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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):**

***Horne v. Dep't of Agriculture*, 186 L.Ed.2d 69 (2013)**

Dear Mr. Langer:

Plaintiffs-appellants notify the Court of *Horne v. Dep't of Agriculture*, which held that the Tucker Act poses no jurisdictional or prudential bar to takings claims (1) for monetary exactions; and (2) where Congress did not provide the Tucker Act as the sole, adequate remedy. 186 L.Ed.2d at 81-83. In prior briefing, defendants-appellees (collectively, the "Administration") argued that obligations to pay money do not constitute takings and that takings-based claims would be unripe without seeking compensation under the Tucker Act. Defs.' Memo. at 31 (docket #32). As explained, *Horne* forecloses the Administration's two arguments.

By way of background, this action challenges the "Affordable Care Act" as a coerced transfer of wealth from healthy insureds to unhealthy ones – *e.g.*, those with pre-existing conditions that would elevate their insurance premiums in the absence of the challenged statute – that constitutes an unlawful taking of private property for *private subsidies*. Opening Br. at 32-33. Although the Administration lacks direct authority to impose that regime, the Chief Justice's saving construction posits that noncompliance penalties could be alternative taxes for opting out of this insurance regime. *Id.* at 28. Plaintiffs allege that the Fifth Amendment prohibits

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selectively taxing those who decline to subsidize private third parties voluntarily. *Id.* at 28-34. *Horne* supports this challenge in two ways.

First, *Horne* holds that plaintiffs need not bring takings claims in the Federal Circuit to recover takings of money when another court has jurisdiction over the dispute. *See* 186 L.Ed.2d at 83 (“it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding”); Opening Br. at 32-34.

Second, the “prudential ripeness” concerns from failing to exhaust available remedies are “not, strictly speaking, jurisdictional,” 186 L.Ed.2d at 81-82, and they are completely inapposite when the government fails to provide alternate remedies. *Id.* Here, the taking occurs when an insured pays elevated premiums to subsidize private third parties’ lower premiums to avoid the Administration’s coercive penalties. Plaintiffs have absolutely no after-the-fact remedy – under the Tucker Act or otherwise – to recover such overpayments.

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

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

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/s/ Lawrence J. Joseph

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