

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
ASSOCIATION OF AMERICAN)	
PHYSICIANS AND SURGEONS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:10-CV-0499 (ABJ)
)	
KATHLEEN G. SEBELIUS, Secretary of)	
the United States Department of Health)	
and Human Services, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

SUPPLEMENTAL BRIEF

The Court directed defendants to “address[] the bases for dismissal of plaintiffs’ claim that the [minimum coverage] provision of the Affordable Care Act constitutes an unconstitutional taking in violation of the Fifth Amendment . . . in light of the Supreme Court’s decision in *National Federal of Independent Business v. Sebelius* [NFIB] . . . finding that Congress had the authority to impose the exaction in that provision under its taxing power.” Minute Order, Oct. 3, 2012.

The arguments included in defendants’ motion to dismiss amply justify dismissal of plaintiffs’ takings claim. *See* Doc. No. 32. But the Supreme Court’s conclusion that Congress had the authority to enact the minimum coverage provision of the Affordable Care Act under the taxing power provides yet another reason to dismiss plaintiffs’ takings claim: Exercises of the taxing power are not takings. *See, e.g., Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916); *Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999); *Coleman v. Commissioner of Internal Revenue*, 791 F.2d 68, 70 (7th Cir. 1986); *Dye v. United States*, 516 F. Supp. 2d 61, 70

(D.D.C. 2007). Article I, section 8, of the Constitution grants Congress the power to tax, and it would make no sense for the Constitution to give this power with one hand, and then take it away with the other – *i.e.*, the Just Compensation Clause of the Fifth Amendment. If the United States had to compensate taxpayers for their tax payments, then it would bring in no tax revenue. This is an absurd reading of the Constitution, and absurdity is to be avoided, not embraced, in constitutional interpretation. *M’Culloch v. Maryland*, 17 U.S. 316, 355 (1819) (“As the inevitable consequence of giving this very restricted sense to the word ‘necessary,’ would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected.”).

An exercise of the taxing power can amount to a taking, but only if it is so “arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property. . . .” *Brushaber*, 240 U.S. at 24. Congress’s exercise of the taxing power here was far from arbitrary. Congress designed the minimum coverage provision “to shape decisions about whether to buy health insurance,” by encouraging individuals to purchase qualifying health insurance. *NFIB*, 132 S. Ct. 2566, 2596 (2012). There is, of course, nothing arbitrary about including an exaction designed to encourage the purchase of health insurance in a law – the Affordable Care Act – which is designed to, among other things, “increase the number of Americans covered by health insurance.” *Id.* at 2581. Rather, such an exaction serves to directly further the law’s goals.

For the reasons stated above, and those included in defendants’ motion to dismiss, the Court should dismiss plaintiffs’ takings claim.

Dated: October 12, 2012

Respectfully submitted,

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