

No. 11-438

In the Supreme Court of the United States

LIBERTY UNIVERSITY, ET AL., PETITIONERS

v.

TIMOTHY F. GEITHNER, SECRETARY OF THE TREASURY,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN RESPONSE TO
THE PETITION FOR REHEARING**

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Respondents do not oppose petitioners' request that the Court reconsider its order denying review in this case, grant the petition for a writ of certiorari, vacate the court of appeals' decision, and remand for further consideration in light of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*).

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),¹ amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a penalty.

¹ Amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

See 26 U.S.C. 5000A (Supp. V 2011) (minimum coverage provision); see also *NFIB*, 132 S. Ct. at 2580; Resp. Br. 4. The Act also provides that, starting in 2014, large employers that do not offer adequate coverage to full-time employees must, under certain circumstances, make assessable payments to the Internal Revenue Service. See 26 U.S.C. 4980H (Supp. V 2011) (employer responsibility provision); see also Resp. Br. 2-3 & n.2.

2. Petitioners, Liberty University and two individuals who do not have health insurance coverage, brought this suit in the United States District Court for the Western District of Virginia. As relevant here, they contended that the minimum coverage and employer responsibility provisions were beyond Congress’s Article I powers to enact and also that those provisions violate the First Amendment’s religion clauses and the equal protection component of the Fifth Amendment’s Due Process Clause. See Pet. App. 172a-173a. In granting respondents’ motion to dismiss, the district court rejected each of those claims on the merits. See *id.* at 201a-239a.

Petitioners raised these same claims on appeal. The court of appeals *sua sponte* held that the Anti-Injunction Act, 26 U.S.C. 7421(a), barred petitioners’ pre-enforcement challenge to both provisions, vacated the district court’s judgment, and remanded with instructions to dismiss for lack of jurisdiction. See Pet. App. 12a-13a.²

² The court of appeals separately held that petitioners’ pre-enforcement challenge to the employer responsibility provision is barred by the Anti-Injunction Act. See Pet. App. 147a n.3. In contrast to the minimum coverage provision, Congress “labeled the exaction” imposed by the employer responsibility provision “a ‘tax’ in cer-

Petitioners filed a petition for a writ of certiorari, challenging the court of appeals' ruling on the Anti-Injunction Act and reasserting only their enumerated-power claims. See Pet. i-ii. Petitioners did not ask the Court to address their claims based on the First or Fifth Amendment. See *ibid.*

In its response to the certiorari petition, the government agreed with petitioners that the Anti-Injunction Act did not bar their challenge to the minimum coverage provision (Resp. Br. 16-21), but suggested that that issue and the merits of the validity of the minimum coverage provision under Article I of the Constitution should be considered in *Department of Health & Human Services v. Florida*, No. 11-398 (Resp. Br. 13-14). The government argued, however, that petitioners' challenge to the employer responsibility provision as exceeding Congress's Article I powers did not warrant review. *Id.* at 21-25. The government first argued that the court of appeals was correct in holding that that challenge was barred by the Anti-Injunction Act and that there was no circuit conflict on that issue warranting review. *Id.* at 21-22. The government further argued that the merits of the constitutionality of the employer responsibility provision under Article I of the Constitution did not warrant review because that provision is plainly constitutional and there was no circuit conflict. *Id.* at 23-25.

In *NFIB*, this Court held that the Anti-Injunction Act does not bar a pre-enforcement challenge to the minimum coverage provision. See 132 S. Ct. at 2582-2584. On the merits, the Court upheld the minimum coverage provision as a proper exercise of Congress's taxing power. See *id.* at 2594-2600.

tain [of its] subsections." *Ibid.*; see Resp. Br. 21-22; cf. *NFIB*, 132 S. Ct. at 2583.

The Court denied the petition for a writ of certiorari in this case the day after it issued its decision in *NFIB*. See 2012 WL 2470099 (June 29, 2012). Petitioners now seek reconsideration of that order denying certiorari, and ask that the Court instead grant the certiorari petition, vacate the decision below, and remand for further proceedings in light of *NFIB*'s holding on the Anti-Injunction Act.

3. The court of appeals incorrectly held that the Anti-Injunction Act bars petitioners' challenges to the minimum coverage provision. Compare Pet. App. 1a-52a with *NFIB*, 132 S. Ct. at 2582-2584. Because of that jurisdictional holding, the court of appeals did not address any of petitioners' challenges to that provision on the merits. With respect to the minimum coverage provision, however, the petition for a writ of certiorari sought review of the court of appeals' jurisdictional ruling and, on the merits, only petitioners' challenge under Article I of the Constitution. See Pet. i. In denying certiorari, the Court may have concluded that there was no basis for further proceedings in this case because petitioners' enumerated-powers challenge to the minimum coverage provision was foreclosed by *NFIB*. See 132 S. Ct. at 2594-2600. With respect to the employer responsibility provision, petitioners likewise sought review only of the court of appeals' ruling that their challenge was barred by the Anti-Injunction Act and, on the merits, only petitioners' challenge under Article I of the Constitution. In denying certiorari, the Court may have agreed with the government that the court of appeals' jurisdictional ruling was correct and did not in any event warrant review, and that petitioners' enumerated-powers challenge to the employer-responsibility provision was foreclosed by established precedent governing regulation and taxation

of employers and did not warrant review, see Resp. Br. 23-25. Thus, as petitioners presented the case in their certiorari petition, there were sound reasons to deny review.

In seeking rehearing, however, petitioners observe that the court of appeals' jurisdictional holding also prevented that court from considering on the merits their claims based on the First and Fifth Amendments. See Pet. for Reh'g 8. Although petitioners did not identify those issues in their certiorari petition and respondents believe those claims lack merit, under the circumstances of this case, respondents do not oppose further proceedings in the court of appeals to resolve them, including under the Anti-Injunction Act with respect to petitioners' challenge to the employer responsibility provision.

CONCLUSION

Respondents do not oppose an order granting the petition for rehearing, granting the petition for a writ of certiorari, vacating the decision below, and remanding for further consideration in light of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

Respectfully submitted.

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