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# Seven-Sky v. Holder - Amicus Brief of Association American Physicians and Surgeons et al.

Association of American Physicians and Surgeons

No. 11-5047

# U.S. Court of Appeals for the District of Columbia Circuit

SUSAN SEVEN-SKY, *et al.*,
*Plaintiffs-Appellants,*

vs.

ERIC H. HOLDER, JR., *et al.*,
*Defendants-Appellees.*

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CIVIL CASE NO. 1:10-cv-0950-GK, HON. GLADYS KESSLER

## *AMICUS CURIAE* BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND ALLIANCE FOR NATURAL HEALTH USA IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

LAWRENCE J. JOSEPH
(D.C. Bar No. 464777)
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

## CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, counsel for *amici* provides the following statements:

1. *Amicus curiae* Association of American Physicians & Surgeons, Inc. states (a) that it is an Arizona-based nonprofit membership organization that conducts educational activities and represents the collective interests of medical professionals and patients before the federal and state executive, legislative, and judicial branches of government; (b) that it is an umbrella group for several thousand members from all sectors and modes of medical practice; and (c) that it has no parent corporations and that no publicly held company owns any stock in it.

2. *Amicus curiae* Alliance for Natural Health USA states (a) that it is a District of Columbia-based nonprofit membership-based organization that conducts educational activities and represents the collective interests of medical professionals and patients interested in an "integrative" approach incorporating food, dietary supplements, and lifestyle changes into medical care and practice; (b) that it is an umbrella group for several thousand members and practitioners,

patients, and suppliers interested in that integrative approach to medical care and practice; and (c) that it has no parent corporations and that no publicly held company owns any stock in it.

Dated: May 23, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amici Curiae Association of American Physicians & Surgeons and Alliance for Natural Health USA*

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA ("ANH-USA") present the following certificate as to parties and *amici curiae,* rulings, and related cases.

### A. Parties and *Amici*

AAPS and ANH-USA adopt the Appellants' statement of parties and *amici,* with the addition of AAPS and ANH-USA as *amici* before this Court.

### B. Rulings Under Review

AAPS and ANH-USA adopt the Appellants' statement of the ruling under review.

### C. Related Cases

AAPS and ANH-USA adopt the Appellants' statement of related cases. AAPS and ANH-USA are plaintiffs in the related challenge now before the U.S. District Court for the District of Columbia, *Ass'n of Am. Physicians & Surgeons v. Sebelius,* No. 1:10-cv-0499-ABJ (D.D.C.). The AAPS and ANH-USA litigation was recently re-assigned to the Hon. Amy Berman Jackson, changing the prior citation (1:10-cv-0499-RJL).

Dated: May 23, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amici Curiae Association of American Physicians & Surgeons and Alliance for Natural Health USA*

## CERTIFICATE ON NEED FOR A SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), the Association of American Physicians & Surgeons, Inc. ("AAPS") and Alliance for Natural Health USA ("ANH-USA") require a separate brief to address the separate issues raised in *Ass'n of Am. Physicians & Surgeons v. Sebelius,* No. 1:10-cv-0499-ABJ (D.D.C.), a separate action pending against related defendants in the U.S. District Court for the District of Columbia. These arguments are ones *not raised* by the Plaintiffs-Appellants in this action, either at trial or in this appeal, which therefore typically would not be considered on appeal. *Am. Dental Ass'n v. Shalala,* 3 F.3d 445, 448-49 (D.C. Cir. 1993). Nonetheless, because of the purely legal nature of these issues, AAPS and ANH-USA write separately to encourage the Court to consider these issues as a matter of judicial economy, which the Court has discretion to do. *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976) ("matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases"). Alternatively, if the Court does not consider these issues, those issues will remain open in *Ass'n of Am. Physicians & Surgeons v. Sebelius.*

Dated: May 23, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amici Curiae Association of American Physicians & Surgeons and Alliance for Natural Health USA*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUES**



**REGULATIONS AND RULES**

## GLOSSARY

| | |
|---|---|
| AAPS | Association of American Physicians & Surgeons |
| ANH-USA | Alliance for Natural Health USA |
| APA | Administrative Procedure Act |
| PPACA | Patient Protection and Affordable Care Act |

## IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

*Amicus curiae* Association of American Physicians & Surgeons, Inc. ("AAPS") is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS members include thousands of physicians nationwide in all practices and specialties, many in small practices. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship.

*Amicus curiae* Alliance for Natural Health USA ("ANH-USA") is a not-for-profit membership organization headquartered in the District of Columbia. ANH-USA was founded to promote sustainable health and freedom of choice in healthcare and to shift the medical paradigm from an exclusive focus on surgery, drugs, and other conventional techniques to an "integrative" approach incorporating food, dietary supplements, and lifestyle changes. Traditional "preventative" medicine is too often

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

defined as taking more and more drugs at an earlier and earlier age, even in childhood. By contrast, ANH-USA's concept of sustainable health is real preventative medicine and dramatically reduces healthcare costs through diet, dietary supplements, exercise, and the avoidance of toxins.

*Amici* AAPS and ANH-USA members include without limitation medical caregivers – who also are consumers of medical care – as well as medical employers and owners and managers of medical businesses subject to the insurance mandates in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("PPACA"). Accordingly, AAPS and ANH-USA have a direct and vital interest in the issues before this Court. *Amici* AAPS and ANH-USA file this *amicus* brief with the consent of all parties.

## INTRODUCTION

AAPS and ANH-USA support Appellants in their challenge to PPACA's insurance mandates. AAPS and ANH-USA filed their own challenge to PPACA and other aspects of the federal government's regulation of medical practice, which still is pending in the U.S. District Court for the District of Columbia. *Ass'n of Am. Physicians & Surgeons*

*v. Sebelius,* No. 1:10-cv-0499-ABJ (D.D.C.). That litigation raises not only the Commerce Clause and Taxing Power issues raised in this litigation, but also issues under the Equal Protection component of the Fifth Amendment and the Takings Clause not raised here. AAPS and ANH-USA write separately to encourage the Court to consider these purely legal issues.

## STATUTES AND REGULATIONS

In addition to the provisions cited in the Appellants' brief and addendum, AAPS and ANH-USA in this *amicus* brief rely on the Fifth Amendment, which provides in pertinent part that "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 3-4. In addition to its express terms, the Fifth Amendment includes an equal-protection component against federal discrimination, paralleling the Equal Protection Clause of the Fourteenth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976). That Clause provides that "[n]o state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." U.S.

CONST. amend. XIV, §1, cl. 4.

## STATEMENT OF ISSUES

In addition to the issues raised in the Appellants' brief, AAPS and ANH-USA respectfully submit the following additional bases on which this Court should find the Individual Mandate unconstitutional:

(1) Whether the Individual Mandate violates the Equal Protection component of the Fifth Amendment?

(2) Whether the Individual Mandate and PPACA's insurance criteria constitute an unlawful Taking under the Fifth Amendment?

The AAPS/ANH-USA litigation squarely presents these issues, but the District Court has not as yet reached them in that litigation. The following section outlines this Court's *discretion* to address these issues in this litigation, in the interest of judicial economy.

## STANDARD OF REVIEW

This Court reviews dismissals under FED. R. CIV. P. 12(b)(6) *de novo. Kaemmerling v. Lappin,* 553 F.3d 669, 676-77 (D.C. Cir. 2008). Even when the issues before this Court are purely legal, the Court generally does not consider "separate contentions raised by *amicus curiae* … [that] are beyond the scope of the issues raised below by the appellants." *Am. Dental Ass'n v. Shalala,* 3 F.3d 445, 448-49 (D.C. Cir.

1993) (*citing Kamen v. Kemper Financial Services,* 500 U.S. 90, 97 n.4 (1991) *and United Parcel Service v. Mitchell,* 451 U.S. 56, 60 n.2 (1981)). Although this judicial practice applies to any arguments not raised before the trial court, it "is particularly true where … th[e] arguments entail fact-intensive inquiries." *Elliott v. U.S. Dep't of Agriculture,* 596 F.3d 842, 851 (D.C. Cir. 2010). Nonetheless, the Court plainly has *discretion* to consider such *amici* arguments: "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976).

Given that AAPS and ANH-USA have a parallel challenge to PPACA pending in the District Court in this Circuit, judicial economy may favor this Court's considering these additional issues here. Whether the Court considers the AAPS/ANH-USA arguments or elects not to consider them, the Court's decision should address the impact of its decision in this litigation on the AAPS/ANH-USA litigation.

## STATEMENT OF THE CASE AND FACTS

PPACA represents a massive expansion of the federal role in

healthcare and health insurance, passed on party-line votes and unusually explicit state-by-state deal-making in the Senate (*e.g.,* the "Cornhusker Kickback" and "Louisiana Purchase") to secure the votes of moderate Democrats and thereby to obtain cloture and defeat a filibuster. For purposes of this appeal, AAPS and ANH-USA focus on only a few PPACA provisions: (1) PPACA §1501 requires individuals to obtain PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §5000A (the "Individual Mandate"); (2) PPACA §1513 requires employers with fifty or more "fulltime" (as defined) employees to provide PPACA-compliant health insurance or pay a penalty, 26 U.S.C. §4980H (the "Employer Mandate"); and (3) Public Health Service Act §2704(a) and §2711(a)(2), as amended by PPACA, drive up the cost of insurance by prohibiting the exclusion of insureds with pre-existing conditions, prohibiting insurers from setting lifetime limits, and restricting insurers' use of annual limits on coverage. 42 U.S.C. §§300gg(a), 300gg-5(a)(2).

## SUMMARY OF ARGUMENT

Although *amici* AAPS and ANH-USA agree with Appellants that PPACA's insurance mandates exceed federal power under the

Commerce Clause and the Taxing Power, this brief argues two additional theories: (1) that PPACA's insurance mandates violate equal-protection principles by failing to provide alternate means of compliance to self-insured individuals whose medical expenses will not impose any burdens on the federal fisc; and (2) that PPACA's insurance mandates and accompanying penalties, together with the various regulations imposed on the insurance industry, constitute unlawful takings by compelling the healthy to subsidize the unhealthy through higher insurance premiums for the healthy so that the unhealthy may enjoy lower insurance rates. While this regime may make sense in the private market for group insurance policies, the federal government – as one of enumerated powers – has no right to compel the public to participate in such a market.

## ARGUMENT

### I. PPACA'S INSURANCE MANDATES VIOLATE THE FIFTH AMENDMENT'S EQUAL PROTECTION COMPONENT

As demonstrated in this Section, PPACA's Individual Mandate violates the Fifth Amendments' equal-protection component. *See Bolling,* 347 U.S. at 499; *Buckley,* 424 U.S. at 93. As such, the Individual Mandate is invalid, even if otherwise within the Commerce

Clause or Taxing Power.

PPACA purportedly seeks to protect the federal fisc from uninsured patients' imposing costs on the health system, arguing circularly that the federal decision to require emergency rooms to treat the public regardless of any ability to pay[2] somehow justifies PPACA's acting against those private citizens who have not burdened, and will not burden, the federal fisc.

At the outset, this federal attempt to save the federal government from itself is hopelessly circular. Even defendants must have standing to proceed, and the federal government here seeks to redress an entirely self-inflicted injury. *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (no standing to redress "self-inflicted" injuries); *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injury does not support standing if it is "so completely due to the [complainant's] own fault as to break the causal chain") (*quoting* 13C. WRIGHT, A. MILLER & E. COOPER, FED. PRACTICE & PROCEDURE: Jurisdiction 2d §3531.5 (2d ed. 1984)). While the federal government

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[2] *See* Emergency Medical Treatment & Active Labor Act, 42 U.S.C. §1395dd.

may have the authority to tax the public generally and to provide benefits to some or all of the public, *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 585 (1937), the authority to proceed discretely under the Taxing Power and under the Spending Clause (as the government argued in *Steward Machine* for Social Security) differs completely from PPACA's cobbled-together mandates of private actions and private subsidies.

Moreover, at least with respect to individuals who prefer and choose to maintain high-deductible, catastrophic-risk insurance and are financially able to make their deductible payments, the Individual Mandate imposes burdens on these "self-paying" citizens, greater than the burdens imposed on citizens who hold the type of insurance that PPACA ordains. This differential treatment unlawfully discriminates against those with high-deductible plans who do not impose any burdens on the federal fisc.

Such people – and AAPS and ANH-USA member-affiants in the AAPS/ANH-USA litigation fall within this group – may therefore invoke the right to equal treatment, via an exemption from PPACA's penalties for maintaining their preferred method of health insurance and

payment. *Gratz v. Bollinger,* 539 U.S. 244, 262 (2003) ("*'injury in fact'*… is the denial of equal treatment [from] imposition of the barrier") (emphasis added). "[W]hen the "right invoked is that of equal treatment," "the appropriate remedy is a mandate of *equal* treatment, [which] can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 740 (1984) (emphasis in original). Plaintiffs therefore have equal-protection rights to enforce against PPACA's insurance mandates.

Precisely to avoid equal-protection arguments and injuries, states that condition the *privilege* of a driver's license on maintaining minimum insurance *for third-party liability* typically allow alternatives, such as self-insurance, bonds, and certificates of deposit for those minimum amounts. *See, e.g.,* CAL. VEH. CODE §16053; OHIO REV. CODE ANN. §4509.45; LA. REV. STAT. ANN. §32:104. Failure to provide these alternatives on equal terms with the insurance option constitutes an equal-protection violation:

> Another reason against having separate penalty rules for insurers and self-insurers dealing with claimants is the potential violation of the constitutional concepts of equal protection and

> fundamental fairness [because] [a]ll persons in the same class, including insurers and self-insurers, should have similar legal obligations under similar circumstances.

*Hebard v. Dillon,* 699 So.2d 497, 503 (La. App. 1997); *Jitney Bus Ass'n v. City of Wilkes-Barre,* 256 Pa. 462, 469, 100 A. 954, 956 (Pa. 1917) ("municipality is entitled to require good and sufficient security, but beyond that it should not go"); *People v. Kastings,* 307 Ill. 92, 108-09, 138 N.E. 269, 275 (Ill. 1923) (reversing conviction and invaliding statute for impermissibly discriminating between taxis giving bonds and taxis with insurance).

Of course, using the automobile-insurance analogy *to defend* the Individual Mandate is a rhetorical canard by PPACA supporters. Unlike PPACA's regulating *inactivity* (*i.e.,* simply being alive), automobile-insurance requirements cover liability *to third parties* and attach to the *privilege* of a license. Nonetheless, even the automobile-insurance cases demonstrate that such mandates – *when lawful at all* – must comply with equal-protection principles. Because PPACA does not, this Court should find it unconstitutional, even if regulating inactivity falls within the Taxing or Commerce Powers.

## II. PPACA'S INSURANCE MANDATES VIOLATE THE TAKINGS CLAUSE

In addition to violating equal-protection principles, the Individual Mandate also constitutes an unconstitutional taking. In the AAPS/ANH-USA litigation, the federal government defended against the Takings Clause on four grounds: (1) plaintiffs have not sought compensation in the Court of Federal Claims, (2) PPACA does not itself *require* insurance-premium increases, (3) requiring payment of money is not a taking, and (4) PPACA confers benefits on those it compels to pay increased premiums. Because all of these defenses lack merit, PPACA clearly constitutes a taking of that portion of the PPACA-mandated premium or penalty that subsidizes PPACA's lowered premiums rates for those with pre-existing conditions and other conditions that previously elevated their insurance premium rates.

"[I]t 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." *Kelo v. City of New London,* 545 U.S. 469, 477 (2005) (emphasis in original). Even to the extent that the benefits conferred upon those whom PPACA subsidizes constitute a *public* benefit, the taking nonetheless requires

compensation. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241-42 (1984). Accordingly, PPACA is either *per se* unconstitutional for taking private property *for private use,* or it is unconstitutional for taking private property for public use *without compensation.* Either way, PPACA violates the Takings Clause.

Certainly, PPACA cannot accomplish indirectly through its directives on insurers – with whom PPACA compels the public to deal – what PPACA could not accomplish directly: "It would be a palpable incongruity to strike down … legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost v. Railroad Comm'n of State of California,* 271 U.S. 583, 593-94 (1926). AAPS and ANH-USA now rebut the federal government's four defenses.

*First,* provided that the court otherwise has jurisdiction, federal courts can hear claims that future – even speculative – takings would render a statute unconstitutional:

> Mr. Justice REHNQUIST suggests that appellees' "taking" claim will not support jurisdiction under § 1331(a), but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act. We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases,* which were brought under § 1331 as well as the Declaratory Judgment Act. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

*Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 71 n.15 (1978) (citations omitted). The *Duke* plaintiffs satisfied constitutional thresholds with aesthetic standing, based on nuclear power plants' environmental impacts, but sought declaratory relief that a statutory damage cap for future catastrophic nuclear accidents constituted an unconstitutional taking. *Id.* Similarly, plaintiffs can challenge PPACA's *future* unconstitutional takings by seeking declaratory relief that the regime is unlawful.

*Second,* contrary to its suggesting mere *encouragement* or *awareness* of changes in the private insurance market, the federal government *commanded* those changes in its capacity as federal sovereign. Specifically, in the AAPS/ANH-USA litigation now pending below, the federal government cited *Nat'l Bd. of YMCA v. U.S.,* 395 U.S. 85, 93 (1969), and its progeny to suggest that the federal government lacks "direct and substantial enough government involvement to warrant compensation under the Fifth Amendment." *YMCA* involved the military's "temporary, unplanned occupation" of a private building in the Canal Zone to protect that building from rioters, which is not a taking just as "entry by firemen upon burning premises cannot be said to deprive the private owners of any use of the premises." *YMCA,* 395 U.S. at 93. Here, by contrast, the federal government's actions are permanent, planned, and unwelcome.

None of the federal government's other cited decisions involve government compulsion. *See Casa de Cambio Comdiv S.A. v. U.S.,* 291 F.3d 1356, 1362 (Fed. Cir. 2002) (private bank debited plaintiff's account for amount of fraudulent U.S. Treasury check after Federal Reserve debited private bank's Treasury account upon discovery of the

fraud); *Shewfelt v. U.S.,* 104 F.3d 1333, 1337 (Fed. Cir. 1997) (mere awareness of private conduct); *B&G Enters., Ltd. v. U.S.,* 220 F.3d 1318, 1321 (Fed. Cir. 2000) (mere encouragement of state conduct through federal funding). In *Turney v. U.S.,* 126 Ct.Cl. 202, 115 F.Supp. 457 (1953), the Federal Circuit's predecessor found a taking based on the fact that "[t]he relations, at the time, between our Government and the Philippine Government, were close" and that the Philippine Government "naturally, readily complied" when the federal government "requested that [the Philippine] Government … place an embargo upon the exportation of any of the property," thereby "put[ting] irresistible pressure upon the corporation to come to terms with" the federal government. *Turney,* 115 F.Supp. at 463. Here, the federal government is intimately more involved with the insurance industry in its negotiations over PPACA's enactment and implementation than the federal government was actually involved with the Philippine government in *Turney*.

Under PPACA, insurers essentially serve as public utilities that implement federal policy. Significantly, private-entity public utilities can have the power of eminent domain because they serve a public

purpose, *Pacific Gas & Electric Co. v. Hay,* 68 Cal.App.3d 905, 910-11 (Cal. App. 1977), but must satisfy the Fifth Amendment when they take private property for public use. *Id.* Even if PPACA drives insurance premiums *down,* PPACA nonetheless effects a taking for the quantifiable portion of insurance premiums for the healthy that subsidize lower insurance premiums for those with pre-existing and other high-premium conditions (*i.e.,* the healthy should have *still-lower* premiums).

*Third,* the federal government cited a cobbled-together "majority" of Supreme Court dissents and concurrences in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), for the proposition that obliging payment of money is not a taking. Such cobbling is meaningless because, for "fragmented [decisions in which] no single rationale explaining the result enjoys the *assent* of five Justices, the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments* on the narrowest grounds." *Marks v. U.S.,* 430 U.S. 188, 193 (1977) (emphasis added, interior quotations omitted). Indeed, this Court has held as much for the very *Eastern Enterprises* decision that the federal government cited. *See Ass'n of Bituminous Contractors, Inc. v.*

*Apfel,* 156 F.3d 1246, 1254-55 (D.C. Cir. 1998).

Contrary to the federal government's cobbled-together majority, the Supreme Court has held that "[t]here is no warrant for taking the property *or money* of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees." *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330, 357 (1935). With respect to the taking of money (*i.e.,* the issue here), the Supreme Court has not overturned that proposition. "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (interior quotations omitted); *accord U.S. Air Tour Ass'n v. FAA,* 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002).

In any event, a quantifiable portion of every PPACA-compliant health insurance policy covers PPACA's subsidy of those with pre-existing conditions and other conditions that elevated their pre-PPACA insurance rates. As such, PPACA "takes" that portion of the insured's

premium (*i.e.,* PPACA takes a "specific, separately identifiable fund of money"). *See Apfel,* 524 U.S. at 555 (*distinguishing Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), because it involved a "specific, separately identifiable fund of money") (Breyer, J., dissenting). Thus, even under the theory put forward by the federal government, PPACA constitutes an unlawful taking.

*Fourth,* the notion that PPACA provides something valuable is simply false for the self-insured or those with PPACA-noncompliant catastrophic-risk insurance who must pay a penalty. Affected AAPS and ANH-USA members (and millions like nationwide) them get *nothing* valuable from PPACA. Even members with "traditional" employer-provided health insurance who must pay higher premiums to subsidize PPACA's favorable treatment of those with pre-existing conditions do not obtain "significant, concrete, and disproportionate benefits" for that portion of their insurance premiums that subsidizes the lower premiums that PPACA makes available for those with pre-existing conditions. Overcharging A to subsidize B constitutes a quantifiable taking within the insurance premium of every healthy person.

Because all of the federal government's objections lack merit,

PPACA's insurance mandates violate the Takings Clause and thus are invalid, even if within the Commerce Clause or the Taxing Power.

## CONCLUSION

While it may be permissible to tax the public honestly through the Taxing Power and to spend that tax revenue on the uninsured honestly through the Spending Clause, *see Steward Mach.,* 301 U.S. at 585, that does not allow the federal government to compel the public to pay for the uninsured through inflated private insurance premiums or to pay related non-tax penalties. In avoiding the honest – and *potentially* constitutional – means of accomplishing its goals, PPACA is too clever by half. In no way, however, is PPACA constitutional.

For the foregoing reasons and those argued by Appellants and *amici* with respect to the Commerce Clause, the Court should reverse the district court and hold the PPACA unconstitutional.

Dated: May 23, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amici Curiae Association of American Physicians & Surgeons and Alliance for Natural Health USA*

## BRIEF FORM CERTIFICATE

Pursuant to FED. R. APP. P. 32(a), I certify that the attached "*Amicus Curiae* Brief of Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA in Support of Appellants in Support of Reversal" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 3,664 words, including footnotes, but excluding this Brief Form Certificate, the Corporate Disclosure Statement, the Statement with Respect to Parties and *Amici,* the Table of Authorities, the Table of Contents, the Glossary, and the Certificate of Service. I have relied on Microsoft Word 2010's word calculation feature for the calculation.

Dated: May 23, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, DC Bar #464777
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amici Curiae Association of American Physicians & Surgeons and Alliance for Natural Health USA*

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May 2011, I have caused the foregoing "*Amicus Curiae* Brief of Association of American Physicians & Surgeons, Inc. and Alliance for Natural Health USA in Support of Appellants in Support of Reversal" to be served on the parties' counsel via the Court's CM/ECF System. In addition, I have caused two copies of the foregoing *amicus* brief to be served on the following counsel who are not CM/ECF participants by First Class U.S. Mail:

Jay Alan Sekulow,
Miles Landon Terry
American Ctr. for Law & Justice
201 Maryland Avenue, NE
Washington, DC 20002

/s/ Lawrence J. Joseph
Lawrence J. Joseph