IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF UNITED STATES HOUSE OF REPRESENTATIVES'
MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7, Plaintiff United States House of Representatives ("House") respectfully moves for entry of judgment on Count I and the remaining aspect of Count V of its Complaint (Nov. 21, 2014) (ECF No. 1).[1] With respect to these Counts, there are no genuine issues of material fact and, for all the reasons set forth in the accompanying Memorandum of Points and Authorities, the House is entitled to judgment as a matter of law.

A proposed order is submitted herewith, as is the [House's] Statement of Material Facts as to Which There is No Genuine Issue.

The House does not request oral argument.

[1] *See* Mem. Op. at 43 (Sept. 9, 2015) (ECF No. 41) (dismissing Counts II-IV, VI-VIII, and parts of Count V).

Respectfully submitted,

/s/ Jonathan Turley
JONATHAN TURLEY, D.C. Bar No. 417674
2000 H Street, N.W.
Washington, D.C. 20052
(202) 285-8163
jturley@law.gwu.edu

KERRY W. KIRCHER, General Counsel
D.C. Bar No. 386816
WILLIAM PITTARD, Deputy General Counsel
D.C. Bar No. 482949
TODD B. TATELMAN, Sr. Assistant Counsel
ELENI M. ROUMEL, Assistant Counsel
ISSAC B. ROSENBERG, Assistant Counsel
D.C. Bar No. 998900
KIMBERLY HAMM, Assistant Counsel
D.C. Bar No. 1020989

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Plaintiff United States House of Representatives

December 2, 2015

CERTIFICATE OF SERVICE

I certify that on December 2, 2015, I served one copy of the foregoing Plaintiff United States House of Representative's Motion for Summary Judgment by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF UNITED STATES HOUSE OF REPRESENTATIVES' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Federal Rule of Civil Procedure 56(c) and Local Rule 7(h), Plaintiff United States House of Representatives respectfully sets forth the following material facts as to which there is no genuine issue.[1]

Congressional Enactments

1. Congress enacted, and the President signed into law, the Patient Protection and Affordable Care Act ("ACA"). *See* Pub. L. No. 111-148, 124 Stat. 119 (2010); Answer ¶¶ 22-24 (Nov. 2, 2015) (ECF No. 52).
2. Congress enacted, and the President signed into law, the Continuing Appropriations Act, 2014. *See* Pub. L. No. 113-46, 127 Stat. 558 (2013).
3. Congress enacted, and the President signed into law, H.J. Res. 106. *See* Pub. L. No. 113-73, 128 Stat. 3 (2014).

[1] Where appropriate, materials (or pertinent pages of materials) cited in this Statement are attached as exhibits to the Memorandum of Points and Authorities in Support of Plaintiff United States House of Representatives' Motion for Summary Judgment (Dec. 2, 2015).

4. Congress enacted, and the President signed into law, the Consolidated Appropriations Act, 2014. *See* Pub. L. No. 113-76, 128 Stat. 5 (2014).
5. Congress enacted, and the President signed into law, the Continuing Appropriations Resolution, 2015. *See* Pub. L. No. 113-164, 128 Stat. 1867 (2014).
6. Congress enacted, and the President signed into law, H.J. Res. 130. *See* Pub. L. No. 113-202, 128 Stat. 2069 (2014).
7. Congress enacted, and the President signed into law, H.J. Res. 131. *See* Pub. L. No. 113-203, 128 Stat. 2070 (2014).
8. Congress enacted, and the President signed into law, the Consolidated and Further Continuing Appropriations Act, 2015. *See* Pub. L. No. 113-235, 128 Stat. 2130 (2014).
9. Congress enacted, and the President signed into law, the Continuing Appropriations Act, 2016. *See* Pub. L. No. 114-53, 129 Stat. 502 (2015).

Executive Branch Actions

10. The current Administration prepared and submitted to Congress a Fiscal Year 2014 budget. *See* Office of Management & Budget ("OMB"), Fiscal Year 2014 Budget of the U.S. Government (Apr. 10, 2013) ("FY 2014 Budget"), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf; https://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/appendix.pdf.
11. The current Administration prepared and submitted to Congress a Fiscal Year 2015 budget. *See* OMB, Fiscal Year 2015 Budget of the U.S. Government (Mar. 4, 2014), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf; https://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/appendix.pdf.

12. The current Administration prepared and submitted to Congress a Fiscal Year 2016 budget. *See* OMB, Fiscal Year 2016 Budget of the U.S. Government (Feb. 2, 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf; https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/appendix.pdf.

13. Defendant Department of Health and Human Services ("HHS") prepared and submitted to Congress justifications for appropriations requested in the FY 2014 Budget for the Centers for Medicare and Medicaid Services ("CMS"). *See* HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriation Committees (Apr. 10, 2013), *available at* https://www.cms.gov/about-cms/agency-information/performancebudget/downloads/fy2014-cj-final.pdf.

14. The current Administration never submitted a formal withdrawal document respecting its request for a non-permanent appropriation to carry out §§ 1402 and 1412 of the ACA in Fiscal Year 2014 and the first quarter of Fiscal Year 2015. *See* Joint Submission in Resp. to This Court's June 1, 2015 Minute Order at 3 n.1 (June 15, 2015) (ECF No. 30).

15. OMB prepared and submitted to Congress a Fiscal Year 2014 Sequestration Report. *See* OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version (May 20, 2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy14_preview_and_joint_committee_reductions_reports_05202013.pdf.

16. OMB prepared and submitted to Congress a Fiscal Year 2015 Sequestration Report. *See* OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2015

(Mar. 10, 2014), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/sequestration_order_report_march2014.pdf.

Other

17. The Committee on Appropriations of the United States Senate approved and reported out S. 1284, a bill to make appropriations for the Departments of Labor, HHS, and Education, and related agencies for Fiscal Year 2014. *See* S. Rep. No. 113-71, at 123, 251 (2013), *available at* https://www.congress.gov/113/crpt/srpt71/CRPT-113srpt71.pdf.

18. None of the Fiscal Year 2014 appropriations enactments appropriated funds for the payment of cost-sharing reductions under § 1412 of the ACA. *See* Tr. of Oral Arg. at 27 (May 28, 2015).

19. Defendant Lew began making advance payments of cost-sharing reductions in January 2014, and has continued to make such payments since that date. *See* Answer ¶ 35; Joint HHS OIG/TIGTA Report: *Review of the Accounting Structure Used for the Administration of Premium Tax Credits* at 18-19 (Mar. 31, 2015), *available at* http://oig.hhs.gov/oei/reports/oei-06-14-00590.pdf; CMS March Marketplace Payment Processing Cycle: Enrollment & Payment Data Reporting and Restatement at 9 (Feb. 12, 2014), *available at* https://www.regtap.info/uploads/library/FM_MPP_Slides_021214_5CR_021214.pdf.

Respectfully submitted,

/s/ Jonathan Turley
JONATHAN TURLEY
D.C. Bar No. 417674

2000 H Street, N.W.
Washington, D.C. 20052
(202) 285-8163

jturley@law.gwu.edu

KERRY W. KIRCHER, General Counsel
D.C. Bar No. 386816
WILLIAM PITTARD, Deputy General Counsel
D.C. Bar No. 482949
TODD B. TATELMAN, Senior Assistant Counsel
ELENI M. ROUMEL, Assistant Counsel
ISAAC B. ROSENBERG, Assistant Counsel
D.C. Bar No. 998900
KIMBERLY HAMM, Assistant Counsel
D.C. Bar No. 1020989

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Plaintiff United States House of Representatives

December 2, 2015

CERTIFICATE OF SERVICE

I certify that on December 2, 2015, I served one copy of the foregoing Plaintiff United States House of Representatives' Statement of Material Facts as to Which There Is No Genuine Issue by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES HOUSE OF REPRESENTATIVES, *Plaintiff*, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., *Defendants*.	)	Case No. 14-cv-01967-RMC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES HOUSE OF REPRESENTATIVES' MOTION FOR SUMMARY JUDGMENT

Jonathan Turley
2000 H Street, N.W.
Washington, D.C. 20052
(202) 285-8163

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Todd B. Tatelman, Senior Assistant Counsel
Eleni M. Roumel, Assistant Counsel
Isaac B. Rosenberg, Assistant Counsel
Kimberly Hamm, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

Counsel for Plaintiff United States House of Representatives

December 2, 2015

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INTRODUCTION

This case concerns Congress' exclusive power of the purse: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "[T]he facts [of the case] are not in dispute," Order at 3 (Oct. 19, 2015) (ECF No. 51), including the fact that, since January 2014, defendants have been paying to health insurance companies ("Insurers") billions of taxpayer dollars under a program (the "Section 1402 Offset Program") created by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"), and the fact that those payments began *after* defendants formally asked Congress for a non-permanent appropriation to fund the Section 1402 Offset Program, and *after* Congress rejected defendants' appropriations request.[1]

The legal question now before the Court – the sole remaining question – is whether the billions defendants admit that they have "drawn from the Treasury" and paid to Insurers were "in Consequence of [any] Appropriation[] made by Law," as required by the Constitution. The answer to that question is an unqualified no, notwithstanding defendants' many and varied efforts over the past 18 months to fashion a justification for their Section 1402 Offset Program payments. Accordingly, plaintiff United States House of Representatives ("House") is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

As the Court is aware, the ACA, in pertinent part, created two programs. Section 1401(a) created a program to reduce the health insurance premiums of qualified individuals by providing them with refundable tax credits (the "Section 1401 Refundable Tax Credit Program"). *In the*

[1] The defendants are Sylvia Mathews Burwell, Secretary of the Department of Health and Human Services ("HHS"); Jacob J. Lew, Secretary of the Department of the Treasury; and the respective departments they head.

ACA itself, Congress appropriated funds for this program by (1) amending the Internal Revenue Code ("IRC") to add a new refundable tax credit provision (§ 36B, entitled "Refundable Credit for Coverage Under a Qualified Health Plan"), *see* ACA § 1401(a); and (2) amending 31 U.S.C. § 1324 – a permanent appropriation "for refunding internal revenue collections as provided by law," *id.* § 1324(a) – to include the new IRC § 36B credit in the list of refundable tax credits permitted to be paid from that appropriation, *see* ACA § 1401(d)(1).

Separately, the ACA created the Section 1402 Offset Program by (1) requiring Insurers offering policies through ACA Exchanges to reduce deductibles, coinsurance, copayments, and similar charges for certain policyholders (reductions referred to in the ACA as "Cost-Sharing Reductions"), *see* ACA § 1402; and (2) *authorizing* the federal government to make payments directly to Insurers to offset costs they incur in providing Cost-Sharing Reductions to policyholders, *see id.* § 1412(c)(3).[2]

In stark contrast to the Section 1401 Refundable Tax Credit Program, Congress nowhere in the ACA appropriated any funds for the Section 1402 Offset Program. With respect to that program, the ACA did *not* amend the IRC, did *not* amend 31 U.S.C. § 1324, and did *not* otherwise appropriate funds. Congress thereby made clear that the Section 1402 Offset Program would be funded, if at all, only through the process by which Congress funds the vast majority of government programs, functions, and activities, namely, the annual appropriations process.

The Administration initially – and correctly – acknowledged the need for a non-permanent appropriation to fund the Section 1402 Offset Program. It did so by, among other things, formally requesting, in March 2013, a non-permanent appropriation to fund the program

[2] Both programs became effective in January 2014. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15410, 15414 (Mar. 11, 2013).

for Fiscal Year ("FY") 2014 (Oct. 1, 2013 through Sept. 30, 2014), and the first quarter of FY 2015. Congress said no, and did not appropriate any funds for the program for FY 2014 (or for FY 2015, or, to date, for FY 2016). Notwithstanding the lack of *any* constitutionally-mandated congressional appropriation, defendants nonetheless began making Section 1402 Offset Program payments to Insurers in January 2014. By January 2015, those payments totaled $3.27 billion.[3]

Defendants' *only* merits defense to the House's claim that these payments violate the Appropriations Clause and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity."), has been that the 31 U.S.C. § 1324 permanent appropriation is available to make Section 1402 Offset Program payments. While defendants have offered various shifting justifications for their position, none withstand scrutiny, nor could they in light of the plain language of § 1324:

> Disbursements may be made from the appropriation made by this section *only* for – (1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the [IRC]. . . .

31 U.S.C. § 1324(b) (emphasis added). Section 1402 Offset Program payments plainly are neither "refunds" due on an "individual tax account," nor "refunds" due from any IRC credit provision enumerated in § 1324(b)(2) – and defendants have not argued otherwise.

In short, there simply is no "Appropriation[] made by Law," U.S. Const. art. I, § 9, cl. 7, from which defendants legally could make Section 1402 Offset Program payments to Insurers.

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[3] *See* Joint HHS OIG/TIGTA Report: *Review of the Accounting Structure Used for the Administration of Premium Tax Credits* at 18-19 (Mar. 31, 2015) ("Joint OIG/TIGTA Report"), pertinent pages attached as Ex. A; *see also* CMS March Marketplace Payment Processing Cycle: Enrollment & Payment Data Reporting and Restatement at 9 (Feb. 12, 2014), pertinent pages attached as Ex. B. We do not have more current figures because defendants have taken steps to make that information publicly unavailable. *See infra* at 26 & n.14.

Accordingly, defendants' Section 1402 Offset Program payments, both past and ongoing, violate both the Appropriations Clause and § 706(2)(B) of the APA.

SUMMARY JUDGMENT STANDARD

A court "shall grant summary judgment" where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Here, as the Court already has recognized, there is no genuine dispute as to any material fact. *See* Order at 3 (Oct. 19, 2015) ("[T]he facts are not in dispute."). Accordingly, the only issue now before the Court is whether the House is entitled to judgment as a matter of law. It is.

STATEMENT OF UNDISPUTED FACTS

Plaintiff United States House of Representatives' Statement of Material Facts as to Which There Is No Genuine Issue, filed simultaneously herewith, recites individual factual statements that underpin this case, including references to parts of the record relied on to support each statement. Here, we describe the pertinent material undisputed facts in a more narrative fashion, with references where appropriate to relevant record citations.

CONGRESS ENACTS THE AFFORDABLE CARE ACT

On December 24, 2009, H.R. 3590, 111th Cong. (2009), as amended and retitled "Patient Protection and Affordable Care Act," passed the Senate by a vote of 60-39. *See* Answer ¶ 22 (Nov. 2, 2015) (ECF No. 52). On March 21, 2010, the House agreed to the Senate amendments by a vote of 219-212. *See id.* ¶ 23. On March 23, 2010, H.R. 3590, as agreed to by both the

Senate and the House, was signed into law by the President. *See* ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010); Answer ¶ 24.

The ACA authorized the creation of two programs pertinent here:

1. The Section 1401 Refundable Tax Credit Program. The ACA creates a program to reduce the health insurance premiums of qualified individuals by providing them with refundable tax credits. *See* ACA § 1401 (titled "REFUNDABLE TAX CREDIT PROVIDING PREMIUM ASSISTANCE FOR COVERAGE UNDER A QUALIFIED HEALTH PLAN"). The program operates through the IRC. In particular:

- Section 1401 amends the IRC to add a new § 36B to the Code. *See* ACA § 1401(a) ("Subpart C of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 (relating to refundable credits) is amended by inserting after section 36A the following new section: [§ 36B]."). New § 36B, in turn, provides in pertinent part that "there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year." 26 U.S.C. § 36B.

- Section 1401 also amends 31 U.S.C. § 1324, which is a permanent appropriation providing "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law. . . ." 31 U.S.C. § 1324(a). Section 1401 amends § 1324 as follows: "Paragraph (2) of section 1324(b) of title 31, United States Code, is amended by inserting '36B,' after '36A,'." ACA § 1401(d)(1).

The net effect of these two amendments is to make the permanent appropriation established by 31 U.S.C. § 1324 available to fund the Section 1401 Refundable Tax Credit Program.

2. The Section 1402 Offset Program. The second program is rooted in section 1402 of the ACA (titled "REDUCED COST-SHARING FOR INDIVIDUALS ENROLLING IN QUALIFIED HEALTH PLANS"). Section 1402 provides that "[i]n the case of an eligible insured enrolled in a qualified health plan – (1) the Secretary shall notify the issuer of the plan of such eligibility; and (2) the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c)." ACA § 1402(a). The ACA defines "cost-sharing" to "include[] – (i) deductibles, coinsurance, copayments, or similar charges." ACA § 1302(c)(3)(A)(i). Section 1402 thus effectively requires Insurers offering qualified health plans through the ACA to reduce deductibles, coinsurance, copayments, and similar charges for qualified policyholders enrolled in their plans. These reductions are referred to in the ACA as "Cost-Sharing Reductions." *See, e.g.*, ACA §§ 1331(d)(3)(A)(i), 1402(c)(3)(B), 1412(c)(3).

The ACA also *authorizes* the federal government to make payments directly to Insurers to offset costs incurred in providing Section 1402 Cost-Sharing Reductions:

> COST-SHARING REDUCTIONS. – The Secretary [of HHS] shall . . . notify the Secretary of the Treasury . . . if an advance payment of the cost-sharing reductions under section 1402 is to be made to the issuer of any qualified health plan with respect to any individual enrolled in the plan. The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice.

ACA § 1412(c)(3).[4] *However*, unlike § 1401, neither § 1402 nor § 1412(c)(3) amend the IRC in any manner; nor do they amend 31 U.S.C. § 1324 in any manner, or make any reference to that

[4] Notably, the required Cost-Sharing Reductions are not contingent upon the receipt by Insurers of any offsetting payments. *See* ACA § 1402; *see also* C. Stephen Redhead, Cong. Research Serv., R42051, *Budget Control Act: Potential Impact of Sequestration on Health Reform Spending* at 15 & n.42 (2013) ("ACA entitles certain low-income exchange enrollees to coverage with reduced cost-sharing and requires the participating insurers to provide that coverage."), pertinent pages attached as Ex. C.

statute; nor do they (or any other provision in the ACA) otherwise appropriate any funds for the Section 1402 Offset Program.

THE ADMINISTRATION ASKS CONGRESS FOR AN ANNUAL APPROPRIATION TO FUND THE SECTION 1402 OFFSET PROGRAM FOR FISCAL YEAR 2014 AND THE FIRST QUARTER OF FISCAL YEAR 2015

The Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program were not effective before January 2014. *See supra* at n.2. The former was appropriated, as noted above, by way of 31 U.S.C. § 1324. However, the latter was not; accordingly, FY 2014 was the first fiscal year in which the Administration needed to consider funding for the Section 1402 Offset Program.

On or about April 10, 2013, the Administration submitted its FY 2014 budget to Congress. *See* Office of Management & Budget ("OMB"), Fiscal Year 2014 Budget of the U.S. Government (Apr. 10, 2013) ("FY 2014 Budget"), pertinent pages attached as Ex. D. The section of the budget dealing with requested appropriations for the Centers for Medicare and Medicaid Services ("CMS"), an agency within defendant HHS, requested:

> For carrying out . . . sections 1402 and 1412 of the [ACA], such sums as necessary. For carrying out . . . such sections in the first quarter of fiscal year 2015[,] . . . $1,420,000.000.

Id. App. at 448. The Administration never withdrew its FY 2014 Budget request for an appropriation to fund the Section 1402 Offset Program.[5]

Also on or about April 10, 2013, HHS submitted to Congress its justification for the appropriations requested by CMS for FY 2014. *See* HHS, Fiscal Year 2014, CMS, Justification

[5] *See* Joint Submission in Resp. to This Court's June 1, 2015 Minute Order at 3 n.1 (June 15, 2015) (ECF No. 30) ("Joint Submission") (acknowledging there was no "separate formal withdrawal document"). We earlier explained the process by which budget requests are withdrawn. *See* [House's] Suppl. Mem. Concerning Defs.' Mot. to Dismiss at 6-7 n.6 (July 1, 2015) (ECF No. 33).

of Estimates for Appropriations Committees (Apr. 10, 2014) ("FY 2014 CMS Justification"), pertinent pages attached as Ex. E. The FY 2014 CMS Justification stated:

- "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014." *Id.* at 184; *see also id.* at 183 (providing rationale for funding requests).
- CMS requires an FY 2014 appropriation for its "five annually-appropriated accounts," including a "new appropriation" for the Section 1402 Offset Program beginning in FY 2014, the "Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans (Cost Sharing Reductions)" account. *Id.* at 2, 7; *see also id.* at 183-84.
- CMS needs an "annual" appropriation for Section 1402 Offset Program payments in the amount of "$4.0 billion in the first year of [ACA Exchange] operations . . . [and] a $1.4 billion advance appropriation for the first quarter of FY 2015 . . . to permit CMS to reimburse [certain Insurers]." *Id.* at 7; *see also id.* at 184 (same).

OMB DECLARES THAT SECTION 1402 OFFSET PROGRAM PAYMENTS ARE SUBJECT TO SEQUESTRATION

On or about May 20, 2013, OMB, then headed by defendant Burwell, issued an annual Sequestration Report.[6] The report stated that Section 1402 Offset Program payments to Insurers in FY 2014 – which OMB estimated would total $3.978 billion – were subject to sequestration in the amount of $286 million. *See* OMB FY 2014 Sequestration Report App. at 23 (Ex. F).

[6] *See* OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version (May 20, 2013) ("OMB FY 2014 Sequestration Report"), pertinent pages attached as Ex. F.

The OMB FY 2014 Sequestration Report also referenced Treasury account no. 009-38-0126, under "Centers for Medicare and Medicaid Services," as the account established to make Section 1402 Offset Program payments to Insurers, *see id.*, but the report did not reference the Section 1401 Refundable Tax Credit Program or the separate Treasury account (no. 015-45-0949) established to make payments under that program.

We explain below why these statements in the OMB FY 2014 Sequestration Report are legally significant. *See infra* at 22-24.

CONGRESS ENACTS APPROPRIATIONS LEGISLATION FOR FISCAL YEAR 2014

On or about July 11, 2013, the Senate Committee on Appropriations approved and reported out S. 1284, a bill to make appropriations for the Departments of Labor, HHS, and Education, and related agencies for FY 2014. *See* S. Rep. No. 113-71 (2013), pertinent pages attached as Ex. G. The Senate Report stated that "[t]he Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA." *Id.* at 123; *see also id.* at 251.

On October 17, 2013, the President signed into law the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013), which continued appropriations at FY 2013 levels through January 15, 2014.

On January 15, 2014, the President signed into law H.J. Res. 106, Pub. L. No. 113-73, 128 Stat. 3 (2014), which continued appropriations at FY 2013 levels through January 18, 2014.

On January 17, 2014, the President signed into law the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014), which provided appropriations for FY 2014 through the end of the fiscal year.

None of these three enactments contained any appropriation to fund the Section 1402 Offset Program for FY 2014 (or the first quarter of FY 2015). *See* Pub. L. No. 113-46; Pub. L. No. 113-73; Pub. L. No. 113-76. Indeed, defendants have acknowledged that Congress did not appropriate any funds for the Section 1402 Offset Program in any of the FY 2014 appropriations enactments: "[I]f [the Court's] question is was there an additional 2014 statute passed providing for those funds, the answer is no. We're not relying on a 2014 statute. . . . *There was no 2014 statute appropriating new money [for the Section 1402 Offset Program]*." Tr. of Oral Arg. at 27 (May 28, 2015) (ECF No. 31) (emphasis added).

CONGRESS ENACTS APPROPRIATIONS LEGISLATION FOR FISCAL YEAR 2015

On September 19, 2014, the President signed into law the Continuing Appropriations Resolution, 2015, Pub. L. No. 113-164, 128 Stat. 1867 (2014), which continued appropriations for FY 2015 at FY 2014 levels through December 11, 2014.

On December 12, 2014, the President signed into law H.J. Res. 130, Pub. L. No. 113-202, 128 Stat. 2069 (2014), which continued appropriations for FY 2015 at FY 2014 levels through December 13, 2014.

On December 13, 2014, the President signed into law H.J. Res. 131, Pub. L. No. 113-203, 128 Stat. 2070 (2014), which continued appropriations for FY 2015 at FY 2014 levels through December 17, 2014.

And, on December 16, 2014, the President signed into law the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014), which provided appropriations for FY 2015 through the end of the fiscal year.

None of these four enactments contained any appropriation to fund the Section 1402 Offset Program for FY 2015. *See* Pub. L. No. 113-164; Pub. L. No. 113-202; Pub. L. No. 113-203; Pub. L. No. 113-235.

CONGRESS ENACTS APPROPRIATIONS LEGISLATION FOR FISCAL YEAR 2016

On September 30, 2015, the President signed into law the Continuing Appropriations Act, 2016, Pub. L. No. 114-53, 129 Stat. 502 (2015), which continues appropriations for FY 2016 at FY 2015 levels through December 11, 2015. The Continuing Appropriations Act, 2016 does not contain any appropriation to fund the Section 1402 Offset Program for FY 2016. *See* Pub. L. No. 114-53.

DEFENDANTS MAKE SECTION 1402 OFFSET PROGRAM PAYMENTS TO INSURERS

In January 2014, defendants began making Section 1402 Offset Program payments to Insurers, and they have continued to do so since then. *See* Answer ¶ 35; *supra* at n.3.

ARGUMENT

The House is entitled to judgment as a matter of law. In Part I of the Argument, we provide a brief overview of the relevant constitutional and statutory landscape. In Part II, we explain that the House is entitled to judgment on Count I, which alleges that defendants' Section 1402 Offset Program payments to Insurers violate the Appropriations Clause, *see* Compl. ¶¶ 51-56, because no law appropriating funds for that program ever has been enacted. Finally, in Part III, we explain that, for the same reason, the House is entitled to judgment on Count V, which alleges that, because no law appropriating funds for the Section 1402 Offset Program ever has been enacted, defendants' payments to Insurers under that program violate APA § 706(2)(B). *See id.* ¶¶ 82, 83, 85, 87-90.

I. The Constitutional and Statutory Context.

A. THE CONSTITUTION EXPRESSLY BARS THE EXECUTIVE FROM SPENDING PUBLIC FUNDS ABSENT A LEGISLATIVELY ENACTED APPROPRIATION.

Foremost among Congress' core constitutional powers is the power of the purse. *See, e.g.*, The Federalist No. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961) ("The House of Representatives can not only refuse, but they alone can propose the supplies requisite for the support of government."). The principal constitutional basis for Congress' power of the purse is the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, which not only vests Congress with a particularized and exclusive legislative authority, but also affirmatively limits the power of the Executive (and the Judiciary) by expressly barring the expenditure of *any* public funds absent enactment of a law appropriating such funds. *See* Mem. Op. at 3 (Sept. 9, 2015) (ECF No. 41) ("Authorization and *appropriation by Congress are nonnegotiable prerequisites to government spending*. . . ." (emphasis added)).[7]

The Supreme Court and the lower courts repeatedly have emphasized the importance of this exclusive congressional power:

> No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. . . . The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, § 9 (1 Stat. at Large, 15). However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any

[7] Congress' power of the purse also is reflected in other Article I provisions, including art. I, § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, [and] to pay the Debts . . . of the United States"); art. I, § 8, cl. 2 ("Congress shall have power . . . To borrow Money on the credit of the United States"); and art. I, § 8, cl. 5 ("Congress shall have power . . . To coin Money [and] regulate the Value thereof"), as well as Amend. XVI ("Congress shall have power to lay and collect taxes on incomes, from whatever source derived").

> thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

Reeside v. Walker, 52 U.S. 272, 291 (1850); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds is proper only when authorized by Congress . . . ."); *Dep't of the Navy v. Fed. Labor Relns. Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("Congress's control over federal expenditures is 'absolute.'" (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992))); *Rochester*, 960 F.2d at 185 (Congress has "exclusive power over the federal purse"); *Hart's Adm'r v. United States*, 16 Ct. Cl. 459, 484 (1880) ("[A]bsolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886).

Courts particularly have emphasized the importance of the Appropriations Clause as a check on the Executive. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425; *see also Cincinnati Soap*, 301 U.S. at 321 ("The [Appropriations Clause] was intended as a restriction upon the disbursing authority of the Executive department . . . ."); *Dep't of the Navy*, 665 F.3d at 1347 ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers . . . [because it operates] as a restraint on Executive Branch officers . . . [who may seek] 'unbounded power over the public purse . . . .'" (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States*

§ 1342, at 213-214 (1833))); *Dep't of the Air Force v. Fed. Labor Relns. Auth.*, 648 F.3d 841, 845 (D.C. Cir. 2011) (same).

As a result, permitting the Executive, "on its own, [to] carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers," *Am. Fed'n of Gov't Emps. v. Fed. Labor Relns. Auth.*, 388 F.3d 405, 414 (3d Cir. 2004), as this Court already has recognized:

> Article I could not be more clear: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const. art. I, § 9, cl. 7. Neither the President nor his officers can authorize appropriations; the assent of the House of Representatives is required before *any* public monies are spent. Congress's power of the purse is the ultimate check on the otherwise unbounded power of the Executive. . . . The genius of our Framers was to limit the Executive's power "by a valid reservation of congressional control over funds in the Treasury."

Mem. Op. at 35 (emphasis in original; quoting *Richmond*, 496 U.S. at 425).

B. CONGRESS EXERCISES ITS APPROPRIATIONS CLAUSE AUTHORITY BY ENACTING, OR DECLINING TO ENACT, APPROPRIATIONS LEGISLATION, AS WELL AS BY SELECTING DIFFERENT FORMS OF APPROPRIATION.

Given the fundamental importance of the Appropriations Clause to the structure and durability of our form of government – as well as, ultimately, to the liberty of our people – it is no surprise that the legal rules regarding what is and is not a constitutionally valid appropriation are precise and well-developed. Those rules begin with an important distinction between authorizing legislation and appropriations legislation. *See* Mem. Op. at 3 ("The distinction between authorizing legislation and appropriating legislation is relevant here . . . .").

"Authorizing legislation establishes or continues the operation of a federal program or agency, either indefinitely or for a specific period." *Id.* (citing U.S. Gov't Accountability Office ("GAO"), GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* at 15

(2005) ("GAO Glossary")).[8] Authorizing legislation alone, however, does not provide the legal authority required by the Appropriations Clause to expend public funds to effectuate a program, agency, or function. Only an "appropriations" enactment can do that. *See* GAO, *Principles of Federal Appropriations Law* at 2-41 (3d ed. 2004) ("GAO Red Book") ("An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act.").

"Appropriations" legislation, which *does* implement the authority vested in Congress by the Appropriations Clause, is legislation that designates *an amount and source* of public funds to pay for a program, agency, or function that Congress has authorized, and permits expenditure of such funds in support of such program, agency, or function. *See Nevada*, 400 F.3d at 13-14 (appropriation requires specific direction to pay and designation of funds to be used). As this Court already has held:

> Appropriation legislation "provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." [GAO Glossary] at 13. Appropriations legislation has "the limited and specific purpose of providing funds for authorized programs." *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (quoting *TVA v. Hill*, 437 U.S. 153, 190 (1978)).

Mem. Op. at 4.

> It is well understood that "a direction to pay without a designation of the source of funds is not an appropriation." [GAO Red Book at 2-17]. The inverse is also true: the designation of a source, without

[8] As this Court has noted, while "GAO decisions are not binding, [courts] give special weight to [GAO's] opinions due to its accumulated experience and expertise in the field of government appropriations." Mem. Op. at 3 n.1 (citations and quotation marks omitted). *See also Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005); *Delta Data Sys.Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Court "regard[s] the assessment of the GAO as an expert opinion, which [the courts] should prudently consider"); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971) (recognizing GAO's "accumulated experience and expertise").

> a specific direction to pay, is not an appropriation. *Id.* Both are required.

Id.; *see also Nevada*, 400 F.3d at 14 ("a statute may 'be construed as making an appropriation if it contains a specific direction to pay . . . and a designation of the [f]unds to be used'" (quoting 63 Comp. Gen. 331, 335 (1984))); GAO Red Book at 2-17 (private relief act that contained authorization and direction to pay, but no designation of funds, not an appropriation); 67 Comp. Gen. 332, 333 (1988) (designation of source of funds without specific direction to pay, not an appropriation).

Importantly for purposes of this case, "[a]n appropriation must be expressly stated; it cannot be inferred or implied." Mem. Op. at 4; *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); *id.* § 1301(d) ("A law may be construed to make an appropriation . . . only if the law specifically states that an appropriation is made . . . ."); GAO Red Book at 2-16 ("[T]he rule is that the making of an appropriation must be expressly stated.").

In 1885, the Attorney General acknowledged that this salutary "no inferred or implied appropriations" principle is derived directly from the Appropriations Clause: "[I]n view of the constitutional provision [art. I, § 9, cl. 7] . . . a statute should not be construed as making an appropriation . . . unless the language is sufficiently explicit to clearly justify it [and] authority for the use of the public money cannot rise by inference without very clear terms requiring it." 18 Op. Att'y Gen. 174, 176 (1885). Subsequently, Congress codified this rule into federal statutory law. *See* Pub. L. No. 217, 32 Stat. 552, 560 (July 1, 1902) (codified as amended at 31 U.S.C. § 1301(d)).

The most common form of appropriation is a non-permanent (usually annual) appropriation for a particular agency, program, or function. The least common is a permanent

appropriation which (i) remains in effect until Congress repeals or modifies it, and (ii) permits a federal agency to expend public funds without the need for passage of a non-permanent appropriations bill in the current Congress. For an appropriation to be considered permanent, the law must clearly and expressly so provide. *See* GAO Red Book at 2-14. The distinction between permanent and non-permanent appropriations is well established, and the Executive well understands it.[9]

As it did on some occasions in the ACA, Congress may combine authorizations and appropriations in a single enactment; however, it most often enacts them separately. Moreover, Congress may choose to appropriate amounts different from the amount (if any) provided for in an authorization, *see, e.g.*, 36 Comp. Gen. 240, 242 (1956) ("It is fundamental . . . that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act."); or it may limit the purposes for which appropriated funds may be used, *see, e.g.*, *City of Los Angeles v. Adams*, 556 F.2d 40, 48-51 (D.C. Cir. 1977) (giving full effect to appropriations provisions containing limitations resulting in less funding than previously enacted authorizations).

Finally, and importantly here, Congress may elect not to appropriate funds for a program it has authorized. For example, in 1978, Congress permanently authorized Treasury to make prepayments to certain U.S. territories for amounts they were expected to collect from taxes, duties, and fees. However, because neither that statute nor any other contained an appropriation, the prepayments could not be made. *See* GAO Red Book at 2-17 (citing GAO, B-114808 (Aug.

[9] The small number of permanent appropriations laws include, in addition to 31 U.S.C. § 1324, 31 U.S.C. § 1304(a) (providing funding for payment of certain judgments); 31 U.S.C. § 1305(2) (providing funding for payment of interest on national debt); 42 U.S.C. § 401(a) (providing funding for payments to Social Security recipients); and 42 U.S.C. § 1395i(a) (providing funding for payments of Medicare benefits).

7, 1979) (permanent authorization insufficient to constitute appropriation)). Another example: Congress never appropriated funds for the Department of Transportation's toll-free air travel consumer complaint hotline which was authorized by the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 415, 126 Stat. 11, 95 (2012).

II. Defendants Violated, and Are Continuing to Violate, the Appropriations Clause by Making Section 1402 Offset Program Payments to Insurers Despite Congress Never Having Enacted a Law Appropriating Funds for That Program.

A. THE ACA DID NOT APPROPRIATE FUNDS FOR THE SECTION 1402 OFFSET PROGRAM.

It is clear beyond any possible doubt that there is *no language* in the ACA that appropriates funds for the Section 1402 Offset Program. Three legal principles buttress this conclusion.

1. *First*, an "[a]n appropriation must be expressly stated; it cannot be inferred or implied." Mem. Op. at 4; *see also supra* at Part I.B. There is no language in the ACA that *expressly* appropriates funds for the Section 1402 Offset Program, and we do not understand defendants to contend otherwise.

2. *Second*, Courts presume that Congress knows how to enact specific types of legislation. *See, e.g., Whitfield v. United States*, 543 U.S. 209, 216 (2005) (Congress' inclusion of specific type of legislative language "demonstrate[s] that [Congress] knows how to impose such a requirement when it wishes to do so"). This principle applies to appropriations legislation which is a particularized type of legislation with which Congress is intimately familiar. The ACA itself is proof of this. The ACA is littered with examples of specific appropriations, leaving no doubt that Congress knew, when it enacted the ACA, how to appropriate money when it so intended.

Examples of Non-Permanent Appropriations in the ACA. Congress in the ACA appropriated $30,000,000 "for the first fiscal year for which this section applies" for a grant program to enable States to establish offices of health insurance consumer assistance, or health insurance ombudsman programs. ACA § 1002 (amending Public Health Service Act). Congress appropriated $250,000,000 for FY 2010-14 for another grant program to enable States to study unreasonable increases in premiums for health insurance. *See id.* § 1003 (amending Public Health Service Act). And Congress appropriated $5,000,000,000 to "pay claims against (and the administrative costs of) [a] high risk pool" created by the ACA. *Id.* § 1101(g)(1). This non-permanent appropriation covered "the period beginning on the date on which such program is established and ending on January 1, 2014." *Id.* § 1101(a).[10]

Example of Permanent Appropriation in the ACA. Congress also demonstrated in the ACA itself that it knew exactly how to fund a program with a permanent appropriation when it so intended. As discussed above, ACA § 1401 did exactly that by (i) amending the IRC to add a new tax credit provision, and (ii) amending 31 U.S.C. § 1324, an existing permanent

[10] *See also* ACA § 1102(e) (appropriating $5,000,000,000 for reinsurance for early retirees); *id.* § 1311(a)(1) (appropriating "to the Secretary, out of any moneys in the Treasury not otherwise appropriated, an amount necessary to enable the Secretary to make awards" for assistance to states to establish American health benefit exchanges); *id.* § 1322(g) (appropriating $6,000,000,000 for federal program to assist establishment and operation of non-profit, member-run health insurance issuers); *id.* § 2405 (appropriating "$10,000,000 for each of fiscal years 2010 through 2014" for expansion of state aging and disability resource centers); *id.* § 2701(e) (appropriating "for each of fiscal years 2010 through 2014, $60,000,000" for development of health care quality measures for adults eligible for Medicaid benefits); *id.* § 2707(e)(1)(A) (appropriating "$75,000,000 for fiscal year 2011" for Medicaid emergency psychiatric demonstration project); *id.* § 2801(a)(5)(C) (appropriating "for fiscal year 2010, $9,000,000" for Medicaid and CHIP Payment and Access Commission); *id.* § 2951(j)(1) (appropriating various amounts for FY 2010-14 for maternal, infant, and early childhood home visitation programs); *id.* § 2953(f) (appropriating "$75,000,000 for each of fiscal years 2010 through 2014" for personal responsibility education); *id.* § 3021(f)(1)(B) (appropriating $10,000,000,000 for FY 2011-19 for establishment of center for Medicare and Medicaid innovation within CMS); *id.* § 4002(b) (appropriating various amounts for FY 2010-15 for prevention and public health fund).

appropriation for "refunds due from credit provisions of the [IRC]." 31 U.S.C. § 1324(b). Specifically, § 1401(d) amended 31 U.S.C. § 1324(b) to include the new IRC § 36B in the exclusive list of tax credits permitted to be paid from that permanent appropriation. *See* 31 U.S.C. § 1324(b)(2) ("Disbursements may be made from the appropriation made by this section . . . for . . . refunds due from credit provisions of the [IRC] . . . [including] section . . . 36B . . . of such Code.").

Accordingly, it is particularly telling that Congress explicitly and deliberately provided a permanent appropriation to fund the Section 1401 Refundable Tax Credit Program but, with respect to the Section 1402 Offset Program – created by immediately adjacent provisions in the same Part (Part I) of the same Subtitle (Subtitle E) of the same Title (Title I) of the ACA – Congress was conspicuously silent on the question of funding. The only possible conclusion to be drawn is that Congress did not intend to appropriate, in the ACA itself, funds for the Section 1402 Offset Program. *See* Mem. from Cong. Research Serv. to Sen. Tom Coburn at 9-10 (July 29, 2013) (Section 1402 Offset Program not funded through 31 U.S.C. § 1324; annual appropriation necessary) ("CRS Coburn Memorandum"), pertinent pages attached as Ex. H.

3. *Third*, in determining the meaning of federal legislation, the most basic canon of construction the Court should follow is the plain meaning rule, which presumes that Congress means what it says.

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations and quotation marks omitted); s*ee also, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S.

1, 6 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997); *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 300 (1989).

The plain language of both § 1402 and § 1412 of ACA, either separately or taken together, provides no basis for the Court to conclude that Congress intended to appropriate funds for the Section 1402 Offset Program. As discussed above, *see supra* at Part I.B, three elements must be present for there to be a valid appropriation: (i) a direction to pay; (ii) a source of funds; and (iii) language that "specifically states that an appropriation is made," 31 U.S.C. § 1301(d). The plain text of §§ 1402 and 1412 satisfies, at most, the first element (direction to pay). It most assuredly does not satisfy the second or third elements.

Even if § 1402 and §1412 *authorize* payments to be made to Insurers under the Section 1402 Offset Program, *an authorization is not an appropriation*, as this Court already has held. *See* Mem. Op. at 3-4; *see also supra* at Part I.B. Authorization language creates programs, prescribes functions, and/or provides legal authority for an agency to conduct a program or activity. *See* Mem. Op. at 3. Authorization language – even language that says "shall make such advance payment," as does ACA § 1412(c)(3) – *does not* provide any funds to be spent on programs, functions, or activities; *only* appropriations language can do that. *See supra* at Part I.B; *see also, e.g.*, GAO Red Book at 2-40 ("authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by Congress actually appropriating the funds" (citing 35 Comp. Gen. 306 (1955) & 27 Comp. Dec. 923 (1921))).

GAO recently applied this principle to another ACA program known as the "Risk Corridors Program." *See* GAO, B-325630, HHS – Risk Corridors Program (Sept. 30, 2014) ("GAO Opinion Letter"), pertinent pages attached as Ex. I. Like the Section 1402 Offset Program, the statutory language creating the Risk Corridors Program directs that the "Secretary

shall pay" to qualified health plans an amount necessary to compensate for certain losses incurred as a result of costs exceeding permitted premiums. ACA § 1342(b)(1). Applying both the Appropriations Clause and 31 U.S.C. § 1301(d), GAO concluded that, because "*[i]t is not enough for a statute to simply require an agency to make a payment* . . . [ACA] Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." GAO Op. Ltr. at 3 (emphasis added).

Accordingly, it is clear that there is *no language* in the ACA that appropriates funds for the Section 1402 Offset Program. Rather, Congress intended that the program would be funded, if at all, only through the annual appropriations process. Indeed, as we now explain, the Administration's conduct with respect to the FY 2014 budget cycle – the budget cycle that was current when the Section 1402 Offset Program became effective, *see supra* at n.2 – confirms that it recognized this reality.

B. DEFENDANTS CONCEDED IN 2013 THAT THE ACA DID NOT APPROPRIATE FUNDS FOR THE SECTION 1402 OFFSET PROGRAM.

In April 2013, the Administration acknowledged the need for a non-permanent appropriation to fund the Section 1402 Offset Program by requesting such an appropriation to fund the program for FY 2014 and the first quarter of FY 2015. *See* FY 2014 Budget App. at 448 (Ex. D); FY 2014 CMS Justification at 2, 4, 7, 183-84 (Ex. E); *supra* at 7-8.[11]

Then, in May 2013, the Administration again effectively acknowledged the need for a non-permanent appropriation to fund the Section 1402 Offset Program, this time through OMB. As discussed above, the OMB FY 2014 Sequestration Report:

[11] After first advising the Court at the May 28, 2015 hearing that the Administration had withdrawn this request, *see* Tr. of Oral Arg. at 23, defendants subsequently acknowledged that the request never was withdrawn, *see* Joint Submission at 3 n.1.

- Stated that Section 1402 Offset Program payments to Insurers in FY 2014 – which it estimated would total $3.978 billion – were subject to sequestration in the amount of $286 million;
- Referenced Treasury account no. 009-38-0126, under "Centers for Medicare and Medicaid Services," as the account established to make Section 1402 Offset Program payments to Insurers; and
- Did not reference the Section 1401 Refundable Tax Credit Program, or account no. 015-45-0949, the account established to make Section 1401 Refundable Tax Credit payments.

See OMB FY 2014 Sequestration Report App. at 23 (Ex. F). This is legally significant for two reasons.

First, because payments properly made under 31 U.S.C. § 1324(b) are exempt from sequestration, OMB's statement that Section 1402 Offset Program payments to Insurers *were subject to sequestration* necessarily was an acknowledgement that § 1324 could not be the funding source for such payments.[12]

[12] The explanation is as follows. In 1985, Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended at 2 U.S.C. § 905(d)) ("Gramm-Rudman-Hollings"). Section 255 of Gramm-Rudman-Hollings as amended provides that "[p]ayments to individuals made pursuant to provisions of the Internal Revenue Code of 1986 establishing refundable tax credits shall be exempt from reduction under any order issued under this part." 2 U.S.C. § 905(d).

In 2011, Congress enacted the Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011) ("Budget Control Act"). Section 302 of the Budget Control Act amends Gramm-Rudman-Hollings by adding a new § 251A, which creates a process of automatic, largely across-the-board spending reductions ("sequestration rules"). Certain payments are exempt from the sequestration rules. In particular, new § 251A(8) of Gramm-Rudman-Hollings provides that, "[w]hen implementing the sequestration of direct spending pursuant to this paragraph, OMB shall follow . . . the exemptions specified in section 255 . . . ." The "exemptions specified in section 255" include "payments to individuals made pursuant to provisions of the Internal

(*Continued…*)

Second, by referencing only the Treasury account established to make Section 1402 Offset Program payments to Insurers (no. 009-38-0126), and by avoiding any reference to the Section 1401 Refundable Tax Credit Program and the separate Treasury Account established to make those payments (no. 015-45-0949), OMB effectively acknowledged that the two programs were separate and subject to separate funding requirements. As we discuss below, defendants are in fact doing exactly the opposite of what OMB indicated was proper: they are making payments for both programs from one Treasury account – i.e., the account established to make Section 1401 Refundable Tax Credit Program payments – and using one funding source, i.e., the permanent appropriation established by 31 U.S.C. § 1324. *See infra* at Part II.D.

* * *

Because there is no appropriation for the Section 1402 Offset Program in the ACA itself – as the Administration effectively conceded in seeking a non-permanent appropriation for FY 2014 (and the first quarter of FY 2015), and in the OMB FY 2014 Sequestration Report – the Appropriations Clause of the Constitution precluded defendants from making any Section 1402 Offset Program payments unless Congress subsequently, through legislative enactment, appropriated funds for the program. Congress never did that, as we explain in the next section.

Revenue Code of 1986 establishing refundable tax credits," the permanent appropriation for which is provided by 31 U.S.C. § 1324(b).

See also Dep'ts of Labor, Health & Human Servs., & Educ., & Related Agencies Appropriations for Fiscal Year 2014, *Hr'g Before the S. Comm. on Appropriations*, 113th Cong. 141 (2013) (statement of Sen. Patty Murray, Chairwoman, S. Comm. on Budget) ("Unlike [§ 1401] premium assistance subsidies, [§ 1402] cost-sharing subsidies are not provided to individual taxpayers, but paid directly to insurers. As such, they appear to be subject to sequestration.").

C. CONGRESS REJECTED THE ADMINISTRATION'S REQUEST FOR A NON-PERMANENT APPROPRIATION FOR THE SECTION 1402 OFFSET PROGRAM FOR FY 2014, AND ALSO DID NOT APPROPRIATE FUNDS FOR THAT PROGRAM FOR FY 2015 OR FY 2016.

In response to the Administration's request for an annual appropriation to fund the Section 1402 Offset Program for FY 2014 (and the first quarter of FY 2015), Congress said no. The Senate Report is explicit: "The Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA." S. Rep. No. 113-71, at 123 (Ex. G).

Congress, thereafter, enacted three bills that dealt with appropriations for FY 2014, all of which excluded the Administration's requested appropriation for the Section 1402 Offset Program, *see supra* at 9-10, as defendants have conceded, *see* Tr. of Oral Arg. at 27. Similarly, none of the appropriations bills Congress enacted for FY 2015 and FY 2016 included any appropriation for the Section 1402 Offset Program. *See supra* at 10-11.

D. DEFENDANTS MAY NOT USE THE PERMANENT APPROPRIATION ESTABLISHED BY 31 U.S.C. § 1324 TO MAKE SECTION 1402 OFFSET PROGRAM PAYMENTS.

Defendants admit that, in January 2014, immediately after Congress rejected the Administration's request for an annual appropriation, they nonetheless began making Section 1402 Offset Program payments to Insurers. *See* Answer ¶ 35. They did so without informing or providing any justification to Congress.

At some point – although it is not clear exactly when – defendants decided that their position would be that they are entitled to tap the permanent appropriation for tax refunds established by 31 U.S.C. § 1324 to make Section 1402 Offset Program payments.[13] As of

[13] *See, e.g.*, Defs.' Suppl. Mem. in Supp. of Their Mot. to Dismiss the Compl. at 1 (July 1, 2015) (ECF No. 34) ("Defendants' Supplemental Memorandum") ("[T]he Executive . . . has made (*Continued…*)

January 2015, defendants had paid $3.270 billion to Insurers under this program. *See supra* at 3 & n.3. However, the House – and the American people – are unable to determine the exact amount defendants have passed out to Insurers under the Section 1402 Offset Program. This is so because defendant Treasury Department is making payments for that program, the Section 1401 Refundable Tax Credit Program, and a third program as well, *out of one account*, and is not separating out – for public reporting purposes – the amounts paid for the three programs individually.[14]

As we now show in the two subsections that follow, defendants have advanced, over the past 18 months, a variety of justifications for their decision to tap 31 U.S.C. § 1324. However, they have abandoned many of those justifications along the way, and the ones that remain are legally and constitutionally untenable.

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advance payments of . . . [cost-sharing] reduction[] [payments] from . . . 31 U.S.C. § 1324."); Defs.' Suppl. Reply Mem. in Supp. of Their Mot. to Dismiss the Compl. at 1 (July 17, 2015) (ECF No. 35) ("Defendants' Supplemental Reply") (same).

[14] *See* Joint OIG/TIGTA Report at 3 ("The allocation account associated with the Department of the Treasury permanent indefinite refund appropriation, administered by the IRS . . . used to pay the [Section 1401 Refundable Tax Credit Program] is also used to make other payments by the CMS [including] advance cost-sharing reduction payments . . . and basic health program payments.") (Ex. A). The "Basic Health Programs For Low-Income Individuals Not Eligible For Medicare" is created by ACA § 1331.

Treasury is making payments for all three programs from account no. 015-45-0949, entitled "Refundable Premium Assistance Tax Credit," and is not separating out the amounts paid for the three programs. *See* OMB SF 133 Reports on Budget Execution and Budgetary Resources, at 12,130-34, Line 4190 (Dep't of the Treasury) (Dec. 1, 2014), pertinent pages attached as Ex. J. (We note, however, that the Administration's FY 2016 budget states that it paid $2.111 billion to Insurers under the Section 1402 Offset Program in FY 2014; expected to pay Insurers $5.004 billion under that program in FY 2015; and expected to pay Insurers $6.215 billion under that program in FY 2016. *See* OMB, Fiscal Year 2016 Budget of the U.S. Government, App. at 1046 (Feb. 2, 2015), pertinent pages attached as Ex. K.)

1. Defendants Advance Various, Shifting Justifications for Their Use of the Permanent Appropriation Established by 31 U.S.C. § 1324 To Make Section 1402 Offset Program Payments.

In March 2014 – by which time defendants already had begun making Section 1402 Offset Program payments to Insurers – the Administration submitted its FY 2015 Budget to Congress. *See* OMB, Fiscal Year 2015 Budget of the U.S. Government (Mar. 4, 2014) ("FY 2015 Budget"), pertinent pages attached as Ex. L. In the FY 2015 Budget, the request that had appeared in the HHS/CMS section of the FY 2014 Budget for a non-permanent appropriation to enable CMS to make Section 1402 Offset Program payments, *see supra* at 7, had disappeared. That constitutionally appropriate request was replaced in the FY 2015 Budget with a single line item in the Internal Revenue Service ("IRS") section of the budget, lumping together the Section 1401 Refundable Tax Credit Program with the Section 1402 Offset Program. *See* FY 2015 Budget App. at 1087-88 (Ex. L). Neither the Administration nor the FY 2015 Budget itself offered any explanation or justification for this multi-billion-dollar change of position, even though it appears that defendants, by lumping together the two programs, already had decided that they would contend that they were entitled to tap 31 U.S.C. § 1324.

In May 2014, during then-OMB Director Burwell's confirmation hearings to be Secretary of HHS, two Senators inquired of her why the Administration had flip-flopped on the question of whether Section 1402 Offset Program payments would be subject to mandatory sequestration rules. *See* Letter from Senators Ted Cruz and Michael S. Lee, to Sylvia M. Burwell, Dir. OMB, at 2 (May 16, 2014), attached as Ex. M.[15] Burwell responded, in pertinent part, that no payments

[15] The Senators' May 16, 2014 letter resulted from a significant discrepancy between OMB's sequestration reports to Congress for FY 2014 and FY 2015. As discussed above, OMB reported for FY 2014 that Section 1402 Offset Program payments to Insurers for that fiscal year were predicted to be $3.978 billion, and that such payments *were subject to mandatory sequestration*

(*Continued…*)

would be made from Treasury account no. 009-38-0126, established to make Section 1402 Offset Program payments (presumably because the account was empty since Congress had appropriated no funds for the program). *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, Responses at 4 (May 21, 2014), attached as Ex. O. Instead, she said, "[Section 1402 Offset Program payments] will be paid out of the same account [no. 015-45-0949] from which the [Section 1401 Refundable Tax Credit Program payments] . . . are paid," an explanation she justified solely on grounds of "efficiency." *Id.* at 4. Since 31 U.S.C. § 1324 is the appropriation from which Section 1401 Refundable Tax Credit Program payments are paid, Burwell effectively was saying that administrative "efficiency" justified the defendants drawing money from that permanent appropriation to make Section 1402 Offset Program payments.

The next year, in May 2015, in the midst of this litigation, defendants disavowed defendant Burwell's "efficiency" rationale. *See* Tr. of Oral Arg. at 10. Instead, they now said, unidentified "principles of appropriations law," *id.* at 8, entitled them to tap 31 U.S.C. § 1324. They so asserted, even though:

- the appropriation established by 31 U.S.C. § 1324 is *expressly* limited to "(1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the [IRC]," 31 U.S.C. § 1324(b); and

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in the amount of $286 million. *See supra* at 8-9; OMB FY 2014 Sequestration Report App. at 23 (referencing Treasury account no. 009-38-0126 under CMS) (Ex. F). Ten months later, account no. 009-38-0126 had disappeared from OMB's sequestration report for FY 2015, with no explanation. *See* OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2015, App. at 6 (Mar. 10, 2014), pertinent pages attached as Ex. N.

- there is no credit provision in the IRC for the Section 1402 Offset Program.[16]

One month later, in June 2015, defendant Burwell put forth a new justification. Testifying before the House Committee on Ways and Means, she asserted that the Section 1402 Offset Program was a "tax credit,"[17] even though that self-evidently is false. The Section 1402 Offset Program is not part of the IRC and, as we noted immediately above, there is no credit provision in the IRC for the Section 1402 Offset Program.

The very next month, in July 2015, defendants tacitly disavowed the "tax credit" idea. *See* Defs.' Suppl. Mem. (no mention of "tax credit" notion); Defs.' Suppl. Reply (same). Instead, defendants now floated three new justifications for their decision to use 31 U.S.C. § 1324 to make Section 1402 Offset Program payments:

- Congress, in subsequent enactments, never restricted the use of any federal funds for Section 1402 Offset program payments. *See* Defs.' Suppl. Mem. at 4-7, 9.
- "[T]he ACA . . . was *premised on the understanding* that cost-sharing reductions did not require yearly appropriations." *Id.* at 4 (emphasis added).
- Certain programmatic language in § 1001 of the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, 566 (2013), evinced "a *shared*

[16] To claim any tax credit enumerated in 31 U.S.C. § 1324(b)(2) – including the Section 1401 Refundable Tax Credit (IRC § 36B) – taxpayers are required to submit to the IRS an appropriate tax credit form. There is a separate IRS form for each such credit listed in § 1324(b)(2). *See* Chart of Tax Credit Forms, attached as Ex. P. Not surprisingly, there is no IRS tax credit form for the Section 1402 Offset Program, underscoring that the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program are separate and distinct, and suggesting that the IRS, at least, does not view 31 U.S.C. § 1324 as a source of funds for the latter.

[17] *Obamacare Implementation & the Dep't of Health & Human Services FY16 Budget Request*, *Hr'g before the H. Comm. on Ways & Means*, 114th Cong. (June 10, 2015) (testimony of Sec'y Burwell at 58:08:00 – 1:01:23), *available at* http://www.c-span.org/video/?326494-1/health-human-services-secretary-testimony-affordable-care-act-implementation.

understanding that [Section 1402 Offset Program] payments could be made." Defs.' Suppl. Mem. at 7 (emphasis added).

None of these three newly-contrived justifications fare any better than their predecessors, as we now explain.

2. All of Defendants' Most Recent Justifications for Their Decision to Tap the Permanent Appropriation Established by 31 U.S.C. § 1324 To Make Section 1402 Offset Program Payments Are Fatally Flawed, Both Legally and Constitutionally.

a. The Absence of an Appropriation Does Not Imply an Appropriation. Defendants' contention that they may tap 31 U.S.C. § 1324 to make Section 1402 Offset Program payments because Congress "enacted no . . . restriction as to cost-sharing payments" in FY 2014/2015, Defs.' Suppl. Mem. at 9 (emphasis removed), is at least thrice flawed.

First, this contention is statutorily precluded by the plain language of § 1324 itself. Section 1324(b) *expressly* restricts the use of that appropriation to "only . . . (1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the [IRC] . . . ." *Defendants have never contended, because they cannot, that Section 1402 Offset program payments are either "refunds" due on an "individual tax account," or "refunds" due from any IRC credit provision enumerated in § 1324(b)(2). See* CRS Coburn Mem. at 9-10 (Section 1402 Offset Program not funded through 31 U.S.C. § 1324; annual appropriation necessary) (Ex. H).

Second, the legislative history of § 1324 undercuts defendants' contention. The statutory language expressly limiting the universe of uses for the funds made available via this permanent appropriation was added in 1978. *See* Second Supplemental Appropriations Act, 1978, Pub. L. No. 95-355 § 303, 92 Stat 523, 563-64 (1978). The limiting language was added because Congress was "concerned that [31 U.S.C. § 1324] could be used to an even greater extent in the

future and in ways never contemplated when the statute was enacted. . . ." S. Rep. No. 95-1061, at 153 (1978). In other words, Congress amended 31 U.S.C. § 1324 out of concern that future Administrations might do exactly what defendants are doing here: use that permanent appropriation to fund programs and make expenditures not sanctioned by Congress.

Third, defendants' contention presumes that they are entitled to pass out taxpayer dollars unless and until Congress specifically prohibits such giveaways. But the Constitution says exactly the opposite: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Not surprisingly, when faced with this argument, the courts consistently have sided with the Constitution. "Our cases underscore the straightforward and explicit command of the Appropriations Clause. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424 (quotation marks omitted); *see also* GAO Red Book at 1-2 to 1-5; *supra* at Part I.B. Under defendants' logic, Congress' failure expressly to preclude funding for a program may be treated as an affirmative appropriation for the program. Such interpretative alchemy, if adopted, would turn the Constitution on its head and wholly negate Congress' power of the purse. *See, e.g.*, *MacCollom*, 426 U.S. at 321 (rejecting this logic as "novel approach," and reversing lower court ruling that funds could be expended unless prohibited by Congress).

b. The Alleged "Congressional Understanding" Lacks Any Record Support and Confuses Authorizations and Appropriations. Defendants' second contention has no record support, and rests only on the undisputed fact that Congress created the Section 1402 Offset Program and *authorized* payments to be made to Insurers under the program. But, as we already have explained, authorizations and appropriations are not the same. And even authorization

language that says "shall pay" does not provide any funds to be spent on programs, functions, or activities; only appropriations language can do that. *See supra* at Part I.B.

Sections 1401 and 1402 of the ACA are classic examples of this distinction. While both create programs and *authorize* payments to be made, *only* the Section 1401 Refundable Tax Credit Program actually is funded – by virtue of ACA § 1401(d)(1) which amends 31 U.S.C. § 1324(b). *There is no language in the ACA that appropriates funds for the Section 1402 Offset Program* (either by amending § 1324 or otherwise), and tossing around words and phrases like "mandatory," "unified administration," and "[Congress'] understanding," Defs.' Suppl. Mem. at 3-4, cannot and does not change that fact.

c. Defendants Misconstrue § 1001 of the Continuing Appropriations Act, 2014. Section 1001, on its face, says nothing about appropriations; it is a simple anti-fraud provision, designed only to ensure that individuals who apply for tax credits and cost-sharing reductions actually are eligible to receive them. *See* Pub. L. No. 113-46, § 1001.[18]

Moreover, the structure of the Continuing Appropriations Act, 2014, belies defendants' contention that § 1001 evinces some sort of "shared understanding that [Section 1402 Offset Program payments] could be made" from 31 U.S.C. § 1324. Defs.' Suppl. Mem. at 7. Division A contains various appropriations, while Division B (containing § 1001) deals with "Other Matters" and contains no appropriations or amendments to any laws governing any appropriations.

Finally, when § 1001 was enacted in October 2013, the Administration's position – insofar as Congress was aware – was that an *annual* appropriation from Congress was required

[18] We explained earlier how § 1001 actually does this. *See* [House's] Resp. to Defs.' Suppl. Mem. at 7 & n.9 (July 17, 2015) (ECF No. 37).

to make Section 1402 Offset Program payments. *See supra* at 7-8; Joint Submission at 3 n.1 (Administration's FY 2014 request for annual appropriation never withdrawn). Accordingly, the notion that Congress "affirmatively ratified" those payments, Defs.' Suppl. Mem. at 11, in October 2013 – months before the first payments even were made, and months before Congress even discovered what defendants were doing – is facially illogical.

* * *

In sum, defendants' shifting justifications for their unconstitutional use of funds appropriated by 31 U.S.C. § 1324 to make Section 1402 Offset Program payments reflect a transparent and meritless effort to circumvent and usurp the appropriations authority assigned by the Constitution exclusively to the Congress and, accordingly, the Court should reject their arguments. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (one branch of government "may not 'aggrandiz[e] its power at the expense of another branch. . . .'" (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991))).

Instead, the Court should declare that defendants' Section 1402 Offset Program payments violate Article I, § 9, cl. 7 of the Constitution, and it should permanently enjoin them from making any additional payments unless and until a law appropriating funds for such payments is enacted in accordance with Article I of the Constitution.

III. Defendants' Section 1402 Offset Program Payments to Insurers Violate Section 706(2)(B) of the Administrative Procedure Act.

The APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

Defendants plainly are "agencies" within the meaning of the APA. *See* 5 U.S.C. § 701(b)(1) ("For the purpose of this chapter – (1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ."); Answer ¶¶ 2-5.

Moreover, defendants' decision to make Section 1402 Offset Program payments to Insurers, as well as the payments themselves, constitute "agency action" and/or "final agency action" within the meaning of the APA. *See* 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *id.* § 551(13) (defining agency action as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

Finally, for all the reasons discussed above in Part II, defendants' payments to Insurers under the Section 1402 Offset Program – ongoing since January 2014 and now totaling in the billions of dollars – are "contrary to constitutional right, power, privilege, or immunity." Indeed, those payments not only violate an express provision of the Constitution, U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."), they also affirmatively damage the structure of our government which requires all three branches to respect the limitations placed on them by the Constitution, and they erode the confidence of our people in the rule of law. Defendants' cavalier disregard of the Appropriations Clause suggests a profound disrespect for our separated powers system of government; indeed, it

smacks of political expediency and a cynical belief that defendants are beyond judicial accountability.

No deference is afforded to an agency action that, as here, violates the Constitution. *See, e.g.*, *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1305, 1310-11 (Fed. Cir. 2008) ("[W]e review the constitutionality of a regulation without deference to the agency."). Accordingly, the Court should declare that defendants' Section 1402 Offset Program payments to Insurers violate APA § 706(2)(B), and it should permanently enjoin defendants from making any additional payments unless and until a law appropriating funds for such payments is enacted in accordance with Article I of the Constitution.

CONCLUSION

The Court should grant the House's Motion for Summary Judgment.

Respectfully submitted,

/s/ Jonathan Turley
JONATHAN TURLEY, D.C. Bar No. 417674
2000 H. Street, N.W.
Washington, D.C. 20052
(202) 285-8163
jturley@law.gwu.edu

KERRY W. KIRCHER, General Counsel
D.C. Bar No. 386816
WILLIAM PITTARD, Deputy General Counsel
D.C. Bar No. 482949
TODD B. TATELMAN, Sr. Assistant Counsel
ELENI M. ROUMEL, Assistant Counsel
ISSAC B. ROSENBERG, Assistant Counsel
D.C. Bar No. 998900
KIMBERLY HAMM, Assistant Counsel
D.C. Bar No. 1020989

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Plaintiff United States House of Representatives

December 2, 2015

CERTIFICATE OF SERVICE

I certify that on December 2, 2015, I served one copy of the foregoing Memorandum of Points and Authorities in Support of Plaintiff United States House of Representatives' Motion for Summary Judgment by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse