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ORAL ARGUMENT HELD JANUARY 10, 2014

January 13, 2014

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):

U.S. v. Williams, **504 U.S. 36 (1992); and**
Jones v. Bock, **549 U.S. 199 (2007)**

Dear Mr. Langer:

At oral argument, Judge Williams queried whether the opening brief of plaintiffs-appellants Association of American Physicians & Surgeons and Alliance for Natural Health USA (collectively, "Plaintiffs") needed to assert affirmatively the reasons why the district court erred in finding that Plaintiffs waived arguments under the Origination Clause in the district court, as a precondition to Plaintiffs' asserting the Origination Clause in the court of appeals.[1] No such rule applies to *de novo* appellate review, and adopting a rule would require rulemaking. *Jones v. Bock*, 549 U.S. 199, 224 (2007).

[1] The brief filed by the federal appellees-defendants (the "Administration") neither asserts forfeiture regarding Plaintiffs' opening brief and the Origination Clause, *see* Fed. Br. at 10, 14-15, nor identifies it as an issue. *See id.* at 1-2. Assuming *arguendo* that forfeiture existed under these circumstances (it does not), the Administration would have waived it by failing to assert it. *See* Reply Br. at 7 & n.3.

Although they have discretion to consider even issues not raised by the parties, appellate courts typically confine themselves to issues pressed in or passed upon by the lower court, a "rule [that] operates (as it is phrased) in the disjunctive." *U.S. v. Williams*, 504 U.S. 36, 41 (1992). Here, Plaintiffs plainly pressed the Origination Clause below, JA111-14, which is all that *de novo* review requires. A "we-raised-it-below" showing is not required for each issue that each appellant seeks to raise in *de novo* appeals. Instead, any such alleged failure constitutes a counterargument that appellees can raise, *Bock*, 549 U.S. at 212; *Sims v. Apfel*, 530 U.S. 103, 109-10 (2000), and appellants can rebut in reply.

One general reason courts enforce forfeiture is to avoid "sandbagging" appellees. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000). Here, the Administration knew Plaintiffs' views from the briefing of the motion for interim relief. Indeed, regarding waiver and the Origination Clause, it is the Administration (not Plaintiffs) who waived the issue when its brief failed to respond to issues raised in Plaintiffs' notice of supplemental authority on the *Liberty University* litigation. *See* Reply Br. at 16-18.

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2014, 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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