

Supreme Court, U.S.
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No. 11-438

IN THE SUPREME COURT OF THE
UNITED STATES

LIBERTY UNIVERSITY, MICHELE G.
WADDELL and JOANNE V. MERRILL,
Petitioners.

v.

TIMOTHY GEITHNER, KATHLEEN
SEBELIUS, HILDA L. SOLIS, and ERIC H.
HOLDER, JR.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

PETITION FOR REHEARING

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Petitioners, Liberty University, Inc., Michele Waddell and Joanne Merrill (“Petitioners” herein) respectfully request a rehearing and reversal of the order entered by the Court on June 29, 2012, denying the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit. Specifically, Petitioners request that this Court enter an order granting, vacating and remanding (“GVR”) the petition because the Fourth Circuit’s determination that the Anti-Injunction Act deprived it of subject matter jurisdiction was overruled by this Court in *National Federation of Independent Businesses v. Sebelius*. Entry of a GVR would allow Petitioners’ remaining claims involving the challenge to Section 1513 (which was not before this Court), and the First Amendment Free Exercise, Establishment Clause, and Equal Protection in reference to Sections 1501 and 1513.

PROCEDURAL SUMMARY

Petitioners filed the present Petition for a Writ of Certiorari after the Fourth Circuit dismissed all of Petitioners’ claims challenging Sections 1501 and 1513 of the Patient Protection and Affordable Care Act (“the Act”) based upon the Fourth Circuit’s conclusion that the Anti-Injunction Act (“AIA”) deprived the court of subject matter jurisdiction. *Liberty*

Univ., Inc. v. Geithner, 671 F.3d 391, 400 (4th Cir. 2011). In dismissing Petitioners' claims in their entirety, the Fourth Circuit failed to address challenges to the individual insurance mandate (Section 1501 of the Act) and employer insurance mandate (Section 1513 of the Act) based upon the Commerce Clause, Taxing and Spending Clause and Necessary and Proper Clause. The Fourth Circuit also did not address the Free Exercise Clause, Establishment Clause and Equal Protection Clause challenges. *Id.*

Petitioners timely filed the instant Petition in this Court. This Court granted review of Section 1501 of the Act in *National Federation of Independent Business, et al. v. Sebelius*, No. 11-393, *Department of Health and Human Services, et al. v. Florida, et al.*, No. 11-398, and *Florida, et al. v. Department of Health and Human Services et al.* No. 11-400 (collectively "*NFIB*"). In its June 28, 2012 decision in *NFIB*, this Court held that the individual insurance mandate in Section 1501 was a tax for constitutional purposes, but not for purposes of the AIA, and therefore the AIA did not bar pre-enforcement challenges. *NFIB v. Sebelius*, 132 S.Ct. 2566, 2584 (2012). This Court also found that the individual mandate could not be sustained under the Commerce Clause or Necessary and Proper Clause. *Id.* at 2591, 2593. On June 29, 2012, the petition in *Liberty University* was denied, when, we

submit, the petition should have been granted, vacated, and remanded because this Court reached the opposition conclusion on the AIA from the Fourth Circuit.

The decision in *NFIB* abrogated the Fourth Circuit's ruling that the AIA deprived it of subject matter jurisdiction. Consequently, Petitioners' remaining claims should be subject to adjudication by the lower courts. *NFIB's* decision regarding the Commerce Clause and Necessary and Proper Clause upholds Petitioners' challenges to Section 1501 on those bases. However, Petitioners' challenges to Section 1513 (the employer mandate), as well as their challenges to Sections 1501 and 1503 based upon the Free Exercise Clause, Establishment Clause and Equal Protection Clause remain unresolved. This Court's denial of the Petition deprives Petitioners' of their right to have these claims adjudicated.

I. THIS COURT'S DECISION IN NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS IS AN INTERVENING, CONTROLLING PRECEDENT THAT AFFECTS THE JUSTICIABILITY OF PETITIONERS' CLAIMS.

A rehearing of denial of a petition for a writ of certiorari is appropriate when, as has

occurred here, there have been “intervening circumstances of a substantial or controlling effect” relative to the petition. Sup. Ct. R. 44.2. Furthermore, this Court may modify any judgment brought before it, and vacate and remand that case to the court below “as may be just under the circumstances.” 28 U.S.C. § 2106 (2006). This particular remedy—to grant the petition, vacate the judgment below, and remand the case—is particularly appropriate when the court below did not consider the intervening decision by this Court that the AIA does not deprive the court of jurisdiction. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

Although “only the most extraordinary circumstances should justify [a rehearing],” 16B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4004.6 (2d ed. 1987), this Court has granted petitions for rehearing when, after issuing a watershed decision, the Court determined that the appellate court should reconsider its analysis in light of the new decision. See, e.g., *Criston v. United States*, 543 U.S. 1117 (2005) (mem.) The GVR order has “become an integral part of this Court’s practice,” and this Court has exercised GVR when its decisions affect the outcome of another case seeking review from the Court. *Lawrence*, 516 U.S. at 166 (per curiam).

In *Criston*, this Court granted a petition for rehearing based upon its intervening

decision in *United States v. Booker*, 543 U.S. 220 (2005), that federal sentencing guidelines are discretionary, thereby affecting the sentence of the petitioner in *Criston*. *Id.* The Fifth Circuit had applied the Federal Sentencing Guidelines as though they were mandatory guidelines. *United States v. Criston*, 87 Fed. App’x 391 (5th Cir. 2004). However, one year later, this Court held that the Guidelines were discretionary. *Booker*, 543 U.S. at 220. In light of *Booker*, the petitioner in *Criston* was entitled to a GVR to have his sentence reviewed under the new precedent. *Criston*, 543 U.S. at 1117.

Similarly, in *Lawrence*, this Court found that the petitioner should have the opportunity to have his claim reviewed by the lower court following an administrative re-interpretation of the statute under which the petitioner sought relief. 516 U.S. 174-75. This Court found that a GVR order was particularly appropriate in that case because the intervening change in administrative interpretation could have been outcome determinative to the petitioner. *Id.* at 174. “Giving Lawrence a chance to benefit from it furthers fairness by treating Lawrence like other future benefits applicants.” *Id.* at 175.

Likewise, in this case, the Court’s decision in *NFIB* is a significant intervening change in established precedent that will be outcome determinative for Petitioners. The Fourth Circuit found that it had no jurisdiction

to consider Petitioners' claims because the AIA barred all pre-enforcement challenges to the Act. *Liberty Univ. v. Geithner*, 671 F.3d 391, 415-16 (4th Cir. 2011). This Court's determination that the AIA does not bar challenges to the Act establishes that the Fourth Circuit does have jurisdiction to determine Petitioners' claims. *NFIB*, 132 S.Ct. at 2583. Furthermore, this Court's determination that the individual insurance mandate is not a valid exercise of Congress' powers under the Commerce Clause and Necessary and Proper Clause is determinative of Petitioners' challenges under those clauses. *Id.* at 2591, 2593. That determination regarding the scope of the Commerce Clause and Necessary and Proper Clause with regard to an insurance mandate also affects Petitioners' similar challenge to the employer mandate in Section 1513. Petitioners still have claims that remain unresolved, namely the challenge to the employer mandate in Section 1513 based on the Commerce Clause, the Necessary and Proper Clause, and the Taxing and Spending Clause. Petitioners also have the unresolved challenges to Sections 1501 and 1513 based on the First Amendment Free Exercise, Establishment Clause, and Equal Protection Clause. As was true in *Lawrence*, Petitioners here should have the opportunity to have those claims determined according to the

new interpretation of the AIA, Commerce Clause and Necessary and Proper Clause.

In addition, as this Court stated in *NFIB*, both parties and the other federal courts to consider the AIA had determined that it was not applicable to challenges to the individual insurance mandate. *NFIB*, 132 S.Ct. at 2581 n.1. It was the Fourth Circuit's *sua sponte* decision to consider and then apply the AIA irrespective of the parties' and other courts' determinations that deprived Petitioners of their opportunity to have their challenges to the employer mandate and their First Amendment and Equal Protection challenges considered. *See id.* This Court's abrogation of that *sua sponte* decision reveals the error in the Fourth Circuit's decision to decline jurisdiction. Petitioners should now have the opportunity to receive the appellate review that they were denied by the Fourth Circuit's error. This Court's denial of the Petition for a Writ of Certiorari deprived Petitioners of that right and left the Fourth Circuit's error intact. Consequently, the equities strongly militate in favor of a rehearing and granting of a GVR order.

Therefore, under *Lawrence* and S. Ct. R. 44.2, Petitioners' request for rehearing should be granted and the Fourth Circuit's judgment vacated and remanded for consideration in light of this Court's decision in *NFIB*.

II. WITHOUT A REHEARING AND GVR, PETITIONERS WILL BE DEPRIVED OF THEIR RIGHT TO HAVE AN APPELLATE COURT CONSIDER THE MERITS OF ITS REMAINING CLAIMS BASED ON CLAIM PRECLUSION.

Petitioners are also entitled to rehearing under the "other substantial grounds not previously presented" provision in S. Ct. R. 44.2. Without a rehearing and GVR order, Petitioners would arguably be forever barred from having their claims related to the employer insurance mandate and First Amendment and Equal Protection claims considered on appeal.

The district court held, in keeping with this Court's ultimate decision in *NFIB*, that the AIA did not bar Petitioners' claims and proceeded to consider all Petitioners' claims on their merits. See *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010). The Fourth Circuit's refusal to accept jurisdiction over Petitioners' appeal, if upheld, would leave that final decision on the merits intact and preclude Petitioners from litigating those claims under the new interpretations of the relevant law under *NFIB*. See e.g., *Hughes v. United States*, 71 U.S. 232, 237 (1866) (a judgment is a bar to another suit if it is rendered in a proceeding between the same

parties or their privies, the point of controversy is the same in both cases, and is determined on its merits).

Unless this Court grants the petition for rehearing and issues a GVR, Petitioners will remain in limbo and their claims will fade into oblivion. "Whether a GVR order is ultimately appropriate depends further on the equities of the case" *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam). Here, the equities of the case urge that Petitioners receive a GVR order. A GVR order is the only remedy capable of reversing the Fourth Circuit's erroneous determination that it lacked jurisdiction over Petitioners' claims. As was true in *Lawrence*, this case presents a circumstance in which "the GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id.* at 168.

CONCLUSION

This Court's decision in *NFIB* is an "intervening circumstance of a substantial or controlling effect" relative to the Petition here. The abrogation of the Fourth Circuit's dismissal of Petitioners' claims greatly affects the outcome of Petitioners' challenges to the

insurance mandates under the Act. This Court's denial of the Petition for Writ of Certiorari leaves Petitioners without the opportunity to have their claims adjudicated. For these reasons, Petitioners respectfully request that this Court grant a rehearing and issue a GVR order remanding this case to the Fourth Circuit for consideration in light of its decision in *NFIB*, and for such further relief to which they may be entitled.

July 2012

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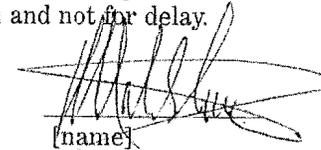
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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



[name]