No. 10-612

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL G. ANDERSON, et al., *Petitioners,*

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States, *Respondent,*

APPLICATION FOR SUSPENSION OF ORDER DENYING CERTIORARI AND FOR INJUNCTION PENDING REHEARING

To the Honorable John Roberts, Chief Justice of the United States Supreme Court, and Circuit Justice for the Fourth Circuit:

Petitioners Daniel G. Anderson; William Colliton, M.D.; Richard P. Delaney, M.D.; Gaetano Molinari, M.D.; Richard Loria, M.D.; Lorenzo Marcolin, M.D.; James Ronan, M.D.; Edward Sheridan, M.D.; Edward Soma, M.D.; and Ronald Ucinski, M.D., respectfully move for the entry of an Order temporarily suspending the denial of certiorari in the above referenced matter and temporarily enjoining the Respondent, President Barack Hussein Obama, from further implementing or enforcing the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 ("Affordable Care Act" or "ACA") pending the disposition of Petitioners' Motion for Leave to File a Petition for Rehearing Out of Time and

Petition for Rehearing of the above referenced matter, which is being filed simultaneously with this application.

The petition for certiorari sought plenary review of the judgment of the Fourth Circuit Court of Appeals entered on September 8, 2010, dismissing the petitioners' appeal of the decision (A - 6) and judgment of the United States District Court for the District of Maryland entered July 27, 2010 (A - 30). A copy of the Fourth Circuit's judgment, together with the District Court's opinion and judgment, are attached hereto.

Statement of Facts and Procedural History of this Case

On November 7, 2009, the House of Representatives passed the Affordable Health Care for America Act, H.R. 3962, by a 220-215 vote and forwarded the bill to the Senate for passage. The Senate, however, failed to take up debate on the House bill and instead decided to originate its own health care reform bill. In an effort to circumvent the constitutional requirement that all revenue-raising bills originate in the House, *see* U.S. Const. Art. I, § 7, cl. 1 (A - 44), the Senate took up H.R. 3590, a bill entitled "Service Members Home Ownership Tax Act of 2009." H.R. 3590, § 1(A - 186). This bill had been introduced in the House of Representatives by Charles Rangel (D-NY) on September 17, 2009 and passed by the House on October 8, 2009 by a vote of 416-0. This bill's purpose was to amend the Internal Revenue Code "to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes." H.R. 3590, Preamble

(A - 186). H.R. 3590 was a very short, noncontroversial measure, had nothing to do with health care reform and did not constitute a revenue-raising bill as its primary purpose was to provide tax breaks to (, i.e., to *reduce* the taxes imposed on,) members of the uniformed services, the Foreign Service, and the intelligence community. H.R. 3590 called for a one-year extension of the first-time homebuyer $8,000 credit for service members deployed outside the United States for 90 days or longer between January 1, 2009 and December 1, 2009, and their spouses. H.R. 3590, § 3 (A - 187-89); *see* R. Maze, "House OKs Tax Breaks for Military Homeowners," AirForce Times, Oct. 8, 2009. H.R. 3590 did not impose taxes designed to raise revenue beyond offsetting the cost of providing the tax breaks.[1]

The Senate leadership used H.R. 3590 as a "shell bill" for the Senate's health care reform measure by completely striking out all of H.R. 3590 "after the enacting clause" and substituting multifarious and very lengthy amendments collectively known as Senate Amendment 2786. The revised bill ("the Senate Bill"), by now entitled the Patient Protection and Affordable Care Act ("ACA"), was introduced on the Senate floor on or about November 19, 2009.

On December 24, 2009, the Senate passed the bill by a vote of 60 to 39. All

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1 H.R. 3590 increased the penalty for failure to file a partnership or S Corporation return, from $89 to $110 per partner or shareholder, and made certain other revenue enhancing adjustments. *See* H.R. 3590, §§ 5 & 6 (A - 189-90). These provisions were an incidental effort to make the bill revenue neutral by offsetting, in whole or in part, the loss of revenue created by providing tax breaks to service members. The Joint Committee on Taxation (JCT) estimated that, for the period 2010-2019, H.R. 3590 would generate net revenue of only $7 million, and that in the first three years after it was enacted (2010-2012), substantial losses in tax revenue would be experienced. *See* JCT, Estimated Revenue Effects of H.R. 3590, JCX-40-09 (Oct. 6, 2009).

Senate Democrats and Independents voted for the bill, while all Senate Republicans (except Senator Jim Bunning (R-KY), who did not cast a vote) voted against it. On January 19, 2010, in a special election held in Massachusetts, Scott Brown (R-MA) was elected to the Senate, ending the Democrats' 60-member, filibuster-proof majority in the Senate.

As a result, the House Democratic leadership, at the urging of the President, undertook to pass the Senate Bill through the House of Representatives and amend it with a third bill, the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029. The House passed the Senate Bill on March 21, 2010, by a vote of 219 to 212, with 34 Democrats and all 178 Republicans voting against it. President Obama signed the bill on March 23, 2010.

The Senate Bill, as introduced on the Senate floor, originated in the Senate and not the House, where Speaker Pelosi urged its membership to "pass it so you can find out what's in it." It was signed by the President, contains numerous new taxes, fees and penalties designed to raise revenue both (1) to offset the cost of the Senate Bill's health care insurance and other reforms and (2) to reduce the federal deficit, including:

- **New Medicare Taxes.** Effective January 1, 2013, individuals with an adjusted gross income (AGI) of more than $200,000 a year, and married couples with an AGI of more than $250,000 a year, (a) had their Medicare Part A (hospital insurance) tax rate increased by 0.9 percent, to 2.35 percent, and (b) began to pay an entirely new

tax of 3.8 percent on unearned income (e.g., interest, dividends). The JCT estimates these new Medicare taxes will bring in $210 billion between 2013 and 2019. ACA, § 9015, 124 Stat. 870-72.

• **Tax on Expensive Health Insurance.** Effective January 1, 2018, an excise tax will be levied on insurers of employer-sponsored health plans that cost more than $10,200 annually for individual coverage, or more than $27,500 annually for family coverage. The tax would be 40% of the cost of any plan that exceeds these dollar thresholds. The JCT estimates this tax will bring in around $32 billion in 2018 and 2019. *See* ACA, § 9001, 124 Stat. 847-53.

• **Fees and Taxes Imposed on Health Care Industries.**

  • Drug manufacturers will pay $27 billion in new annual fees (2011 to 2019). ACA, § 9008, 124 Stat. 859-62.

  • Health insurers will pay $60.1 billion in new annual fees (2014 to 2019). ACA, § 9010, 124 Stat. 865-68.

  • Effective January 1, 2013, medical device makers began to pay a 2.9% excise tax on the sale of any of their wares, which, it is estimated, will bring in a total of $20 billion. ACA, § 9009, 124 Stat. 862-65.

• **Tanning Salon Tax.** Effective July 1, 2010, a tax of 10% began to be levied on indoor tanning services. It is estimated that this tax will net approximately $2.7 billion between 2010 and 2019. ACA, § 9017, 124 Stat. 872-73.

• **Tax Penalties Imposed On Employers.** Effective January 1, 2014, the PPACA

calls for the levying of a tax penalty of $750 per employee[2] on employers with over 50 employees who do not offer health insurance to their full-time workers. ACA, §§ 1513, 10106, 124 Stat. 253-256, 906-911. In July of this year, President Obama announced that his administration was unilaterally delaying implementation of the employer mandate, including this tax penalty, for one year, until January 1, 2015.

• **Tax Penalties Imposed On Individuals.** Effective January 1, 2014, an annual tax penalty will be levied on those individuals who do not comply with the individual mandate requiring most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. § 5000A. This penalty is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. 26 U.S.C. § 5000A(c). The penalty is expected to raise about $4 billion a year by 2017.[3]

Before the Senate passed the Senate Bill, the Congressional Budget Office (CBO) and the JCT, in a letter to Senate Majority Leader Harry Reid, dated December 19, 2009, estimated that the Senate Bill "would yield a net reduction in federal deficits of $132 billion over the 2010-2019 period".[4] Before the House passed the Senate Bill, the CBO and JCT similarly estimated, in a letter addressed to the

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2 Increased to a tax penalty of $2000 per employee by the Reconciliation Act.

3 *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2594 (2012), citing Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009-2010, p. 71 (rev. 2010).

4 *See* Letter at http://www.cbo.gov/ftpdocs/108xx/doc10868/12-19-Reid_Letter_Managers_Correction_Noted.pdf

Speaker of the House, Nancy Pelosi, dated March 20, 2010, that the bill, by itself, "would yield a net reduction in federal deficits of $118 billion over the 2010 to 2019 period, of which about $65 billion would be "on budget".[5]

After initiating this action by filing their original Complaint on January 5, 2010, Petitioners, on March 18, 2010, moved for leave to file a Second Amended Complaint. In Count III of their proposed Second Amended Complaint, Petitioners alleged that, if the House of Representatives passed the Senate Bill, "then the House will be passing a revenue raising bill that originated in the Senate and not in the House, in violation" of U.S. Const. Art. I, § 7, cl. 1 (A - 44). Among other relief, Petitioners in their Second Amended Complaint sought the entry of a judgment "[d]eclaring the Senate Bill, if passed by the House of Representatives and/or signed into law by the President, null and void as passed in violation of" U.S. Const. Art. I, § 7, cl. 1 and "[e]njoining the enforcement and implementation of any resulting health care reform bill that is presented by Congress to the President and is signed by the President" (A - 82).

On July 27, 2010, the District Court, the Honorable Peter J. Messitte presiding, issued an Order denying Petitioners' Motion for Leave to File Second Amended Complaint as to President Obama (A -37). In an accompanying Memorandum Opinion, Judge Messitte reasoned that the motion for leave to amend should be denied "[s]ince any amendment with regard to President Obama would be futile," concluding that Count III presented nonjusticiable, political questions and

5 *See* Letter at http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf

that the relief sought against the President "is also nonredressable" (A -35).

On August 10, 2010, Petitioners filed their Notice of Dismissal of Proposed Second Amended Complaint as to the remaining proposed defendants, Nancy Pelosi, Steny Hoyer, and James E. Clyburn, under Rule 41(a)(1) of the Federal Rules of Civil Procedure (A -191). The District Court, by Order filed August 11, 2010, approved the Notice of Dismissal of Proposed Second Amended Complaint and directed the Clerk of Court to close the case. (A-41)

After giving their Notice of Appeal (A - 135), Petitioners moved before the Fourth Circuit for a temporary injunction pending resolution of the appeal (A – 137). Respondent cross-moved to dismiss the appeal "for lack of Article III standing and for failure to present a substantial federal question" (A – 155). On August 30, 2010, the Fourth Circuit denied Petitioners' motion for a temporary injunction (A - 5). On September 8, 2010, the Fourth Circuit granted the Respondent's motion to dismiss the appeal (A - 6). On September 8, 2010, the Fourth Circuit entered its Judgment dismissing the appeal (A - 7).

This Court denied Petitioners' petition for certiorari on January 10, 2011. *Anderson v. Obama*, 131 S.Ct. 940 (2011). A motion for leave to file a petition for rehearing was denied on June 4, 2012. *Anderson v. Obama*, 132 S.Ct. 2738 (2012).

Thereafter, on June 28, 2012, this Court issued its decision in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). The Court rejected the Government's argument that the Affordable Care Act's individual

mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. *Id.*, at 2585-93. But the Court then proceeded to uphold the individual mandate as levying a tax on those without health insurance within the power of Congress to "lay and collect taxes," U.S. Const. Art. I, § 8, cl. 1. *Id.*, at 2593-2601.

Although President Obama in July of this year unilaterally extended, by one year, the January 1, 2014 deadline for implementing and enforcing the employer mandate, he has refused to similarly extend the January 1, 2014 deadline for implementing and enforcing the individual mandate. He has now refused to negotiate with Congress regarding delaying or repealing portions of, or making amendments to the Affordable Care Act, as a condition of Congress either (1) funding the operations of the federal Government, or (b) raising the debt limit. As a result, a partial Government shutdown, resulting in the furloughing of approximately one-third of federal employees, took effect on October 1, 2013.

The Government will reach its current debt limit on or about October 17, 2013. If the President continues to refuse to negotiate and if Congress refuses to raise the debt limit unconditionally, the Government may default on the national debt with catastrophic consequences for the national and global economies.

Argument

I. Suspension Of The Order Denying Certiorari Is Justified By This Court's Intervening Decision In *National Federation of Independent Business*

v. Sebelius.

An order denying certiorari "will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice." Rule 16.3. "This most extraordinary relief will not be granted unless there is a 'reasonable likelihood of this Court's reversing its previous position and granting certiorari.'" *Boumedienne v. Bush*, 550 U.S. 1301 (2007) (Roberts, C.J.), quoting *Richmond v. Arizona*, 434 U.S. 1323 (1977) (Rehnquist, J., in chambers).

In view of this Court's intervening decision in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), there is a reasonable likelihood of this Court's reversing its position and granting certiorari. In *Sebelius*, the Court upheld the ACA's individual mandate as levying a tax to raise revenue under Congress' power to "lay and collect taxes," U.S. Const. Art. I, § 8, cl. 1, rather than as a regulatory measure under either the Commerce Clause or the Necessary and Proper Clause. Given that the individual mandate is the key provision in the ACA, the Court's conclusion that it is a tax for the primary purpose of raising revenue, as opposed to an economic regulation to force individuals to acquire health insurance, means that the ACA should be characterized as as revenue-raising measure subject to the mandate of the Origination Clause. Indeed, in view of *Sebelius*, the employer mandate is also likely to be held to be an exercise of Congress' power to tax for revenue-raising purposes. In other words, the ACA, as construed and upheld in *Sebelius*, is a bill to "levy taxes in the strict sense of the

word." *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

Thus, in view of the purpose of the ACA to provide excess revenues designed to reduce the deficit and thereby offset general governmental expenditures, the Court's decision in *Sebelius* provides critical support for Petitioners' argument that the ACA is a revenue-raising measure that was required by the Origination Clause to originate in the House of Representatives. The order denying certiorari in this case should therefore be suspended since *Sebelius* makes it reasonably likely that the Court will reverse its position and grant certiorari.

II. Issuance Of The Requested Temporary Injunction Is Necessary Or Appropriate In Aid Of The Supreme Court's Jurisdiction In Order To Avoid The Appeal Becoming Moot Or Defeated Through A Default On The National Debt And Ensuing Catastrophic Consequences.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of the Supreme Court's authority to issue an injunction. This power is to be used sparingly and only in the most critical and exigent circumstances. *See, e.g., Ohio Citizens For Responsible Energy v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); Supreme Court Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). An injunction is appropriate only if (1) it is "necessary or appropriate in aid of [the Supreme Court's] jurisdiction," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers); *Ohio Citizens For*

Responsible Energy, supra, at 1313-1314.

An injunction or other extraordinary writ is considered necessary or appropriate in aid of the Supreme Court's jurisdiction "where appellate review will be defeated if a[n injunction or other extraordinary] writ does not issue." *Parr v. United States*, 351 U.S. 513, 520 (1956), citing *Maryland v. Soper*, 270 U.S. 9, 29-30 (1926). In other words, an injunction is appropriate in aid of the Court's jurisdiction if the appeal will become moot unless the injunction is issued. *Cf. Renaissance Arcade & Bookstore v. County of Cook*, 473 U.S. 1322, 1323 (1985) (Stevens, J., in chambers) ("[B]ecause the application does not indicate that the appeal will become moot unless a stay is granted, it does not appear that an extraordinary writ may be issued pursuant to 28 U. S. C. § 1651 in aid of this Court's appellate jurisdiction.").

In this case, the actions of the Respondent in continuing to implement and enforce the Affordable Care Act, including the individual mandate, threaten to make this appeal moot and defeat this Court's appellate jurisdiction, by causing irreparable harm to the Nation's health care system and economy, which Petitioners seek to avoid by their Origination Clause challenge to the ACA. In particular, Respondent's stubborn refusal to negotiate with Congress regarding any delay of or change to the provisions of the ACA threatens to trigger a default on the Nation's debt, which could cause catastrophic damage to the United States and global economies.

Furthermore, "[w]hen an alleged deprivation of a constitutional right is involved,

. . . no further showing of irreparable injury is necessary." *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031, 1045 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), quoting *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (in turn quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973)); *see also Associated Gen'l Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm"), *cert. denied*, 503 U.S. 985 (1992) (quoting *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)). In the case of an alleged constitutional violation, "[m]oney damages are inadequate compensation for the threatened loss[.]" *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d at 1045.

In this case, Petitioners allege that the ACA was originated in the Senate in violation of the Origination Clause. Thus, the continued implementation and enforcement of the individual mandate, including the imminent levy and collection of the "penalty" for individuals not having health insurance, which this Court ruled is a tax in *National Federation of Independent Business v. Sebelius*, has caused and threatens to continue to cause ongoing irreparable harm to the constitutional rights of those individuals who are required to pay the tax.

In short, issuance of the requested injunction pending the disposition of Petitioners' Motion for Leave to File a Petition for Rehearing Out of Time is necessary and appropriate in aid of the Court's jurisdiction, as it would prevent the

defeat of that jurisdiction through the infliction of irreparable harm to the Nation's health care system and economy and to Petitioners' constitutional rights.

III. The Legal Rights At Issue Are Indisputably Clear: The ACA Originated In The Senate In Violation Of The Origination Clause.

In this case, the Origination Clause was violated by the Senate using a non-germane, non-revenue-raising House bill as a "shell bill" to pass a revenue-raising Senate measure, in an obvious effort to circumvent the Origination Clause's mandatory requirement that all bills for raising revenue originate in the House of Representatives. To paraphrase Justice Douglas, "[w]hat may not be done directly may not be done indirectly lest the [Origination] Clause become a mockery." *Cf. School District of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Douglas, J., concurring) (Establishment Clause). A procedural rules trick may not be used to trump a constitutional mandate.

The Origination Clause should not be reduced to a meaningless admonition, easily circumvented. The Origination Clause guarantees the basic right of "the people . . . to hold the purse strings." 1 *Journal of the Federal Convention* 158 (E.H. Scott ed. 1894) (reporting the remarks of Elbridge Gerry of Massachusetts, in favor of including the Origination Clause in the Constitution, that "it was a maxim that the people ought to hold the purse-strings."). Proposed as part of the "Great Compromise" during the Constitutional Convention of 1787, the Origination Clause

was placed in the Constitution to be sure that "all Bills for raising Revenue *shall* originate in the House of Representatives." U.S. Const. Art. I, § 7, cl. 1 (emphasis added). To enable the people to retain control over the "purse strings", revenue-raising measures were to originate in the body apportioned by population and considered to be closer and more responsive to the will of the people – the House of Representatives.

The limitation "expresses a preference for keeping the taxing power as close as possible to those subject to it . . .."[6] *Baines v. N.H. Senate President*, 152 N.H. 124, 135, 876 A.2d 768, 779 (2005). It reflects "a belief that the branch of government closest to the people 'will be more watchful and cautious in the imposition of taxes' and thus should be the source of those bills." *Bobo v. Kulongoski*, 338 Ore. 111, 107 P.3d 18, 23 (2005) (quoting Joseph Story, *Commentaries on the Constitution of the United States*, 341 (1833)).

To permit the Senate, aided and abetted by the President and the House, to dodge at will the Origination Clause's requirement that revenue-raising bills originate in the House would be to loosen the public's grip on the Nation's purse strings, with potentially disastrous consequences for the United States' already shaky fiscal stability and its future economic growth. *See, e.g.*, National Research Council & National Academy of Public Administration, *Summary: Choosing the Nation's Fiscal Future* at 2 (2010) ("If remedial action is postponed for even a few

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6 Not only is the House the larger and more representative branch of Congress, all of its members must stand for re-election every two years, not just one-third as is the case with the Senate. U.S.Const. Art. I, § 2, cl. 1 & Art. I, § 3, cl. 2.

years, a large and increasing federal debt will inevitably limit the nation's future wealth by reducing the growth of capital stock and of the economy.").

A. The Senate Bill is One for Raising Revenue.

The Origination Clause mandates that "[a]ll bills *for raising Revenue* shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const., Art. I, § 7, cl. 1 (emphasis added); *see U.S. v. Munoz-Flores*, 495 U.S. 385, 387 (1990). The Senate Bill is one "for raising Revenue." It raises hundreds of billions of dollars of revenue by way of new taxes, fees and penalties, including, but not limited to, higher Medicare payroll taxes on top earners; a tax on high end, "Cadillac" health insurance plans; the imposition of fees on health insurance companies and drug manufacturers; the imposition of an excise tax on medical device manufacturers; levying a tax on tanning salons; and the imposition of tax "penalties" (ruled to be taxes in the strict sense in *Sebelius*) on corporations and individuals. More importantly, the Senate Bill imposes these new taxes, fees and penalties, not just for the purpose of covering the cost of the health insurance reforms established by the Act, but also in order to achieve significant federal deficit reduction, i.e., to raise revenue to meet the overall obligations of the federal Government.

"[R]evenue bills are those that levy taxes in the strict sense of the word, . . . not bills for other purposes which may incidentally create revenue." *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196, 202 (1897); *accord, Munoz-Flores*, 495 U.S. at 397.

This "mean[s] that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495 U.S. at 397.

In *Nebeker*, this Court rejected an Origination Clause challenge to what the statute denominated a "tax" on circulating notes of banking associations. The Court concluded that "[t]he tax was a means for effectually accomplishing the great object of giving to the people a currency . . . . *There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.*" *Nebeker*, 167 U.S. at 203 (emphasis added). Similarly, in *Millard v. Roberts*, 202 U.S. 429 (1906), the Court upheld, as against an Origination Clause challenge, a statute that levied property taxes in the District of Columbia to support railroad projects, reasoning that "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437.

Most recently, in *Munoz-Flores*, the Court turned aside an Origination Clause challenge to a provision requiring courts to impose a monetary special assessment on defendants convicted of federal misdemeanors. Proceeds of these special assessments were to be deposited into a Crime Victims Fund established by the Victims of Crime Act of 1984. The act provided "various mechanisms to provide money for the Fund, including the simultaneously enacted special assessment provision" at issue in *Munoz-Flores*. 495 U.S. at 398. Congress specified that if the

total income to the Fund exceeded $100 million in any one year, the excess would be deposited in the general fund of the Treasury. However, "nothing in the text or legislative history of the statute explicitly indicate[d] whether Congress expected that the $100 million cap would ever be exceeded" and "in fact, it never was." *Munoz-Flores*, 495 U.S. at 398-399. Special assessment revenues from the statute's operation accounted for just 4% of all deposits into the Crime Victims Fund.

As "[f]our percent of a minimal and infrequent excess over the statutory cap is properly considered 'incidental'," the Court in *Munoz-Flores* concluded:

> As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program -- the Crime Victims Fund. Although any excess was to go to the Treasury, *there is no evidence that Congress contemplated the possibility of a substantial excess*, nor did such an excess in fact materialize.

495 U.S. at 399 (emphasis added).

In this case, unlike in *Nebeker*, *Millard*, and *Munoz-Flores*, Congress contemplated that the taxes imposed by the ACA will generate a "substantial excess" of revenue beyond that needed to defray the cost of the health care reform programs established by the Act. Specifically, Congress anticipated that the taxes imposed by the Act will result in an excess of over $100 billion in revenue from 2010 to 2019, which excess revenue would be used to significantly pare the federal deficit. In short, the ACA has the purpose, not only to finance health care reform, but also "to raise revenue to be applied in meeting the expenses or obligations of the Government." *See Nebeker*, 167 U.S. at 203.

Furthermore, the Court ruled in *Sebelius* that the individual mandate, the

key provision of the ACA, levies a tax for revenue-raising purposes, and is not an economic regulation designed to force individuals to acquire insurance. The ACA's employer mandate, in view of *Sebelius*, must likewise be viewed as levying a revenue-raising tax.

Finally, the health care subsidies and programs financed by these taxes will benefit groups of low-income citizens who are "entirely unrelated to the [high income] persons paying for the program[s]." *See Munoz-Flores*, 495 U.S. at 400 n. 7 (not reaching question "[w]hether a bill would be 'for raising Revenue' where the connection between payor and program was more attenuated . . ."). The Act contemplates a massive redistribution of wealth to pay for the health care reform programs established by its provisions.

In short, the ACA is a "Bill[] for raising Revenue" that was required to originate in the House of Representatives by the Origination Clause.

B. The ACA Originated in the Senate.

The Senate leadership attempted to circumvent the Origination Clause's requirement that a revenue-raising bill originate in the House of Representatives by taking up a House bill, H.R. 3590, deleting its text, and substituting by way of a Manager's Amendment the text of the ACA. In doing so, the Senate apparently relied on this Court's prior decisions in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) and *Rainey v. U.S.*, 232 U.S. 310 (1914).

In *Flint*, the House passed a general bill for the collection of revenue

containing an inheritance tax. The Senate deleted the inheritance tax and substituted a corporate tax, and the act was then passed as amended. Rejecting an Origination Clause challenge to the Senate's action, the Supreme Court reasoned that "[t]he bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case." 220 U.S. at 143. The Court further reasoned that "[t]he amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose." *Id.* In *Rainey*, the Supreme Court, per Chief Justice White, found unobjectionable the Senate's addition of a revenue amendment to a House-originated bill for raising revenue. 232 U.S. at 317.

This case is readily distinguishable from *Flint* and *Rainey*. In those cases, the House originated a revenue-raising bill, the Senate then exercised its constitutional prerogative to amend the bill, *see* U.S. Const. Art. I, § 7, cl. 1 ("[T]he Senate may propose or concur with Amendments as on other Bills"), and the amended bill was enacted. In this case, by contrast, the House originated *a non-revenue raising bill*, namely the Service Members Home Ownership Tax Act of 2009; the Senate substituted a non-germane, revenue-raising bill, namely the ACA; and the Senate bill was enacted. In view of *Nebeker*, *Millard*, and *Munoz-Flores*, the Service Members Home Ownership Tax Act of 2009 is not a bill for raising revenue, since it enacts a program of financial assistance in the form of tax relief for service members and incidentally raises revenue to pay for that program. Rather, the ACA

is a revenue raising bill, since the taxes imposed by that bill were purposely designed to generate a substantial excess of revenue over and above that needed to finance the health care reform programs established by that bill, specifically an excess of over $100 billion over a ten-year period, to be used for federal deficit reduction purposes. Furthermore, the ACA is not at all germane to the subject matter of the House bill, which did not concern either health care reform or federal deficit reduction.

By substituting the ACA for the Service Members Home Ownership Tax Act of 2009, the Senate did not simply amend a House-originated revenue-raising bill as in *Flint* and *Rainey*, but itself improperly originated a revenue-raising bill in violation of the Origination Clause. This constitutional violation was thereafter rendered complete by the actions of the House in passing, and the President in signing, the Senate-originated revenue-raising bill.

C. The Claim Is Justiciable And Redressable

As *Munoz-Flores* held, an Origination Clause "has none of the characteristics that *Baker v. Carr* [, 369 U.S. 186 (1962)] identified as essential to a finding that a case raises a political question. *It is therefore justiciable.*" 495 U.S. at 396 (emphasis added). Judge Messitte's ruling to the contrary fatally conflicts with the Supreme Court's holding in *Munoz-Flores.*

As for redressability, Judge Messitte failed to consider that "numerous subordinate executive officials engage[] in the continued operation and enforcement

of [the challenged Obamacare legislation's] provisions." *See Made in the USA Found. v. U.S.*, 242 F.3d 1300, 1310 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001). Thus, "even short of directly ordering the President to terminate [implementation and enforcement of the ACA], a judicial order instructing the subordinate executive officials to cease their compliance with its provisions [will] suffice for standing purposes." *See id.* at 1310-1311. That the proposed Second Amended Complaint does not "identify subordinate [executive] officials who could be enjoined, as well as specific provisions [of the ACA] that such officials should cease to implement in order to redress [Petitioners'] injuries . . . does not preclude a finding of redressability." *Id.* at 1311 n. 25. The Court has held that a court has power under the All Writs Act, 28 U.S.C. § 1651(a), to issue commands that apply to "persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *U.S. v. New York Tel. Co.*, 434 U.S. 159, 172-174 (1977); *see Made in USA*, 242 F.3d at 1311 n. 25.

In short, the redressability requirement for standing is fully satisfied by this Court's ability to issue injunctive relief against subordinate executive officials to halt the enforcement and implementation of the ACA. "[S]uch partial relief is sufficient for standing purposes when determining whether [the Court] can order more complete relief [against the President himself] would require [the Court] to delve into complicated and exceptionally difficult questions regarding the

constitutional relationship between the judiciary and the executive branch." *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

As can be seen from the above discussion, the legal rights at issue are "indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S., at 1306 (Rehnquist, C.J., in chambers). Thus, since suspension of the denial of certiorari and grant of the requested temporary injunction is necessary to aid the Court's jurisdiction, the requirements for such suspension and grant of a temporary injunction by an individual justice have been fully met.

CONCLUSION

In view of the arguments made and authorities cited above, Petitioners respectfully request that their Application for Suspension of the Denial of Certiorari and for Injunction Pending Rehearing be granted, and that an Order be issued enjoining the Respondent, pending the disposition of Petitioners' Motion for Leave to File a Petition for Rehearing Out of Time and Petition for Rehearing of the above referenced matter, from taking any further steps to implement and/or enforce the Affordable Care Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2013, three copies of Application for Suspension of Order Denying Certiorari and for Injunction Pending Rehearing were served by first-class mail postage prepaid to:

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