No. 14-20039

In the
United States Court of Appeals
for the Fifth Circuit

STEVEN F. HOTZE, M.D., AND
BRAIDWOOD MANAGEMENT, INCORPORATED,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY, UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES AND
JACOB J. LEW, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division

BRIEF OF CITIZENS' COUNCIL FOR HEALTH FREEDOM, JANIS CHESTER, M.D., MARK HAUSER, M.D., AND GRAHAM SPRUIELL, M.D., AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case is number 14-20039. The case is styled as *Hotze v. Sebelius.*

Amicus Citizens' Council for Health Freedom is a Minnesota non-profit corporation. It has no parent corporation and no publicly owned corporation owns ten percent or more of its stock.

The undersigned counsel of record certifies that, in addition to the interested persons set forth in Brief for Plaintiffs-Appellants, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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ISSUE

Is the power to originate taxes merely a "prerogative" of the House or is it a judicially enforceable constraint upon the House and the Senate considering

> "the 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 of Representatives, who are elected every two years and who are most familiar with the circumstances of "We the People," can constitutionally propose federal laws under the taxing power of Congress" ?

Hearing on "The Original Meaning of the Origination Clause" before the 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) (internal citation omitted).

IDENTITIES, INTERESTS OF *AMICI,* AND AUTHORITY TO FILE[1]

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

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 Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

In recent years, *Amici* have followed the introduction, passage and early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education

[1] Pursuant to Rule 29(a) of Fed. R. App. P., this Brief is being filed with the consent of all parties. Pursuant to Rule 29(c)(5), the undersigned counsel states that: (A) this brief was authored in its entirety by Counsel for the *Amici Curiae* and was not written, in whole or in part, by counsel for any party; (B) no party or party's counsel contributed money that was intended to fund the preparation or submission of this Brief; and (C) no person or entity other than *Amici Curiae*, members of CCHF, and their counsel has made a monetary contribution that was intended to fund the preparation or submission of this brief.

Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("HCERA" or "Reconciliation Act"). For the reasons set forth below, *Amici* believe that 26 U.S.C. §5000A (the "Individual Mandate") and 26 U.S.C. §4980H (the "Employer Mandate") were enacted unconstitutionally. [2]

Each of the *amici curiae* (collectively, the "*Amici*") has duly authorized the filing of this brief in support of the Appellants.

[2] The Individual Mandate was enacted by Section 1501 of ACA, amended by Section 10106, and further amended by Sections 1002 and 1004 of HCERA. *See* Office of the Legislative Counsel, United States House of Representatives, 111th Cong., 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010*] ("*Compilation Report*") at 145-151. The Employer Mandate was enacted by Section 1513 of ACA, amended by Section 10106 and further amended by Section 1003 of HCERA. *Compilation Report* at 155-159.

PRELIMINARY STATEMENT

The first clause of Article I, Section 7 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 ("Origination Clause"). This power is not merely a prerogative or power to be asserted by the House of Representatives, as it wishes. It is a command that must be followed by Congress in order to enact taxes. Along with the next clause, *id*. at cl. 2 (the "Presentment Clause"), the Origination Clause is part of the "single, finely wrought and exhaustively considered, procedure" required to enact all federal taxes[3]. The Origination Clause protects the people through their liberties, purses, and representation. Unless and until an amendment to the Constitution is proposed and ratified pursuant to Article V[4], compliance with the Origination Clause may not be waived, either intentionally or inadvertently.

This case is about the continued vitality of the Origination Clause, the heart and soul of the Constitution. As the Court may know, the Origination Clause was perhaps the most hotly debated issue of the Constitutional Convention of 1787. Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 The Yale J. of Int'l

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[3] *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983) and *Clinton v. City of New* York, 524 U.S. 417, 439-440 (1998) regarding the Presentment Clause.

[4] *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995).

L. 1, 7-10 (2013)("*Tax Treaties*"). The Origination Clause, which diffuses taxing power between the House and the Senate, is the fulcrum upon which the Great Compromise teetered. Its importance to the Constitution cannot be overstated because issues of taxation and representation kindled the American Revolution. *Id.* at 2, 9-10.

The decision below renders the Origination Clause a nullity. The court below stated: "neither the ACA as a whole nor the individual and employer mandates *per* se within the Act are a "Bill[] for raising Revenue" subject to the Origination Clause". (ROA.221). In reaching its decision, the District Court condoned a Senate practice of questionable constitutional validity – striking the entirety of a House-passed Revenue bill and completely replacing the House's language with its own. *See* Note 13, *infra*. Some commentators have referred to this practice as the "Shell Bill Game"[5]. Others have used the terms "gutting and amending" and "legerdemain" to refer to this practice[6].

[5] Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 Wash. Univ. L. Rev. 659 (2014); Randy Barnett, *The Origination Clause and the problem of "double deference",* Washington Post, March 12, 2014.

[6] Timothy Sandefur, *So It's a Tax, Now What?*: *Some of the Problems Remaining After NFIB v. Sebelius*, 17 Tex. Rev. of L. & Pol. 203, 229 n.164 (2013) ("*Sandefur*")(internal citation omitted); Brief of *Amici Curiae* U.S. Representatives Trent Franks, *et al.* in Support of Appellant Seeking Reversal in *Sissel v. HHS* (D.C. Cir., Docket No. 13-5202) at 3, 21-29.

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 (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 SMHOTA sent to the Senate.

On November 19, 2009, the Senate introduced the "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 amendment passed the Senate (60-39, Rollcall Vote No. 396) on December 24, 2009. 155 Cong. Rec. S13891. *Amici* refer to the Senate-passed bill as HR 3590* to distinguish it from the House-passed SMHOTA.

The Senate-passed bill differed from the SMHOTA in several key respects: (1) the Senate completely obliterated the House's language; (2) the Senate removed the short title of the SMHOTA and replaced it with its own short title ("Patient Protection and Affordable Care Act") ; (3) the Senate-passed bill was

approximately 532.21 times the length of the House-passed bill (an increase of **53,121 percent**)[7]; (4) originally the House voted unanimously to pass SMHOTA but later the House passed the Senate-passed HR 3590* by only seven votes (219-212, Roll No. 165), 156 Cong. Rec H2153 (March 21, 2010); and (5) because 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, the Senate's amendments should be considered non-germane. Only the bill's number, HR 3590, was retained by the Senate.

Having passed both Houses of Congress, HR 3590* became law on March 23, 2010 upon the President's signature. 124 Stat. at 1024.

[7] 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

Two years ago, the Supreme Court decided that Congress could not enact the Individual Mandate under the power "To regulate" but could enact it under its power "To lay and collect". U.S. CONST. art. I, §8, cls. 3 & 1, respectively. *National Federation of Independent Business v. Sebelius,* 132 S.Ct. 2566 (2012)("*NFIB*")[8]. *NFIB* did not address whether the Individual Mandate was enacted properly nor did *NFIB* address whether the Employer Mandate was enacted properly or was within Congress' enumerated powers. This case addresses those issues. Because "[a]ny tax must still comply with other requirements in the Constitution," *NFIB* , 132 S.Ct. at 2598, compliance with both the Origination and Presentment Clauses is required. Because the Mandates were passed in utter disregard of the Origination and Presentment Clauses, ***the Mandates do not exist***. [9]

Because the Senate completely struck the House's language from SMHOTA, SMHOTA became a blank slate upon which the Senate wrote HR 3590*. As originator of HR 3590*, the Senate violated the Origination Clause.

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[8] Unless otherwise indicated, *NFIB* refers to Chief Justice Roberts' opinion.

[9] When a court is asked to construe a law, it has authority to determine if that law exists. Thus, it is appropriate for a court to raise the Presentment Clause issue *sua sponte* because a violation of the Presentment Clause negates the existence of the Mandates. *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446-47 (1993)("*USNB*")("[A] court properly asked to construe a law has the constitutional power to determine whether the law exists.")(internal citation omitted).

By noticing the Founders coupled the initial clauses in Sections 7 and 8 of Article I, *Amici* realized that the phrase "Bills for raising Revenue" was the Founders' collective classification for the set composed of Taxes, Duties, Imposts, and Excises. Therefore, if a bill contains a Tax (or Duty, Impost, or Excise) such as the Individual Mandate's exaction ("IMX"), that bill *per se* is a "Bill for raising Revenue". There is no need to determine either the bill's purpose or whether the bill or any of its provisions would increase Federal revenue. Argument I, *infra*.

In enacting ACA, Congress violated the Presentment Clause at least twice. First, incompatible versions of 26 U.S.C. §5000A were presented to the President in sections 1501(b) and 10106(b&c) of ACA. Second, incompatible versions of §4980H were presented to the President in sections 1513(a) and 10106 (e&f) of ACA. Argument II, *infra*.

In *NFIB*, the Supreme Court determined the IMX is "not a Direct Tax that must be apportioned among the several States". 132 S.Ct. at 2599. Accordingly, the validity of the IMX as a Direct Tax should not be addressed here. It is also unnecessary to address the Uniformity Clause, U.S. CONST. art. I, §8, cl. 1, because Duties, Imposts, and Excises are triggered by the purchase of a good or service and the Supreme Court held that the IMX is an exaction based on the non-purchase of health insurance. *NFIB* 132 S.Ct. at 2598. If the Court treats the IMX as an income tax, the Sixteenth Amendment is violated because the IMX depends

on a census through a triply embedded definition of "poverty line." Argument III, *infra*.

If one Mandate is declared to be unconstitutional, then the other Mandate must be declared unconstitutional as well. The two Mandates are not severable from each other because Congress bound the Mandates to each other in Subtitle F, entitled "Shared Responsibility for Healthcare". Finally, ACA is void in its entirety because the Mandates are "essential" components of ACA. Argument IV, *infra*.[10]

[10] Because the Mandates are unconstitutional under the Origination Clause, Presentment Clause, and Sixteenth Amendment, the Court may avoid addressing the Takings Clause, U.S. CONST. amend. V.

ARGUMENT

I. THE INDIVIDUAL AND EMPLOYER MANDATES ARE UNCONSTITUTIONAL TAXES WHICH ORIGINATED IN THE SENATE DESPITE ACA'S ENROLLMENT AS HR 3590

To determine whether the Senate's passage of HR 3590* "originated" a new bill or "amended" the House's version, the Constitution requires the judiciary to look beyond the bill's number to decide which chamber originated the bill. As explained below, *Amici* believe the Senate converted HR 3590 from a House-originated bill into a Senate-originated bill by striking all of the House's language plus the bill's title.

A. An Enrolled Bill's Number Is Conclusive With Respect to the Presentment Clause But Only is Presumptive With Respect to the Origination Clause

Normally, when a court is asked to determine where a federal law "originated", it does not look beyond the record of the law's enrollment lodged with the Secretary of State. James v. Saturno, Congressional Research Service, *The Origination Clause and the U.S. Constitution: Interpretation and Enforcement* at 10-12 (Mar. 15, 2011); and *United States v. Munoz-Flores*, 495 U.S. 385, 408-10 (1990)(Scalia, J., concurring). *Amici* believe courts should look beyond the bill's number[11]. Before passing HR 3590*, the Senate removed every vestige of the

[11] Although Congress often defers to judicial precedent and courts often defer to Congress, the Oath Clause requires all judges and members of Congress to comply with the Constitution. U.S. CONST. art. VI, cl. 3 ("The Senators and

House-originated bill but for the bill's number. One cannot conclude ACA originated in the House without stretching the meaning of the words "originate" and "amend" well beyond recognition. These definitions describe the most fundamental boundary separating the powers of the Senate and the House.

According to the language and structure of article I, the use of the word "originate" in the Origination Clause provides an absolute constraint on Congress - only the House may initiate the set of bills specified in the first clause of 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*.[12] The Origination Clause is followed by the Presentment Clause which prescribes the general procedure used to enact federal statutes. Similarly, the power "To lay and collect" is followed by the other Congressional powers in the remaining clauses of Section 8. U.S. CONST. art. I, §8, cls. 2-18.

Amici distinguish the use of the word "originate" in the Origination Clause from its use in the Presentment Clause. The Presentment Clause explicitly directs and sequences actions that may be taken by the President and both chambers after the veto of a bicamerally-passed bill. Nothing is left to chance. The President

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Representatives ... and all … judicial officers …shall be bound by Oath or Affirmation, to support this Constitution …").

[12] The Founders attached an enormous importance to funding the government. A tax-related clause initiates both Sections 7 and 8 of Article I.

returns the bill to the originating chamber. The Presentment Clause could have required the President to return an objectionable bill to both chambers. Instead, the Framers provided for ***sequential reconsideration*** based upon the House of origin. As used in the Origination Clause, the word "originate" simply provides that tax bills flow asymmetrically from the House to the Senate.

B. By Striking the House's Title and Language from HR 3590, the Senate Left Itself Nothing to Amend

The Senate-passed HR 3590* begins by completely striking the entirety of the House's language. The first page of HR 3590* states:

> *Resolved,* That the bill from the House of Representatives (H.R. 3590) entitled "An Act to amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes." do pass with the following
>
> **AMENDMENTS**
>
> Strike out all after the enacting clause and insert: [….]

155 Cong. Rec. S11607 (bold in original, underlining added). The phrase "strike out all" is not ambiguous in any way. It means that nothing was left in SMHOTA to amend. It ceased to exist. Every word in HR 3590* was authored by the Senate. *Amici* believe the word "amend" suggests a change or improvement rather than a total replacement or substitution. Once the Senate struck "out all after the enacting clause", there was nothing but a vacuum left to amend. Clearly, the Senate's passage of HR 3590* was an act of "origination". *See Sandefur*, 17 Tex. Rev. of

Law & Pol. at 231 n.181(" Notably, the Senate's own rules deem a gut-and-amend substitute to be a new bill, and treat it as though it were a Senate-initiated bill.")(internal citation omitted)[13].

C. The Individual and Employer Mandates Are Taxes Which Automatically Trigger the Origination Clause

There is no question that the Individual Mandate is a tax. The Supreme Court ruled so two years ago. *NFIB*, 132 S.Ct. at 2598 ("… Congress had the power to impose the exaction in §5000A under the taxing power").

The Constitution specifies a set of four items which raise revenue: Taxes, Duties, Imposts and Excises. These items are the objects of the power "To lay and collect" and "Taxes" is one element of that set. Because the Court should consider that any element of that set is *per se* a "Bill for raising Revenue" and that "Taxes" is an element of that set, the IMX automatically triggers the Origination Clause.

Although the Supreme Court and this Circuit have yet to rule whether the Employer Mandate's exaction ("EMX") could be enacted as a tax, Congress placed the EMX in the Internal Revenue Code at 26 U.S.C. §4980H. Furthermore, the District Court recognized that the EMX generated revenue for the Treasury. (ROA.220)("… some revenue under these mandates will be paid to the general

[13]In contrast to Plaintiffs-Appellants, who argue that SMHOTA was **not** a "Bill for raising Revenue", Brief for Plaintiffs-Appellants at 44-46, *Amici* are able to assume *arguendo* SMHOTA was a "Bill for raising Revenue" because the central tenet of *Amici*'s argument is that when the Senate struck House's language, SMHOTA ceased to exist.

Treasury…"). At least one Circuit has held that the EMX is a tax. *Liberty University v. Lew*, 733 F3.d 72 (4th Cir.), *cert. denied*, 134 S.Ct. 683 (2013). Like the IMX, the EMX is a "tax" which automatically triggers the Origination Clause.

D. The Origination Clause Excludes the Origination Power from the Senate

The Origination Clause lies at the heart of the Constitution for several reasons. First, taxes played an essential role in the shaping of our nation by kindling the American Revolution. Second, the Constitution would not have been adopted but for the inclusion of the Origination Clause. The House's power to originate "Bills for raising Revenue", like the Senate's power to ratify treaties and to confirm a Presidential appointment, was indispensable to reaching 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 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."

Kysar, *Tax Treaties*, 38 The Yale J. of Int'l L. at 9-10(emphasis added, footnote omitted).

In contrast to violations of the House's internal rules[14], violations of the Origination Clause may never be waived by the House. Indeed, the Origination Clause is judicially enforceable. "[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*, 38 Yale J. of Int'l L. at 11 (footnotes omitted). Calling the Origination Clause a "privilege" or "prerogative" of the House grossly distorts and understates the Clause's importance to the Constitution. As a strict constitutional requirement, the Clause must never be compromised.

The Senate's power to "amend" a House-originated Revenue bill[15] 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

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[14] Under the Rules Clause, each chamber is expressly authorized to "determine its own rules of proceedings". U.S. CONST. art. I, §5, cl. 2. Thus, each chamber is permitted to waive its own rules. It is important to recognize that **no statute may limit an internal procedure of the House or Senate because that statute would compromise the independence of the two chambers, as requiredby the Rules, Bicameral and Presentment Clauses**. *Amici* believe the Reconciliation Act's amendments to the Mandates are void because the Reconciliation Act was passed under statutorily restricted procedures. *Cf.,*156 Cong. Rec. S2086-87 (March 25, 2010)(According to the Vice-President "the question is on the passage of H.R. 4872, ***as amended by operation of Section 313(e) of the Congressional Budget Act of 1974***.")(emphasis added). This issue may be raised *sua sponte* because a Rules Clause violation negates the existence of the Reconciliation Act. *See* Note 9 *supra* (Under *USNB*, the judicial power to construe a law includes the power to determine whether that law exists).

[15] *See* note 13, *supra*.

construction creates a loophole so large that it consumes, *i.e.* nullifies, the Origination Clause.

"The 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*, 132 S.Ct. at 2677 (Opinion of Justices Scalia, Kennedy, Thomas, and Alito, dissenting)("*NFIB-SKTA*"). The Constitution spells out in detail the processes by which the two branches of Congress bring their diffused power to bear on federal lawmaking.[16] The Constitution made the House of Representatives responsible for originating tax legislation, U.S. CONST. art. I, § 7, cl. 1, and made them accountable at the polls every two years for such actions, *id.* at § 2. *See also, NFIB-SKTA*, 132 S.Ct. at 2655. Meanwhile, Senators are accountable every six years. U.S. CONST. art I, § 3; and amend. XVII. Senators Byrd, Moynihan and Levin understood how the Origination Clause "safeguards 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

[16] The Constitution begins by diffusing legislative power between the House and Senate. U.S. CONST. art. I, §1("Bicameral Clause"). The Constitution's other provisions and *The Federalist* No. 51 reveal our Founders concern about the natural tendency of people to develop into factions that promote their own self-interests. Therefore, the Founders 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. *See generally,* John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (1944); and John Forbes Nash, Jr., *Non-Cooperative Games* (1950).

> "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* at 21 (Docket No. 97-1374)("*Byrd-Moynihan-Levin Brief*")(emphasis added). Furthermore, the Constitution specifies that members of the Senate and the House represent different geographic constituencies, have different modes of election, and have different requirements for holding office. U.S. CONST. art. I, §§ 2&3 and amend. XVII. The Court should consider whether the Senate-House relationship was altered, or at least ignored, in order to enact HR 3590*. *Amici* believe that the SMHOTA was converted into HR 3590* by completely ignoring the Origination Clause and numerous differences between the House and the Senate specified in the Constitution. Without proposing and ratifying an Article V Amendment, the Origination power may neither be ceded by the House nor aggrandized by the Senate.

> "[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other … We have not hesitated to invalidate provisions of law which violate this principle."

Metropolitan Washington Airports Authority, 501 U.S. at 273 (citations and quotation marks omitted).

1. The word "all" in the Origination Clause precludes exceptions

The Origination Clause begins with the word "[a]ll". U.S. CONST. art. I, §7, cl. 1. Because the Founders used the word "all", the judiciary is prohibited from creating or interpreting any exception to the Origination Clause. Therefore, the Origination Clause applies to each and every Tax, Duty, Impost, and Excise provision, 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, 202-203 (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 meaning.[17] "All" means the "entire[ty]" or "total[ity]" of its object. *See e.g. The American Heritage Dictionary of the English Language* 33 (William Morris, ed., 1979). The Origination Clause establishes a firm and bright line, rather than a fuzzy standard, for the House, Senate, President and courts to utilize. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001).

[17] *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, … judicial inquiry is complete") (internal citations and quotation marks omitted). *Amici* have applied this principle to the interpretation of the Constitution itself.

Because Taxes, as well as Duties, Imposts, and Excises, *per se* are "Bills for raising Revenue", it is not necessary for the Court to examine the purposes of ACA (and its Mandates) and to project whether Federal revenue will be increased, decreased, or left unchanged thereby.

Moreover, projecting changes in Federal revenue is a notoriously difficult task which could introduce "junk economics" into the courtroom. Junk economics, like junk science, does not belong there. *See generally,* Peter 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 serving 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 rates.

> [I]f 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).

II. CONGRESS VIOLATED THE PRESENTMENT CLAUSE BY SIMULTANEOUSLY PRESENTING EACH MANDATE TO THE PRESIDENT ACCOMPANIED BY AN INCOMPATIBLE VERSION OF SUCH MANDATE

A. Two Incompatible Versions of the Individual Mandate Were Presented Simultaneously to the President

Each House of Congress simultaneously passed Subsection 1501(b) and Subsections 10106(b)&(c) as parts of ACA. *See Compilation Report* at 145-151, and 835. The former provision creates 26 U.S.C. §5000A, 124 Stat. at 244-249, while the latter provisions simultaneously revise some portions of §5000A, 124 Stat. at 909-10.

Among these revisions is the definition of "applicable individual" which is the core component driving the Individual Mandate. Appellees cannot dispute that the Individual Mandate was simultaneously enacted and amended. Because Subsections 1501(b) and 10106(b)&(c) contain incompatible definitions of "applicable individual",[18] they cannot coexist. They cross-nullify each other in violation of the Presentment Clause. Because these provisions cannot be presented to the President within the same bill, they are void *ab initio*.

[18] The literal language of the term "applicable individual" is not altered by Section 10106. Rather, it is the term "religious conscience exemption," an exemption from "applicable individual", that is altered by Section 10106. 124 Stat. 246 and 124 Stat. 910. Furthermore, Subsection 1501(b) and Section 10106 contain incompatible versions of "amount of penalty", 124 Stat. at 244-45 and 909-910, and "applicable dollar amount", 124 Stat. at 245 and 910. Enactment of each incompatible provision pair violates the Presentment Clause.

B. Two Incompatible Versions of the Employer Mandate Were Presented Simultaneously to the President

Similarly, each House of Congress simultaneously passed Subsection 1513(a) and Subsections 10106(e)&(f) as parts of ACA. *See Compilation Report* at 155-159, and 835. The former provision creates 26 U.S.C. §4980H, 124 Stat. at 253-56, while the latter provisions simultaneously revise some portions of §4980H, 124 Stat. at 910-11. Appellees cannot dispute that the Employer Mandate was simultaneously enacted and amended. Because Subsections 1513(a) and 10106(e)&(f) are incompatible, they cannot coexist. They cross-nullify each other in violation of the Presentment Clause. Because these provisions cannot be presented to the President within the same bill, they are void *ab initio.*

C. The Presentment Clause Prevents the Simultaneous Presentment to the President of Two Incompatible Versions of the Same Provision

Congress may not simultaneously enact any provision and a revision to that provision within the same bill because that simultaneity defies the "single, finely wrought and exhaustively considered, procedure" used to enact Federal legislation. *Chadha*, 462 U.S. at 951; *Clinton*, 524 U.S. at 439-40. Strict adherence to that procedure is required and is set forth in the Presentment Clause.

At its core, the Presentment Clause requires that both Houses pass, in exactly the same final form, every bill that enacts,

> "adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to ***approving it in whole, returning it in whole, or taking no action***."

Brief of Appellees Snake River Potato Growers, Inc. and Mike Cranney at 2 in *Clinton v. City of New York* (Docket No. 97-1374)(emphasis added). The Supreme Court agreed and held: "[R]epeal of statutes, no less than enactment, must conform with Art. I." *Clinton*, 524 U.S. at 438 (quoting *Chadha*, 462 U.S. at 954). Considering *Clinton, Amici* believe **the Presentment Clause prevents the enactment of any bill which revises itself.**

According to the Supreme Court, the legislative process requires congruity within and between the two chambers and with the President. *Clinton,* 524 U.S. at 448. Thus the House, Senate and President must agree to precisely the same text and the President may only approve or veto a bill in its entirety. This prevents any of the three participants from unilaterally revising what has been agreed to by the other two participants in the legislative process. *Accord*, Letter from George Washington to Edmund Pendleton (Sept. 23, 1793) in 33 *The Writings of George Washington*, 94, 96 (John C. Fitzpatrick, ed. 1940)("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto..."). Thus, each chamber must agree to ***ALL*** parts of a bill in order for that bill to become law.

Whenever either chamber passes a bill with dueling provisions the following constitutional paradoxes arise: How can the two houses of Congress present both

the base provision and its variant to the President? How can the President agree simultaneously to both the base provision and its variant? These paradoxes are of Congress's own making and easily could have been avoided if either house had, before it voted on and passed HR 3590*, taken the time to hit the delete button on its computers and stricken the base provision[19].

Clinton's reasoning is absolutely clear. To enact a Federal statute, the President, House, and Senate must all agree to an entire bill. 524 U.S. at 448. When a bill, such as HR 3590*, is internally inconsistent, *i.e.* self-contradictory, *in toto* agreement is impossible. The Presentment Clause is violated.

Besides defying the Presentment Clause, Congress defies logic whenever it includes two incompatible versions of the same provision within the same bill. Purely, as a matter of logic, two mutually exclusive statements cannot both be true because at least one of them is false. *See The Oxford Companion to Philosophy* 661 (2nd ed., Ted Honderich, ed., 2005) ("The conjunction of a proposition and its negation is a contradiction and is necessarily false…")(internal citations omitted).[20] Expressed in terms of logic, Subsections 1501(b) and 10106(b)&(c) assert a

[19] Leaving only the replacement language to present to the President.

[20] William Shakespeare implicitly understood this principle. He wrote: "To be, ***or*** not to be; that is the question:" William Shakespeare, *The Tragedy of Hamlet: Prince of Denmark*, act III, sc. 1 in *William Shakespeare: The Complete Works* 697, line 58 (2d ed., Stanley Wells, *et al.,* eds., 2005) (emphasis added). Shakespeare did not write: "To be **AND** not to be, that is the question." The former phrasing provides a choice. The latter phrasing is a nullity.

proposition with respect to the Individual Mandate and then negate that proposition. Similarly, Subsections 1513(a) and 10106(e)&(f) assert a proposition with respect to the Employer Mandate and then negate that proposition. Under the Presentment Clause and *Clinton*, the President, House and Senate must all agree to the whole bill with every provision being given effect. Because the simultaneous enactment and revision of any single provision prevents *in toto* agreement, the Individual and Employer Mandates are unconstitutional.

In addition to defying the Presentment Clause and logic, it is bad policy for Congress to simultaneously enact and revise a law because it causes confusion during both the legislative process and afterwards. Distinguishing between permitted and prohibited conduct is made more difficult.

While the simultaneous enactment and revision of each Mandate may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the gravamen of the constitutional defect is that incompatible versions of the IMX and incompatible versions of the EMX were presented to the President within the same bill. That cannot be done constitutionally.

III. IF THE INDIVIDUAL MANDATE IS AN INCOME TAX, THEN IT VIOLATES THE SIXTEENTH AMENDMENT BECAUSE THE DEFINITION OF "POVERTY LINE" DEPENDS ON A CENSUS

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

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, if the Court determines the IMX is an income tax, then compliance with the Sixteenth Amendment is required. The Sixteenth Amendment provides:

> "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and ***without regard to any census or enumeration.***"

U.S. CONST. amend. XVI (emphasis added).

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), 124 Stat. at 246, "[t]he term 'poverty line' has the meaning given to 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: “The 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)(emphasis added). Because this triply embedded definition of the term “poverty line” is ***based on a census***, the IMX violates the Sixteenth Amendment.

Third, the Uniformity Clause is only triggered if the Court first determines that the IMX is a Duty, Impost, or Excise. Because the IMX does not involve the purchase or importation of any good or service, it is outside of the definition of a Duty, Impost or Excise and cannot trigger the Uniformity Clause. Indeed, the Supreme Court already has determined the IMX is a tax triggered by “not obtaining health insurance”. *NFIB,* 132 S.Ct. at 2598 and *NFIB-SKTA,*132 S.Ct. at 2652-54.

Even assuming *arguendo* that the IMX falls within the definition of a Duty, Impost or Excise, the IMX should be declared void because it is geographically

non-uniform. Because Congress exempted an "incarcerated individual" from the definition of "applicable individual" in 26 U.S.C. §5000A(d)(4)[21], Federal and State prisons are "off-limits" to the IMX. This means any map which shows where the IMX applies would look like a slice of Swiss cheese rather than a smooth, uniform and continuous surface[22]. By excising prisons from IMX's universality, [23] Congress violated the Uniformity Clause. The IMX is void. Additionally, *Amici* believe that Indian reservations - as defined by their metes and bounds - are "off-limits" to the IMX because Congress exempted members of Indian tribes from the IMX itself. 26 U.S.C. §5000A(e)(3).

[21] *See NFIB-SKTA*, 132 S.Ct. at 2653.

[22] Each hole represents the location of a prison, as defined by its metes and bounds.

[23] *Amici* suggest that the word "throughout" implies more than applicability in every State. Rather, "throughout" implies universal applicability.

IV. IF EITHER MANDATE IS UNCONSTITUTIONAL THEN SO IS THE OTHER MANDATE BECAUSE THE TWO MANDATES ARE BOUND TO EACH OTHER AS SHARED RESPONSIBILITY PAYMENTS

The binding or coupling of the Mandates to each other is reflected in ACA's text. Congress placed the Individual Mandate in Section 1501 of ACA and the Employer Mandate in Section 1513 of ACA. Collectively, the Individual and Employer Responsibilities comprise Subtitle F, which is entitled "Shared Responsibility for Health Care". 124 Stat. at 242-258 and 907-911.

The binding or coupling of the Mandates is also reflected in the joint opinion of Justices Scalia, Kennedy, Thomas, and Alito. They explained that

> "after the invalidation of burdens on individuals …, the preservation of the employer-responsibility assessment would upset the ACA's design of "shared responsibility." It would leave employers as the only parties bearing any significant responsibility. That was not the Congressional intent."

NFIB-SKTA, 132 S.Ct. at 2674-75.

Because each Mandate is an indispensable component of ACA, neither Mandate may be severed to save the remainder of ACA. *Amici* believe such severance is a judicial line item veto which provides courts with legislative power in violation of the Bicameral Clause. *See* Tom Campbell, *Severability of Statutes*, 62 Hastings L. J. 1495 (2011).

In *Clinton,* the Supreme Court declared that a Presidential Line Item Veto is unconstitutional. 524 U.S. 417. Previously, the Supreme Court declared that a Congressional Veto is unconstitutional. *Chadha*, 462 U.S. 919. Although the

Supreme Court has sometimes severed a defective provision from a federal statute, *see e.g., Alaska Airlines v. Brock*, 480 U.S.678 (1987), that remedy should not be available post-*Clinton*. The Presentment Clause requires that the House and Senate pass precisely the same text – not a single word may vary between the bills passed by each chamber. The judiciary has no power to rewrite a statute. *NFIB-SKTA*, 132 S.Ct. at 2655. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the drafters of the Constitution. *Byrd-Moynihan-Levin Brief* at 9-10.

While *Amici* acknowledge the deference courts must accord Congress when reviewing a federal statute, a court may not sever a defective provision in the absence of a severability clause because that severance would transfer some legislative power to the judiciary. In the absence of a severability clause, the ability to partition a statute rests solely with Congress. Because ACA lacks a severability clause, it is entirely void.

V. CONCLUSION

For the reasons set forth above, *Amici* believe the Individual and Employer Mandates are void *ab initio*, are not severable from each other, and are not severable from the remainder of ACA.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Rule 29(d) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,885 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using 2007 version of Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I, Karen B. Tripp, hereby certify pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure that, on May 15, 2014, the foregoing brief of Citizens' Council for Health Freedom, Janice Chester, M.D., Mark Hauser, M.D., and Graham Spruiell, M.D., as *Amici Curiae* in Support of Plaintiffs-Appellants and Reversal was filed through the CM/ECF system and served electronically upon the individuals listed below:

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