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 15, 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):

***Center for Biological Diversity v. EPA,* No. 11-1101, 2013 U.S. App. Lexis 14108 (D.C. Cir. July 12, 2013)**

Dear Mr. Langer:

Plaintiffs-appellants ("Plaintiffs") notify the Court of *Center for Biological Diversity v. EPA ("CBD")*, which held that a federal agency lacks authority to defer the operation of mandatory Clean Air Act provisions with respect to biogenic sources of carbon dioxide. As noted in Plaintiffs' notice of supplemental authority on July 11, 2013, defendants-appellees (collectively, the "Administration") recently announced that technical reporting difficulties require deferring for one year the "employer mandate" challenged in Count II of Plaintiffs' complaint. *CBD* makes clear that the Administration lacks authority to defer mandatory statutory provisions like the employer mandate by executive fiat, thereby reinforcing Plaintiffs' argument that deferring the employer mandate has no *lawful* effect on this litigation.

By way of background, §1513(d) of the "Affordable Care Act" requires the employer mandate to commence in 2014, Pub. L. No. 111-148, §1513(d), 124 Stat. 119, 256 (2010), and the employer mandates' provisions are mandatory, 26 U.S.C. §4980H, with no delegated discretion except the Administration's authority to allow periodic payments. *Id.* §4980H(d)(2). As such, the Administration's planned

delay is unlawful unless an administrative exception applies. *CBD* rejects the only two options, the one-step-at-a-time and administrative-necessity doctrines.

First, the one-step-at-a-time doctrine requires that incremental steps be "consistent with the statutory text." *CBD*, 2013 U.S. App. Lexis 14108, at 30 (Kavanaugh, J, concurring.); *cf. id.* at 19-22 (Tatel, J.) (finding agency action arbitrary and capricious). Here, the proposed deferral is inconsistent with the statutory text, which makes the one-step-at-a-time doctrine inapposite. Moreover, to the extent that the deferral could survive judicial review, the Affordable Care Act's lack of a severability clause would require deferring not only the employer mandate but also any provisions – such as the individual mandate, if not the whole statute – that Congress would not have enacted but for the employer mandate.

Second, the administrative-necessity doctrine requires both impossibility and the narrowest feasible exemption. *CBD*, 2013 U.S. App. Lexis 14108, at 22-23 (Tatel, J.). Given its willingness to accept individuals' mere "attestation" for dispensing subsidies to individuals, 78 Fed. Reg. 42,160, 42,254 (2013), the Administration cannot argue that self-reporting would not similarly provide acceptable employer-mandate information for 2014.

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 15th 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