No. 15-543

In the

Supreme Court of the United States

MATT SISSEL,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES; SYLVIA BURWELL, in her official capacity as United States Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB LEW, in his official capacity as United States Secretary of the Treasury,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Constitution provides that "all Bills for raising Revenue" must "originate in the House of Representatives," but it allows the Senate to "propose or concur with Amendments" to revenue-raising bills originated by the House. Art. I, § 7. Among many other taxes, the Patient Protection and Affordable Care Act (PPACA) imposes "[a] tax on going without health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (*NFIB*). The PPACA did not originate in the House, but in the Senate, which erased the entire text of a House-passed bill relating to a different subject and replaced it with what became PPACA. Petitioner alleges that enactment of PPACA violated the Origination Clause. The Court of Appeals dismissed, ruling over a lengthy dissent that because PPACA's "primary purpose" was to overhaul the nation's health insurance market, it was not a "Bill[] for raising Revenue" subject to the Origination Clause.

The questions presented are:

1. Is the tax on going without health insurance a "Bill[] for raising Revenue" to which the Origination Clause applies?

2. Was the Senate's gut-and-replace procedure a constitutionally valid "amend[ment]" pursuant to the Origination Clause?

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INTRODUCTION

The issue here is whether the constitutional rule that "all bills for raising revenue [must] originate in the House of Representatives"—and that the Senate may "amend," but not "originate" such bills—allows the Senate to initiate a "tax on going without health insurance," *NFIB*, 132 S. Ct. at 2599, by deleting the text of an entirely unrelated, non-revenue-raising House bill, and substituting the new wording.

The court below answered yes, reasoning that because the PPACA *as a whole* had the "primary purpose" of overhauling the nation's health insurance industry, it was not a bill for raising revenue, and was exempt from the Origination Clause, regardless of how many taxes it might include, or how revenues from them are spent. Pet. App. at C-13.

As the Dissent below warned, this new test creates "a broad new exemption" under which even "commonplace bills" that have always been seen as bills for raising revenue are immune from the Origination Clause. *Id.* at C-56. This means the Senate could originate taxes by simply characterizing them as having "weightier non-revenue purposes." *Id.* at C-43. For example, the Senate could originate a gasoline tax by embedding it in a bill that serves broader environmental goals. *Id.*

The Opposition does not try to allay these concerns. Instead, it suggests that this Court need not enforce the Clause because the House can refuse to adopt bills it considers unconstitutional. Opp. at 17-18. Yet *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990), rejected that argument, holding that the House's power to reject unconstitutional bills

"[does] not justify the Government's conclusion that the Judiciary has no role to play in Origination Clause challenges."

The Government also ignores the test described in *Munoz-Flores*, 495 U.S. at 399-400, which exempts legislation from the Clause *only* if it raises money for a specific program, and connects the program's payers and beneficiaries. Instead, it relies on statements in *Senate* rule books, *see* Opp. at 17, that are not reliable guides for interpreting a constitutional provision that secures the *House's* prerogatives—and on an out-of-context reading of an extrajudicial statement by Justice Joseph Story: that the Clause applies only to "bills [that] levy taxes in the strict sense of the words, and . . . not . . . bills for other purposes, which may incidentally create revenue." 2 Joseph Story, *Commentaries on the Constitution* § 877, at 343 (1833). Correctly understood, that statement supports Sissel's position, not the Government's. Finally, the Government's contention that the Clause imposes no germaneness requirement, Opp. at 15-16, conflicts with established law, and would effectively render Origination Clause cases non-justiciable, contrary to *Munoz-Flores*.

This case involves "a serious constitutional question about . . . one of the most consequential laws ever enacted." Pet. App. at C-33; *see also Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015). And there is at least one other case involving this question now pending in New York. *Bank v. HHS*, No. 15-cv-431 (E.D.N.Y. filed Jan. 28, 2015). More cases are likely to be filed in the coming months, as the *ad hoc* delays to PPACA's mandates expire, forcing taxpayers to pay not only the Section 5000A tax, but also taxes on medical

devices (26 U.S.C. § 4191), certain employer-provided insurance plans (26 U.S.C. § 4980I), tanning salons (26 U.S.C. § 5000B), and others. The same Origination objection applies to all. This case presents an excellent vehicle for resolving the question now.

I

THE DECISION BELOW ALTERS THE CHECKS AND BALANCES SYSTEM AND UNDERMINES A CRITICAL PROTECTION FOR DEMOCRATIC CONTROL OVER CONGRESS

A. The "Primary Purpose of the Whole" Test Enables the Senate to Ignore the Origination Clause at Will

The Origination Clause requires that all bills for raising revenue begin in the House of Representatives. But legislation that establishes a discrete program and generates funds for that program is exempt. *Munoz-Flores*, 495 U.S. at 398; *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196 (1897); *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999).

Section 5000A imposes a tax on people who do not purchase health insurance. *NFIB*, 132 S. Ct. at 2599. That tax is collected by the I.R.S. through the ordinary process of taxation, and the revenues are deposited into the general treasury for Congress to spend however it chooses. PPACA does not create a "particular governmental program" or "raise[] revenue to support that program," *Munoz-Flores*, 495 U.S. at 398, and there is no "connection between [the] payor and [any] program." *Id.* at 400 n.7. PPACA therefore does not qualify for the exception detailed in *Munoz-Flores*, *Nebeker*, and other cases.

Nor did the court below hold otherwise. Instead, it established a new exception to the Clause—one wide enough to swallow the clause whole. Pet. App. at C-56. Under that rule, any statute—no matter how lengthy, no matter how many subjects it relates to or taxes it includes—is exempt if its "*primary purpose*," *id.* at C-13, is something broader than the raising of revenue. *Id.* at A-13.

This test allows the Senate to easily evade the origination requirement through a simple labeling game. It also undermines the democratic values the Clause was meant to serve, by "upset[ting] the longstanding balance of power between the House and the Senate," Pet. App. at C-34 - C-35, encouraging lawmakers to describe proposed legislation in non-specific terms, and to embed controversial taxes in large, unreadable omnibus bills. The Origination Clause was adopted to ensure that the taxing power remained as close as possible to voters. The "primary purpose of the whole" test allows that power to be wielded by the branch of government *least* responsive to voters—the Senate, which is never wholly replaced, and whose members serve longer terms than the President—and in a manner that will reduce democratic accountability still further.

That test also deputizes judges to determine the amorphous "primary purpose" of a challenged statute, Pet. App. at C-13, a nearly impossible task when the statute involved is "a huge act with many provisions that are completely unrelated." Transcript of Oral Argument, *NFIB v. Sebelius* (Day 3) at 46 (argument of Mr. Kneedler). That test therefore maximizes judicial discretion to determine Congressional

purposes—a far more subjective approach than the objective test established in *Munoz-Flores*.

The court below ignored the objective fact that Section 5000A levies a tax in the strict sense of the words, and established a test that invites judges to decide what Congress *generally meant* to do when it passed a bill over 2,000 pages long, containing provisions regarding all manner of different subjects. That holding ignores this Court's warning that "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself" ignores "the processes of compromise and . . . prevents the effectuation of congressional intent." *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). The "primary purpose" test gives the Senate a simple means to evade the Clause, and invites judges to ignore what Congress *did*, to pursue what they think Congress *meant* to do.

The Opposition makes no effort to respond to these concerns.

It observes that the House can reject a bill that it believes violates the Clause, but *Munoz-Flores* rejected that very argument as overbroad: "Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional," it noted. "Yet such congressional consideration of constitutional questions does not

foreclose subsequent judicial scrutiny of the law's constitutionality." 495 U.S. at 391.

The Government also observes that the House registered no objection to PPACA when voting. Opp. at 18. But the House has no power to waive constitutional limits on the lawmaking process, let alone to absolve the Senate of a violation of the Clause. If "congressional consideration of constitutional questions" does not bar judicial review, *Munoz-Flores*, 495 U.S. at 391, surely Congress's *failure* to consider such questions cannot bar such review.

B. The Government's Argument Rests on a Misunderstanding of Justice Story's Treatise and on Inappropriate Sources

Both the panel and the Opposition emphasize a sentence in Justice Joseph Story's 1833 *Commentaries on the Constitution* to justify their conclusion that PPACA is immune from Origination Clause scrutiny. *See* Pet. App. at C-29 - C-31; Opp. at 6. This misreads history.

In a footnote in his 1803 edition of Blackstone, Virginia Supreme Court Justice St. George Tucker suggested that Congress violated the Clause by enacting laws establishing the Post Office and the Mint, and regulating the value of foreign coin. 1 St. George Tucker, ed., *Blackstone's Commentaries* at App. 261-62 n.§ (1803). Those bills originated in the Senate, Tucker wrote, but "the reason of the acquiescence of the house of representatives [*sic*] on those occasions, probably was, that no revenue was intended to be drawn to the government by those laws." *Id.*

Story rebutted this argument in his *Commentaries*. The Clause was "confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue," he wrote. "No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution . . . although [they] might incidentally bring revenue into the treasury." 2 Story, *supra*, § 877, at 343.

In other words, a bill that imposes a tax—that levies an involuntary assessment upon citizens to fund government operations generally—*is* a bill to raise revenue in Story's sense, *regardless* of whether or not Congress intended to draw revenue thereby.[1] In this passage, Story *rejected* the argument (advanced by the opposition) that the Clause is inapplicable if Congress thinks a bill will not draw revenue. He contrasted bills that "levy taxes in the strict sense" with laws passed pursuant to some constitutional power *other than* Congress's taxing power. A law that sells public stock might incidentally raise revenue, but *because it does not exercise Congress's taxing power*, it is not subject to the Clause.

Section 5000A, on the other hand, *levies a tax in the strict sense of the word*. The levy requires all applicable individuals to pay money into the treasury

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[1] The Government's claim, Opp. at 13, that Section 5000A's "successful operation" would "*decrease* payments to the government" is therefore irrelevant. *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985), rejected the proposition that the Clause only applies to bills that increase taxes, but not bills that decrease them. "The term 'Bills for raising Revenue,' " it concluded, "refers in general to all laws *relating* to taxes."

for Congress to spend at will. It is "*only* a tax," *NFIB*, 132 S. Ct. at 2599 (emphasis added)—not a penalty, command, regulation, or any other kind of law. *Cf. id.* at 2600 (it remains "a lawful choice" not to purchase insurance).

Thus the Government's reliance on Story is inapt. Under Story's test, Section 5000A *is* a tax, and *is* subject to the Clause. That provision does not "incidentally" raise revenue: it *only* raises revenue, because it *only* levies a tax "in the strict sense." True, that tax is "'in some measure regulatory,'" *NFIB*, 132 S. Ct. at 2596 (citation omitted), but neither Story's treatise nor any legal precedent supports the contention that such a fact *immunizes* a tax from the origination requirement.

The Government's reliance on Jefferson's Senate *Manual* and an 1872 Senate Report, Opp. at 17, is even more misguided, because the Senate cannot be expected to protect the House's prerogative, particularly when that prerogative limits the Senate's own.[2] Indeed, that 1872 Senate Report arose in the midst of a long clash between the two houses over the power to originate revenue bills. *See* 2 *Hinds Precedents of the House* §§ 1487-1490, at 946-53 (1907) (despite conferencing, the houses were ultimately unable to agree on the Senate's power to "gut and

[2] To the extent that Senate rules *are* relevant, those rules regard legislation that, like PPACA, begins in the Senate as an amendment in the nature of a substitute, as having *originated in the Senate*. *See* Alan S. Frumin, ed., *Riddick's Senate Procedure* 90 (1992) ("In the case of a complete substitute for a bill . . . the text proposed to be inserted . . . [is] regarded for the purpose of amendment as a question or as original text and not as an amendment in the first degree.").

replace" House-originated bills). During the dispute, the House even passed a resolution asserting its "sole and exclusive privilege to originate all bills . . . for the imposition, reduction or repeal of taxes." *Cong. Globe*, 41st Cong., 3d Sess., at 1928 (1871). Whatever the merits of these views, they suffice to show that the Opposition does *not* accurately describe "long-established congressional practice." Opp. at 17.

In any event, long-standing practice cannot trump a constitutional mandate. *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even [if] that span of time covers our entire national existence."). This Court as well as Congress must enforce the constitutional rule. *Munoz-Flores*, 495 U.S. at 392-93.

II

WITHOUT FAITHFUL APPLICATION OF THE "GERMANENESS" RULE, THE ORIGINATION CLAUSE WILL BE STRIPPED OF ITS EFFECT

The Government claims that this Court has abandoned the "germaneness" requirement that has long been seen as logically entailed by the Clause. *See* Zotti & Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Brit. J. Am. Legal Stud. 71, 104-17 (2014); Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38 Harv. J.L. & Pub. Pol'y 629, 662-65, 687-88, 691 (2015). The germaneness requirement is inherent in the meaning of "amend," because an alteration to a text which is unrelated to the original is not an "amendment," but the origination

of new text. That, at least, was the founders' understanding. While they were familiar with "amendments in the nature of a substitute," even these had to be germane to the subject of the original bill to qualify as "amendments." *Id.* at 691.

This Court upheld the tax in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911), for just this reason, concluding that the Senate's substitution-amendment was constitutional because it "was germane to the [original] subject-matter of the [House] bill." Lower courts have faithfully applied the germaneness requirement since then. *See*, *e.g.*, *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 935 (10th Cir. 1996); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985); *Harris v. U.S.I.R.S.*, 758 F.2d 456, 458 (9th Cir. 1985).

The Opposition claims that this Court abandoned the germaneness requirement in *Rainey v. United States*, 232 U.S. 310, 317 (1914), but that case made no mention of germaneness or of *Flint*, and certainly did not overrule it. On the contrary, it was unnecessary for *Rainey* to discuss germaneness because the tax at issue there satisfied that requirement. It originated in a Senate amendment—which imposed a tax on foreign-built yachts—to a House-created bill that imposed an import tariff. *Rainey* did quote a lower court's statement that it is "'not for [the] court to determine whether the amendment was or was not outside the purposes of the original bill,'" *id.*, but this invoked a form of the "enrolled bill rule" that *Munoz-Flores* expressly disclaimed. 495 U.S. at 391 n.4.

Munoz-Flores made no mention of *Rainey* having abandoned the germaneness requirement. In fact,

before this case, no court ever suggested that Rainey *abolished the germaneness rule or overruled* Flint.

At the very least, the short references to germaneness in *Flint* and *Rainey*, and the considerable confusion as to the effect of that requirement, demonstrates the need for this Court's guidance on that question.

Even the D.C. Circuit here was divided on the question of germaneness. The Dissenters contended that the gut-and-replace tactic was constitutional, but the panel believed that such a holding was "contrary to congressional practice" and would make the Clause an "empty formalism." Pet. App. at C-4. Whether the Constitution requires Senate "amendments" to be germane to the subject of the original bill—or whether the Senate's power to amend renders the Clause an empty formalism—is a question only this Court can resolve.

III

SUBSEQUENT ALTERATION OF THE AMOUNT OF THE SECTION 5000A TAX CANNOT CURE ITS UNCONSTITUTIONALITY

The Government argues that Congress's violation of the Clause was cured by subsequent enactment of a bill which amended Section 5000A by altering the amounts applicable individuals must pay. Opp. at 23. Subsequent alterations in the amount of the tax cannot cure the original constitutional violation, however. Those amendments were merely technical in nature, and did not alter the original, unconstitutional imposition of the tax. And although the Government contends, *id.* at 24, that the amendment represents

"congressional ratification" of Section 5000A, no Congressional ratification can render an unconstitutional law constitutional. Nor is there any reason to believe Congress intended its amendment to do so. The Government's contention is just a remodeled version of its argument that the House could have refused to pass PPACA if it wanted to—which is irrelevant. *Munoz-Flores*, 495 U.S. at 391.

CONCLUSION

The questions presented here are "quite important." Pet. App. at C-65; *Hotze*, 784 F.3d at 999. Because this case involves no complex factual details, or issues about the degree of germaneness required of Senate amendments, it presents an unusually clear opportunity to resolve these questions.

The petition should be *granted*.

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Respectfully submitted,

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