

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

PETITIONERS' BRIEF IN REPLY

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INTRODUCTION

Petitioners' challenges to various provisions of the Patient Protection and Affordable Care Act of 2009 (the "Act") present unique issues of great constitutional importance that this Court should address. Unlike the other cases under consideration by this Court, Petitioners' case squarely presents the threshold question of whether pre-enforcement challenges to individual and employer insurance mandates are barred by the Anti-Injunction Act ("AIA"), 26 U.S.C. §7421. Respondents suggest that this Court should simply "piggyback" the AIA issue onto its Petition seeking review of *Florida v. United States Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), *Department of Health & Human Services v. Florida*, No. 11-398. However, the multiplicity and complexity of issues involved in the *Florida* case (and all the cases for that matter), and the questioned standing of the state petitioners make that case particularly inappropriate for review of the AIA question.

Similarly, this Court should review Respondents' contention that the employer mandate is unquestionably constitutional. This case is the only case that squarely addresses the constitutionality of the employer mandate.

This Court should reject Respondents' request to deny review of the constitutionality of the individual mandate as a veiled attempt to avoid review of the only appellate decision to strike down the mandates.

Similarly, this Court should reject Respondents' argument that this case is an inappropriate vehicle for adjudicating the question of the severability of the insurance mandates from the remainder of the Act.

Petitioners respectfully request that its Petition be granted in its entirety.

ARGUMENT

I. THIS IS THE ONLY CASE TO FULLY ADDRESS THE QUESTION OF WHETHER THE ANTI-INJUNCTION ACT BARS THE CHALLENGES TO THE INDIVIDUAL AND EMPLOYER MANDATES.

Respondents suggest that the AIA question be addressed as an afterthought if this Court should grant its petition in *Department of Health & Human Services v. Florida*, No. 11-398. (Response Brief at 13). Even though the AIA was not squarely addressed by the Eleventh Circuit, Respondents suggest that it would be "most natural" for this Court to consider the AIA question in the course of reviewing that ruling. (Response Brief at 15).

However, this case is the only case in which the circuit panel addressed the applicability of the AIA and found it to be a bar to challenges of both the individual and employer mandates. Consequently, Petitioners are uniquely situated to address this question. Respondents admit that this case is an appropriate vehicle for addressing the applicability of the AIA to pre-enforcement challenges, but argue that it is a less-preferred alternative to having the Court decide the question in Case No. 11-398. (Response Brief at 16). Respondents' preferences aside, the parties agree that this question should be reviewed by this Court and that this case is an appropriate means to do so. Consequently, the petition should be granted.

Respondents suggest that the State respondents in case 11-398 can adequately address the question. (Response Brief at 15). According to Respondents, Case No. 11-398 “would likely prove a more effective way of considering the relevant issues surrounding the Anti-Injunction Act and pre-enforcement challenges to the minimum coverage provision.” (Response Brief at 15). The State respondents go further and say that Case No. 11-398 is a “uniquely attractive” vehicle for review of the AIA. (States' Response Brief, Case No. 11-398 at 14). However, the states' argument that that “the AIA does not apply to States in the same manner as it applies to individual taxpayers...”

belies that claim and demonstrates why this case is the only case that can adequately address the AIA question. (States' Brief in Response, Case No. 11-398 at 14). The states cannot adequately represent the interests of Petitioners, who are individual taxpayers and a private employer. Furthermore, as the states correctly assert, "the judgment in *Liberty University* rests on the AIA," but the judgment in *Florida* does not. (States' Brief, Case No. 11-398, at 14). That is a critical distinction for determining which party should be tasked with addressing the AIA. The states' claims were not dismissed because of the AIA, so any discussion of it would be merely an aside. By contrast, for Petitioners, the AIA lies at the very heart of their case, and in fact was used to drive a stake through the heart of Petitioners' claims. (Petition Appx. 51a-52a). This Court cannot give plenary review to the applicability of the AIA by merely granting review in Case No. 11-398.¹

¹ Even a brief look at the issues presented in Cases 11-393, 11-398 and 11-400 demonstrates how unlikely it would be for the parties in those cases to give anything but a passing mention of the AIA issue, which again belies their claims that their cases would be adequate or even preferred vehicles for addressing that issue. After briefing the questions of the states' standing, the constitutionality of the individual

As Respondents and the parties in Case No. 11-398 admit, it is this Circuit's decision that created the circuit conflict regarding the applicability of the AIA. In addition, it is this case in which the AIA became the centerpiece of discussion, and the only case in which it was determinative. Therefore it is this decision that needs to be reviewed by this Court to determine how the conflict needs to be resolved, and this Court should grant the Petition.

In trying to dissuade this Court from accepting review of the applicability of the AIA to the employer mandate, the Respondents actually illustrate the conflict that needs to be addressed by this Court. Respondents acknowledge that they did not raise the AIA as a bar to Petitioners' challenge to the employer mandate in either their opening or supplemental brief to the Fourth Circuit, but now try to retroactively qualify the arguments in their supplemental brief. (Brief in Response, p. 21 n.8).

mandate, the Medicaid provisions, the standing of the states and/or NFIB to challenge raise severability, and then the extent of what is severable from the Act, there will be little space available to address the AIA. Granting this Petition will ensure that the AIA will get a full analysis (as well as fuller analysis on the other issues Petitioners raise).

In response to this Court's order of May 23, 2011, appellees respectfully submit that the Anti-Injunction Act (AIA) is not applicable **to these proceedings.**

(Appendix to Reply Brief at 6a) (emphasis added). Respondents did not specifically cite 26 U.S.C. §4980(H) in their supplemental brief, but they also did not limit their statement about the inapplicability of the AIA to the individual mandate. (Reply Appx. 1a-21a) Instead, they unequivocally stated that the AIA did not apply to "these proceedings," which necessarily included Petitioners' challenges to both the individual and employer mandates. Respondents' convenient recent argument that they were only addressing the individual mandate raises serious questions about their claim that the AIA bars the challenge to the employer mandate but not the individual mandate.

The pending Petition in *Thomas More Law Center v. Obama*, Case No. 11-117, also does not provide a good vehicle to review the AIA. There the court found that the AIA did not apply to the individual mandate and thus Petitioners in that case did not raise the matter in their Questions Presented. (Petition in Case No. 11-117, at 5). Respondents briefly

mentioned the AIA in their Response only after the Fourth Circuit had dismissed Petitioners' claims based upon the AIA. (Brief in Response, Case No. 11-117, at 20).

This case is the best vehicle to address the applicability of the AIA to the individual and employer mandates. This case is the only case that can address whether the AIA applies to bar the employer mandate claim. This Court should therefore grant review to resolve these important issues.

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION OF WHETHER THE EMPLOYER MANDATE IS A PERMISSIBLE USE OF CONGRESS' ARTICLE I POWERS.

Respondents argue that Petitioners' challenge to the employer mandate does not deserve this Court's review because there is "no conflict" that it is "plainly constitutional" under both the Commerce Clause and the Taxing and Spending Clause. (Response Brief at 23). Respondents' non-sequitur shows why this Court should grant review on the employer mandate question. If no other appellate court has considered the constitutionality of the employer mandate and the issue was not fully analyzed, but mentioned in the concurring and

dissenting opinions, then it cannot be “plainly constitutional.”

Respondents assert that this Court should not grant review because “there is no conflict” among the circuits, and therefore, implicitly, nothing for this Court to resolve. While true that there is no conflict since only this case raised such a challenge, the matter was ruled upon by the district court and by the concurring and dissenting judge in the Fourth Circuit. The breadth of those opinions begs for this Court’s review of the employer mandate as they clearly plowed new ground not charted by this Court.

Furthermore, as did the district court below, Respondents raise an important issue on the nature and scope of Congress’ power over the terms of employment which has not been but should be addressed by this Court. *See* Sup. Ct. Rule 10(c). Respondents assert that “fringe benefits’ can readily be regarded as a form of wages,” so that mandating that all employers provide health insurance falls within this Court’s decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *United States v. Darby*, 312 U.S. 100 (1941). (Response Brief at 23). *Jones & Laughlin* and *Darby* provide that Congress can regulate wages, hours and working conditions of businesses or portions of businesses engaging in interstate commerce.

Jones & Laughlin, 301 U.S. at 31; *Darby*, 312 U.S. at 115. However, neither case, nor any other case cited by Respondents or the district court, has defined “wages” to include fringe benefits. The district court merely surmised that “[t]he opportunity provided to an employee to enroll in an employer-sponsored health care plan is a valuable benefit offered in exchange for the employee’s labor, much like a wage or salary.” (Petition Appx. at 217a-218a). “Much like a wage or salary” is not a legally cognizable definition, and does not fall within the parameters set forth in *Jones & Laughlin*, *Darby* or any of this Court’s other precedents regarding congressional oversight of employment agreements. Respondents’ supposition that “fringe benefits’ can readily be regarded as a form of wages” goes even farther than did the district court. Respondents’ assertion is not limited to health insurance coverage, but would reach any perquisite that an employer might choose to offer to its employees. (Brief in Response at 24). This Court’s precedents have never been stretched that far, nor could they be if private employers are to maintain any autonomy.

Respondents’ extensive discussion of Congress’ purported authority to impose the employer mandate undermines their rejection of Petitioners’ characterization of their claim as a challenge to the mandate as opposed to an

attempt to avoid paying taxes. (Brief in Response at 22). Respondents incorrectly analogize Petitioners' claim to the challenge this Court rejected in *Bob Jones University v. Simon*, 416 U.S. 725, 731-732 (1974). However, as Petitioners explain in their Petition, the university's claims in *Bob Jones* are dissimilar to Petitioners' challenge. (Petition at 14-15). As this Court held in *Bob Jones*, although the plaintiff described its claim as seeking to maintain income flow instead of avoid taxes, in fact "a primary purpose of this lawsuit is to prevent the [Internal Revenue] Service from assessing and collecting income taxes from petitioner," which placed it squarely within the AIA. *Id.* at 738. No such characterization is possible in this case. There might not ever be collection of revenue from Petitioners (or anyone else) for non-compliance with the insurance mandates if all eligible taxpayers comply with the mandate. *See* 26 U.S.C. §5000A. Consequently, Petitioners' action does not pose a threat of judicial intervention to the assessment and collection of revenues, and the AIA is wholly inapplicable. Since Petitioners are not challenging their liability for a tax assessment, but the unconstitutionality of a statutory mandate the AIA does not apply.

Respondents claim that the employer mandate is merely "the latest example of Congress's use of its taxing power to *encourage*

employers to provide health insurance.” (Brief in Response at 25, emphasis added). Respondents try to liken the mandate to the tax deductibility of health insurance premium payments and exclusion of payments from employee’s income as examples of incentives given employers to provide health insurance. (Brief in Response at 25). The comparison is fatally flawed. Employers who do not provide health insurance under the present system will lose the tax deduction but will not incur financial penalties as they will under 26 U.S.C. §4980H. 26 U.S.C. §§ 106, 162. Also, the Act changed the law so that as of January 1, 2011 health insurance premiums paid by employers are included as part of the employee’s income. 26 U.S.C. §6051(a).

Contrary to Respondents’ assertions, Petitioners’ challenge to the employer mandate not only warrants this Court’s review, but requires it in order to prevent an extra-judicial expansion of Congress’ power to regulate private employers.

III. THIS CASE PRESENTS THE BEST VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE.

Respondents admit that the question of the constitutionality of the individual mandate should be reviewed by this Court, but it “does

not appear necessary” to grant review in this case to answer the question. (Brief in Response at 14). However, an examination of Respondents’ arguments in Case No. 11-398 reveals that this petition should be granted to ensure that the constitutionality of the individual mandate actually gets plenary review.

Respondents contend that the states do not have standing to challenge the individual mandate, and indicate that they will raise the standing issue in Case No. 11-398 (Brief in Response at 15 n.7). Should Respondents successfully challenge the states’ standing, then the only appellate decision finding that the mandate is unconstitutional would be reversed and the question of the constitutionality of the individual mandate might never be addressed. Petitioners’ participation in the analysis would ensure that the challenge to the individual mandate does not fall prey to dismissal for lack of standing or to inadequate attention.

Petitioners’ standing is not in question, so the constitutional challenge cannot be brushed away on procedural grounds. Judges Davis and Wynn provided thorough analyses of the question, albeit from different perspectives, and provide a 2-1 majority for the (incorrect) proposition that the individual mandate

comports with Congress' enumerated powers under Article I. Therefore, the question is squarely addressed in this case with no concerns about procedural technicalities preventing resolution.

This case is the only case which squarely presents the issue without the possibility of an issue of standing. Consequently, this Court should grant this petition on the issue of the constitutionality of the individual mandate.

IV. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO REVIEW THE ISSUE OF SEVERABILITY.

Respondents also contend that this case would "present a particularly poor vehicle to review the extent to which other provisions of the Act could be severed from the minimum coverage provision if it were found to be unconstitutional." (Response Brief at 14 n.6). As an alternative, Respondents urge this Court to grant the severability questions presented in the Petitions in Cases 11-393 and 11-400. (Response Brief at 14 n.6). However, as was true with the individual mandate, Respondents' proposed alternative is a thinly veiled attempt to preclude plenary review of the question.

In their Response Brief in Cases 11-393 and 11-400, Respondents urge this Court to

accept review of the severability question in both the States' and private plaintiffs' petitions, but then argue that the petitioners will not have standing to seek severance of other provisions in the Act. (Response Brief in Cases 11-393 and 11-400 at 29). As was true with the individual mandate, Respondents' suggested approach to the severability issue would result in no party having standing to challenge the Act. Consequently, plenary review of the severability question requires that this Court grant this Petition on the severability issue.

CONCLUSION

This Court should grant this Petition as to all of the questions presented to ensure that the issues surrounding the constitutionality of this complex landmark legislation receives plenary review.

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