No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE EGON MITTELMANN, ESQ. IN SUPPORT OF RESPONDENTS MARY BROWN AND KAJ AHLBURG ON THE MINIMUM COVERAGE PROVISION ISSUE, SUPPORTING THE TRIAL COURT AND COURT OF APPEALS DECISIONS

AMICUS BRIEF ON THE MINIMUM COVERAGE PROVISION ISSUE

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STATEMENT OF AMICUS INTERESTS[1]

The Interests of the Amicus is 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 always 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, 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

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[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*, its members, or its counsel made a monetary contribution to its preparation or submission.

the President for his misconduct), and Amicus 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 would be appropriate, since the censure would constitute a bill of attainder.

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

STATEMENT OF THE ISSUES

1. Is the Minimum Essential Coverage Provision (The "Individual Mandate") set forth in Section 1501 of the Patient Protection and Affordable Care Act a penalty or a tax? ("ACA")

2. If the minimum essential coverage provision is a penalty, 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?

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

SUMMARY OF ARGUMENT

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, is a penalty, as opposed to a tax. This is established by the careful decision and opinion of the Trial Court below in its memorandum opinion filed October 14, 2010. This Amicus has nothing to add to the Judge's reasoning and conclusion in this regard, which was affirmed on appeal.

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 (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

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 PENALTY 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 1, Section 9, Clause 3.

The Individual Mandate is a penalty, not a tax. Memorandum Opinion of Judge Vinson in the Trial Court below, issued 10-14-2010.

> "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 penalty amount 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,* 4 Wall. 333, 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.

There is no doubt under the well-reasoned holding of the Trial Court below that the "Exaction" (as the Trial Court referred to the penalty for refusal of the uninsured to purchase health insurance) is indeed a "penalty" as opposed to a "tax."

Accordingly, the imposition of the "exaction" as a fine on such individuals unquestionably places the "exaction" in the ambit of a bill of attainder, if the penalty is imposed without 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 instant litigation involves besides 26 States of the United States at least one trade association, and two individuals – Mary Brown and Kaj Ahlburg – both of whom are uninsured for health insurance, do not intend presently to obtain health insurance, and do not intend to purchase health insurance in the future.

It is these individual plaintiffs supported by this Amicus brief at whom the bill of attainder in the form of penalty implemented and enforced through the Internal Revenue Code, is aimed.

The ACA provides for the Individual Mandate, penalty, 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 penalty 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.)

This Amicus concurs with the carefully reasoned opinion of Judge Vinson in the Trial Court below whereby the invalidation of the Individual Mandate and its penalty should serve to invalidate the entire Act.

CONCLUSION

In view of the foregoing, it is 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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