No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

and

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenors Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth, Case No. 4:18-cv-00167, Hon. Reed Charles O'Connor.

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFFS-APPELEES

Counsel listed on inside cover.

JOHN A. EIDSMOE
FOUNDATION FOR MORAL LAW
1 Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record provides this statement of those with an interest in this amicus brief.

Eidsmoe, John (Counsel for *Amicus Curiae*)

Foundation for Moral Law, Inc. (*Amicus Curiae*)

Respectfully submitted,

/s/ *John A. Eidsmoe*
John A. Eidsmoe
Foundation for Moral Law
1 Dexter Avenue
Montgomery, AL 36014
(334) 262-1245
eidsmoeja@juno.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God and promoting a strict interpretation of the Constitution. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that the Affordable Care Act cannot be justified as a valid exercise of Congressional power and is therefore an unconstitutional encroachment on the rights of the States and of the People. In addition, much litigation has ensued over whether employers must fund contraceptives and abortifacients in violation of their consciences under HHS regulations that apply the ACA. If the courts would recognize that Congress could not pass the ACA to begin with, then resolving the conscience matters that have arisen under the ACA would be much easier. The Foundation believes that its

[1] The Foundation has requested consent from all parties. As explained in the motion to submit this brief, *Amicus* has received consent from most of the parties. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

analysis of this issue would be desirable to the Court because the Origination Clause analysis is intertwined with constitutional questions that the parties have brought before this Court.

SUMMARY OF ARGUMENT

Rather than duplicating the arguments that Appellees have already effectively raised, the Foundation draws the Court's attention to a dilemma raised by the Origination Clause of Article I § 7 of the Constitution.

In *National Federation of Independent Businesses (NFIB) v. Sebelius*, 567 U.S. 519 (2012), a sharply-divided Supreme Court held that the Affordable Care Act (ACA) cannot be sustained by the Commerce Clause of Article I § 8, nor by the Necessary and Proper Clause of Article I § 8. However, the Court said, it could be sustained under the Taxing and Spending Clause of Article I § 8 because the ACA does involve a tax. As evidence that ACA does involve a tax, the Court pointed primarily to the Shared-Responsibility Payment aspect of the Individual Mandate, the requirement that almost all persons in the United States must either obtain health care or pay a penalty that the ACA and the Court called a tax.

However, the Origination Clause of Article I § 7 requires that "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."

If the ACA is a tax, it is null and void under the Origination Clause because it originated in the Senate.[2]

ACA proponents cannot have it both ways. They cannot successfully argue that the ACA is a tax for purposes of the Commerce Clause but not a tax for purposes of the Origination Clause. Both clauses are part of the same Constitution, drafted by the same Committee on Style, adopted by the same Convention, and ratified by the same States.

Therefore, if this Court reverses the District Court and upholds the ACA as a tax, this Court must address the issues of the Origination Clause.

For this reason, the Foundation will focus on the history, purpose, and meaning of the Origination Clause to demonstrate that this Clause is not simply a technical provision for division of power between the two Houses. Rather, the Framers understood the Origination Clause as a fundamental cornerstone of liberty as embodied in the Founding Generation's rallying cry "No Taxation Without Representation."

[2] The strained argument that the ACA actually originated in the House as a "shell bill" will be addressed in Part III of this Brief.

ARGUMENT

I. THE ORIGINATION CLAUSE IS BASED UPON A CHERISHED PRINCIPLE OF COMMON LAW: NO TAXATION WITHOUT REPRESENTATION.

Americans argued for that principle in the Declaration of Independence, fought for in the War for Independence, and enshrined in the Constitution. The Origination Clause is therefore a central pillar of the American constitutional system.

(A) The House of Commons in England

Parliament developed in medieval times from the Great Council (Magnum Concilium) which consisted of clergy, nobles, and "knights of the shire" who represented the various counties.[3] Their duty was to approve taxes proposed by the Crown. But often the Council demanded the redress of the people's grievances before they would vote on taxation, and thus legislative powers developed.[4]

The House of Commons developed into a legislative body distinct from the House of Lords in the late 1200s or early 1300s, when the "knights of the shire" who represented the counties and the burgesses who represented the towns began

[3] Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin 1946) 168-73.
[4] Brent Winters, *The Excellence of the Common Law* (Mountain Press 2006) 176-79; Taswell-Langmead 170.

sitting in a separate chamber (later called the House of Commons) from that used by the nobles and high clergy (later called the House of Lords).

According to the *Oxford Dictionary of Politics,* "The 1689 Bill of Rights established for the Commons the sole right to authorize taxation and the level of financial supply to the Crown." The basic principle that underlay this concern was that the people who pay the taxes should have a voice in the adoption of those taxes.

(B) The Concerns of the American Colonists

The American colonists shared the view of the Commons that there should be no taxation without representation and argued that because they had no representatives in Parliament, Parliament had no authority to tax them. As early as 1640-41, members of Parliament urged the Massachusetts Bay Colony to send delegates to Parliament, but the colonists refused, saying "if we should put ourselves under the protection of the Parliament, we must be then subject to such laws as they should make...[which] might prove very prejudicial to us."[5]

In the 1760s the taxation issue was fanned into flame with the Stamp Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, and the Intolerable Acts. Their opposition was based not on the amount of the taxes, but on the principle that

[5] John Winthrop, *The Journal of John Winthrop 1630-1649* 182-83. (Richard S. Dunn and Laetitia Yeandle, eds., Harvard University Press 1996).

Parliament had no authority to tax the colonists because the colonists had no representatives in Parliament. In 1765, the Virginia House of Burgesses adopted a resolution introduced by Patrick Henry which asserted that taxation without representation is tyranny:

> Resolved, that the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing characteristic of British freedom, without which the ancient constitution cannot exist.[6]

These taxes comprised one of the major grievances raised by the colonists in the Declaration of Independence ("For imposing Taxes on us without our Consent"). And the colonists took up arms to defend this principle.

(C) The Concerns of the Constitutional Convention

Taxes were a major concern of the delegates to the Constitutional Convention. When the delegates adopted the Sherman Compromise by which they established a two-house legislature, many wanted to be sure that only the house that represented the people who pay taxes would be allowed to initiate taxes. Elbridge Gerry of Massachusetts declared, “Taxes and representation are strongly

[6] Patrick Henry, Virginia Resolves on the Stamp Act, 1765.

associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses."[7]

On August 15, Caleb Strong of Massachusetts proposed that only the House of Representatives could initiate revenue bills but that the Senate could "propose or concur with amendments as in other cases."[8] On September 8 Strong's proposal was accepted with revised language, and the Origination Clause in its present form was adopted 9-2.[9]

The overriding issue at the Convention was, how do we give government enough power to govern effectively, but at the same time restrain that power so government does not become tyrannical and oppressive, given the nature of man. Perhaps reflecting on his theological training under Rev. John Witherspoon at the College of New Jersey (now Princeton), James Madison wrote in *Federalist No. 51,*

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature?

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[7] Elbridge Gerry, quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press 1937) II:278; James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America,* ed. Gaillard Hunt and James Brown Scott (Oxford University Press, 1920) 391.

[8] Caleb Strong, quoted in Farrand II:298.

[9] Farrand II:552.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
>
> A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[10]

One of these precautions is to require that taxes originate in the House of Congress that is most directly elected by the people. As Madison explained in *Federalist No. 58,*

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse -- that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.[11]

And James Iredell, who would later serve as a U.S. Supreme Court Justice 1790-1799, argued in the first North Carolina ratifying convention that

> The House of Representatives...will represent the immediate interests of the people. They will originate all money bills, which is one of the greatest securities in any republican government. ... The authority over money will do everything. A government cannot be supported

[10] James Madison, *Federalist No, 51, The Federalist* ed. Michael Loyd Chadwick (Global Affairs 1987), 281.
[11] James Madison, *Federalist No. 58, Id.* 317.

> without money. Our representatives may at any time compel the Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.[12]

The Framers placed the Origination Clause in the Constitution for a very important purpose -- to ensure that revenue bills must originate in the people's House -- the House of Representatives.

(D) The Effect of the Seventeenth Amendment

The Seventeenth Amendment did not change the meaning of the Origination Clause. States now choose their U.S. Senators by popular elections. But the Senators still represent the States, and they still serve six-year rather than two-year terms. The House of Representatives remains the body that most directly represents the people and that can be most quickly turned out of office by the people.

The Framers of the Seventeenth Amendment could have repealed or modified the Origination Clause. But they left it intact. From this we must infer that they intended that its meaning and effect remain unchanged.

[12] James Iredell, quoted in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Lippincott Co. 1901) IV:39,129.

II. THE ORIGINATION CLAUSE IS APPLICABLE TODAY.

(A) The Courts Apply the Origination Clause.

Origination Clause cases are few, but from them several principles can be drawn.

First, although the House of Representatives can enforce the Origination Clause by "blue-slipping" a bill and sending it back to the Senate, or simply by refusing to pass it, the House's failure to do so does not mean the Court should refuse to exercise judicial review:

> 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.

United States v. Munoz-Flores, 495 U.S. 385, 392 (1990).

The Fifth Circuit ruling, *supra* at Appendix 3a, 63a fn 56, notes that members of the House did not "blue-slip" the ACA. However, this does not indicate their concurrence, because the Administration had "sold" the ACA to Congress and the public on the claim that it was not a tax.

Second, the Fifth Circuit has rejected the claim that Origination Clause cases are nonjusticiable political questions, *Texas Ass'n. of Concerned Taxpayers, Inc. v. U.S.*, 772 F.2d 163 (5th Cir. 1985).

Of all Origination Clause issues, the Courts have wrestled most with the question of what constitutes a "Bill for raising Revenue." *Amicus* urges a "plain meaning" construction and suggests that, to the reasonable man-on-the-street, a bill that takes money out of his pocket and places it in the government's coffers and/or is redistributed to other persons, is a bill for raising revenue. This is the way a reasonable person would have understood the Clause in 1787; this is the way a reasonable person would understand it today.

And in fact, the Supreme Court in *NFIB* ruled that the exaction imposed on persons who decline to purchase health insurance is a tax for purposes of Article I Section 8. *Id.* 2601.

The Court in *NFIB* also noted that "Congress's choice of label" does not "control whether an exaction is within Congress's constitutional power to tax." *Id.* 2594. In *Drexel,* what Congress called a tax the Court determined was a penalty. In *United States. v. Sotelo*, 436 U.S. 268, 275 (1978), what Congress called a penalty the Court determined was a tax.

The Court also noted that the ACA tax was expected to raise substantial revenue for the U.S. Treasury. The tax would amount to about $60 per month ($720 per year) for individuals earning $35,000 per year and about $200 per month ($2,400 per year) for individuals earning $100,000 per year. *NFIB* 2596 fn 8. If the CBO estimate that four million people each year will pay the tax rather than buying insurance is correct, that comes to $2,880,000,000 per year if they all earn $35,000 per year or $9,600,000,000 per year if they all earn $100,000 per year. In either event, this is substantial revenue. Furthermore, the Affordable Care Act involves multiple other taxes that will also raise revenue.[13]

Other Supreme Court cases are distinguishable. *United States v. Munoz-Flores*, 495 U.S. 385 (1990), involved an assessment on persons convicted of federal misdemeanors which went to the Crime Victims Fund established by the Victims of Crime Act. The Court ruled that the assessment did not violate the Origination Clause because the assessments were not placed in the general treasury but rather were used to compensate crime victims. By contrast, taxes collected under the Affordable Care Act go directly to the general treasury as revenue.

[13] Letter from Congressional Budget Office to Sen. Harry Reid, Nov. 18, 2009, available at http://cbo.gov.sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf. *Amicus* notes that estimates of the actual amount vary.

Twin City National Bank of New Brighton v. Nebecker, 167 U.S. 196 (1897), involved a banking tax of $73.08. The bank argued that this tax was not in the bill as it was originally passed by the House but was added in an amendment by the Senate, with the House's concurrence. The Court upheld the tax, noting that the bill had originated in the House, and the Origination Clause specifically says "but the Senate may propose or concur with Amendments as on other bills." Unlike this banking bill, the Affordable Care Act originated in the Senate. Therefore, *Nebecker* does not apply to this case.

Millard v. Roberts, 202 U.S. 429 (1906), involved a law for the elimination of grade crossings and for a railway station in the District of Columbia. To finance this, the bill instituted a property tax in the District of Columbia. The primary issue was whether the law appropriated public funds for private purposes, but the Court dismissed an Origination Clause challenge on the ground that the funds raised were not for the general fund but for a specific project. Under the Affordable Care Act all tax moneys will go to the general treasury as revenue; thus *Millard* does not apply.

(B) Congress Interprets the Origination Clause.

To some extent, Congress has policed itself concerning Origination Clause violations, although as noted earlier, Congress's failure to do so does not absolve the Court of its duty to exercise judicial review. *Munoz-Flores* at 392.

The Senate has considered some of the finer points of what constitutes raising revenue:

* A bill is not for the purpose of raising revenue under the Origination Clause if it sets fees for services. The Senate has determined that a bill which included postal rates was not subject to the Origination Clause, reasoning that postal charges are not revenue because they are made in exchange for specific services.[14] The tax imposed by the Affordable Care Act is not in exchange for any government services.

* A bill is more likely to be subject to the Origination Clause if the revenues are paid into the general fund of the Treasury rather than set aside for a specific purpose. The Senate has sustained a point of order against such a bill.[15] Revenues from the tax imposed by the ACA are paid into the general fund of the Treasury.

* The Senate has declined to consider a bill dealing with international oil commerce because import restrictions directly affect tariff revenues.[16] The ACA tax doesn't just affect tax revenues; it provides tax revenues.

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[14] Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States Including References to Provisions of the Constitution and Laws, the Laws, and Decisions of the United States Senate,* Vol. VI. Ch. CLXXXX (Washington: Government Printing Office 1977), § 317.
[15] Cannon § 316.
[16] Cannon § 320.

The House has also protected its prerogatives under the Origination Clause by adopting resolutions "blue-slipping" legislative proposals, that is, returning them to the Senate without action. James V. Saturno, Specialist on the Congress Government and Finance Division, has written, "Overall, House precedents indicate a wide spectrum of tax and tariff actions that have been excluded on the basis of the origination clause...."[17]

The House and Senate themselves have invoked the Origination Clause in circumstances similar to the case at hand. But the fact that the leadership of a Congress controlled by the same political party as the President, in a high-pressure and highly-partisan vote, failed to do so, does not absolve the courts of their duty to enforce the Constitution. *Munoz-Flores,* 392.

III. THE "SHELL BILL" ARGUMENT IS A "SHELL GAME."

ACA advocates have tried to claim that, in fact, the Affordable Care Act did originate in the House. They note that Senate Majority Leader Harry Reid (D-NV) took a short military housing bill that had been passed by the House, struck out all of its language, and inserted what became the Affordable Care Act in its place. *Amicus* contends that the "shell game" of using a "shell bill" does not satisfy the Origination Clause, for the following reasons:

[17] James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (Congressional Research Service, The Library of Congress 2002) CRS-6.

(1) The Affordable Care Act is completely unrelated to the original House bill. The House bill was House Resolution 3590, titled the Service Members Home Ownership Tax Act of 2009. The purpose of the bill was to grant tax credits to military personnel seeking to purchase their first homes and to increase corporate estimated taxes for certain corporations by 0.5%. It had nothing whatsoever to do with anything related to health care. The Senate's "amendment" deleted the House Resolution in its entirety and substituted the Affordable Care Act in its place. H.R. 3590 was a six-page, double-spaced bill. Senator Reid's "amendment" was a 906-page[18], single-spaced bill that bore no relationship whatsoever to the original House Bill.

(2) A basic principle of parliamentary law is that an amendment must be germane to the main measure. According to *Robert's Rules of Order, Newly Revised,* "An amendment must always be *germane* -- that is, closely related to or having bearing on the subject of the motion to be amended. This means that no new subject can be introduced under pretext of being an amendment (see pp. 129-31)."[19] *Robert's* further states on pp. 129-31: "DETERMINING THE GERMANENESS OF AN AMENDMENT. As already stated, an amendment

[18] The exact number of pages varies with the printing and formatting of the bill.
[19] General Henry M. Robert, 1876; rev. Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised* (Perseus Publishing 2000) Art. VI, § 12, p. 125.

must be *germane* to be in order. To be *germane,* an amendment must *in some way involve* the same question that is raised by the motion to which it is applied."[20]

Amicus cites *Robert's,* not necessarily because the Senate is strictly bound thereby, but because *Robert's* sets forth universal principles of fairness and orderliness by which deliberative bodies conduct their business. "Amending" a bill by striking its language entirely and inserting instead a totally new bill that bears no relationship whatsoever to the former, is simply not what people commonly understand the term "amend" or "amendment" to mean. A B-1 bomber is more "germane" to a folded paper airplane than a thousand-plus-page comprehensive health care bill is "germane" to a two-page military housing bill.

Let us also examine definitions from dictionaries published close to the founding era. Samuel Johnson's *A Dictionary of the English Language* (1768) defines "amendment" as "in law, a correction of an error committed in a process."[21] Deleting a 6-page bill about tax credits for military personnel purchasing homes and inserting in its place a 906-page bill about health care hardly constitutes "correcting an error committed in a process." Noah Webster's *An American*

[20] *Robert's,* VI:12, pp. 129-31.

[21] Samuel Johnson, *A Dictionary of the English Language 3rd. Ed.* (Dublin: W.G. Jones, 1768), "Amendment." *books.google.com/.../A_Dictionary_of_the_English_Language.html.*

Dictionary of the English Language (1828) uses a definition similar to Samuel Johnson's but adds an additional definition, "A word, clause or paragraph, added or proposed to be added to a bill before a legislature."[22] Clearly, the common understanding of the term "amendment" did not include substitution of a totally unrelated bill.

The Framers were deeply concerned that the power to tax be carefully and strictly limited to the legislative body that represents the people who pay the taxes. They would have scoffed at the sophist argument that a "shell bill" fulfills the requirements of the Origination Clause. And they would have been disgusted at the "shell game" of ACA advocates saying it is a tax when they want to sustain it under the Taxing and Spending Clause and saying it is not a tax when they want to avoid an Origination Clause challenge.

The plain fact is that the Administration started the ACA in the Senate because they knew the chances of passage were better in the Senate with a 60-vote supermajority. And they knew that if they called it a tax, it would never pass either House. One recalls March 21, 2010 as the Sunday when the House leadership delayed a vote on the ACA while the Administration arm-twisted one reluctant

[22] Noah Webster, *1828 An American Dictionary of the English Language* (1828; reprinted Foundation for American Christian Education 1995), "Amendment." Webster was younger than most of the Framers of the Constitution, but he knew many of them personally, sometimes dined with them during the Convention of 1787, and was commissioned by them to write a defense of the Constitution.

Democrat after another to commit to a "yes" vote; the ACA finally passed the House 219-212. Such steamroller tactics do not legitimize a violation of the Origination Clause.

IV. THE COURTS, THE ORIGINATION CLAUSE, AND THE ACA.

Most courts that have considered cases involving the ACA have not considered the Origination Clause because the issue was not raised at trial. The Supreme Court in *NFIB* did not consider the Origination Clause issue because it was not raised at the trial level for the obvious reason that, until the *NFIB* case, it was not settled that ACA was a tax.[23] In *Sissel v. U.S. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 159 (D.D.C. 2013), the District Court for the District of Columbia dismissed an Origination Clause challenge to the ACA because (1) the individual mandate was not a tax, and (2) even if it was a tax, it was an amendment to a bill that had originated in the House. The D.C. Court of Appeals affirmed, holding that the individual mandate was not a "Bill for raising Revenue" and therefore it was unnecessary to determine whether the bill originated in the House. *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014).

[23] An informative discussion of courts' consideration of issues not raised at trial may be found at 2 Tul. J. Int'l & Comp. L. 329 (2012-2013), Melissa M. Devine, "When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade," https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tulicl21.

CONCLUSION

Speaking for a unanimous Court in 1819, Chief Justice John Marshall declared that "the power to tax involves the power to destroy." *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819). Like their predecessors in England and in the colonies, the Framers of our Constitution were wary about taxing powers and strove to limit those powers to the House of Congress that most directly represents the people who pay the taxes.

The Origination Clause of Article I Section 7 and the Taxing and Spending Clause of Article I Section 8 were drafted and adopted by the same fifty-five delegates to the Constitutional Convention, approved by the same Congress, and ratified by the same delegates to the same state ratifying conventions. There is every reason to assume their meaning is the same.

If the Affordable Care Act was a tax when it was enacted, then it is null and void because it was enacted in violation of the Origination Clause, and any subsequent attempt to "cure" it by repealing the tax aspect cannot resurrect a law that was null and void when enacted.

But if it was not a tax when enacted, or if it was a tax when enacted but is no longer a tax because of the repeal of the Shared-Responsibility Payment aspect of the Individual Mandate, then the Taxing and Spending Clause cannot sustain it.

Either way, the ACA falls.

The Foundation urges the Court to avoid the constitutional minefield of the Origination Clause and simply uphold the District Court's decision that the Affordable Care Act is an unconstitutional violation of the Taxing and Spending Clause.

The Foundation further urges the Court to uphold the District Court's decision that the ACA is unconstitutional in its entirety, thus freeing Congress to draft a new bill consistent with the Constitution.

Respectfully submitted, this the 6th day of May, 2019.

/s/ John A. Eidsmoe
John A. Eidsmoe
Foundation for Moral Law

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 4,690 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ John A. Eidsmoe
John A. Eidsmoe
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on May 6, 2019, I caused the foregoing to be filed electronically via the Court's electronic filing system, which served it upon the registered counsel of record for the parties.

/s/ John A. Eidsmoe
John A. Eidsmoe
Counsel for *Amicus Curiae*