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ORAL ARGUMENT SCHEDULED JANUARY 10, 2014

December 30, 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):**

**Centers for Medicare & Medicaid Services, MLN Matters No:
SE1305, *Full Implementation of Edits on the Ordering/Referring
Providers in Medicare Part B, DME, and Part A Home Health
Agency (HHA) Claims (Change Requests 6417, 6421, 6696, and
6856) (Nov. 6, 2013)***

Dear Mr. Langer:

Plaintiffs-appellants Association of American Physicians & Surgeons and Alliance for Natural Health USA (collectively, "Plaintiffs") notify the Court of the above-captioned agency action (enclosed) by defendants-appellees Department of Health & Human Services *et al.* (collectively, "HHS").¹ The HHS action makes January 6, 2014, the new effective date for the changes to the Medicare-referral procedures challenged in Plaintiffs' Count IV. The HHS action reinstates the situation against which Plaintiffs sought emergency relief (denied by this Court's order dated April 17, 2013), although subsequent HHS action voluntarily and indefinitely deferred the changes' effective date. Now that HHS has reinstated its on-again, off-again changes, Plaintiffs again require interim relief, which they will seek from the Circuit Justice based on this Court's denying interim relief in April.

¹ HHS did not notice its action in the *Federal Register*, but HHS's counsel advised Plaintiffs' counsel of it on December 26, 2013.

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By way of background, Count IV challenges the procedural and substantive validity of new HHS requirements for non-Medicare physicians who refer Medicare-eligible patients for Medicare-covered services (*e.g.*, bloodwork, x-rays, oxygen) by Medicare providers. Opening Br. at 45-52. Because HHS relies on authority conferred by §6405 of the Patient Protection and Affordable Care Act (“PPACA”) for the substantive authority to implement these changes, invalidating PPACA under the Origination Clause would therefore invalidate these Medicare changes. *Id.* at 51-52. Significantly, HHS limited its substantive defense against the Origination Clause to arguing that Plaintiffs waived the issue in district court, HHS Br. at 14, while also arguing that Plaintiffs’ procedural claims are moot. *Id.* at 16.² By not substantively defending PPACA under the Origination Clause, HHS waived its claim to PPACA’s constitutional validity. Reply Br. at 1-3, 18. Accordingly, if this Court accepted Plaintiffs’ unchallenged substantive arguments, HHS would lack authority for the challenged actions, even if HHS adopted them through procedurally proper actions. Further, by resetting the effective date without any procedural compliance, HHS continues its rampant PPACA noncompliance with notice-and-comment requirements.

Plaintiffs will apprise this Court of relevant filings with the Circuit Justice.

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Plaintiffs-Appellants

Enclosure

² Plaintiffs dispute HHS’s waiver and mootness arguments. Reply Br. at 13-18, 24-27.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 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

Lawrence J. Joseph