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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):**

***United States v. Windsor*, ___ S.Ct. ___ (2013)**

Dear Mr. Langer:

Plaintiffs-appellants notify the Court of *U.S. v. Windsor*, which reaffirmed the equal-protection component in the liberty interest protected by the Due Process Clause. ___ S.Ct. at __; Opening Br. at 28-34. Under these equal-protection principles, “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” ___ S.Ct. at __ (*quoting Romer v. Evans*, 517 U.S. 620, 633 (1996), *quoting Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Like *Windsor* and *Coleman* on which it relies, this case applies equal-protection principles to taxation:

[T]he equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.

Coleman, 277 U.S. at 37. As the majorities in *Coleman*, *Romer*, and *Windsor* held, the challenged statutes’ unprecedented distinctions were relevant: “The absence of precedent for [the statute] is itself instructive.” *Romer*, 517 U.S. at 633 (*citing*

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Coleman). Similarly here, using the Commerce Power to compel the private purchase of a private product, coupled with that private product's requiring – as regulated by the federal statute – some private purchasers to subsidize other private purchasers, is wholly unprecedented.

Indeed, the statute here is even more unusual. The Supreme Court found the Affordable Care Act's insurance regime outside the Commerce Power, but construed the penalty for noncompliance as an alternative tax that one could pay in lieu of following the federal insurance regime. Opening Br. at 29-29. As applied to those who decline to surrender voluntarily to the coerced subsidy of private third parties, the statute here *further* lacks lawful precedent. This “unusual” discrimination helps establish “improper animus or purpose.” *Windsor*, __ S.Ct. at __; *Coleman*, 277 U.S. at 37 (“the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis”) (interior quotations omitted).

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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