

**LAWRENCE J. JOSEPH, ESQ.**

1250 Connecticut Ave. NW, Suite 200 - Washington, DC 20036

Tel: 202-355-9452 - Fax: 202-318-2254

**ORAL ARGUMENT NOT SCHEDULED**

July 11, 2013

***Via Electronic Case Filing***

Mr. Mark J. Langer  
Clerk of the Court  
U.S. Court of Appeals, D.C. Circuit  
333 Constitution Ave., NW  
Washington, D.C. 20001

**Re: *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, No. 13-5003  
Notice of Supplemental Authority, FED. R. APP. P. 28(j):**

**Mark J. Mazur, Ass't Secretary for Tax Policy U.S. Dep't of  
Treasury, "Continuing to Implement the ACA in a Careful,  
Thoughtful Manner" (July 2, 2013)**

Dear Mr. Langer:

Plaintiffs-appellants notify the Court of the above-captioned "blog" post, which purports to suspend for 2014 the "employer mandate" challenged in Count II. Although even partial and temporary relief is welcome, this blog posting and future agency actions to the same substantive effect cannot lawfully impact this litigation.

By way of background, "[a]ny assessable payment provided by this section shall be paid *upon notice and demand by the Secretary*, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. §4980H(d)(1) (emphasis added). Under the cited tax-penalty provisions, "[n]o penalty shall be imposed ... unless the Secretary notifies the taxpayer in writing ... that the taxpayer shall be subject to an assessment of such penalty." 26 U.S.C. §6672(b)(1).

Unlike statutes amenable to *unreviewable enforcement discretion*, this section is mandatory, 26 U.S.C. §4980H, making the blog posting and any administrative progeny reviewable. *Ass'n of Irrigated Residents v. EPA*, 494 F.3d

Mr. Mark J. Langer  
Clerk of the Court  
July 11, 2013  
Page 2

1027, 1032 (D.C. Cir. 2007). If reviewed, the deferral surely would be voided because the Executive Branch cannot lawfully amend statutes by fiat.

Indeed, the statute cabins executive authority to waive penalties by allowing that the government “*may* provide for the payment of any assessable payment provided by this section on an annual, monthly, or other *periodic* basis as the Secretary may prescribe.” 26 U.S.C. §4980H(d)(2) (emphasis added). Permissively allowing periodic payments precludes across-the-board, outright waivers of penalties: Agencies “may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 485 (2001).

The current administration’s neglecting its obligation to faithfully execute the laws cannot estop the administration – much less *future administrations* – from collecting mandated penalties for 2014:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

*F.C.I.C. v. Merrill*, 332 U.S. 380, 384 (1947). Accordingly, the blog post has no lawful impact on this litigation.

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph  
*Counsel for Plaintiffs-Appellants*

Enclosure

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of July 2013, I have caused the foregoing Notice of Supplemental Authority and its enclosure to be served on the following counsel via the Court's CM/ECF System:

Dana Kaersvang  
U.S. Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Ave. NW, Rm 7533  
Washington, D.C. 20530  
Tel: 202-307-1294  
Email: Dana.L.Kaersvang@usdoj.gov

/s/ Lawrence J. Joseph

---

Lawrence J. Joseph