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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):**

***Liberty Univ. v. Merrill*, 2013 U.S. App. Lexis 14052 (4th Cir. 2013)**

Dear Mr. Langer:

Plaintiffs-appellants (“Plaintiffs”) notify the Court of *Liberty University v. Merrill*, in which the Fourth Circuit addressed several issues relevant to Plaintiffs’ challenge to the “Affordable Care Act,” both with respect to the jurisdiction and merits of challenges to the “employer mandate” and with respect to the argument that the enactment of the “individual mandate” as a tax under the Chief Justice’s saving interpretation violated the Origination Clause of the Constitution.

Because the Fourth Circuit’s resolution of the employer-mandate issues rejected some of the government’s arguments, while ultimately upholding that mandate, Plaintiffs will address *Liberty University* and the government’s arguments in reply to the government’s brief. With respect to the arguments raised against the entire Affordable Care Act under the Origination Clause, the Fourth Circuit held that the plaintiffs there had waived those arguments:

Plaintiffs had the opportunity to raise these arguments in the district court and in the original briefing in this case but did not do so; thus the arguments are waived.

Mr. Mark J. Langer  
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July 15, 2013  
Page 2

*Liberty Univ.*, 2013 U.S. App. Lexis 14052, at 18 n.3. Although the district court in this action held that Plaintiffs waived these arguments, JA \_\_\_, the district court erred because Plaintiffs raised the issue in response to the district court's request for supplemental briefing – without the government's objection – which suffices as implied consent under FED. R. CIV. P. 15(b). *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965); *Strategic Outsourcing, Inc. v. Continental Cas. Co.*, 274 Fed.Appx. 228, 233 (4th Cir. 2008). To avoid Rule 15(b), the government needed to object. *Banks v. Dretke*, 540 U.S. 668, 704 (2004). Had the government objected, Plaintiffs could have resolved the issue by moving to amend and supplement their complaint. FED. R. CIV. P. 15(a), (c).

Consistent with the Fourth Circuit's tying waiver to failure to raise issues in the district court and those plaintiffs' initial appeal, waiver is inappropriate here, where Plaintiffs raised these issues in district court and their opening appellate brief (at 34-45). *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445-48 (1993).

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:

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/s/ Lawrence J. Joseph

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