No. 14-114

In The
Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE JOSEPH R. EVANNS IN SUPPORT OF PETITIONERS DAVID KING, ET AL.

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QUESTIONS PRESENTED

1. Are there continuing effects of sustaining legislation Patient Protection and Affordable Care Act (the ACA) predicated upon a Bill of Attainder for its enforcement sufficiently adverse to warrant revisiting and reversing the prior holding of facial constitutional validity?

2. Is the exaction for failing to purchase health insurance under The Minimum Essential Coverage Provision (the "individual mandate") set forth in Section 1501 of the ACA a sanction or a detriment in the form of a "penalty" or a "tax?"

3. If the minimum essential coverage provision and the sanction/detriment/exaction for not purchasing such coverage is either a "penalty" or a "tax" does Section 1501 constitute a Bill of Attainder aimed at a targeted, defined group, barred by Article I Section 9, Clause 3 of the Constitution of the United States?

4. If Section 1501 of the ACA constitutes a Bill of Attainder, is it valid and enforceable?

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STATEMENT OF AMICUS INTERESTS[1]

The Interests of the Amicus are threefold: (1) to provide a clear, simple and decisive basis for holding the compulsory purchase of health insurance – and the penalty therefor – unconstitutional; (2) to remove from obscurity and desuetude a powerful constitutional protection now largely forgotten; and (3) to encourage research into and application of classic Constitutional remedies, including the remedy which forms the subject matter of the instant brief, which remedy is now largely consigned to historic interest only.

For many years, Amicus has studied and written about the United States Constitution with a view of researching and applying to current situations some of the classical, but often forgotten, Constitutional provisions.

One of the articles written by Amicus appearing in the 12/28/1998 edition of Investors Business Daily, entitled "A Tainted Censure" came to the attention of the late Congressman Henry Hyde, House Manager of the impeachment prosecution team (during the Clinton administration, when there was talk of a censure of the President for his misconduct), and Amicus

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or his counsel made a monetary contribution to its preparation or submission.

was informed by Mr. Hyde's staff that he read the article in its entirety to the Senate, putting to rest the idea that a censure, instead of the constitutionally required up or down vote on removal would be appropriate, since censure would constitute a Bill of Attainder.

Over the years, Amicus has published other articles in publications of general circulation on Constitutional issues.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act ("ACA") minimum coverage provision (the "Individual Mandate") was reviewed by the court and by a split vote was held facially valid.

The instant cause is an encore for the ACA in this Court, this time for assertedly illegal subsidies from the Federal Government to enrollees in health insurance purchased under the ACA through the Federal website, www.healthcare.gov. Amicus demonstrates that in an analogous case, *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), involving review for a second time of legislation entitled Bipartisan Campaign Reform Act of 2002 ("BCRA"), under legal and practical circumstances virtually identical to those in the case at bar, the Court *sua sponte* revisited and overruled a prior decision on the validity of BCRA.

The Minimum Essential Coverage Provision of the Patient Protection and Affordable Care Act (the "Individual Mandate" to purchase health insurance) results in an exaction included with the taxpayer's annual return which is enforced without judicial intervention, and has been agued to be a penalty by the minority, and a tax by the majority.

Amicus demonstrates (see below) that the prior validation of the ACA's Individual Mandate was error and should be reversed, whether the Individual Mandate is designated a "tax" or a "penalty," and this Amicus contends that the ACA should now be held invalid as predicated upon a constitutionally prohibited Bill of Attainder.

The Individual Mandate targets individual citizens without health insurance requiring them to purchase same under penalty of a $750.00 charge/exaction in the individual's income tax return. This is legislatively imposed punishment/penalty without judicial intervention – whether designated a "tax" or a "penalty" – (Section 1501(g)), a classic example of a Bill of Attainder barred by Article I, Section 9, Clause 3 of the United States Constitution.

ARGUMENT

I. BECAUSE OF THE CONTINUING ADVERSE EFFECTS OF SUSTAINING LEGISLATION PREDICATED UPON A BILL OF ATTAINDER FOR ITS ENFORCEMENT, THE COURT SHOULD REVISIT AND REVERSE ITS PRIOR HOLDING OF CONSTITUTIONAL VALIDITY ON THE BASIS OF THE GOVERNMENT'S TAXING POWER, OF THE AFFORDABLE CARE ACT ("ACA").

In *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010), the challenger invoking the First Amendment had stipulated to dismissing the facial challenge below predicated upon the prior decision favoring the facial validity and relied on narrower grounds for challenge. The Court reinstated the facial challenge *sua sponte* on the ground among others, a claim/argument central to the first amendment's "meaning and purpose" cannot be waived. Official Syllabus, § 1(b).

Among the bases for revisiting and reversing the prior decision:

(1) Uncertainty caused by the Government's litigating position, as in the present case wherein the Government is relying upon a "typo" in the ACA;

(2) Relevant factors in deciding whether to adhere to *stare decisis*: workability, antiquity, reliance interest at stake; and whether the decision was well-reasoned "counsel in favor of abandoning *Austin v.*

> *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)."

As it was in *Citizens United*, so it is in the case at bar. Workability is in serious question for the ACA – besides the instant case, there are numerous challenges to particular aspects of the ACA or the administration thereof. Judicial notice can be taken of the spectacular and expensive failure of the "rollout" of the ACA through the Federal website – www.healthcare.gov – at an initial cost exceeding $650 million with a further cost of a "fix" exceeding $300 million.

The precedent's "antiquity" is small – less than four (4) years. Reliance interests are still nugatory since the ACA by its terms was not to take effect until 2014 and key parts of it have been delayed (i.e., the Employer Mandate).

Regarding character of the decision in *U.S. Department of Health and Human Services, et al. v. State of Florida, et al.,* ___ U.S. ___, Docket No. 11-398 (decided March 12, 2012) the Court was deeply divided between the one-vote majority designating the Individual Mandate a "tax" within the taxing power of Congress while the minority viewed the Mandate as a "penalty" violating the Commerce Clause.

All of these differences, controversies, and schisms have an elegant solution, namely as demonstrated herein below, recognizing the Individual Mandate with the exactions/sanctions for non-compliance as being a Bill of Attainder, constitutionally prohibited.

II. THE INDIVIDUAL MANDATE OFTEN REFERRED TO AS THE "MINIMUM ESSENTIAL COVERAGE PROVISION" OF THE LEGISLATION AT ISSUE HEREIN – TARGETED AT A DEFINED CLASS OF INDIVIDUALS (THOSE WITHOUT HEALTH INSURANCE WHO CHOOSE NOT TO PURCHASE HEALTH INSURANCE) – REQUIRING SAID INDIVIDUALS TO PURCHASE HEALTH INSURANCE AND IMPOSING A MONETARY EXACTION WITHOUT A JUDICIAL TRIAL, IS A BILL OF ATTAINDER BARRED BY ARTICLE I, SECTION 9, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

> "No bill of attainder or ex post facto law shall be passed [by the congress]." United States Constitution, Article I, Section 9, Clause 3.

The individual mandate whether called "penalty" or "tax" is an exaction/sanction/punishment.

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummins v. Missouri*, 4 Wall at 71 U.S. 388.

> "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder

prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315 (1946).

The *Lovett* case squarely applies to the case at bar. In *Lovett,* legislation known as the "Urgent Deficiency Appropriation Act of 1943" was passed, including Section 304, providing that after November 14, 1943, no salary or other compensation would be paid to certain employees of the government (specified by name) out of any monies then or thereafter appropriated, except for services as jurors or members of the armed forces, unless they are again appointed by the president with the advice and consent of the Senate prior to such date.

The respondents in *Lovett* (Lovett, Watson, and Dodd) had been for several years employees of the government with no complaints about their work. In spite of the congressional enactment and the failure of the president to re-appoint the respondents, their respective agencies kept them at work for varying periods after November 15, 1943 but discontinued their pay and respondents brought litigation against the government for their post-November 15 work.

The *Lovett* respondents previously were the subject of congressional investigators for possible "subversive" activities, and were singled out by the legislation on that basis.

Based on the Individual Mandate and exaction of $750.00 per year, raising by government estimates approximately $4 billion annually, it appears that the government anticipates in excess of 5 million

violators per year of the individual mandate. That there is a substantial number of targeted individuals, does not prevent invalidation of a Bill of Attainder directed against them. In *Ex Parte Garland,* 71 U.S. 333 (1866), the targeted class was attorneys desirous of practicing in Federal Courts, such attorneys being required to swear an oath that they had not participated in the Civil War on the side of the Confederacy as a precondition for the attorneys to practice in federal court. This provision was held to constitute an unconstitutional Bill of Attainder.

Accordingly, the imposition of the "exaction," whether designated "penalty" or "tax," on such individuals unquestionably places the "exaction" in the ambit of a Bill of Attainder, whereas here the exaction is being imposed without provision for court intervention.

In *Lovett,* the court observed:

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment.
>
> "They intended to safeguard the people of this country from punishment without trial by duly constituted courts. [citing case . . .] When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of freemen they envisioned.

> And so, they proscribed bills of attainder." *Id.* at 317, 318.

The prior litigation involved, besides 26 States of the United States, at least one trade association, and two individuals – Mary Brown and Kaj Ahlburg – both of whom were uninsured for health insurance, did not intend presently to obtain health insurance, and did not intend to purchase health insurance in the future.

It is these individual plaintiffs at whom the Bill of Attainder in the form of exaction implemented and enforced through the Internal Revenue Code, without recourse to the courts, is aimed.

The ACA provides for the individual mandate, and enforcement, the latter being conducted in an extremely complex manner precluding judicial intervention, as fully set forth hereinbelow.

The ACA lays down the requirement for maintaining minimum essential coverage as follows:

> "Subtitle F: Shared Responsibility for Healthcare: Part I – Individual Responsibility . . . Section 1501 Requirement to Maintain Minimum Essential Coverage . . . (b) In General – Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:
>
> "Chapter 48 – Maintenance of Minimum Essential Coverage. Section 5000A, Requirement to Maintain Minimum Essential Coverage.

"(a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

"(b) SHARED RESPONSIBILITY PAYMENT. –

"(1) IN GENERAL. – If an applicable individual fails to meet the requirement of subsection (a) for one or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

"(2) INCLUSION WITH RETURN. – Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

"(3) PAYMENT OF PENALTY. – If an individual with respect to whom a penalty is imposed by this section for any month –

"(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

"(B) files a joint return for the taxable year including such month, such individual and

the spouse of such individual shall be jointly liable for such penalty.

"*(c) AMOUNT OF PENALTY. –*

"*(1) IN GENERAL. – The penalty determined under this subsection for any month with respect to any individual is an amount equal to* 1/12 *of the applicable dollar amount for the calendar year.*

"*(2) DOLLAR LIMITATION. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.*

"*(3) APPLICABLE DOLLAR AMOUNT. – For purposes of paragraph (1) –*

"*(A) IN GENERAL. – Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $750.*

"*(B) PHASE IN. – The applicable dollar amount is $95 for 2014 and $350 for 2015.*

"*(C) SPECIAL RULE FOR INDIVIDUALS UNDER AGE 18. – If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the*

applicable dollar amount for the calendar year in which the month occurs."

Enforcements/Sanctions are set forth commencing at Section 1501(g).

"*(g) ADMINISTRATION AND PROCEDURE. – "(1) IN GENERAL. – The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.*

"*(2) SPECIAL RULES. – Notwithstanding any other provision of law –*

"*(A) WAIVER OF CRIMINAL PENALTIES. – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.*

"(B) LIMITATIONS ON LIENS AND LEVIES. – The Secretary shall not –

"*(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or*

"*(ii) levy on any such property with respect to such failure.*"

Per Chapter 68 of the Internal Revenue Code, Section 6671 – Rules for Application of Assessable Penalties provides as follows:

> Sec. 6671. Rules for application of assessable penalties.
>
> (a) Penalty assessed as tax.
>
> *The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes.* (Emphasis added). Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.
>
> (b) Person defined.
>
> The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Per Chapter 68 of the Internal Revenue Code, Section 6671, therefore, the assessment and collection of penalties and liabilities is required to be accomplished in "the same manner as taxes;" however, the common remedies for collecting taxes which all involve judicial intervention at some point in the proceedings – (1) Criminal Penalties; (2) Liens

on taxpayer property; (3) Levy on taxpayer property, all involving judicial proceedings, e.g., to order liened property sold – are ruled out by Section 1501(g). Thus, as far as the statute is concerned, the liability for the "exaction" will remain on the record of the resistant taxpayer, to the probable detriment of the taxpayer's credit and reputation (e.g., "Mr. X is a tax evader."). This is truly punishment without judicial intervention.

Accordingly, the requirement for a Bill of Attainder for legislative punishment without judicial proceedings is fulfilled. (It appears that in effect, there is no procedure for enforcing/collecting the penalty for violating the individual mandate. This anomalous situation wherein a penalty for refusing to purchase government-mandated health insurance, supposedly enforceable through taxation, with all judicial enforcement options ruled out, may be a duty without a remedy – or judicial review – and as such may be a nullity. This in itself may be grounds to invalidate the ACA in view of the central importance to the Act of the individual mandate and its revenues.)

CONCLUSION

In view of the foregoing, it is respectfully submitted that the Court's prior decision on the ACA should be revisited and reversed. It is further respectfully submitted that Section 1501 of the ACA, the individual mandate Minimum Coverage Provision, is invalid

as unconstitutional and unenforceable as a Bill of Attainder directed against uninsured individuals.

Respectfully submitted,

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