IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:14-cv-01967-RMC
	)	
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CERTIFICATION OF THIS COURT'S ORDER OF SEPTEMBER 9, 2015, FOR INTERLOCUTORY APPEAL

Section 1292(b) provides for interlocutory appeals of orders that warrant immediate review because they are "pivotal and debatable." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 46 (1995). As our motion demonstrates, that standard is plainly satisfied by this Court's Order. Indeed, this Court recognized that "no precedent dictates the outcome" of this suit, which is "the first" of its kind in the Nation's history and which implicates fundamental questions about the limitations on the role of the Judiciary under Article III. Mem. Op. 2, 41. In other contexts, the Supreme Court has emphasized that "district courts should not hesitate to certify an interlocutory appeal" when an order "involves a new legal question or is of special consequence." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). The same logic applies with special force where, as here, the order resolves a novel and important question with implications for the constitutional separation of powers. The House nonetheless insists that its authority to bring this suit is beyond debate—and that an interlocutory appeal is therefore inappropriate—because a handful of decisions have allowed Congressional entities to sue the Executive in other contexts. But as this Court acknowledged, those decisions addressed very

different circumstances and thus do not establish that the House may bring this unprecedented suit.

The House also asserts that an immediate appeal would not materially advance this litigation because—in the House's view—"the Court of Appeals plainly would benefit from considering the jurisdictional and merits issues together." Pl.'s Mem. in Opp'n to Mot. for Certification (ECF No. 49) ("Opp'n") 12; *see id.* at 2 (asserting that postponing resolution of those fundamental issues would be "to the benefit of the Court of Appeals"). This Court previously rejected the House's similar argument about the management of its own proceedings, determining that the appropriate course was to address the fundamental threshold issues of standing and the proper role of Article III courts separately at the outset. Minute Order of Feb. 9, 2015; *see* Mem. Op. 29 n. 23. We have presented compelling reasons why the House's suggestion that the issues be combined in the court of appeals is likewise misguided. But the critical point for present purposes is that the D.C. Circuit should be permitted to make that determination for itself. The D.C. Circuit would be free to deny a petition for interlocutory review if it agreed with the House. Accordingly, the only question before this Court is whether the court of appeals should be allowed to decide—as this Court did—that the fundamental separation-of-powers questions presented by this suit should be resolved before any consideration of the merits. We respectfully submit that the court of appeals should be afforded that opportunity.

I. This Court's Ruling Involves Controlling Questions of Law as to Which There Are Substantial Grounds for Difference of Opinion

A. Our motion demonstrates that there are substantial grounds for disagreement with this Court's holding that the House has standing to litigate its claim that the Executive is expending funds without a valid appropriation. Contrary to this Court's conclusion, separation-of-powers

concerns inform the Article III standing inquiry, and not only a justiciability analysis (Mot. 8-11); Congress as a whole, if it agreed with the House's view, could halt the expenditures the House opposes by invoking its constitutionally prescribed legislative powers, and its ability to do so deprives the House of standing (Mot. 11-12); the Appropriations Clause does not confer a judicially cognizable stake on the House (Mot. 13-14, 16); the House's claim to standing to assert an Appropriations Clause violation is indistinguishable from its claim to standing to assert violations of appropriations statutes or, indeed, any other violation of law (Mot. 13-18); and under *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), Congress's legislative function does not include the power to seek judicial relief for alleged violations of law (Mot. 18-19). The House offers essentially no response to those points. The House also does not endorse this Court's distinction between a claim based on the Appropriations Clause claim and its remaining claims. Instead, the House adheres to its view that it has standing to challenge *any* purported deficiency in the Executive's execution of the laws. *Cf.* H.R. Res. 676, 113th Cong. (2014) (purporting to authorize the House to challenge any alleged constitutional or statutory violation by the Executive with respect to "any provision" of the Affordable Care Act).

The House insists there is no substantial ground for doubting its standing to bring such suits because "repeated, consistent on-point holdings" purportedly establish that Congressional bodies have standing to sue the Executive. Opp'n 6. But this Court has already rejected that view, emphasizing that "no case has decided whether [the House] has standing on facts such as these." Mem. Op. 22; *see id.* at 2 ("no precedent"); *id.* at 16 ("no authority"). As this Court explained, the cases on which the House relies found standing where a Congressional entity sued the Executive to demand information, typically through the enforcement of a Congressional

subpoena. Mem. Op. 19-20; *see* Opp'n 5-6.[1] This suit does not involve a Congressional subpoena or a demand for information in aid of the House's own legislative function. Instead, the House challenges the Executive's implementation of a federal program for the benefit of private individuals, contending that it is inconsistent with applicable statutes and, as a result, violates the Appropriations Clause. *See* Mem. Op. 29 n. 23. This Court already has concluded that, notwithstanding the cases on which the House relies, the House lacks standing to bring many of the claims alleged in its complaint. In the absence of "fully-applicable precedent," Mem. Op. 22, reasonable jurists could similarly conclude that the House lacks standing to bring its remaining counts and, indeed, that those counts raise "the specter of general legislative standing," *id.* at 33 (citation and quotation marks omitted).[2]

As we have explained, at a minimum, Supreme Court and D.C. Circuit precedents provide substantial grounds for disagreeing with this Court's conclusion that such a suit may go forward. *See Raines v. Byrd*, 521 U.S. 811 (1997); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). The House dismisses those

[1] *United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), cited by the House (Opp'n 5, 6), was a suit brought by the Executive in which a Member intervened as authorized by the House; it was not an affirmative suit brought by the House. And although the House relies (Opp'n 5, 6) on *U.S. House of Representatives v. U.S. Department of Commerce*, 11 F. Supp. 2d 76, 85 (D.D.C. 1995), the Supreme Court dismissed the Commerce Department's appeal in that case without addressing its standing, resolving the merits instead on the basis of a suit brought by private individuals who had established traditional Article III standing. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328-334, 344 (1999).

[2] The House thus errs in asserting that Judge Jackson denied a "virtually identical" Section 1292(b) motion. Opp'n 6, citing Order, *Committee on Oversight & Gov't Reform, U.S. House of Representatives v. Holder*, No. 1:12-cv-01332 (D.D.C. Nov. 18, 2013) (filed as ECF No. 49-1 on this case's docket). Unlike this case, that suit sought enforcement of a Congressional subpoena. Judge Jackson denied certification because she concluded that the case "did not present a question of first impression" in light of other Congressional subpoena cases. ECF No. 49-1 at 3. Here, by contrast, this Court has already concluded that this case presents a question of first impression.

decisions as "patently inapposite" because they involved individual Members of Congress. Opp'n 5. But the fundamental separation-of-powers reasoning of those decisions applies equally to a suit brought by one House of Congress. Indeed, the Supreme Court recently took care to reserve the question "whether Congress has standing to bring a suit against the President," emphasizing that such a suit would raise "separation-of-powers concerns." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015). In addition, three Supreme Court Justices recently emphasized that Congress may not "hale the Executive before the courts … to correct a perceived inadequacy in the execution of its laws." *United States v. Windsor*, 133 S. Ct. 2675, 2703 (2013) (Scalia, J., dissenting). This Court has concluded that those authorities do not compel dismissal of the House's suit. But at the very least, they demonstrate that there are substantial grounds for disagreement with this Court's unprecedented conclusion that a majority vote of one House of Congress may make the Judiciary the referee of a dispute between the political Branches over the Executive's expenditure of funds in the administration of a federal statutory program.[3]

B. Our motion also demonstrates that there are substantial grounds for disagreement with this Court's conclusion that the House has a cause of action. Mot. 19-20. The House does not attempt to defend this Court's reliance on the Declaratory Judgment Act or the Administrative Procedure Act. *See* Opp'n 9 n.5. Instead, the House argues that it is beyond debate that it has an

[3] The House errs in asserting that a disagreement among the lower courts is a "*necessary* predicate" to certification under Section 1292(b). Opp'n 6 (emphasis in original). To the contrary, it is well-established that "a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); *see also, e.g.*, *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013); *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (certifying an interlocutory appeal because, "given the novelty of the issues," other courts "could reasonably differ" on the relevant legal question).

implied right of action to sue under the Constitution itself. But to support that assertion, the House cites only two district court decisions from the quite different context of Congressional subpoenas. Neither of those subpoena decisions has been subjected to appellate review, and the D.C. Circuit stayed the only decision that reached it. *Committee on Judiciary, U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). Given the serious separation-of-powers concerns that this suit presents, the Judiciary should not infer a cause of action for the House that Congress itself has not sought to enact. At a minimum, there is substantial ground to believe that reasonable jurists could differ on that question.

II. Immediate Appeal Will Materially Advance the Termination of This Litigation

The House cannot dispute that an interlocutory appeal in which the Executive prevails would "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), by ending the case entirely, much sooner than would be possible if appeal is delayed. The House's assertion (at 12) that the court of appeals "plainly would benefit from considering the jurisdictional and merits issues together" mirrors an argument that this Court rejected earlier in the case. The House previously urged that "the standing and merits issues [be] briefed together" in this Court, asserting that combining the issues would "avoid needless delay and redundant arguments." Pl.'s Mem. in Supp. of Mot. for Briefing Schedule (ECF No. 21-1) at 2. This Court disagreed, denying the House's request and instead limiting the briefing to whether the House has standing and a cause of action (Minute Order of Feb. 9, 2015)—the very same threshold issues that the defendants now request be certified to the court of appeals.

Having itself concluded that those threshold issues should be decided independently from—and prior to—any consideration of the merits, this Court should afford the court of appeals the opportunity to reach the same conclusion. That is especially appropriate given that

the court of appeals has already noted that these issues are "of potentially great significance for the balance of power between the Legislative and Executive Branches." *Miers*, 542 F.3d at 911. And requiring the court of appeals to address those threshold questions only after this Court has already decided the merits would be far more damaging to the separation of powers than mere simultaneous briefing on jurisdiction and the merits in this Court would have been. As the House does not dispute, the "potential political ramifications" of a merits decision by an Article III court (Mem. Op. 42)—in a suit brought solely by a component of one political Branch against the other Branch—could not be fully undone by an appellate decision concluding that this suit is barred by separation-of-powers principles and the limitations on the proper role of Article III courts under the Constitution. And if the opportunity for appellate review were foreclosed now, the court of appeals' own consideration of those threshold issues at a later date would occur in a context in which the Judiciary had already opined on the merits. The court of appeals should therefore have the opportunity to consider whether a merits decision would "improperly and unnecessarily plunge[]" the Judiciary into a political disagreement between the House and the Executive over the meaning and operation of the Affordable Care Act, *Raines*, 521 U.S. at 827, *before* the Judiciary is actually plunged into such a heated political dispute.

The House's suggestion that offering the court of appeals a chance to weigh in now would needlessly delay the House's presumed victory on the merits (*e.g.*, Opp'n 1, 11) is misguided. It is always true that an interlocutory appeal that results in an affirmance may, in hindsight, have delayed the final resolution of the case. But if that possibility were sufficient reason to decline to allow the courts of appeals a timely say on important questions, certification under Section 1292(b) would never be appropriate. That is not the law. The Supreme Court has made clear that "district courts should not hesitate to certify an interlocutory appeal" of "a

privilege ruling [that] involves a new legal question or is of special consequence" even though such appeals will often delay the termination of the litigation. *Mohawk Industries*, 558 U.S. at 111. Similarly, this Court should not hesitate to certify an interlocutory appeal on the highly consequential threshold separation-of-powers and Article III issues presented here, even if the House is correct that an interlocutory appeal may result in some delay.[4] And in any event, any delay in this case would be minimized by our commitment to move for a highly expedited briefing schedule, under which our opening brief would be due 21 days after the court of appeals acted on a Section 1292(b) petition.[5]

Conclusion

This Court should certify its September 9, 2015 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stay all proceedings pending the D.C. Circuit's ultimate disposition of the appeal.

[4] In fact, if the House's view of its standing is correct, an immediate appeal on standing questions could actually *expedite* the conclusion of this litigation. This Court dismissed most of the House's claims, including all of its claims related to the large-employer tax, for lack of standing. Mem. Op. 30-35. The House presumably intends to appeal that dismissal, and if it were to prevail on that issue in an appeal following final judgment the result would be a remand for further proceedings on the merits of the dismissed claims. Immediate review of this Court's standing ruling, in contrast, could eliminate the possibility of a second proceeding on the merits.

[5] The House also expresses concern that the case be resolved swiftly due to the continued expenditure of assertedly unappropriated funds. Opp'n 11. That concern, which presupposes that the House is correct on the merits, is inconsistent with the considerable delays for which the House itself is responsible. Advance payments of the cost-sharing reductions began in January 2014. There is no dispute that the House was on notice that these mandatory advance payments were being made, and the House concedes that it was aware of their source as early as May 21, 2014. Compl. ¶¶ 37-39. Yet the House did not file its complaint until November 21, 2014—six months later. And during these many months, the House has not taken any legislative action that would halt the expenditure of these funds. Expedited appellate consideration of the important threshold issues presented by this suit should take far less time than the House has taken here.

Dated: October 15, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

VINCENT H. COHEN, JR.
Acting United States Attorney

JENNIFER D. RICKETTS
Director

SHEILA LIEBER
Deputy Branch Director

/s/ Joel McElvain
JOEL McELVAIN
Assistant Branch Director
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov

Counsel for the Defendants