No. 13-306

IN THE
Supreme Court of the United States

LIBERTY UNIVERSITY, *ET AL.*,

Petitioners,

v.

JACOB J. LEW, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., CITIZENS' COUNCIL FOR HEALTH FREEDOM, JANIS CHESTER, M.D., MARK J. HAUSER, M.D., AND GRAHAM L. SPRUIELL, M.D., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Because courts always have independent authority to determine if a law validly exists, may this Court raise issues of non-compliance with the Origination and Presentment Clauses *sua sponte*?

2. Is the Employer Mandate void under the Presentment Clause because Section 1513 was simultaneously enacted and amended?

3. Is the Individual Mandate void under the Presentment Clause because Section 1501 was simultaneously enacted and amended?

4. Was HR 3590 unconstitutionally converted from a House-originated bill into a Senate-originated bill by the total replacement of the House's language with the Senate's language?

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians, an association of physicians whose membership spans the nation, and a nationwide organization of patients and doctors who support health freedom for patients and doctors. *Amici* file this brief in support of Petitioners.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS"), has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the

[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.

patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000)(citing an AAPS *amicus* brief). Because AAPS has also commenced an action against the Respondents which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d. 19 (D.D.C. 2012) *appeal docketed as* 13-5003 (D.C. Cir.).

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to support patient and doctor freedom, medical innovation, and the right of citizens to a confidential patient-doctor relationship.

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 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 ("HCERA").

Amici believe Section 1501 of ACA ("Individual Mandate" or "IM") and Section 1513 of ACA ("Employer Mandate" or "EM")(collectively, the "Mandates") are unconstitutional and deserve this Court's attention[2]. If upheld, the Mandates will undermine, in fundamental and dangerous ways, the practice of medicine and harm patients.[3]

SUMMARY OF ARGUMENT

Certiorari is appropriate because the Mandates are void, *i.e.* non-existent, based upon the failure of Congress to adhere to the lawmaking procedures specified in the Constitution. Article I, Section 7 prevents: (1) the Senate from originating revenue bills, *id.* at cl.1 ("Origination Clause"); and (2) Congress from simultaneously enacting a provision and revision of that provision within the same bill,[4]

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[2] *Amici* take no position regarding Petitioners' other arguments.

[3] For at least six decades, insurance companies have underwritten health insurance to employed persons. *See* Joseph Altman, M.D., *Underwriter's Medical Guide for Accident and Sickness Insurance* vii (1952). The Employer Mandate turns this "benefit" on its head by causing some employers to outsource work, rather than to hire employees. *See generally* GAO, *OFFSHORING OF SERVICES: An Overview of the Issues*, Report No. GAO-06-5 (2005) ("Many economists agree … that in the short run some workers will lose their jobs when employers relocate production abroad.").

[4] ACA contains numerous provisions that were simultaneously enacted and amended. Those base provisions and their corresponding simultaneous amendments have been compiled by the House's legal staff. Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., *Compila-*

id. at cl. 2 ("Presentment Clause"). Preliminarily, however, the Court should address whether these arguments could be raised by the Court *sua sponte*. Because a violation of the Origination Clause has the effect of redistributing the powers between the House and the Senate without using the Article V process, *Amici* believe *certiorari* is particularly appropriate.

ACA is so long and complicated[5] and its final amendments were drafted and inserted with such haste, that many fine and conscientious members of the House and Senate did not recognize that the Origination and Presentment Clauses were violated by the enactment of the Mandates. Compliance is not optional. *See generally Clinton v. City of New York*, 524 U.S. 417 (1998)(regarding Presentment Clause).

Had ACA's drafters simply used the insertion and deletion buttons on their keyboards to revise bill HR 3590, the Presentment Clause would not have been violated. Instead, the drafters attempted to revise the IM of subsection 1501(b) by simultaneously passing revisions specified in Subsections 10106(b)&(c) without having deleted the base version in Subsection 1501(b). The Presentment Clause prevents two versions of the same provision from co-existing within the same bill for the simple reason that each chamber must simultaneously agree to both versions but each version necessarily excludes the other version. Similarly, the EM of Section 1513(a) and the revisions specified by Subsections 10106(e)&(f) cannot coexist. *Compilation Report* at

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tion of Patient Protection and Affordable Care Act [*As Amended Through May 1, 2010*] ("*Compilation Report*").

[5] *See* Notes 16-18 and accompanying text, *infra*.

835 (specifying changes made to Subsections 1501(b) and 1513(a) by simultaneously enacted Subsections 10106(b&c) and 10106(e&f), respectively).

Finally, the Court has independent authority to raise *sua sponte* the arguments related to the Origination and Presentment Clauses because those arguments address whether the EM and IM validly exist. Considering that the Court may raise these arguments *sua sponte*, they cannot be and were not waived by Petitioners.[6]

CERTIORARI IS WARRANTED

Since our nation was founded, "every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 405 (1819). Those powers are constrained by the Constitution's substantive restrictions, *see, e.g.*, U.S. CONST. art. I, sec. 9, and by its procedural requirements, *see, e.g., id.* at sec. 7. While the Petition asks the Court to examine several of the Constitution's substantive provisions related to the Mandates, those examinations are unnecessary considering Congress completely ignored Article I, Section 7 to enact the Mandates. In *National Federation of Independent Business v. Sebelius*, the IM was held to be a tax, 567 U.S. __, 132 S.Ct. 2566, 2594-2600 (2012)("*NFIB*")(Op. of Roberts, Ch. J.). Therefore, compliance with the Origination Clause, as well as the Presentment Clause, is automatically required.

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[6] See Note 9, *infra*.

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 a unanimous vote in both chambers. By protecting Congress from itself, the Court protects the People.

I. BECAUSE COURTS HAVE INDEPENDENT POWER TO DETERMINE IF A LAW EXISTS, ORIGINATION AND PRESENTMENT CLAUSE 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*"). "[T]here 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)). 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.), *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.

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, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, CRS Report No. 7-5700, at 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.

Because an Origination Clause violation negates the existence of the IM, the courts below should have addressed the Origination Clause argument. Instead, the Courts determined that the arguments had been waived.[7] It is, therefore, appropriate for this Court to address the Origination Clause issue *sua sponte*. Similarly, because a violation of the Presentment Clause also negates the existence of the Mandates, the Presentment Clause issue may also be raised by this Court *sua sponte*.

II. BECAUSE THE FOURTH CIRCUIT HELD THAT THE EMPLOYER MANDATE, LIKE THE INDIVIDUAL MANDATE, WAS ENACTED UNDER THE TAXING POWER OF CONGRESS, THE COURT SHOULD NOW ADDRESS ACA'S ORIGINATION, AN ISSUE LEFT OPEN BY *NFIB*.

After acknowledging that the Supreme Court already upheld the IM as a tax, the Fourth Circuit stated: "[s]imilarly, the employer mandate exaction "need not be read to do more than impose a tax." *Liberty University v. Lew*, slip op. at 46 (4th Cir., July 11, 2013)(Docket No.: 10-2347)("*Liberty*").

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[7] See Note 9, *infra*.

A. "Any Tax Must Still Comply with Other Requirements in the Constitution."

"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." *NFIB*, 132 S. Ct. at 2598.[8] In *NFIB*, the Court did not, however, analyze every tax-related clause. Indeed, a majority of the Court limited its focus to the direct taxation clause, *id*. at 2598-2600, 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." *Id*. at 2655 (Joint Opinion)(recounting "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

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[8] *NFIB* is expressly applicable to this case pursuant to the Court's Order, dated November 26, 2012 (Case No. 11-438). That Order vacated the previous denial of *certiorari*, granted *certiorari*, and remanded this case to the Fourth Circuit for further consideration in light of *NFIB*. *Liberty University v. Geithner*, 133 S.Ct. 679 (2012). Consequently, the Constitution's "other requirements" are incorporated into this case and the Origination Clause issue should have been addressed by the court below.

the Origination Clause in *NFIB* - the Court should resolve the Origination Clause issue now.

It is also 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. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995); *see also 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 generally J.W. Hampton v. United States*, 276 U.S. 394, 405-06 (1928) and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991)(""Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents." Levi, *Some Aspects of the Separation of Powers*, 76 Colum. L. Rev. 385-386 (1976)"). The maxim should also be applied by the Court to prevent the two chambers of Congress from reallocating their own powers without an Article V amendment.

B. The Constitution Would Not Have Been Ratified But For the Origination Clause.

Because the inclusion of the Origination Clause was indispensable to reaching the Great Compromise of 1787 and to ratifying the Constitution, it lies at the heart of the Constitution and cannot be ignored.[9]

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[9] The Fourth Circuit relegated the Petitioners' Origination Clause argument to a single footnote which said: "The plaintiffs raise on appeal new arguments that the Affordable Care Act

Taxes played an essential role in the shaping of our nation by kindling the American Revolution. The Constitution would not have been adopted but for the inclusion of the Origination Clause. In fact, 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 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

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violates the Origination Clause … Plaintiffs had the opportunity to raise these arguments in the district court and in the original briefing in this case but did not do so; thus the arguments are waived." *Liberty* at 18 n.3.

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, 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 (footnotes omitted). *Amici* strongly believe that the Origination Clause is a strict constitutional requirement. Calling the Origination Clause a "privilege" or "prerogative" of the House grossly distorts and understates the Clause's importance as the fulcrum of the Constitution's ratification.

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 issue arises if the House simply asserts it 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 does. Neither action occurred here. Both actions were extensively discussed 141 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. 2105-2112 (April 2, 1872). Like the instant case, the Senate then completely changed the title, substance and sheer length of the House-originated bill. *Id*. Given this historical relevance, *Amici* urge the Court to review the entire colloquy regarding the 1872 resolution. *Id*. During that debate, James Garfield, then a Representative from Ohio, explained the Origination Clause's singular importance to the drafting and ratification of the Constitution. *Id*. at 2106. For the Court's convenience, an excerpt from his statement is presented as Appendix A.

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. In enacting the Mandates, Congress surely blurred the line separating a Senate-originated bill from a House-originated bill. *Amici* believe that "[t]hat line … must be not only firm but also bright …." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). By granting *certiorari*, the Court will have the opportunity to parse the Origination Clause's language and set forth a non-fuzzy standard for the House, Senate, President as well as the lower courts to follow.

C. 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 branches of Congress bring their

diffused power to bear on federal lawmaking.[10] The Constitution made the House of Representatives 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*. art I, § 3; and amend. XVII. Senators Byrd, Moynihan and Levin explained the relationship between the political branches as follows:

> 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 . 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).

In addition to specifying different term lengths, the Constitution provides 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 Constitution further differentiates between the

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[10] The Bicameral Clause further diffuses legislative power between the House and the Senate. U.S. CONST. I, sec. 1.

House and the Senate by assigning different powers and responsibilities to each chamber.[11] *See id*. art. I, § 2, cl. 5 (House has sole power to impeach); *id*. art. I, § 3, cl. 6 (Senate has sole power to conduct a trial following an impeachment by the House); *id*. art. I, § 5, cl. 1 (Each house judges the elections, returns and qualifications of its own members); *id*. art. I, § 5, cl. 2 (Each house determines its own rules); *id*. art. II, § 2, cl. 2 (Senate ratifies Treaties and confirms Presidential appointments); *id*. art. II, § 1, cl. 3 and amend. XII (House contingently votes for President); *id*. amend. XIV, § 2 (recalibrates formula used to determine how Representatives are to be apportioned among the several states); *id*. art. V (Two-thirds vote of both houses needed to propose a constitutional amendment); and *Munoz-Flores*, 495 U.S. at 394-95. It is important, therefore, for the Court to consider whether the balance between the Senate and the House has been altered, or at least ignored, in order to enact HR 3590. *Amici* firmly believe that HR 3590 could only have been converted from a House-originated bill into a Senate-originated bill by ignoring the House-Senate relationship specified in the Constitution.

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[11] "[W]hen the Framers intended to authorize either [chamber] to act alone…" or to exercise some unique power, "they narrowly and precisely defined the procedure for such action." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955 (1983).

D. A Bill's Number Should Create a Rebuttable Rather than Conclusive Presumption Regarding Origination, in Order to Protect the People from the Failure of the House to Protect Its Origination Power.

Because this case presents a real and substantial issue as to whether the Senate converted HR 3590 from a House-originated bill into a Senate-originated bill, the Court cannot dispose of the Origination Clause issue simply by looking at the bill's number to determine which chamber originated it. Here, however, the Senate struck the entirety of the House's language as well as the bill's title when the Senate passed its "HR 3590." The Court should determine whether passage of the Senate's version "originates" a new bill or merely "amends" 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). Perhaps 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. Thus, clarifying the meaning of the words "originate" and "amend" is an undertaking well worth the Court's time as it involves the boundary between the Senate's powers and the House's powers, as well as the power of this Court to adjudicate.

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. This use of the word "originate" should be distinguished from its use in the Presentment Clause which explicitly directs and sequences actions that may 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 both chambers. Instead, the Framers provided for **sequential reconsideration** based upon the House of origin.

While there are no private interests at stake if Congress wrongly designates the chamber of origin in connection with a Presentment Clause violation, those interests are affected by an Origination Clause violation that is not enforced by the House of Representatives itself. Generally, the House has been vigilant in protecting its power. The overriding issue here is: May the Court protect the "People" when the House fails to guard its Origination Power?

III. BECAUSE CONGRESS WOULD DEFY THE PRESENTMENT CLAUSE BY SIMULTANEOUSLY ENACTING A PROVISION AND ITS VARIANT WITHIN THE SAME BILL, THE COURT SHOULD GRANT *CERTIORARI*.

A. Congress Simultaneously Enacted and Amended the Employer Mandate.

The Fourth Circuit determined that the EM was valid. *Liberty* at 27-47. Therefore, it is appropriate for this Court to determine if the EM validly exists.

Congress simultaneously passed Subsections 1513(a) and 10106(e)&(f) of ACA. The former provision creates 26 U.S.C. §4980H, 124 Stat. at 253-56, while the latter provision contains revisions to some portions of §4980H, 124 Stat. at 910-11. *See Compilation Report* at 835. Therefore, the Respondents cannot dispute that the Employer Mandate, including terms related to "assessable payments" and "extended waiting periods", was simultaneously enacted and amended. Since Sections 1513(a) and 10106(e)&(f) contain incompatible versions of the Employer Mandate, they cannot coexist because they cross-nullify each other in violation of the Presentment Clause, *i.e.*, they cannot be presented to the President in the same bill.

B. Congress Simultaneously Enacted and Amended the Individual Mandate.

Although the Supreme Court has already "upheld the individual mandate exaction as a constitutional tax," *Liberty* at 46 (citing *NFIB*, 132 S. Ct. at 2594-2600), this Court has never determined whether the IM validly exists or not.

Congress similarly simultaneously passed Subsections 1501(b) and 10106(b)&(c) of ACA. The former provision creates 26 U.S.C. §5000A, 124 Stat. at 244-49, while the latter provision contains revisions to some portions of §5000A, 124 Stat. at 909-10. *See Compilation Report* at 835. These revisions include the definition of "applicable individual" which is the core component driving the Individual Mandate. The Respondents cannot dispute that the Individual Mandate was simultaneously enacted and amended. Since Subsections 1501(b) and 10106(b)&(c) contain incompatible definitions of Applicable Individual,[12] they cannot coexist because they cross-nullify each other in violation of the Presentment Clause, *i.e.*, they cannot be presented to the President in the same bill.

C. The Presentment Clause Prevents the Simultaneous Enactment of a Provision and a Variant of that Provision Within the Same Bill.

Congress may not simultaneously enact any provision and a revision to that provision within the same bill because that simultaneity violates the "single, finely wrought and exhaustively considered, procedure" which is 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 Bicameral Clause, U.S. CONST. art. I,

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[12] The literal language of the term Applicable Individual is not altered by Section 10106. Rather, it is the "Religious Conscience Exemption," an exception to the term Applicable Individual, that is altered by Section 10106. The incompatible definitions of "Religious Conscience Exemption" are found at 124 Stat. 246 and 124 Stat. 910.

§ 1, and the Presentment Clause, U.S. CONST. art. I, § 7, cl. 2.

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 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).

The Court viewed the legislative process as requiring 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.[13] The Court articulated this point as follows:

> Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution.

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[13] *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..."). Similarly, each chamber must agree to ALL parts of a bill.

> The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105-33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, § 7.

Clinton, 524 U.S. at 448.[14]

Whenever either House of Congress passes a bill with dueling provisions it creates several constitutional problems. How can the second chamber agree simultaneously to both the base provision and its variant, as passed by the first chamber, regarding precisely the same subject matter? How can 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 problems are of Congress's own making and easily could have been avoided if either chamber had taken the time to strike the original language from the bill and thereby leave only the replacement language.

To better understand the problems created by simultaneously enacting and amending the Mandates, the Court might consider the following hypothetical bill (the "Hypo-Bill"). The Hypo-Bill

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[14] A bill may also become law if the President vetoes it and two-thirds of the members of both Houses subsequently override that veto pursuant to the Presentment Clause. U.S. CONST. art. I, § 7, cl. 2.

contains two sections. Section (A) provides: "The Washington Monument shall be red." Section (B) provides: "Section (A) is amended to provide: 'The Washington Monument shall be white.'" While either chamber of Congress might pass the Hypo-Bill first, it is impossible for the second chamber to agree simultaneously to both sections passed by the first chamber.

Assume *arguendo*, the House passed the Hypo-Bill first, followed by passage in the Senate. Under this scenario, Section (A) of the House-passed Hypo-Bill nullifies Section (B) of the later Senate-passed Hypo-Bill and Section (B) of the House-passed Hypo-Bill nullifies Section (A) of the later Senate-passed Hypo-Bill. Similarly, Section (A) of the Senate-passed Hypo-Bill nullifies Section (B) of the earlier House-passed Hypo-Bill and Section (B) of the Senate-passed Hypo-Bill nullifies Section (A) of the earlier House-passed Hypo-Bill. Thus, even though the intent of each chamber to amend its choice of color for the Washington Monument is very clear, and exactly the same as the other chamber, Sections (A) and (B) of the Hypo-Bill cannot coexist, even for a scintilla of time. Sections (A) and (B) cross-nullify each other. The second chamber cannot agree simultaneously to both provisions passed by the first chamber.

Cross-nullification of the Hypo-Bill's incompatible provisions, *i.e.*, Sections (A) and (B), also arises when the bicamerally passed Hypo-Bill is presented to the President. The President's agreement to Section (A) nullifies Section (B) of the bicamerally passed Hypo-Bill and the President's agreement to Section (B) nullifies Section (A) of the bicamerally passed Hypo-Bill. Thus, even though the President's intent to

amend his or her choice of color for the Washington Monument is very clear and exactly the same as that of Congress, sections (A) and (B) of the Hypo-Bill cannot coexist, even for a scintilla of time. These sections cross-nullify each other. Thus, the President cannot agree simultaneously to both provisions presented to him.

As explained above, the reasoning in *Clinton* is clear. The President, House, and Senate must agree to the entire bill. 524 U.S. at 448. When a bill, such as HR 3590, is internally inconsistent, *i.e.* self-contradictory, it is impossible to agree to the entire bill and the Presentment Clause is thereby violated.

Besides defying the Presentment Clause, Congress defies logic when it simultaneously enacts and amends any 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…")(citations omitted).[15] Expressed in terms of logic, Subsections 1501(b) and 10106(b)&(c) may be viewed as asserting a proposition with respect to the IM and then negating that proposition. Similarly, Subsections

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[15] William Shakespeare understood this principle when 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.

1513(a) and 10106(e)&(f) may also be viewed as asserting a proposition with respect to the EM and then negating that proposition. However, according to the Presentment Clause and *Clinton*, the President, House and Senate must all agree to the whole bill with every provision being given effect. To prevent laws from being enacted and amended simultaneously, *certiorari* should be granted which would allow this Court to declare, on the merits, that such simultaneity is unconstitutional.

In addition to defying the Presentment Clause and logic, it is bad policy for Congress to simultaneously enact and amend a law because it leads to confusion during both the legislative process and afterwards. In some instances, distinguishing between permitted and prohibited conduct would be made difficult.

During the ratification debate, James Madison stated laws should be understandable, not too long, and not "be revised before they are promulgated." *The Federalist*, No. 62, at 381 (Madison). Congress ignored Madison's warning and passed HR 3590, a 2409-page bill[16] which became ACA. HR 3590's 375 pages of internal amendments[17] made it far too difficult for ACA to have been fully read and understood by members of Congress (as well as by lawyers, by physicians, and by the population generally) either prior to or even after enactment. Indeed, it was only several months after the enactment of ACA that the House's legal staff published its 955-page *Compilation Report* that

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[16] 906 pages in enacted format, *see* 124 Stat. at 119-1024.

[17] 142 pages in enacted format, *see* 124 Stat. at 883-1024.

explained and highlighted the changes made by ACA's internal amendments.[18]

The simultaneous enactment and revision of the EM and of the IM are not isolated events. Rather, such simultaneous revisions completely infest ACA. *See generally Compilation Report*.

While simultaneously enacting and revising the Mandates may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the gravamen of the constitutional defect was the simultaneous presentment of both the original and revised versions of each of the Mandates to the President in the same bill. That cannot be done.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* to determine whether Congress violated the Origination and Presentment Clauses to enact the Mandates.

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[18] Pages 927-955 of the *Compilation Report* analyze changes made by HCERA.

APPENDIX

APPENDIX A

Statement of Rep. James A. Garfield (1872)

Excerpt from House of Representatives Debate on the RIGHT TO ORIGINATE REVENUE BILLS 42 Cong. Globe 2106 (April 2, 1872)(James A. Garfield of Ohio):

> "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 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."