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Amicus Brief in Support of Neither Party in Sebelius v. Auburn Reg. Med. Ctr., No. 11-1231

Scott Dodson

No. 11-1231

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

AUBURN REGIONAL MEDICAL CENTER, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PROFESSOR SCOTT DODSON AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

I am a professor at the University of California, Hastings College of the Law, where I teach and write in the areas of federal jurisdiction and procedure. My institutional affiliation is provided for identification purposes only. I have an interest in the clarification of the boundaries, scope, and regulatability of federal jurisdiction, and in the continuing vitality and stability of jurisdictional doctrine. On that basis, I submit this brief in support of neither party.[1]

SUMMARY OF ARGUMENT

In recent years, this Court has taken an interest in what is properly typed "jurisdictional." A series of opinions has clarified jurisdictional doctrine in helpful and productive ways.

This case, however, presents a question that, whatever its answer, need not implicate jurisdictional doctrine. The question can and should be answered through independent assessments of statutory construction, common-law traditions, and administrative policy. The question should *not* be answered by resort to jurisdictional classifications.

Jurisdictional classifications will not dispose of this case. Nonjurisdictional deadlines may disallow equitable tolling. Contrapositively, jurisdictional deadlines may allow equitable tolling. In short,

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[1] I notified counsel of record for both parties and the Court-appointed *amicus* on August 28, 2012, of my intention to file this brief. Their written letters of consent are attached. No counsel or 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* and his academic institution made a monetary contribution to its preparation or submission.

whether a statutory deadline is jurisdictional does not resolve whether it is subject to equitable tolling.

For this reason, the Court should answer the important question presented without deciding the jurisdictional character of § 1395*oo*(a)(3).

ARGUMENT

THE COURT SHOULD DECIDE THIS CASE WITHOUT RESOLVING THE JUISDICTIONAL CHARACTER OF § 1395*oo*(a)(3).

At times, this Court has taken a jurisdiction-first approach of deciding the jurisdictional character of a judicial limit to define its effects. That approach assumes that jurisdiction has immutable characteristics: It is not subject to principles of equity, discretion, estoppel, forfeiture, consent, or waiver; courts must police its boundaries sua sponte; and a jurisdictional defect may be raised and decided at any time prior to final judgment. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982). The approach also assumes that a nonjurisdictional rule has (at least presumptively) the inverse effects of jurisdiction. *See, e.g.*, *Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar sua sponte.") (original emphasis); *id.* at 213 (Scalia, J., dissenting) (stating that ordinary time-bar defenses "are nonjurisdictional and thus subject to waiver and forfeiture").

Some of this Court's opinions, relying on these assumptions, have followed this jurisdiction-first approach. In *Bowles v. Russell*, 551 U.S. 205 (2007), for example, the Court determined that the deadline

to file a notice of appeal in a civil case is jurisdictional and therefore not subject to equitable exceptions for noncompliance. *Id.* at 213. The Court engaged no separate analysis of the appellate deadline's effects; it merely held the deadline to be jurisdictional and assumed, therefore, that the normal effects of jurisdictionality followed.

In other cases, however, the Court has taken an effects-based approach that avoids the jurisdictional-characterization decision and instead construes the effects of the limit directly. For example, in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court was presented with the question of whether the 60-day notice requirement of the Resource Conservation and Recovery Act was a limit on federal subject-matter jurisdiction. However, the Court declined to answer that question and instead answered the narrow question presented by the facts: whether the requirement was amenable to equitable exceptions. *Id.* at 31. The Court answered that question directly without addressing the jurisdictional character of the notice requirement.

The Court has followed this effects-based approach in recent cases. For example, the petition for certiorari in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), phrased the question presented as whether the Tucker Act's six-year limitations period was jurisdictional. The precise issue in that case, however, was whether a court must enforce the limitations period even if the United States, as a party-defendant, had waived the issue. The Court rephrased the question presented to reflect these terms and answered yes. In the process, this Court avoided characterizing the limitations period

as jurisdictional or nonjurisdictional. *Id.* at 135 (characterizing the time bar as a "more absolute" bar that justifies departure from usual waiver rules).

In this case, the effects-based approach of *Hallstrom* is better than the jurisdiction-first approach of *Bowles*. Cases like *Bowles*, which resolve the broader jurisdictional characterization, decide both more and less than needed. That is because the assumptions underlying the jurisdiction-first approach are flawed. In truth, the jurisdictional characterization of a limit does not inexorably define its effects.

This truth is easier to appreciate with nonjurisdictional rules. Nonjurisdictional rules can have jurisdictional effects. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6 (2008). And they often do. *See, e.g.*, *Day*, 547 U.S. at 206-07 (a habeas petitioner's procedural default may be raised sua sponte); 28 U.S.C. § 2254(b)(3) (the habeas exhaustion requirement cannot be forfeited by the State); *Jones v. Block*, 549 U.S. 199, 201 (2007) (the PLRA's exhaustion requirement is mandatory); *cf. Kontrick v. Ryan*, 540 U.S. 443, 457 n.12 (2004) (certain bankruptcy rules may not be circumvented by consent of the parties). The point is that nonjurisdictional rules do not have a defined set of effects. Thus, a characterization of the 180-day limit in § 1395*oo*(a)(3) as nonjurisdictional will not resolve whether it is amenable to equitable tolling.

Although somewhat harder to appreciate, the flip side is true as well: jurisdictional questions can have nonjurisdictional effects, in myriad ways. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1437 (2011). For example, although the deadline to

file a civil notice of appeal is jurisdictional, the statutory framework specifically directs courts to apply the deadline with certain equitable considerations in mind. 28 U.S.C. § 2107(c) (allowing a district court to extend the deadline for "excusable neglect or good cause"). The boundary set by the appellate deadline may be jurisdictional, but that boundary can be influenced by statutorily mandated considerations of equity.

Could other considerations not expressed in the statute's text affect a jurisdictional limit? Those who read statutes according to expressed textual terms may say no; those who think statutory law can incorporate implicit considerations may say yes. *Cf. Teague v. Regional Comm'r of Customs*, 394 U.S. 977, 981 (1969) (Black, J., dissenting from denial of certiorari) (construing the jurisdictional deadline for filing a civil petition for certiorari as incorporating flexibility for "certain extenuating circumstances"). The point is that "things may depend upon one's preferred method of statutory interpretation, but they ought not depend upon the jurisdictional nature of the statute." Dodson, *Hybridizing*, at 1461.

For these reasons, this Court should eschew jurisdictional labels and adhere to the *Hallstrom* effects-based approach instead of the *Bowles* jurisdiction-first approach. An effects-based approach would allow a direct and narrow resolution of the question presented: whether the time limit in § 1395*oo*(a)(3) is subject to equitable tolling. It also would allow resolution without calling into doubt the Secretary's "good cause" exception to the deadline, a construction that is not directly implicated by the facts of this case.

CONCLUSION

This Court should answer the question presented without resort to jurisdictional characterizations.

Respectfully submitted,

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