

No. 17-924

**In The
Supreme Court of the United States**

ROBERT S. CABACOFF,

Petitioner,

v.

SELECT PORTFOLIO SERVICING, INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Robert S. Cabacoff, a 31 year New Hampshire homeowner, respectfully submits this petition for rehearing of March 5, 2018, Order of this Court, denying petition for a writ of certiorari. Acting Pro Se, the petitioner has signed final page certification required by this Court's Rule 44.2. This petition is timely as its submission before this Court is being made within 25 days post decision of March 5, 2018 enumerated under Rule 44.2.

Robert S. Cabacoff, submitted a petition for writ of certiorari highlighting claims intrinsic to a United States Adversary Court proceeding on April 17, 2016 which the petitioner argued violated due process rights there and subsequently in the First Circuit Bankruptcy Appeals Court and the United States Court of Appeals for the First Circuit pursuant to Rule 44.2, the latter of which were central to the petitioner's argument for certiorari.

Rule 44.2 also expressly conveys grounds for rehearing "shall be limited to *intervening* circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." The petitioner believes such grounds are bonafide and merited in this instance as they articulate United States Constitutional issues which impact upon reasons for the above actions.

The record shows it is far more common for this Court to grant rehearing and then grant certiorari, thereby vacating the judgment below, through issue of

a Grant, Vacate, and Remand Order (hereinafter, GVR) “for consideration of an intervening decision of this Court.” See, *Lauersen v. United States*, 543 U.S. 1097 (2005), *Hawkins v. United States*, 543 U.S. 1097 (2005).

More specifically, this Court has “broad power to GVR. . . .” See, *Lawrence v. Chater*, 516 U.S. 163 (1996) which derives from 28 U.S.C. § 2106 authorizing this Court to “vacate any judgment”, “remand the cause”, and “require such further proceedings as may be just under the circumstances.” Here intervening developments, developments which impinge upon due process rights, would lend itself to “reveal a reasonable probability that the lower court would reject if given the opportunity for further consideration” and that such redetermination may determine the ultimate outcome of litigation.” *Chater*, 516 U.S. at 167, *USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001). The petitioner believes the standard’s threshold requirements are reached by arguments below.

It should be noted that some Justices who have objected to GVR Orders have agreed that this form of relief is appropriate but only when “an **intervening** factor has arisen such as new legislation or a recent decision that has a legal bearing (here, Constitutional) on the decision in question.” *Webster v. Cooper*, 130 S. Ct. 456, 456 (2009)



REASONS FOR GRANTING REHEARING

Point I. Denying writ exacerbates petitioner's rights under the Equal Protection Clause, Section 1, Fourteenth Amendment because an ancillary case unexpectedly continued at state level concurrent with this Court's review seeking to rectify parallel arguments that could be accomplished by granting GVR.

In other words, conflict surrounding a common nucleus of operative fact prevalent in the federal case argued in brief only at the United States Court of Appeals for the First Circuit and those unexpectedly arising at state (Superior Court of New Hampshire) level declaring state rather than federal jurisdiction resulted in final disposition by the state **before** this Court's decision on the matter.¹

There are numerous decisions by this Court supporting the essence of the Equal Protection Clause enumerated below:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

¹ Timely briefing was transmitted to The Supreme Court of The State of New Hampshire on March 14, 2018. The fundamentals of Case No. 2017-0707 argues concurrent lower court decision unilaterally detached itself from federal oversight entirely stating so explicitly in its one sentence decision prior to this Court's Writ disposition. In doing so, issues of state versus federal facts and law and impact upon loss of due process rights formed the centerpiece of currently exploding arguments.

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any **State** deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" [emphasis added]

The fact the lower court high jacked a parallel case which integrates First Circuit denial, despite motioning to abate until such time as petition finality contradicts, "No state . . . shall deprive any person of life, liberty or property without due process of law." *Meyer v. Nebraska*, 262 U.S. 390 (1923). Given broader level of interpretation "all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states." *Whitney*, 274 U.S. at 373. Further reinforcement intersecting writ and concurrent lower court dynamics are examined, indeed fulfilled, under substance of state versus federal law and matters of procedure consistent with the due process clause of the Fourteenth Amendment. *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring, joined by Holmes, J.) see also, *Adamson v. California*, 332 U.S. 46, 104 (1947) (Black, J., dissenting).

In 1967 this Court held that "we cannot leave to the States the formulation of the authoritative . . . remedies designed to protect people from **infractions by the States of federally guaranteed rights**". *Chapman v. California*, 386 U.S. 18, 22 (1967)

If examination departs from procedural and substantive legal grounds even issues of fairness should fall under the umbrella of equal protection and due process even if for example, procedure and laws have not been breached in this instance but fairness has. Mutual exclusivity between both concepts were not upheld in *Bolling v. Sharpe*, 347 U.S. 497 (1954) with further elaboration in *Lawrence v. Texas* this Court added: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."

The intersection of the lower court case and decision with the same operative facts (mortgage reformation) occurring in the identical time frame as the writ while disregarding federal oversight and abatement due to this Court's right to review, should be consistent with inequitable equal protection.

Point II. Continuation of lower court action and ruling (ordering mortgage reformation rather than abatement) at precisely the time in which this Court was considering the petitioner's writ is in violation of the Supremacy Clause enumerated under Article VI, Clause 2 of the United States Constitution.

In short, the Supremacy Clause establishes "the Constitution as the supreme law of the land". In cases of conflict between federal and state law, federal law must be applied, providing constitutional issues are at

stake. This petition should be applicable because intervening state court ruling occurred **before** this Court ruled on underlying parallel issues.

The Constitution declares federal law as the supreme law of the land and this Court is the ultimate determiner of that law. It is established fact this Court's interpretations are binding on state courts and for substantial reasons. As recently reaffirmed and noted in *James v. City of Boise*:

The Supreme Court in *James* repeated the sage point offered by famed Justice Joseph Story 200 years ago: If state courts were permitted to disregard the Court's rulings on federal law, "the laws, the treaties, and the Constitution, of the United States would be different in different states; and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." The Supreme Court is the final expositor of federal law, and the rule of law expects lower courts – state as well as federal – to recognize this, whether the lower court agrees with the Supreme Court's reasoning or not, and whatever the magnitude of the issue." <http://thehill.com/blogs/pundits-blog/the-judiciary/268193-supreme-court-reaffirms-supremacy-over-state-courts-and-why>.

Point III. This Court has ultimate power of judicial review determined by *Marbury v. Madison* thereby enabling “checks and balances” over unrestrained actions, here in this instance, and beyond in general, to any interpretation contrary to constitutional law.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) the essence of conflicting state versus federal law and procedure intersect:

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. This is the very essence of judicial duty.”

Here, due to unmistakable confluence of state and federal laws and required interpretations as noted, this Court should view intervening circumstances as offensive to constitutional protections and thus due process. Balancing the scales, countering the order and denial of abatement of the lower court at the same time of writ processing is unfathomable.

◆

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the Court should grant

certiorari, vacate the decision below and remand with appropriate instruction.

Respectfully submitted, this 27th day of March, 2018.

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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.

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