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**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):**

***Koontz v. St. Johns River Water Mgmt. Dist.*, \_\_ S.Ct. \_\_ (2013)**

Dear Mr. Langer:

Plaintiffs-appellants (“Plaintiffs”) notify the Court of *Koontz v. St. Johns River Water Mgmt. Dist.*, which held the Takings Clause and the “unconstitutional conditions” doctrine to apply to coerced takings of money. In prior briefing, defendants-appellees (collectively, the “Administration”) improperly sought to cobble concurring and dissenting opinions into a holding that the Takings Clause does not apply to taking money. Compare Defs.’ Memo. at 54 (docket #32) with *Marks v. U.S.*, 430 U.S. 188, 193 (1977) and *Ass’n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). *Koontz* forecloses that Administration effort and reaffirms the application of the Takings Clause and unconstitutional conditions doctrine here.

By way of background, Plaintiffs challenged the “Affordable Care Act” as a 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 – thereby unlawfully taking private property for *private subsidies*. Opening Br. at 32-33. The Chief Justice’s saving construction acknowledges that the federal government lacks authority to impose this regime *directly*, but posits that the penalty for not complying with the regime could be a

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tax. *Id.* at 28-29. Plaintiffs allege that the Fifth Amendment prohibits such selective taxation for not surrendering voluntarily to the taking under the Fifth Amendment. *Id.* at 28-34.

*Koontz* supports Plaintiffs by reaffirming that the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up” and “forbid[s] the government from engaging in out-and-out ... extortion that would thwart the Fifth Amendment right to just compensation.” \_\_\_ S.Ct. at \_\_\_-\_\_\_ (internal quotations omitted). As here (Opening Br. at 32-33), the Administration “could not have constitutionally ordered [Plaintiffs] to do what it attempted to pressure [Plaintiffs] into doing” (namely, subsidize private third parties’ insurance premiums), where “directly seiz[ing]” subsidies from those who fail to volunteer them “would have [been] a *per se* taking.” \_\_\_ S.Ct. at \_\_\_-\_\_\_; Opening Br. at 33-34. Even if otherwise-lawful, nondiscriminatory taxes *could have* met the Administration’s goals, the “tax” here violates the Fifth Amendment.

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 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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