3-13-74

No. 15-543

In the Supreme Court of the United States

MATT SISSEL, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Neither Party in Case 15-543 ("*Sissel*").[2] Re the Patient Protection and Affordable Care Act[3] ("Act"), Amicus has long opposed the individual mandate[4] to buy health insurance ("Mandate"), and even States' Mandates, such as Massachusetts', in this Court and elsewhere, so here continues to comment on Mandate-related issues.

Amicus salutes Matt Sissel's military service to his country, and also Sissel's courage in challenging the Mandate. Nevertheless, that all does not automatically mean the instant case deserves certiorari—nor does it preclude certiorari.

SUMMARY OF ARGUMENT

The weakness and paucity of Petitioner's claims re the Origination Clause,[5] and the malodorous effects of destroying the Act through such claims, are factors to consider re granting certiorari or not.

ARGUMENT

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court by Petitioner, and Respondents have e-mailed Amicus permission.

[2] *Matt Sissel v. Dep't of Health and Hum. Servs., et al.*, 760 F.3d 1 (D.C. Cir. 2014) (*cert. granted*, 83 U.S.L.W. 3928 (U.S. 2015)).

[3] Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).

[4] Act § 1501(b) (26 U.S.C. § 5000A).

[5] U.S. Const. art. I, § 7, cl. 1.

I. INCOHERENCE PROBLEMS WITH THIS CASE; OR, THE MANDATE TAX IS ABOUT THE WEAKEST POSSIBLE REASON TO SUPPORT PETITIONER'S CLAIMS

Petitioner's first Question Presented reads, "1. Is the tax on going without health insurance a 'Bill[] for raising Revenue' to which the Origination Clause applies?" Pet. for Writ of Cert. at i. But that Question is one of the last that should be asked, if Petitioner were fully serious (as he no doubt is) about desiring certiorari.

Indeed, that Question risks making a mountain out of a molehill. To use the Mandate tax (as unpopular as that tax is) as a nexus of complaint is incoherent for various reasons. It would've made far more sense, if Petitioner were truly worried about the Act's taxes violating the Origination Clause, to have focused on any one, or probably all, of the many taxes—say, on tanning salons—that were in the Act, and recognized as taxes, from the beginning in 2010. To offer one piece of (putative) evidence, the Mandate tax, for violation of the Clause, when there are so many other pieces are available, is self-defeating. It would be like attending a Thanksgiving feast and eating only a pumpkin seed: bizarre. *Cf.*

> The dissent nonetheless points out that there are taxes in the ACA other than the shared responsibility payment. *Id.* [Dissent 1, 8-9] But only the shared responsibility payment was alleged as the basis for the Origination Clause claim in this case[:] Rehearing is not appropriate on an issue that no party

> raised, briefed or argued to the panel, the panel did not consider, and that was not even advanced in the losing party's petition for rehearing. *See King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1985) (Bork, J., concurring in denial of rehearing *en banc*).

Sissel at 799 F.3d 1035, 1041 & n.3 (D.C. Cir. Aug. 7, 2015) (Rogers, Pillard, and Wilkin, JJ., concurring in denial of rehearing *en banc*).

Second: by contrast with those taxes which were recognized as taxes from the start of the Act, the Mandate tax was not even firmly established as a tax (as opposed to a "penalty") until *NFIB v. Sebelius* (132 S. Ct. 2566) was decided in June 2012. And that tax is very much a regulatory tax, with the purpose of pushing people to buy health insurance willy-nilly. Thus, it is less vulnerable to claims of Origination Clause violation than are any, or all, of the Act's taxes which are more clearly for revenue-raising, instead of for regulatory purposes.

Otherwise put: Petitioner is leading with a glass jaw. This makes *Sissel* a very poor vehicle for considering the issues it purports to bring up. Incoherence is usually not a virtue.

And there may be other, future opportunities to review the Mandate, if people find the Mandate objectionable; but Sissel's case tries to destroy the entire Act, not just the Mandate. *See, e.g.*, Pl.'s Am. Compl. (Oct. 11, 2012) at 1, "seek[ing] a declaration that the [Mandate,] and the Act *in toto*, are unconstitutional", *id.* An attempt to destroy the Act by bringing up a virtual issue of legislative protocol, over 5 ½ years after the Act passed, does not smell

exceptionally fresh to Amicus. Though Amicus agrees with Sissel that the Mandate is a bad thing, that does not mean *Sissel* is a necessary or proper vehicle through which to destroy it.

II. POSSIBLE BAD CONSEQUENCES OF GRANTING THE PETITION

If the Court bothers to grant the petition at hand, that probably means they are taking seriously the possibility of destroying the whole Act due to the alleged Origination Clause violation re the Mandate tax. But such a slender reason for destroying the entire massive Act, may look to the general public like a technicality of a formality of an emanation of a Clause. The Court, after having spent so much time over the past several years saving the Act, saving parts of it, and chopping parts out, might well lose serious credibility by now destroying the Act over Sissel's claims. After all, if the Origination Clause issue is important enough to wipe out the whole Act, shouldn't the Court have brought up that Clause *sua sponte* about 4 years ago, as part of a Question Presented in *NFIB*, *supra*?

Sissel is just one of many cases where the focus is not purely on destroying the Mandate, but on using that issue, whether as a "Trojan Horse" or not, to destroy the whole Act. We have been here before. If the whole Act is destroyed, this will statistically tend to produce a lot of injured or dead Americans, because when people lack health care, they then tend to lack health, or even to lack life entirely, i.e., to die. This is an "undesirable result" *par excellence*.

Amicus is perfectly ready to keep mending the Act (as opposed to ending it); e.g., he is likely to

submit a brief in support of a religious exemption re the "abortifacient-contraceptive mandate" in *Zubik v. Burwell*,[6] just as he submitted an amicus brief[7] on the winning side in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). So Amicus is not some mindless partisan of the Act, which is a flawed (yet savable) piece of work.

Readers may feel that Amicus is not highly enthusiastic for the Court granting "cert" to this case. At the same time, Amicus opposes the Mandate so strongly that he does not want to explicitly oppose cert for *Sissel*, either. So as per this brief's cover, Amicus is not supporting either party, but just laying out some of the background and context for the case, to help the Court avoid mischief.

III. AVOIDING WASTING THE COURT'S TIME

The Court's time is relatively precious. On that note, Amicus is still mystified why certiorari was granted in *Schuette v. BAMN* (134 S. Ct. 1623 (2014)), a case where Amicus thinks summary reversal would have been appropriate. While people often "have a right to a day in court", a spectacularly weak case like the plaintiffs' in *BAMN*, *supra*, when granted cert, takes space and time away from, e.g., possibly-meritorious death-penalty appeals, since the Court can handle only so many cases.

Of course, if the Court somehow feels a desperate need to revisit Origination Clause issues in general, this case, *Sissel*, hypothetically could be a vehicle for

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[6] 778 F.3d 422 (3d Cir. 2015) (*cert. granted*, U.S.L.W. 3257 (U.S. 2015)) (No. 14-1418).

[7] *Available at* http://sblog.s3.amazonaws.com/wp-content /uploads/2014/02/13-354_bsac__13-356_tsac_ DavidBoyle1.pdf.

such. But is there a huge need to revisit those issues at this time, with this particular vehicle and its incredible weaknesses? Amicus wonders.

* * *

The Mandate should never have been passed by Congress and signed by the President; it is so egregious that it needs to be fought appropriately. But Petitioner's oblique way of fighting, by evoking Origination Clause issues and then not even bothering to complain, in the Questions Presented, about any tax but the Mandate tax, does not seem like an appropriate way of fighting the Mandate—or of seriously addressing Origination Clause issues. Better vehicles may arrive someday, for addressing all those concerns. —But if the Court wishes to grant the petition anyway, for whatever unforeseen reason, Amicus is not raising any formal objection.

CONCLUSION

Amicus respectfully asks the Court to consider the various factors mentioned herein, and any relevant factors not mentioned herein, re the instant case and petition; and humbly thanks the Court for its time and consideration.

November 27, 2015 Respectfully submitted,

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