless of the impact upon federal revenue. This more robust approach is necessary because any specific tax or any combination of taxes might increase or decrease federal revenues prospectively. *See id.*

### C. The Constitution Would Not Have Been Ratified But For The Origination Clause.

Students of history know that taxes played an essential role in the shaping of our nation by kindling the American Revolution. Consequently, it is not surprising that the inclusion of the Origination Clause was indispensable to reaching the Great Compromise of 1787 and to ratifying the Constitution. The Origination Clause lies at the heart of the Constitution and cannot be ignored. The power to originate a tax bill is granted to the House and denied to the Senate. The House's power to originate tax bills, like the Senate's power to ratify treaties and to confirm Presidential appointments, was critical to attaining the Great Compromise of 1787.

> "***[T]he House's power under the Origination Clause was perceived as so important that bestowal of the rest of the Senate's powers relating to executive appointment, treaty-making, impeachment, and presidential elections was necessary to reach a final agreement*** …. So understood, the Origination Clause served two purposes. First, the Origination Clause acted as a counterbalance to

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ticular tax or from taxes cumulatively. *Cf.*, Robert J. Shiller, *Irrational Exuberance* (2000)(regarding irrationality in the United States equity markets during the 1990s).

> the powers secured to the small states in the Senate. Second, the Origination 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."

Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 The Yale J. of Int'l L. 1, 9-10 (2013)("*Tax Treaties*")(emphasis added, footnote omitted).

In Federalist No. 58, James Madison forcefully defended the Origination Clause. He said: "[t]his 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, p. 359 (C. Rossiter, ed. 1961).

In contrast to violations of the House's internal rules[11], violations of the Origination Clause may not be waived by the House and are enforceable by the Court. "[T]he Court can strike down a bill in violation of the Origination Clause even though the House has chosen to waive its origination privilege or has improperly found a bill to be outside of the clause's reach." Kysar, *Tax Treaties*, at 11 (footnote omitted). *Amici* strongly believe that the Origination Clause is a strict constitutional requirement. Calling the clause a "privilege" or "prerogative" of the House grossly distorts and understates its importance. As

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[11] Under the Rules Clause, each chamber is permitted to waive its own rules. *See* U.S. CONST. art. I, § 5.

indicated above, the Origination Clause is the fulcrum upon which the Constitution rests. *See* page 3, *supra.*

Since our nation's founding, the importance of the Origination Clause has not gone unnoticed by members of Congress. When the Senate attempts to "originate" a revenue bill, no constitutional crisis arises if the House simply asserts its origination power or if the sponsoring Senator asks a member of the House to introduce an identical bill and the House approves that bill before the Senate approves its bill. Neither action occurred here. Both actions were extensively discussed 142 years ago in the House during a debate over a resolution informing the Senate that its attempted "amendment" of a House bill to repeal existing duties on coffee and tea conflicted with the Origination Clause. *See* 42 Cong. Globe. at 2105-2112. Like the instant case, the Senate then completely changed the title, substance and sheer length of the House-originated bill. Given this historical relevance, *Amici* urge the Court to review the entire colloquy regarding the 1872 resolution. *Id.*

### D. Senate-Originated Tax Bills Change The Distribution Of Powers Prescribed By The Constitution.

The Constitution spells out in detail the processes by which the two chambers of Congress bring their diffused power to bear on federal lawmaking.[12]

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[12] The Constitution begins by diffusing legislative power between the House and the Senate. U.S. CONST. art. I, §1. It is apparent from reading the Constitution's other provisions and *The Federalist* No. 51 that our Constitution's Framers were concerned about the natural tendency of people to develop into fac-

The Constitution made the House responsible for originating tax legislation and made them accountable at the polls every two years for such actions. U.S. CONST. art. I, § 2. On the other hand, Senators are accountable every six years. *Id*. at art. I, § 3 and at amend. XVII. In addition, Senators Byrd, Moynihan and Levin explained how the Constitution's structure fosters liberty.

> This Court has repeatedly held the separation of powers is not merely an intramural interest of the branches of government. Abridgement of the separation of powers threatens harm to all whose "liberty and security" are its "ultimate purpose." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 272 (1991); *see also, United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) (***allocation of lawmaking authority under Art. I, § 7, cl. 1 of the Constitution "safeguard[s] liberty").***

Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan and Carl Levin as *Amici Curiae* in Support of Appellees in *Clinton v. City of New York* 21 (Docket No. 97-1374)(emphasis added).

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tions that would promote their own self-interests. Therefore, they designed a legislative process that, in theory and practice, would be modeled today as a series of non-cooperative games whereby a bill becomes a law if and only if the President, Senate and House reach the same equilibrium point by agreeing to identical statutory language. *Cf.* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944)(generally regarded as the formal beginning of game theory) and John F. Nash, Jr., *Non-Cooperative Games* (1950) (Princeton University Ph.D. Dissertation).

It is important for the Court to consider whether the balance of power between the Senate and the House has been altered, or at least ignored, in order to enact ACA. *Amici* firmly believe that HR 3590 was converted from a House-originated bill into a Senate-originated bill the instant the Senate struck the entirety of the House bill.

It is a fundamental principle of constitutional law that the chambers of Congress may not reallocate their own powers *inter sese*. Only the People may reallocate the powers of the House and Senate through an amendment to the Constitution. *See generally, U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995); and *Clinton*, 524 U.S. at 449.

The maxim *delegata potestas non potest delegari* has been applied by this Court to prevent the transfer of power between the branches without the ratification of an Article V Amendment. *See Metropolitan Washington Airports Authority,* 501 U.S. at 272 ("'Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents.' [Edward H.] Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 385-386 (1976)"). This petition provides an opportunity to apply the maxim, in a different context, to prevent the two chambers of Congress from reallocating their own powers without an Article V amendment being ratified.

**E. This Court Should Protect The "People" From The House's Failure To Protect Its Origination Power.**

There is no question this case involves a very real and substantial issue regarding "origination." Here,

the Senate struck the entirety of the House's language as well as the bill's title when the Senate passed its HR 3590*. To determine the originating chamber, the Court should ask itself whether passage of the Senate's version "originated" a new bill or merely "amended" the House's version.

Normally, when a court is asked to determine where a federal law "originated", the court does not look beyond the record of law's enrollment lodged with the Secretary of State. *CRS Report* at 10-12; and *Munoz-Flores*, 495 U.S. at 408-10 (Scalia, J., concurring). It should. In considering ACA, the Senate removed every vestige of the House-originated bill but for the bill's number. One cannot conclude that ACA originated in the House without stretching the meaning of the word "originate" well beyond recognition. Judicial review of a bill's origination is both necessary and proper. This cannot be done unless the Supreme Court clarifies the meaning of the words "originate" and "amend". This undertaking is well worth the Court's time because those words separate the power of the House from the power of the Senate.

It is apparent from the Constitution's language, structure, and history that, as used in the Origination Clause, the word "originate" provides an absolute constraint on which chamber may "originate" the particular class of bills specified in the first clause of art. I, § 8. That chamber is the House of Representatives. Furthermore, the use of the word "originate" in the Origination Clause should be distinguished from its use in the Presentment Clause. U.S. CONST. art. I, §7, cl. 2. The latter Clause explicitly directs and sequences actions that are to be

taken by the President and both chambers after the veto of a bill. Nothing is left to chance. The President returns the bill to the originating chamber. The Presentment Clause could have required the President to return an objectionable bill to either or both chambers (for simultaneous reconsideration). Instead, the Framers provided for **sequential reconsideration** based upon the chamber of origin.

Although there are no private interests at stake when Congress wrongly designates the chamber of origin in connection with a Presentment Clause violation, private interests are seriously affected by an Origination Clause violation that is not enforced by the House of Representatives. While the House generally has been vigilant in protecting its "origination" power, it has failed to do so here. Consequently, and perhaps reluctantly, the Court now must ask itself the following question: May the Court protect the "People" when the House fails to guard its "origination" power?

Concerns of encroachment and aggrandizement of legislative power, as well as the abdication of legislative power by Congress, have been integral to this Court's separation of powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 382 (1989)("It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'"). Granting a petition for a writ of *certiorari* is not just appropriate where one branch of the federal government encroaches upon the province of another branch. It is also appropriate where one chamber of

Congress encroaches upon the province of the other chamber.

It has been said "[t]he fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *NFIB-SKTA*, 132 S.Ct. at 2677. It is up to this Court to maintain that fragmentation of power, as implemented through the Origination Clause.

## III. IT IS APPROPRIATE TO ADDRESS VIOLATIONS OF THE SIXTEENTH AMENDMENT BECAUSE THE INDIVIDUAL MANDATE EXACTION CONTAINS A TRIPLY EMBEDDED DEFINITION OF "POVERTY LINE" WHICH DEPENDS ON A CENSUS.

Like a violation of the Origination Clause, *Amici* believe a violation of the Sixteenth Amendment may be raised by this Court *sua sponte*.

According to *NFIB*, taxes must still comply with the Constitution's other provisions. 132 S.Ct. at 2598. Different provisions might apply including the Direct Taxation Clause, U.S. CONST. art. I, §9, cl. 4; the Uniformity Clause, *id*. at §8, cl. 1 (with respect to duties, imposts and excises); and the Sixteenth Amendment, *id.* at amend. XVI.

First, this Court need not address the Direct Taxation Clause because the Supreme Court held that: "[a] tax on going without health insurance does not fall within any recognized category of direct tax … The shared responsibility payment is thus ***not a direct tax*** that must be apportioned among the several States." *NFIB*, 132 S. Ct. at 2599 (emphasis added).

Second, the Court need not even address the Uniformity Clause. Congress lacks the power to enact the IMX as a duty, impost or excise because there is no object on which to impose such an exaction. *Cf. NFIB*, 132 S. Ct. at 2586 ("The power to regulate commerce presupposes the existence of commercial activity to regulate."). The power to impose a duty, impost or excise should be treated similarly.

Third, assuming *arguendo* the Court determines that the IMX is an income tax, compliance with the

Sixteenth Amendment is required. The Sixteenth Amendment provides: "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, … and ***without regard to any census or enumeration***." U.S. CONST. amend. XVI (emphasis added). Therefore, an income tax may not depend on a census in any way. As explained below, the IMX does depend on a census.

Section 5000A(e)(2) provides an exemption to the IMX for an "applicable individual" with household income below 100 percent of the poverty line. 124 Stat. at 247. According to section 5000A(c)(4)(D)(i), 124 Stat. at 246, "[t]he term 'poverty line' has the meaning given that term in section 2210(c)(5) of the Social Security Act (42 U.S.C. § 1397jj(c)(5))." Subsection 1397jj(c)(5), in turn, provides: "[t]he term 'poverty line' has the meaning given such term in section 9902(2) of this title, including any revision required by such section." 42 U.S.C. § 1397jj(c)(5). Subsection 9902(2), in turn, refers to data from the Bureau of the Census. It provides:

> "The term 'poverty line' means the official poverty line defined by the Office of Management and Budget based on the most recent data available from the Bureau of the Census. The Secretary shall revise annually (or at any shorter interval the Secretary determines to be feasible and desirable) the poverty line …."

42 U.S.C. § 9902(2). Considering the triply embedded definition of the term "poverty line" depends on a census, it violates the Sixteenth Amendment.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: October 27, 2014