IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0499-ABJ
KATHLEEN G. SEBELIUS, Secretary of Health & Human Services, in her official capacity, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S MINUTE ORDER DATED OCTOBER 3, 2012

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA

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INTRODUCTION

Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA ("Plaintiffs") respectfully file this response to the Court's minute order dated October 3, 2012, which directed the parties to "address[] the bases for dismissal of plaintiffs' claim that the individual mandate provision of the Affordable Care Act ["ACA"] constitutes an unconstitutional taking in violation of the Fifth Amendment of the United States Constitution, in light of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ["*NFIB*"], finding that Congress had the authority to impose the exaction in that provision [] under its taxing power." While Plaintiffs have not argued that the federal defendants (collectively, "Defendants") lack the authority to accomplish ACA's *general* goals via the independent tax-and-spend mechanisms used to defend the Social Security Act, Pls.' Opp'n at 12 n.5 (docket #38), this litigation concerns whether Defendants have the authority for *ACA's individual mandate as enacted,* either facially or as applied to Plaintiffs' members. Under the Fifth Amendment, they do not, and the facial challenge in *NFIB* did not address – much less decide – anything to the contrary.

I. *NFIB* DOES NOT DISPOSE OF THE TAKINGS ISSUE

Before addressing the takings issue in the Court's order, it bears emphasizing that *NFIB* involved a facial challenge on Commerce-Clause grounds, accepting Congress at its word that ACA's individual mandate was not a tax.[1] As argued before the Supreme Court, *NFIB* did not

[1] Significantly, the *NFIB* plaintiffs prevailed in those two respects: (1) Defendants lack authority under the Commerce Clause to regulate inactivity in the form of compelling the purchase of ACA-compliant insurance, and (2) Congress intended the individual mandate as a non-tax penalty. Unfortunately for the *NFIB* plaintiffs, a five-justice majority (as controlled by the justice taking the narrowest view, *Marks v. U.S.*, 430 U.S. 188, 193 (1977)) was willing to view the penalty as a tax, notwithstanding that Congress did not intend it as a tax.

present any Fifth Amendment claims, and the case never addressed takings at all. *See NFIB,* 132 S.Ct. at 2623 (Opinion of Ginsburg, J.); *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Serv.*, 648 F.3d 1235, 1292 n.93 (11th Cir. 2011) (plaintiffs did not appeal dismissal of substantive due-process claim for fundamental contract rights). Because facial and as-applied challenges can concern different issues and involve different standards of review, a plaintiff can win an as-applied challenge even after losing a facial challenge. *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2665 (2011); *Ass'n of Private Sector Coll. & Univ. v. Duncan,* 681 F.3d 427, 442 (D.C. Cir. 2012) ("we … uphold the provision [facially] and preserve the right of complainants to bring as-applied challenges against any alleged unlawful applications"); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Thus, Plaintiffs can prevail as applied, even if the *NFIB* plaintiffs did not prevail facially.

Moreover, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004) (interior quotations omitted), so the *NFIB* Court plainly did not decide the takings issue *against* Plaintiffs. The *NFIB* Court did, however, agree that a tax cannot violate the Fifth Amendment and remain a lawful tax. *NFIB,* 132 S.Ct. at 2598 ("any tax must still comply with other requirements in the Constitution") (Roberts, C.J., for the Court); *id.* at 2624 ("mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly infringed on a liberty interest protected by the Due Process Clause") (Opinion of Ginsburg, J.); *id.* at 2650 (Joint Opinion of Scalia, Kennedy, Thomas, and Alito, J.J.). All nine *NFIB* justices therefore agreed – in general principle with Plaintiffs – that a tax that conflicts with the Fifth Amendment cannot stand. That is not to say that *NFIB* decided *sub silentio* whether the individual mandate did (or

did not) violate the Fifth Amendment. That issue was not before the Court.

II. ACA'S INDIVIDUAL MANDATE VIOLATES THE FIFTH AMENDMENT

Like pyromaniacs in a field of straw men, Defendants attack as an "absurdity" a position that Plaintiffs never have taken. Defs.' Suppl. Br. at 2. Plaintiffs have never argued that any and all otherwise-valid taxes violate the Takings Clause.

To summarize Defendants' argument, if taxation itself constituted a taking, government could *never* tax: "the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). In other words, the Takings Clause does not swallow the Taxing Power.

By the same token, of course, "any tax must still comply with other requirements in the Constitution," *NFIB,* 132 S.Ct. at 2598 (Roberts, C.J., for the Court), which is to say the Taxing Power does not swallow any other provision of the Constitution either. Thus, Defendants concede – as they must – that "exercise[s] of the taxing power can amount to a taking," Defs.' Suppl. Br. at 2, where the tax "is so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property.'" Defs.' Suppl. Br. at 2 (*quoting Brushaber,* 240 U.S. at 24). The individual mandate is just such an arbitrary confiscation.[2]

To be sure, the separate fields of taxation and takings are typically not analyzed together:

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[2] *Brushaber* primarily concerned whether the Due Process Clause prohibited a progressive income tax. Technically, *Brushaber* merely held that the Due Process Clause did not prevent progressive taxation until the rates compelled "the conclusion that [the tax] was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." *Brushaber,* 240 U.S. at 24-25. In that respect, *Brushaber* provides Defendants no support for the proposition that taxation lawfully may effect a taking.

> Because of the substantial conceptual overlap between takings and taxes, legal scholars in the fields of both taxation and takings have long puzzled over the apparently inconsistent treatment the two topics receive under the applicable constitutional law.

Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185 (2004). Taken back to their first principles, the two concepts are distinct enough. Takings concerned eminent domain for real property, which was distinct from revenue-raising taxes of any sort. The advent of regulatory takings and regulatory taxation, however, has blurred the two concepts and, therefore, requires resolution. *Id.* at 2188-89 ("reconciling takings with taxation has come into sharper relief"). ACA's individual mandate is a tax that violates the Takings Clause.

The government cannot use indirection to defeat constitutional rights that the government cannot defeat directly. *Frost v. Railroad Comm'n of State of California*, 271 U.S. 583, 593-94 (1926). Thus, for example, the government cannot tax the public for declining to consent voluntarily to a taking without just compensation (*i.e.*, for declining to consent to confiscation). That is precisely what the individual mandate seeks to do by giving the public the "choice" either (a) to consent to purchase ACA-sanctioned insurance that subsidizes the sick and the old – insurance that Defendants have absolutely no authority to coerce the public to purchase – or (b) to pay a penalty for exercising the right to say "no, thanks" to Defendants' request voluntarily to subsidize others. The individual mandate is no different than a hypothetical "Good Neighbor Act" that requires all property owners with lots greater than an acre to "choose" between giving a half acre to the homeless or else paying a "Bad Neighbor Tax." By taxing only those who choose to exclude others – "traditionally … one of the most treasured strands in an owner's bundle of property rights," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) – the Good Neighbor Act's Bad Neighbor Tax indirectly nullifies property rights in violation of *Frost* and the Takings Clause. So too for ACA's individual mandate.

As Plaintiffs have explained (Compl. ¶24, docket #26; Joseph Decl. ¶7, docket #38-1),[3] ACA constitutes a taking of that portion of the ACA-mandated premium that subsidizes ACA's lowered premiums for those with pre-existing conditions and other conditions that previously elevated their insurance rates. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation") (emphasis in original). Indeed, even private entities with the power of eminent domain must comply with the Fifth Amendment. *Pacific Gas & Electric Co. v. Hay*, 68 Cal.App.3d 905, 910-11 (Cal. App. 1977). Moreover, Defendants have actively *mandated* these cost-raising elements of ACA's insurance regime that do not benefit Plaintiffs' members, which renders inapposite instances where the government was merely aware of third-party costs. *See* Defs.' Memo. at 54 (docket #32). Finally, the Takings Clause can apply to money paid into an account like insurance, *R.R. Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 357 (1935), which binds this Court until the Supreme Court overrules it. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

CONCLUSION

For the foregoing reasons and those previously argued by Plaintiffs, the Court should deny the Defendants' Motion to Dismiss and enter judgment for Plaintiffs. FED. R. CIV. P. 52(c).

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[3] Those with ACA-noncompliant catastrophic-risk insurance who must pay the tax (Christman Decl. ¶9, Smith Decl. ¶15, docket #38-1) get *nothing* valuable from ACA. Even members with "traditional" employer-provided health insurance who must pay higher premiums to subsidize ACA's favorable treatment of those with pre-existing conditions do not obtain "significant, concrete, and disproportionate benefits," *Colo. Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992), for that portion of their insurance premiums that insurers take to subsidize the low premiums that ACA makes available for those with pre-existing conditions. Compl. ¶¶23, 65-66 (docket #26). Under actuarial principles, this easily qualifies as a "specific, separately identifiable fund of money" subject to the Takings Clause. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 555 (1998) (Breyer, J., dissenting).

Dated: October 19, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which I understand to have caused the service of Justin M. Sandberg and Eric B. Beckenhauer of the U.S. Department of Justice ("DOJ"), and their DOJ colleagues, on behalf of all defendants.

/s/ Lawrence J. Joseph
Lawrence J. Joseph