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' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Introduction

The Affordable Care Act ("ACA") helps eligible individuals purchase health coverage through an integrated program of subsidies consisting of premium tax credits, cost-sharing reductions, and advance payments. The Act itself and the accompanying legislative record show that, when Congress enacted the ACA in 2010, it understood that these subsidies would not require annual appropriations. Consistent with the ACA's legislative plan, the Executive from the outset has made advance payments of credits and reductions from the same permanent appropriation, 31 U.S.C. § 1324. Congress was well aware of these payments. Yet, when it enacted appropriations legislation for both fiscal year ("FY") 2014 and FY2015, Congress never sought to prevent the Executive's use of the Section 1324's permanent appropriation or to otherwise prohibit the use of federal funds to make the cost-sharing reduction payments mandated by the ACA. To the contrary, it enacted appropriations legislation presuming that those payments would be made.

The House now takes a different view and disputes the Executive's statutory authority to make these payments. The House may act on its newly-held view by seeking to have the full Congress amend the relevant statutes or prohibit the use of federal funds to make the payments—actions that Congress routinely takes in other contexts. But the House has not followed the constitutionally prescribed path here. Instead, it has brought this unprecedented suit, asking this Court to violate the separation of powers by wading into a dispute between the political Branches over the interpretation of the ACA and Section 1324, and to do for the House what the House will not use its legislative authority to do for itself.

There is no basis for the House to claim Article III standing in this case—for the first

time in history—to challenge the Executive Branch's interpretation and implementation of federal law. Even assuming that the House would have standing if the Executive refused to comply with a clear appropriations restriction, this is not that case. This case presents a question of statutory interpretation, in which one House of Congress disagrees with the Executive's determination that a particular appropriations provision (Section 1324) provides funding for all of the advance payments that the ACA requires the Secretary of the Treasury to make. The House may have come to disagree with the Executive's reading of its statutory authority, but once Congress passes a law, its interest in the proper interpretation of that law "is shared by, and indistinguishable from, that of any other member of the public," *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978), and cannot provide a basis for standing. Indeed, if the rule were otherwise, one House of Congress could sue the Executive over virtually *any* dispute over the meaning of federal law, thereby undermining the careful limitations of Article III. As the D.C. Circuit has long held, disputes over the execution of federal law do not injure Congress in any particularized way that could give rise to Article III standing—especially where, as here, other legislative remedies are available to Congress and have gone unused. *E.g.*, *Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977) (agency's alleged misuse of funding "does not invade the lawmaking power of Congress or appellant; all the traditional powers related to the 'power of the purse' remain intact"). Neither the facts nor the law justify the sweeping and unprecedented expansion of standing doctrine that the House seeks here.

Background

I. The Affordable Care Act

The 111th Congress enacted the ACA "to expand coverage in the individual health

insurance market." *King v. Burwell*, No. 14-114, slip op. at 1 (U.S. June 25, 2015). The ACA "requires the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase [private] insurance plans." *Id.*; *see* 42 U.S.C. §§ 18031(b)(1), 18041(c)(1). The ACA further requires Exchanges to enter into contracts with health insurance issuers for the offering of "qualified health plans," or "QHPs," on the Exchanges. 42 U.S.C. §§ 18021(a)(1)(C), 18031(d)(2)(A).

To defray the cost of health coverage, the ACA provides premium tax credits to help eligible individuals purchasing QHPs through the Exchanges, 26 U.S.C. § 36B, and also provides for federal payments to help cover cost-sharing expenses (such as co-payments or deductibles) for certain individuals receiving the credits. 42 U.S.C. § 18071(c)(2), (f)(2). The ACA mandates the payment of these subsidies. The premium tax credit "shall be allowed" for eligible individuals. 26 U.S.C. § 36B(a). Likewise, the Act directs that the insurance issuer "shall reduce the cost-sharing under the plan" for such individuals under a statutory formula, 42 U.S.C. § 18071(a)(2), and mandates that HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A). The Act further directs that the Department of the Treasury "shall" make advance payments of the ACA's subsidies to the relevant insurers. 42 U.S.C. § 18082(c)(2)(A), (c)(3).

The Act instructs the defendants to "establish a program" for the unified administration of advance payments of both forms of the subsidy. 42 U.S.C. § 18082(a). Under this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing reductions "in order to reduce the premiums payable by individuals eligible for such credit." 42 U.S.C. § 18082(a)(3).

Consistent with the mandatory nature of these payments, Congress enacted a provision in the ACA that was premised on the understanding that cost-sharing reductions did not require yearly appropriations. Some Members of Congress had objected that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which limits the use of annually-appropriated funds to pay for abortions under certain circumstances. *See, e.g.*, 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) ("this bill is not subject to appropriations"). In response, Congress applied such funding restrictions to the subsidies that were permanently appropriated in the Act itself, expressly including both cost-sharing reductions and advance payments. 42 U.S.C. § 18023(b)(2)(A).

II. Fiscal Year 2014 Appropriations

In 2013, the Office of Management and Budget ("OMB") submitted a budget request for FY2014 to Congress, which, *inter alia*, sought a line item designating funds for the payment of cost-sharing reductions by HHS. Fiscal Year 2014 Budget of the United States Government, Appx., at 448 (Apr. 2013).

The House Appropriations Committee never reported a FY2014 appropriations bill for HHS, and the full House never voted on a stand-alone appropriations bill for HHS for that year. *See* House Appropriations Committee, *Postponed: Subcommittee Markup - FY 2014 Labor, Health and Human Services, and Education* (July 25, 2013) (ECF 30-7). The House did pass H.R. 2775, the No Subsidies Without Verification Act, which proposed to condition the payment of premium tax credits and cost-sharing reductions upon HHS's certification that a program is in place to verify eligibility for those subsidies. H.R. 2775, 113th Cong. § 2 (Sept. 12, 2013). Proponents of the bill argued that it was necessary to "protect taxpayer dollars" that would

otherwise be "wasted" through the payment of subsidies on behalf of ineligible individuals. *E.g.*, 159 Cong. Rec. H5517 (Sept. 12, 2013) (Rep. Ellmers).

Both the House and Senate enacted H.R. 2775 as part of the Continuing Appropriations Act, 2014, Pub. L. No. 113-46 (2013). That Act retained the House's language conditioning the payment of cost-sharing reduction on a certification by HHS that a program is in place to verify that applicants are in fact eligible for such subsidies. *Id.*, Div. B, § 1001(a). In compliance with this provision, HHS certified to Congress that the Exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions." Letter of the Hon. Kathleen Sebelius to the Hon. Joseph R. Biden, Jr. at 1 (Jan. 1, 2014) (ECF 30-10).[1] The certification provided further confirmation to Congress that advance payments of cost-sharing reductions would be made in the coming year, as mandated by the ACA.

Two weeks after this certification, Congress enacted the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 (2014). The Act imposed dozens of explicit restrictions on particular uses of appropriated funds, *see, e.g.*, *id.*, Div. H, tit. V, §§ 501-520, but did not restrict the use of any federal funds for the advance payment of cost-sharing reductions under the ACA.

[1] As the House acknowledges, *see* Compl. ¶ 39, these payments have been made under Section 1324, which provides a permanent appropriation for refundable tax credits. Read consistently with the ACA, Section 1324 allows for payment of premium tax credits and for payments that Congress intended to be made as part of the same unified program as tax credits, namely, advance payments under 42 U.S.C. § 18082. As even the House concedes, Section 1324 provides funds to pay for advance payments of premium tax credits. *See* Compl. ¶ 29 & n.4. The interpretative dispute between the House and the Executive thus turns on whether Congress provided funding for all, or only part, of the ACA's unified program for advance payments to subsidize the purchase of health insurance.

III. Fiscal Year 2015 Appropriations

In April 2014, OMB submitted a budget request for FY2015 to Congress. Having recognized that advance payments of cost-sharing reductions are payable from the standing appropriation in 31 U.S.C. § 1324, this submission did not seek a new appropriation for this purpose. Fiscal Year 2015 Budget of the United States Government (Mar. 2014).

On May 21, 2014, then-OMB Director Sylvia Burwell responded to an inquiry from Senators Cruz and Lee, informing them that all forms of the ACA's advance payments were being paid from the same source. *See* Compl. ¶¶ 38-39. Congressional debates during 2014 do not reveal that any Member objected that appropriations were unavailable for the advance payments of cost-sharing reductions.[2]

For FY2015, in December 2014, Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (2014). The Act imposed numerous explicit restrictions on particular uses of appropriated funds, *see, e.g.*, *id.*, Div. G, tit. V, §§ 501-519, but, again, did not purport to restrict the use of federal funds for the advance payment of cost-sharing reductions under the ACA.

Discussion

The House does not have standing to sue the Executive over the interpretation of federal law—here, whether Section 1324 covers the payments at issue. After a law is enacted, Congress's interest in its interpretation is no different than that of the public at large. And it

[2] Instead, some Members objected that some of these payments were being made on behalf of persons whose eligibility had (purportedly) not been adequately verified. *E.g.*, 160 Cong. Rec. H5251 (June 11, 2014) (Rep. Black) (asserting that "tax credits and cost-sharing assistance for ObamaCare premiums" had been paid without adequate verification).

would be particularly inappropriate to accord the House standing under the facts here. The House has asserted that it has made "prior legislative judgments" not to fund the advance payment of cost-sharing reductions under the ACA, Opp'n to Mot. to Dismiss at 24 (ECF 22), but this is not so. In 2010, the House and the Senate passed a provision, as part of the ACA itself, that incorporated their shared understanding that all forms of the subsidies for the purchase of insurance on the Exchanges were fully appropriated. For FY2014, the House (much less the full Congress) never took action to alter that state of affairs. Instead, it did the opposite: the House, together with the Senate, passed a law that *conditioned* the payments of cost-sharing reductions on a certification by HHS that applicants' eligibility for the payments had been verified. The necessary premise of that legislation was that once the condition had been satisfied—as it promptly was—the Executive would begin making the mandatory payments in January 2014. Thus, although the House seeks to focus on the Administration's initial budget request for FY2014, the end result of the budget process for that year confirms a shared understanding that these payments could be made. And, for FY2015, the House, together with the Senate, with full knowledge that advance payments of cost-sharing reductions were being made under Section 1324's permanent appropriation, enacted new appropriations legislation without any restriction on the Executive's use of federal funds to make these payments.

As noted, Congress intended in the ACA that all forms of the ACA's insurance subsidies would be paid together under a single program, and were permanently appropriated. It did not act to alter that understanding at any time after it enacted the ACA. Advance payments of the premium tax credits and of cost-sharing reductions are made at the same time, by the same entity (the Department of the Treasury), to the same recipients (issuers of QHPs), for the same purpose

(defraying the cost of an eligible insured's health coverage), and pursuant to the same statutory provision (42 U.S.C. § 18082). Contrary to the House's effort to subdivide advance payments under 42 U.S.C. § 18082, the ACA confirms that all forms of the advance payment are paid together in a single, unified program from the same appropriation. *See King*, slip op. at 21 ("A fair reading of legislation demands a fair understanding of the legislative plan.").

This Court, of course, need not address the merits of the House's and the Executive Branch's competing interpretations to resolve the pending motion to dismiss.[3] For purposes of the pending motion, the critical point is that the House's claims rest on a disagreement over statutory interpretation. The House has recognized that defendants are making the challenged advance payments under Section 1324. Compl. ¶ 39. It asserts, however, that Section 1324 and the ACA do not authorize the payments. But the House does not have standing to bring such a claim because it lacks any particularized injury—apart from the interest that *any* citizen could assert in the proper interpretation and administration of the law—from the Executive's alleged misreading of the law, or alleged misuse of federal funds. *See, e.g.*, *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (legislators lacked standing to claim Executive had "usurp[ed] Congressional authority" by, *inter alia*, spending unappropriated funds).

It would be particularly inappropriate to accord the House standing here, as it retains many other legislative tools to vindicate its interpretation of the relevant statutes. Under this

[3] The defendants have not presented briefing on the merits of the House's claims, as, consistent with this Court's Minute Order of February 9, 2015, they understand the only matter before the Court to be the defendants' motion to dismiss for lack of standing and for lack of a cause of action. A fuller explication of the defendants' understanding of the operation of the ACA and the relevant appropriations statutes would require further briefing at the merits stage, which, for the reasons presented in the motion to dismiss, should not be reached in this case.

Circuit's precedent, the existence of those tools alone deprives the House of standing. *See Harrington v. Bush*, 553 F.2d at 213 (even if it is "assumed" that agency had "misuse[d]" appropriations, such an "abuse of delegated authority does not invade the lawmaking power of Congress or appellant; all the traditional alternatives related to the 'power of the purse' remain intact").[4] Because the House could have used its constitutionally prescribed legislative tools—but never did—it cannot now assert "standing in federal court to challenge the lawfulness of actions of the executive." *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000).

Moreover, contrary to its assertions that Congress made a "legislative judgment" to bar the payments at issue, the House cannot point to any Act of Congress prohibiting defendants from making advance payments of cost-sharing reductions. In the years in question, Congress enacted legislation that imposed dozens of affirmative restrictions on the use of federal funds for particular purposes.[5] But it enacted *no* such restriction as to cost-sharing payments. The House's argument, instead, is that by not explicitly designating funds for these payments in annual appropriations, Congress must have meant to prohibit them. But that conclusion does not follow. The more plausible explanation is that the absence of a specific annual appropriation for cost-sharing reductions, particularly in the face of the Executive's advance payment of these subsidies, reflects Congress's judgment that an annual appropriation is

[4] *See also Campbell*, 203 F.3d at 23 (no standing where plaintiffs "continued … to enjoy ample legislative power to have stopped prosecution of the 'war'"); *Chenoweth*, 181 F.3d at 116 ("Congress could terminate the [contested program] were a sufficient number in each House so inclined," and the "parties' dispute is therefore fully susceptible to political resolution").

[5] *E.g.*, Pub. L. No. 113-76, Div. E, tit. VII, § 736(a)(1) (2014) ("[n]one of the funds made available in this or any other Act may be used to pay for the painting of a portrait of an officer or employee of the Federal government …").

unnecessary because the payments were permanently appropriated.[6] "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). It is therefore of no moment that Congressional inaction here followed the Executive's initial request for an annual appropriation. *See Am. Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry. Co*., 387 U.S. 397, 418 (1967) ("The advocacy of legislation by an administrative agency – and even the assertion of the need for it to accomplish a desired result – is an unsure and unreliable, and not a highly desirable, guide to statutory construction.").

In claiming that it made a "legislative judgment" to deny funding for advance payments of cost-sharing reductions, the House does not purport to rely on any duly enacted appropriations statute, or even on any document of the House itself. It instead relies on language from a July 2013 *Senate* committee report accompanying an unenacted spending bill, which it interprets, incorrectly, as seeking to prohibit funding for cost-sharing reduction payments. The Senate, however, is not a party here, and its absence provides an independent reason to dismiss the complaint.[7] In any event, the House misreads the report from its sister chamber. The Senate committee stated that it did not propose a specific line item for cost-sharing reduction payments,

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[6] *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1363 n.95 (1988) ("Is failure to appropriate any money the same as an explicit denial of appropriations? The answer is 'no' if the unmentioned activity is nonetheless within the terms of activities that *are* funded …. Obviously, the scope of funded activities is an issue of statutory interpretation.").

[7] The Constitution permits one House of Congress to act in the absence of the other only in limited circumstances, which do not include litigation against the Executive Branch over the interpretation of federal law. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991); *INS v. Chadha*, 462 U.S. 919, 955-56 (1983).

but offered no explanation as to why it chose not to do so. S. Rep. No. 113-71, at 123 (2013). The committee did not suggest that the absence of this line item would prevent the operation of the cost-sharing reduction program. The committee instead recognized that the program would continue as mandated by the ACA, explaining that "[t]his program helps eligible low- and moderate-income individuals and families afford the out-of-pocket costs associated with healthcare services." *Id.* And, in any event, Congress speaks through legislation, not through reports issued by one committee of one of its chambers with respect to an unenacted bill.

In fact, far from prohibiting the use of federal funds for cost-sharing reductions under the ACA, Congress affirmatively ratified these payments. As noted, in the Continuing Appropriations Act for 2014, Congress imposed a condition on the payment of cost-sharing reductions, requiring HHS to certify that adequate measures were in place before these subsidies were paid. Pub. L. No. 113-46, Div. B, § 1001(a) (2013). This provision would have been pointless if Congress had believed that no funds were available to make cost-sharing reduction payments in the first place. But, contrary to the House's position here, "courts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006).[8]

This conclusion is further reflected in Congress's treatment of the issue for FY2015. Congress enacted a new appropriations statute for 2015, on materially the same terms as for the prior year, with full knowledge that the defendants were making payment of all forms of advance

[8] Likewise, the ACA's provision applying abortion funding restrictions to cost-sharing reduction payments, 42 U.S.C. § 18023(b)(2)(A), *see* p. 4, *supra*, would have been an empty gesture if Congress had not understood these payments to be funded by a standing appropriation.

payments of the ACA's subsidies from the same source. *See* p. 6, *supra*. If the House objected to these payments for FY2014 or for FY2015, it should have followed the process spelled out by Article I for enacting its preferred policies into law. It may not now short-circuit the legislative process by turning to the courts instead.

In sum, the House's incomplete factual description in its prior briefing does not establish its standing to bring a suit like this one for the first time in this Nation's history. To the defendants' knowledge, neither the Executive nor one or both Houses of Congress have ever brought suit against each other "on the basis of claimed injury to official authority or power." *Raines v. Byrd*, 521 U.S. 811, 826 (1997). The House declined to pursue the constitutionally prescribed means for affecting matters outside the Legislative Branch: the enactment, with the Senate, of new law. *See Chadha*, 462 U.S. at 952-55. It cannot now use this lawsuit to advance its generalized interest in the proper interpretation and implementation of federal law. Separation of powers principles preclude the House's claim to standing, because "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314, slip op. at 14 n.12 (U.S. June 29, 2015) (noting separation-of-powers impediment to suit by Congress against the Executive).

Conclusion

For the reasons stated above and in our prior briefs, the complaint should be dismissed.

Dated: July 1, 2015

Respectfully submitted,

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