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' OPPOSTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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January 15, 2016

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GLOSSARY OF ACRONYMS AND SHORT CITES

ACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)
CBO	Congressional Budget Office
CMS	Centers for Medicare and Medicaid Services
Defs.' Mem.	Defendants' Memorandum in Support of Their Motion for Summary Judgment (Dec. 2, 2015) (ECF No. 55-1)
Defs.' Suppl. Mem.	Defendants' Supplemental Memorandum in Support of Their Motion to Dismiss the Complaint (July 1, 2015) (ECF No. 34)
FPL	Federal Poverty Level
GAO	General Accountability Office
GAO Red Book	General Accountability Office, Principles of Federal Appropriations Law (3d ed. 2004)
HHS	Defendant Department of Health and Human Services
House Mem.	Memorandum of Points and Authorities in Support of Plaintiff United States House of Representatives' Motion for Summary Judgment (Dec. 2, 2015) (ECF No. 53)
House Mot. to Dismiss Opp'n	Opposition of the United States House of Representatives to Defendants' Motion to Dismiss the Complaint (Feb. 27, 2015) (ECF No. 22)
House Resp. to Defs.' Suppl. Mem.	United States House of Representatives' Response to Defendants' Supplemental Memorandum (July 17, 2015) (ECF No. 37)
IRC	Internal Revenue Code
IRS	Internal Revenue Service

IRS Form 8962 Instructions	Dep't of the Treasury, Internal Revenue Service, 2015 Instructions for Form 8962, Premium Tax Credit (PTC) (Dec. 10, 2015)
Member Amicus Br.	Brief of *Amici Curiae* Members of Congress in Support of Defendants' Motion for Summary Judgment (Dec. 16, 2015) (ECF No. 63)
Mem. Opp.	Memorandum Opinion (Sept. 9, 2015) (ECF No. 41)
OMB	Office of Management and Budget
OMB FY 2014 Sequestration Report	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)
S. Budget Comm. Report	Senate Committee on the Budget, 113th Congress, Tax Expenditures: Compendium of Background Material on Individual Provisions (Comm. Print 2014)
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INTRODUCTION

"No Money shall be drawn from the Treasury,
but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

Defendants admit that they have "drawn from the Treasury," and paid to Insurers under the Section 1402 Offset Program – one of many programs created by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") – billions of taxpayer dollars. The only question now before the Court is whether those withdrawals and payments were "in Consequence of [any] Appropriation[] made by Law," as required by the Constitution.

This Court has held that "[a]n appropriation must be expressly stated; it cannot be inferred or implied." Mem. Op. at 4 (Sept. 9, 2015) (ECF No. 41) (citing 31 U.S.C. 1301(d): "A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . ."). That ruling is dispositive here because neither the ACA nor any other legislative enactment "specifically state[] that an appropriation is made" for the Section 1402 Offset Program. *See* Mem. . . . in Supp. of [House's] Mot. for Summ. J. at 18-22, 25 (Dec. 2, 2015) (ECF No. 53) ("House Memorandum").[1]

As the Court is aware, Congress, in the ACA, specifically appropriated funds for the Section 1401 Refundable Tax Credit Program by amending an existing permanent appropriation statute, 31 U.S.C. § 1324. *See* ACA § 1401(d).[2] In now moving for summary judgment, defendants never assert that Congress expressly appropriated funds for the Section 1402 Offset

[1] At the time the House submitted its Motion for Summary Judgment on December 2, 2015, Congress had enacted legislation continuing appropriations for FY 2016 (at FY 2015 levels) only through December 11, 2015. *See* House Mem. at 11. Subsequently, Congress enacted, and the President signed into law, the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, __ Stat. __ (2015), which provides appropriations for the remainder of FY 2016. The Consolidated Appropriations Act, 2016, does not contain any appropriation for the Section 1402 Offset Program.

[2] Because the House cites to provisions of the ACA, and defendants cite to corresponding provisions of the U.S. Code, we have included, for the Court's convenience, a Table of Parallel Citations at p. iii.

Program. *See* Defs.' Mem. in Supp. of Their Mot. for Summ. J. (Dec. 2, 2015) (ECF No. 55-1) ("Defendants' Memorandum"). Instead, they argue almost entirely from the premise that, because the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program serve a common purpose – to make health insurance more widely available, *see id.* at 1 – the Court may deem the permanent appropriation that indisputably is available to fund the former also available to fund the latter. That is, defendants now ask the Court to do exactly what it already has said that it may not do – infer an appropriation for the Section 1402 Offset Program. Every supporting argument in Defendants' Memorandum – whether framed as textual, structural, legislative record, or something else – confirms this. Accordingly, the House urges the Court to reject defendants' invitation to rewrite the ACA and 31 U.S.C. § 1324.

ARGUMENT

Defendants have produced a grab bag of contentions, many overlapping, presumably hoping that something will stick – but none do. The House's opposition – which thus necessarily is long and has many parts – proceeds as follows: Part I addresses the predicate contention that the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program are linked in some constitutionally dispositive manner. Parts II and III address arguments that flow from, and relate to, *King v. Burwell*, 135 S. Ct. 2480 (2015). Parts IV and V address arguments defendants characterize, respectively, as "textual" and based in the "legislative record." Part VI addresses defendants' *Chevron* argument, and Part VII addresses their renewed standing argument.

I. The Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program Are Not Inextricably Intertwined.

Defendants' contention that the Court may infer an appropriation for the Section 1402 Offset Program is predicated on the false notion that that program and the Section 1401

Refundable Tax Credit Program are "inextricably intertwined," Defs.' Mem. at 1, "inextricably linked," *id.* at 16, and/or "integrated," *id.* at 16, 21, 29.[3] As a result, defendants say, the express appropriation for the latter must be deemed available for the former (notwithstanding Congress' decision not to appropriate funds for the Section 1402 Offset Program): "[T]he Executive Branch[] [has] determin[ed] that the permanent appropriation in 31 U.S.C. § 1324, as amended by the [ACA], is available to fund *all components* of the Act's integrated system of subsidies for the purchase of health insurance . . . ." *Id.* at 10 (emphasis added).

But defendants' saying – no matter how many times – that the two programs are "inextricably intertwined" does not make them so. While the two programs serve the same broad purpose – in common with virtually every provision of the ACA (and many other statutes) – of making health insurance more widely available, the ACA structures (and funds) the two programs differently; they have different eligibility standards; and they operate differently.

A. THE SECTION 1401 REFUNDABLE TAX CREDIT PROGRAM AND THE SECTION 1402 OFFSET PROGRAM ARE STRUCTURED AND FUNDED DIFFERENTLY.

The Section 1401 Refundable Tax Credit Program and Section 1402 Offset Program serve two distinct specific purposes. The former is designed to subsidize *health insurance premiums* of eligible policyholders by providing them with refundable premium tax credits, while the latter is intended to reduce "deductibles, coinsurance, copayments, or similar charges,"

[3] The two amici groups use similar predicate language. *See* Br. of *Amici Curiae* Members of Congress . . . at 16-18 (Dec. 16, 2015) (ECF No. 63) ("Member Amicus Brief"); Br. *Amici Curiae* for Econ. & Health Policy Scholars . . . at 14, 17 (Dec. 16, 2015) (ECF No. 64) ("Scholar Amicus Brief"). Neither amici group advances arguments not already made by defendants. For this reason – and because the Member Amicus Brief is fairly characterized as an effort to equate after-the-fact views of 11 Members with "the intent of Congress," *see, e.g.*, Member Amici Br. at 21, which "[p]ost-enactment legislative history" is not a "legitimate tool" of judicial decision-making, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *see also id.* at 242 ("post-enactment legislative history" lacks persuasive effect because it "could have had no effect on the congressional vote" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008))) – we do not address either amicus brief separately.

ACA § 1302(c)(3)(A)(i), reductions the ACA refers to as "Cost-Sharing Reductions," *id.* §§ 1331(d)(3)(A)(i), 1402(c)(3)(B), 1412(c)(3). The ACA effectuates these two different purposes in different ways.

As to the Section 1401 Refundable Tax Credit Program, ACA § 1401 amends the Internal Revenue Code ("IRC") to add to the Code a new § 36B. *See* ACA § 1401(a). The newly-created IRC § 36B 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. And the ACA amends 31 U.S.C. § 1324 to add the newly created IRC § 36B to the list of tax credits that can be paid from that permanent appropriation. *See* ACA § 1401(d)(1); 31 U.S.C. § 1324(b)(2).[4]

The ACA works entirely differently with respect to the Section 1402 Offset Program. ACA § 1402 *mandates* that covered Insurers provide, *directly to eligible policyholders*, Cost-Sharing Reductions. *See* ACA § 1402(a)(2) ("[T]he issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c).").[5] Separately, the ACA *authorizes* the government to make payments to Insurers to offset costs they incur in providing Cost-Sharing Reductions to policyholders. *See id.* § 1412(c)(3). However, neither § 1402 nor § 1412(c)(3) amend the IRC in any manner. Nor do they amend 31 U.S.C. § 1324 (which lists the specific tax credits that may be paid from that permanent appropriation). Nor do they otherwise appropriate any funds for the Section 1402 Offset Program.

[4] Defendant Department of the Treasury describes the Section 1401 Refundable Tax Credit as "provid[ing] financial assistance to pay the premiums for the qualified health plan . . . by reducing the amount of tax . . . owe[d by the taxpayer], giving [him or her] a refund, or increasing [his or her] refund amount." Dep't of the Treasury, Internal Revenue Service ("IRS"), 2015 Instructions for Form 8962, Premium Tax Credit (PTC) at 1 (Dec. 10, 2015) ("IRS Form 8962 Instructions"), attached as Ex. Q.

[5] Section 1402(a)(2) is similar to other non-tax insurance mandates created by the ACA such as, for example, the essential health benefits mandate. *See* ACA §§ 1301(a)(1)(B), 1302.

In their zeal to erase any distinctions between the two programs, defendants mischaracterize the two separate programs as a "unified advance-payment program." Defs.' Mem. at 2; *see also id.* at 6 ("single program of 'advance payments'"). The ACA, however, does not say the two programs are a "unified advance-payment program," or anything like that. Rather, Congress created two separate programs, in two separate sections of the ACA, and made separate provision for each. *See* Mem. Op. at 5-6; House Mem. at 5-7.

Moreover, defendants' mischaracterization not only ignores the obvious statutory distinctions between the two programs, it also confuses authorizations with appropriations. As this Court already has noted, "[t]he distinction between authorizing legislation and appropriating legislation is relevant here . . . ." Mem. Op. at 3.[6] While ACA § 1412 authorizes advance payments to be made for both programs, the language of ACA § 1412 is most assuredly *authorization* language, not appropriations language. *See* House Mem. at 14-18, 21. Accordingly, even if defendants' "unified advance-payment program" characterization were accurate – which it is not – it does not matter. Authorization language – even language that says "shall make" advance payments, as does ACA § 1412(c)(2), (c)(3) – does not appropriate any funds to be spent on the underlying programs. *See* Mem. Op. at 4; House Mem. at 21-22.

Thus, even though ACA § 1412 permits advance payments to be made for both programs, it does not make the permanent appropriation established by 31 U.S.C. § 1324 available to pay for *either*. It is only ACA § 1401(d) that makes that permanent appropriation available to pay Section 1401 Refundable Tax Credits – and there is no corresponding ACA language that makes

[6] *See also, e.g., Pac. Legal Found. v. Goyan*, 664 F.2d 1221, 1226 (4th Cir. 1981) ("more than a passing distinction between substantive legislation and appropriations bills"); *Louisiana v. U.S. Army Corps of Eng'rs*, 2015 WL 5083683, at *2 n.4 (E.D. La. Aug. 27, 2015) ("The distinction between authorization bills and appropriations bills is a crucial one."), *appeal docketed*, No. 15-30962 (5th Cir. 2015).

31 U.S.C. § 1324 available to fund Section 1402 Offset Program payments to Insurers.

B. STATUTORY ELIGIBILITY STANDARDS FOR THE TWO PROGRAMS ARE DIFFERENT.

Defendants suggest that the universes of those who receive Section 1401 Refundable Tax Credits and those who receive Section 1402 Cost-Sharing Reductions from their Insurers are identical (or nearly so). *See* Defs.' Mem. at 2, 7, 12-13. Not so. While there is overlap between the two groups, they are not remotely identical.

First, policyholders who earn between 100% and 400% of the Federal Poverty Level ("FPL") are eligible for the Section 1401 Refundable Tax Credit. *See* 26 U.S.C. § 36B(a), (c)(1). In contrast, only policyholders who earn between 100% and 250% of the FPL, *and who enroll in a silver plan on an Exchange*, are eligible for Section 1402 Cost-Sharing Reductions. *See* ACA §§ 1402(b), 1411.[7]

Second, because different plans are available for purchase on an Exchange (bronze, silver, gold, platinum), each with a sliding scale of coverage and prices, not every policyholder with an income between 100% and 250% of the FPL chooses a silver plan, further adding to the disparity between the two groups.

Third, defendants' assertion that "[e]ligibility for a premium tax credit is . . . a statutory precondition for receipt of the cost-sharing reduction," Defs.' Mem. at 2, is not always true. For example, policyholders defined by the ACA as "Indians" are eligible to receive Cost-Sharing Reductions regardless of (i) whether they are eligible to receive Section 1401 Refundable Tax

[7] While ACA § 1402(b)(2) states that policyholders enrolled in a silver plan whose "household income exceeds 100 percent but does not exceed 400 percent of the poverty line for a family of the size involved" are eligible to receive Cost-Sharing Reductions, defendant Department of Health and Human Services ("HHS"), by regulation, has excluded those with incomes between 250% and 400% of the FPL. *See* 45 C.F.R. § 155.305(g)(1)(i)(C); Centers for Medicare & Medicaid Services ("CMS"), Cost-Sharing Reduction Amounts in Risk Corridors and Medical Loss Ratio Reporting at 12, 14-15 (June 19, 2015), attached as Ex. R.

Credits, and (ii) whether or not they enroll in silver plans. *See* ACA § 1402(d)(2); CMS, Cost-Sharing Reductions Reconciliation at 2 (Mar. 2013), attached as Ex. S.

According to CMS, as of March 2015, "[o]f the approximately 10.2 million consumers who had effectuated Marketplace enrollments . . . 85 percent or about 8.7 million consumers were receiving an advanced premium tax credit to make their premiums more affordable. [However, only] 57 percent or about 5.9 million consumers were receiving cost-sharing reductions." CMS Fact Sheets, March 31, 2015 Effectuated Enrollment Snapshot (updated Sept. 4, 2015), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-06-02.html. That is, defendants' own figures demonstrate that 2.8 million (or 32%) fewer policyholders are receiving Cost-Sharing Reductions as compared with the universe of those receiving Section 1401 Refundable Tax Credits, further reinforcing the obvious conclusion that the two programs are separate and distinct, not "inextricably intertwined."

C. THE SECTION 1401 REFUNDABLE TAX CREDIT PROGRAM AND THE SECTION 1402 OFFSET PROGRAM ARE OPERATIONALLY DISTINCT.

Operationally, the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program also are separate and distinct. The former operates entirely through the federal tax system while the latter operates independently of the federal tax system.[8]

The Section 1401 Refundable Tax Credit Program. A policyholder seeking a Section 1401 Refundable Tax Credit must enter appropriate income and exemption information on IRS Form 8962, which the policyholder "must file . . . to compute and take the [Section 1401 Refundable Tax Credit]." IRS Form 8962 Instructions at 1, 5-6; IRS Form 8962 (2015), attached as Ex. T; ACA §§ 1401(c)(1)(A), 1411. "Eligible participants can choose to either: (a) have the

[8] Section 1402 mentions the IRC twice, and only to incorporate definitions. *See* ACA § 1402(b), (f).

credit paid in advance to their insurance company to lower the cost of monthly premiums, or (b) claim all of the credit when they file a tax return for the year." S. Comm. on the Budget, 113th Cong., Tax Expenditures: Compendium of Background Material on Individual Provisions at 883-84 (Comm. Print 2014) ("Senate Budget Committee Report"), pertinent pages attached as Ex. U; *see also* IRS Form 8962 Instructions at 1 (Ex. Q). (Either way, it is the policyholder's obligation, not the Insurer's, to "file [IRS] Form 8962 with [his or her] income tax return" to claim the Section 1401 Refundable Tax Credit. IRS Form 8962 Instructions at 2 (Ex. Q)).

If the policyholder chooses *not* to have the credit paid in advance directly to his or her Insurer, the credit operates much like any other refundable tax credit – it is computed and taken on the basis of actual income and exemptions for the tax year in question (in which case the policyholder is responsible for paying the full amount of the applicable premium to the Insurer when the premium is due).

If, however, the policyholder chooses to have the tax credit paid in advance directly to his or her Insurer, the amount of the credit is computed on the basis of *projected* income and exemptions for the upcoming tax year. In that case, the policyholder must reconcile – on IRS Form 8962 for the next succeeding tax year – the amount paid in advance on the policyholder's behalf to the Insurer with the correct amount of the credit computed on the basis of actual income and exemptions for the tax year in question. *See* 26 U.S.C. § 36B(f); IRS Form 8962 Instructions at 1, 9 (Ex. Q); IRS, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30383-84 (May 23, 2012); S. Budget Comm. Rep. at 884 (Ex. U) ("If the participant chooses to have the credit paid in advance, then they will reconcile the amount paid in advance with the actual credit computed on their tax return.").

If the policyholder underestimated his or her projected income when applying for the

Section 1401 Refundable Tax Credit, he or she is personally liable for any tax consequences that flow therefrom. *See* 26 U.S.C. § 36B(f)(2)(A); IRS Form 8962 Instructions at 1-2, 14 (Ex. Q). This means, for example, that if the policyholder's actual income turned out to be higher than projected, he or she is liable for repaying to the government the difference between the amount of the tax credit advanced to the Insurer on the policyholder's behalf and the actual amount of the tax credit for which the policyholder was eligible. *See* IRS Form 8962 Instructions at 1, 14 (Ex. Q). Conversely, if the amount advanced was less than it should have been (i.e., the policyholder's income projection for the tax year was too high), the policyholder is entitled to a tax credit "which will reduce [his or her] tax payment or increase [his or her] refund." *Id.* at 2.

The Section 1402 Offset Program. In sharp contrast, individual eligibility for the Cost-Sharing Reductions mandated by ACA § 1402 is determined by income estimates for the upcoming year provided by the policyholder at the time of enrollment. *See* ACA § 1412(b)(1); 45 C.F.R. § 155.320(c)(3)(ii)(D); *see also* ACA § 1412(a)(1), (2)(A) (Secretary of HHS notifies Insurers of such eligibility). The policyholder is not required to file anything with the IRS to participate in the Section 1402 Offset Program, and there is no IRS tax credit form for the program. *See* House Mem. at 28-29 & n.16. And, in contrast to the Section 1401 Refundable Tax Credit Program, *see* IRS Form 8962 Instructions at 1 (Ex. Q) (reporting requirements for certain changes in circumstances), there is no requirement that policyholders update their income estimates, either to defendants or their Insurers, in the event of changed circumstances.

Furthermore, there is no reconciliation process to ensure that policyholders who receive Section 1402 Offset Program Cost-Sharing Reductions actually are entitled to them.[9] The

[9] *See, e.g.*, Health Policy Alternatives, Inc., Patient Protection and Affordable Care Act: HHS Notice of Benefit & Payment Parameters for 2014 – Final Rule Summary at 49 (Mar. 21, 2013) ("Unlike premium tax credits, cost-sharing reductions are not reconciled at the end of the year."),

(*Continued. . .*)

policyholder is not required to file anything with the IRS (or the Insurers or anyone else for that matter) to reconcile estimated annual income with actual annual income. Thus, if the policyholder underestimated his income and, as a result, received Cost-Sharing Reductions to which he was not entitled, he is not liable to repay the difference to the government (or the Insurer). *See* ACA § 1402. Defendants have made clear that they have no plans to implement any program that would require such a reconciliation on the part of policyholders. *See, e.g.*, CMS, Cost-Sharing Reduction Amounts in Risk Corridors and Medical Loss Ratio Reporting at 10-15 (Ex. R); CMS, Cost-Sharing Reduction (CSRs): Advance Payments for 2015 at 7-9 (Apr. 16, 2014), attached as Ex. V.

Furthermore, there is, at present, no reconciliation process in place with respect to Insurers who receive Section 1402 Offset Program payments from defendants. To receive such payments in advance, Insurers merely provide CMS with estimates of the amount of Cost-Sharing Reductions their eligible policyholders are predicted to receive on a monthly basis. *See, e.g.*, CMS, Cost-Sharing Reductions (CSRs): Advance Payments for 2015 at 7-9 (Ex. V); CMS, Cost-Sharing Reductions Reconciliation at 4 (Ex. S). To date, if an Insurer has received too much from defendants because the Insurer overestimated the amount of Cost-Sharing Reductions its policyholders were entitled to receive, it has not been required to repay the government.[10]

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https://www.chausa.org/docs/default-source/advocacy/e6c3d6d3eb0a438088a0b4db08fe7ec61-pdf.pdf?sfvrsn=6.

[10] A "reconciliation" process of sorts is scheduled to take effect for the first time on April 30, 2016, with respect to Section 1402 Offset Program payments to Insurers. *See* CMS, Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year at 2 (Feb. 13, 2015), attached as Ex. W. However, this Insurer "reconciliation process" for Section 1402 Offset Program payments is very different from the reconciliation process imposed on individual policyholders who receive Section 1401 Refundable Tax Credits. The latter operates entirely through the IRC, and the burden and responsibility falls entirely on the policyholder. The former will not operate through the IRC (not surprisingly, since Section 1402 Offset Program payments are not tax credits); will require Insurers only to "reconcile" the Cost-Sharing Reduction estimates they used to calculate advance payments with data reflecting actual Cost-Sharing

(*Continued. . .*)

Thus, the manner in which the Section 1401 Refundable Tax Credit and the Section 1402 Offset Program operate in practice, under defendants' direction, also belies their claim that the two programs are "inextricably intertwined."[11]

* * *

In sum, the premise that the Section 1401 Refundable Tax Credit program and the Section 1402 Cost-Sharing Reduction program are inextricably intertwined is wrong. Although the two programs serve the broad common purpose of making health insurance more widely available, they are separate and distinct programs in terms of their statutory structure and funding, their eligibility standards, and the manner in which they operate.

Moreover, and in any event, defendants' conclusion – that, because the two programs serve a common purpose, this Court may infer that the permanent appropriation available to fund the Section 1401 Refundable Tax Credit Program also is available to fund the Section 1402 Offset Program – simply does not follow. Leaving aside the fact that "[a]n appropriation must be expressly stated; it cannot be inferred or implied," Mem. Op. at 4, and that there is no express appropriation for the Section 1402 Offset Program, defendants' new "piggyback" appropriations theory is not subject to any articulable limiting principle. If adopted, it would permit the Executive to tap the permanent appropriation established by 31 U.S.C. § 1324 to pay for virtually

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Reduction benefits received by policyholders; will impose no obligations on individual policyholders; and will not require Insurers to determine whether individual policyholders who received Cost-Sharing Reductions actually were entitled to receive those benefits (for which, of course, Insurers are being reimbursed by defendants). *See* 45 C.F.R. § 156.430(d), (e); CMS, Cost-Sharing Reduction Amounts in Risk Corridors and Medical Loss Ratio Reporting at 1 (Ex. R); CMS, Cost-Sharing Reductions (CSRs): Advance Payments for 2015 at 7-9 (Ex. V).

[11] *See also* HHS Notice of Benefit Payment Parameters for 2014, 78 Fed. Reg. 15410, 15411 (Mar. 11, 2013) (reciting that ACA § 1401(a) "amended the [IRC] (26 U.S.C.) to add [§] 36B, allowing an advance, refundable premium tax credit . . . . [that] reduc[es] an eligible taxpayer's out-of-pocket premium cost"; notwithstanding extensive discussion of Section 1402 Offset Program, no suggestion that program is a tax credit or results in tax refunds).

any ACA program on the theory that the program is linked to the Section 1401 Refundable Tax Credit Program. That makes no sense, particularly given that Congress in the ACA repeatedly used appropriations language to fund specific programs when it so intended. *See, e.g.*, House Mem. at 18-20.

II. *King v. Burwell* Does Not Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants repeatedly cite to and quote snippets from *King v. Burwell* in an effort to gain legal traction for their plea for an inferred appropriation.[12] *King* does not help defendants here.

King was neither an Appropriations Clause case, nor a challenge to the manner in which appropriated funds were being spent. Rather, *King* concerned the scope of an authorization provision in the ACA, in particular, language in the new IRC § 36B which provides that the Section 1401 Refundable Tax Credit is available only to individuals purchasing health insurance "through an Exchange established by the State under section 1311." 26 U.S.C. § 36B(c)(2)(A)(i); *see also id*. § 36B(b)(2)(A), (B). The precise issue in *King* was whether that language meant that the tax credit was available only to residents of States which established their own exchanges, or whether the tax credit also was available to residents of States where the Exchange had been established by the federal government. *See King*, 135 S. Ct. at 2487 ("The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange.").

Because IRC § 36B refers in pertinent part to "Exchanges," a concept defined and refined in other provisions of the ACA, including ACA §§ 1311, 1321, the Supreme Court's analysis began with the unremarkable proposition that the Court was required to read IRC § 36B together

[12] The two sets of amici also cite *King* often and to the same effect as defendants. *See, e.g.*, Member Amicus Br. at 4, 15, 17, 20; Scholar Amicus Br. at 3, 5-7, 17.

with those other provisions. *See id.* at 2490. In doing so, the Court concluded that the phrase "'an Exchange established by the State . . .' is properly viewed as ambiguous." *Id.* at 2491. According to the Court, the ambiguity was amplified by the fact that other ACA provisions presumed that the refundable tax credit would be available to State residents, regardless of whether the Exchange operating in a particular State was established by that State or by the federal government. *See id.* at 2491-92.

Only after reaching that threshold conclusion did the Court proceed to "turn to the broader structure of the Act to determine the meaning of Section 36B," *id.* at 2492, and ultimately held that § 36B makes the refundable tax credit available in States that have a Federal Exchange as well as in States that had established their own Exchanges. *See id.* at 2493-94. In so holding, however, the Court emphasized, in language pertinent here, that "[i]f the statutory language is plain, we must enforce it according to its terms," *id.* at 2489, and it further cautioned that "[r]eliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself,'" *id.* at 2495-96 (quoting *Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939)).

What defendants are arguing for in this case is precisely the type of judicial legislation that the Supreme Court warned against in *King.*

First, *King* involved an ordinary question of statutory interpretation, namely, whether the Executive properly had determined eligibility for a refundable tax credit. Thus, to properly resolve that question, the Court needed fully to understand those eligibility requirements, requiring it to look outside the narrow confines of the specific provision in question. *See King*,

135 S. Ct. at 2489 ("[O]ftentimes the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." (quotation marks omitted)).

The question here is different. The House's claim is that, contrary to the requirements of Article I, § 9, cl. 7 of the Constitution, *there is no statute* that appropriates funds for the Section 1402 Offset Program payments defendants are making to Insurers. *King* is inapposite, and no *King*-type inquiry is required, because there is no ambiguity inasmuch as (i) the law requires that appropriations be express and may not be inferred, *see* Mem. Op. at 4; House Mem. at 15-18; (ii) no ACA provision appropriates any funds for that program; and (iii) there could be no more plain expression of Congress' intent than its declination to appropriate funds for the program, *see* House Mem. at 20-21; *Sierra Club v. E.P.A.*, 294 F.3d 155, 161 (D.C. Cir. 2002).

Moreover, even if the Court considered ACA §§ 1402, 1412(c)(3) in light of other ACA provisions in order to determine whether there was an ambiguity as to the existence-of-an-appropriation issue, that would not help defendants. Given the applicable legal standards, such an inquiry would make it even clearer that Congress did not appropriate funds for the Section 1402 Offset Program. *See* House Mem. at 18-22.

Second, in *King*, the Supreme Court only considered "the broader structure of the Act to determine the meaning of Section 36B," *King*, 135 S. Ct. at 2492, *after* it had concluded that the "Exchange established by the State" language in § 36B "is properly viewed as ambiguous," *id.* at 2491. Here, defendants seek to flip *King* on its head. Rather than beginning with an ambiguity in the text of the provisions that create the Section 1402 Offset Program, i.e., ACA §§ 1402, 1412(c)(3), defendants start with clarity – because, of course, there is no express appropriation for the program – and then try to manufacture an ambiguity. *See, e.g.*, Defs.' Mem. at 6, 16-20.

This reverse-*King* maneuver is premised on defendants' claim that "if it is accepted, the House's [position] will predictably lead to substantially greater net expenditures from the very same appropriation – but in a vastly more cumbersome and less efficient manner . . . . 'It is implausible that Congress meant the [ACA] to operate in this manner.'" Defs.' Mem. at 20 (quoting *King*, 135 S. Ct. at 2494). Not only does this contention turn *King* on its head, as explained above, it also is wrong on its own terms, as we explain below.

III. The "Undesirable Results" Defendants Posit Do Not Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants say the Court must infer an appropriation for the Section 1402 Offset Program because, if it does not, what they regard as "undesirable results," Defs.' Mem. at 17, "anomalies," *id.* at 20, "[in]efficien[cies]," *id.*, and "implausible consequences," *id.* at 21, may follow. In particular, defendants speculate that, absent a judicially inferred appropriation, Insurers (i) will increase premiums, *id.* at 17, such that "Treasury . . . pay[s] more for premium tax credits," *id.* at 18; *see also* Scholar Amicus Brief at 13-14, or (ii) might initiate Tucker Act litigation "seeking to enforce that [ACA § 1412(c)(3)] statutory right through litigation," which litigation, if successful, might result in judgments payable from "the Judgment Fund, 31 U.S.C. § 1304(a)," and possibly a "windfall" because Insurers might have "recover[ed] once in the form of increased premium tax credits and a second time from the Judgment Fund," Defs.' Mem. at 20.[13] The Court should reject both contentions for the reasons that follow.

[13] For another view of what may follow if the Court rules for the House, *see* Seth Chandler, *Why the House Lawsuit Over Cost Sharing Reductions Might Win but Won't Kill Obamacare*, Forbes, Jan. 14, 2016, http://www.forbes.com/sites/theapothecary/2016/01/14/why-the-house-lawsuit-over-cost-sharing-reductions-might-win-but-wont-kill-obamacare/#2715e4857a0b5612024efcbf.

A. DEFENDANTS' "UNDESIRABLE RESULTS" CONTENTIONS ARE POLICY ARGUMENTS THAT MUST BE ADDRESSED TO CONGRESS.

As noted immediately above, defendants' "undesirable results" argument pivots off the statement in *King* that "[i]t is implausible that Congress meant the [ACA] to operate in this manner." *King*, 135 S. Ct. at 2494. But when the Court in *King* talked about "implausibility," it was referring to its conclusion that the ACA could not function at all without the availability of tax credits across the board. *Id.*

That is not the case here. The ACA plainly can function without an appropriation for the Section 1402 Offset Program payments. If the House prevails, eligible policyholders will continue to receive tax credits under the Section 1401 Refundable Tax Credit Program, and Cost-Sharing Reductions from their Insurers.[14] Indeed, defendants concede that health insurance markets will continue to operate, albeit, in their judgment, in a "more cumbersome and less efficient manner." Defs.' Mem. at 20. But the fact that defendants view this arrangement as sub-optimal is not a basis for the Court to infer any appropriation, let alone one that entails the pay out of billions of taxpayer dollars from a permanent appropriation.

Defendants' and the Scholar Amici's contentions are policy arguments for why, in their view, Congress *should appropriate* funds for the Section 1402 Offset Program. As such, in our constitutional system, these arguments appropriately are addressed to Congress, which possesses the *exclusive* power to appropriate public funds (including for the Section 1402 Offset Program).

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[14] *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." (emphasis added)) (House Mem. Ex. C); Mem. from Cong. Research Serv. to Sen. Tom Coburn at 9-10 (July 29, 2013) ("Under § 1402 of the ACA, health plans *must* reduce the cost-sharing for . . . enrollees," regardless of funding (emphasis added)) (House Mem. Ex. H).

See U.S. Const. art. I, § 9, cl. 7; Mem. Op. at 1 ("Only these two bodies [the House and Senate], acting together, can pass laws – including the laws necessary to spend public money. In this respect, Article I is very clear . . . .").

Policy arguments cannot justify defendants' decision to pay to Insurers billions of unappropriated taxpayer dollars over the last two years under the Section 1402 Offset Program, nor can such arguments justify a judicial inference that 31 U.S.C. § 1324 is available to defendants to make payments to Insurers under that program.

B. THERE IS NO "UNDESIRABLE RESULTS" CANON OF STATUTORY CONSTRUCTION, AND THE COURT SHOULD NOT INVENT ONE.

To the extent defendants are attempting to establish some new "undesirable results" canon of statutory construction, they fail. *First*, while courts sometimes rely on "the long-standing rule that a statute should not be construed to produce an absurd result," *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998), defendants have neither relied on that canon here, nor suggested that Congress' decision not to appropriate funds for the Section 1402 Offset Program produces an "absurd result" (as opposed to a result they deem "undesirable"). Moreover, we know of no case, nor have defendants cited any, in which a court has inferred into existence an appropriation on the ground that, Congress' failure to enact an appropriation resulted in undesirable, or inefficient, or implausible consequences. *Cf. Horn v. Comm'r*, 968 F.2d 1229, 1239 (D.C. Cir. 1992) ("The ["absurd results"] canon is sensible, so far as it goes, but it can only be used to further Congress' intent, not to circumvent it.").

Second, even if there were an "undesirable results" canon of construction – which there is not – it would be superseded in the appropriations context by federal statutory law: "A law may be construed to make an appropriation . . . *only* if the law *specifically* states that an appropriation is made . . . ." 31 U.S.C. § 1301(d) (emphasis added).

Third, the results defendants deem "undesirable," Defs.' Mem. at 17, "anomal[ous]," *id.* at 20, "[in]efficient," *id.*, and/or "implausible," *id.* at 21, are speculative. For example, their assertion that premiums would rise admittedly is only a guess, *id.* at 17 ("HHS has estimated"); *id.* at 19 (same); *id.* at 17 ("Most of the remaining individuals . . . *would likely* buy gold plans . . . ." (emphasis added)); *id.* ("[S]ilver-plan premiums *would likely* have to cover 90 percent or more of the total costs . . . ." (emphasis added)); *id.* ("[P]remiums for silver plans *would likely* increase . . . ." (emphasis added)). That guess is predicated on the "current mix of enrollees in silver plans," *id.* at 17, which may or may not hold true in the future, and it is a guess for which defendants' principal authority is themselves, *id.* (citing HHS report produced on Dec. 1, 2015, one day before defendants filed their motion for summary judgment, and more than five years after Congress considered and enacted the ACA).[15]

The same is true of defendants' Tucker Act argument. *See id.* at 20 (The House's interpretation *could yield* [Tucker Act suits]." (emphasis added)); *id.* ("The absence of an appropriation *would not prevent* the insurers from [suing]." (emphasis added)); *id.* ("*If* insurers were successful in bringing such suits . . . ." (emphasis added)).

Because courts will not apply the absurd results canon on the basis of "mere speculation,"

[15] Defendants' assertion that "if premiums rise, federal payments for tax credits 'would have to rise to make up the difference,'" Defs. Mem. at 18 (quoting Defs.' Ex. 2 at 213), also is flawed because the quoted language – lifted from a November 30, 2009 Congressional Budget Office ("CBO") analysis – is taken very much out of context. The quoted portion of the CBO analysis has nothing to do with Cost-Sharing Reductions, and does not concern or support their argument that failure to provide Cost-Sharing Reductions would lead to increased "silver plan" premiums, and thus result in increased Section 1401 Refundable Tax Credit payments. Rather, the portion of the CBO analysis from which the quoted language is lifted concerns an entirely separate issue: "people who are older and more likely to use medical care would be more likely to enroll in nongroup plans – a phenomenon known as adverse selection." *See* Defs.' Ex. 2 at 212. In the particular context of describing features of the proposed legislation that would tend to mitigate the adverse selection problem, CBO noted that "higher premiums resulting from adverse selection would not translate into higher amounts paid by those enrollees (though federal subsidy payments would have to rise to make up the difference)." *Id.* at 213.

Dal-Tile Corp. v. United States, 424 F.3d 1286, 1290 (Fed. Cir. 2005); *see also Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (Ct. Int'l Trade 1988) ("speculations . . . [are] not a demonstration that the plain language is absurd"), it follows that defendants' proposed new "undesirable results" canon also may not be predicated on such speculation.

C. INSURERS WOULD HAVE NO CAUSE OF ACTION UNDER THE TUCKER ACT.

Defendants' speculation that Insurers might seek, and obtain, judgments under the Tucker Act, payable out of the Judgment Fund, *see* Defs.' Mem. at 20, also is wrong on its merits.

The Tucker Act, 28 U.S.C. § 1491(a)(1), is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Accordingly, one "must look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States." *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008) (citing *United States v. Mitchell*, 463 U.S. 206, 216 (1983)). Here, there is no such cause of action.

While defendants seem to suppose some sort of "statutory right," Defs.' Mem. at 20, ACA § 1412(c)(3) is, at most, only an authorization for payment, nothing more. *See* House Mem. at 21; *see also* Mem. Op. at 3-4 (discussing difference between authorizations and appropriations). Absent a valid appropriation, no Insurer would have any basis for claiming any sort of vested and actionable interest in the payments authorized by that statute. *See, e.g.*, *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (denying recovery because "Congress ha[d] appropriated no money for the payment of the benefits [sought], and the Constitution prohibits that any money

'be drawn from the Treasury' to pay them").[16]

Indeed, defendants' argument presumes the existence of an untenable end run around the Appropriations Clause. If, notwithstanding Congress' refusal to appropriate funds, a beneficiary of an authorized but unfunded program could recover under the Tucker Act, the Executive could circumvent the Clause simply by colluding with potential beneficiaries of the program to enable them to collect from the Judgment Fund, via a Tucker Act suit. Congress' power of the purse effectively would be transferred to the Executive, substantially eviscerating Congress' ability to use that power to check the Executive, thereby gutting a principal purpose of the Appropriations Clause. *See* House Mem. at 12-13 (citing cases); Opp'n of the [House] to Defs.' Mot. to Dismiss the Compl. at 27-29 (Feb. 27, 2015) (ECF No. 22) ("House Motion to Dismiss Opposition") (citing cases). We are unaware of any case that has permitted recovery from the Judgment Fund under circumstances similar to those present here, and defendants have cited none.[17]

D. THE "UNDESIRABLE RESULTS" DEFENDANTS POSIT, EVEN WERE THEY TO COME TO PASS, WOULD BE CONSISTENT WITH THE CONSTITUTION.

Defendants acknowledge that, if the House prevails, eligible policyholders will continue to receive Cost-Sharing Reductions. *See* Defs.' Mem. at 20; *see also supra* at 4. Indeed, Defendants must so acknowledge because the premise of their "undesirable results" argument is

[16] The same thing would be true of Insurer actions based on contracts. *See, e.g., Hercules Inc. v. United States*, 516 U.S. 417, 427 (1996); *Goodyear Tire & Rubber Co. v. United States*, 276 U.S. 287, 291-92 (1928); *Leiter v. United States*, 271 U.S. 204, 207 (1926); *Sutton v. United States*, 256 U.S. 575, 581 (1921); *Bradley v. United States*, 98 U.S. 104, 114 (1878); *E.I. Du Pont de Nemours & Co. v. United States*, 365 F.3d 1367, 1374 (Fed. Cir. 2004); *RCS Enters. v. United States*, 57 Fed. Cl. 590, 594 (2003).

[17] Defendants cite one case, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), for the proposition that recovery from the Judgment Fund is possible. *See* Defs.' Mem. at 20. *Salazar*, however, is inapposite because there, unlike here, a valid congressional appropriation existed. *See Salazar*, 135 S. Ct. at 2191 ("Congress here appropriated 'not to exceed' a given amount for contract support costs, thereby imposing an express cap on the total funds available."); *see also id.* at 2186 (noting sufficient appropriation by Congress). Accordingly, *Salazar* provides no support for the notion that recovery from the Judgment Fund is available when Congress has not appropriated funds.

that if Insurers do not receive Section 1402 Offset Program payments, they still will be paid through "[increased] premium tax credits," Defs.' Mem. at 18, and/or through recoveries from "the Judgment Fund," *id.* at 20.

Even assuming that defendants are correct, what they miss is that payments to Insurers of the same (or even more) money – either through increased premium tax credits and/or recoveries from the Judgment Fund – would be consistent with the Constitution because Congress has actually appropriated funds for both. *See* ACA § 1401(d); 31 U.S.C. § 1324(b)(2) (appropriation for Section 1401 Refundable Tax Credit Program); 31 U.S.C. § 1304(a) ("Necessary amounts are appropriated to pay final judgments" under specified circumstances). What defendants are doing now – and what they are asking the Court to do – is *not* consistent with our Constitution, and that makes all the difference.

IV. Neither the Text of 31 U.S.C. § 1324, nor the Text of the ACA, Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants also advance two sets of "textual" arguments: That language in 31 U.S.C. § 1324 supports their contention that the Court should infer an appropriation for the Section 1402 Offset Program, and that language in ACA § 1303 (and language missing from the ACA) does the same thing. *See* Defs.' Mem. at 12-16. Both sets of arguments are flawed.

A. THE TEXT OF 31 U.S.C. § 1324 DOES NOT SUPPORT INFERRING AN APPROPRIATION.

1. Section 1402 Offset Program Payments Are Not "Refunds Due From Credit Provisions of the [IRC]" within the Meaning of 31 U.S.C. § 1324(b)(2).

Defendants say that "[w]hen Congress amended Section 1324 to include 'refunds due from' Section 36B, it thereby appropriated funds for *both*" the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program. Defs.' Mem. at 12 (emphasis in original).

According to defendants, payments to Insurers under the Section 1402 Offset Program "are properly regarded as 'refunds due from' Section 36B because [they] are compensatory payments made to subsidize an individual's insurance coverage based on the individual's satisfaction of the eligibility requirements in Section 36B." *Id.* Charitably, this makes no sense.

First, "[a]n appropriation must be expressly stated; it cannot be inferred or implied," Mem. Op. at 4, and defendants' "refunds due from" contention is an argument for an inferred or implied appropriation if there ever was one.

Second, the ACA nowhere describes the Section 1402 Offset Program as a tax credit, which is significant, given that Congress, in drafting the ACA, clearly knew how to legislate a tax credit into existence when it wanted to do that. *See* ACA § 1401(a) (creating IRC § 36B).

Third, a "refundable tax credit" is a unique type of tax provision characterized by the following attributes: it (i) reduces the tax liability of eligible taxpayers; (ii) permits eligible taxpayers to claim the full value of the credit, even if full value exceeds the taxpayer's total tax liability; and (iii) permits cash payment from the Treasury for any negative balance.[18]

The Section 1402 Offset Program contains none of these elements. All Section 1402 Offset Program payments – that is, the payments at issue in this case – are made directly to

[18] *See, e.g.*, IRS, *IRS Tax Tip 2013-33, Five Tax Credits that Can Reduce Your Taxes* (updated Aug. 4, 2015) ("A refundable tax credit not only reduces the federal tax you owe, but also could result in a refund."), https://www.irs.gov/uac/Newsroom/Five-Tax-Credits-that-Can-Reduce-Your-Taxes; Tax Policy Center, *The Tax Policy Briefing Book* at II-2-4 (Aug. 20, 2009) (tax credits termed "refundable because they can generate cash refunds that exceed the taxpayer's tax liability"), http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf; Kathleen Krueger, U.S. Tax Center, *Refundable v. Non-Refundable Tax Credits* (Feb. 20, 2015) ("A refundable tax credit . . . can reduce your tax liability to below zero. If the amount of a refundable tax credit is more than the amount of taxes due, the difference will be given back to you as a tax refund."), http://www.irs.com/articles/refundable-vs-non-refundable-tax-credits; Erika K. Lunder, Cong. Research Serv., R44290, *Legal Authority for Aliens to Claim Refundable Tax Credits: In Brief* at 1 (2015) ("Refundable credits, unlike nonrefundable credits, can be larger than a taxpayer's income tax liability, with the taxpayer receiving the difference as a cash payment from the IRS in the form of a tax refund."), https://www.fas.org/sgp/crs/misc/R44290.pdf.

Insurers. *See* ACA § 1412(c)(3)(A). Those payments do not reduce anyone's tax liability. Moreover, the payments are unrelated to Insurers' (and policyholders') tax liabilities, and thus neither claims a credit of any kind for the payments (or for the underlying Cost-Sharing Reductions provided by Insurers to policyholders) on any IRS form. *See* House Mem. at 29 n.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."). And finally, Congress has not authorized cash payments for any negative credit balance for the Section 1402 Offset Program – obviously, because the program creates no such negative credit balances.

Fourth, the fact that there is some overlap between the universe of policyholders eligible for Section 1401 Refundable Tax Credits, and the universe of policyholders eligible to receive Section 1402 Offset Program Cost-Sharing Reductions from Insurers, *see* Defs.' Mem. at 12-13, is immaterial in terms of defendants' textual "refunds due from" argument.

Fifth, defendants are wrong when they say that "[a]dvance payments of the cost-sharing reductions [to Insurers] are . . . inextricable from . . . advance payments of the premium tax credits." *Id.* at 13. Section 1401 Refundable Tax Credits most assuredly are extricable – indeed they are separate and distinct – from Section 1402 Offset Program payments to Insurers, as we already have explained. *See supra* Argument, Part I.

At bottom, defendants' argument that Section 1402 Offset Program payments to Insurers are "refunds due from [IRC § 36B]," Defs.' Mem. at 12, reduces to this: the "refunds due from" language in 31 U.S.C. § 1324 means whatever defendants choose it to mean.[19] Whatever the

[19] *Cf.* Lewis Carroll, Through the Looking Glass 213 (Great Books for Children ed., Holt, Rinehart & Winston 1961) ("'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'" (emphasis in original)).

viability of that proposition elsewhere in our polity, it should carry no weight in this Court, especially as applied to a question of such overarching constitutional importance.

2. The Text of 31 U.S.C. § 1324(b)(2) Permits Payments Only for Credits Listed in That Provision.

Section 1324 of title 31 provides that:

> (b) 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) (emphases added). Defendants do not deny that the ACA "provisions governing cost-sharing reductions and advance payment[] [of Section 1402 Offset Program payments to Insurers]," Defs.' Mem. at 27, are not among the specified "credit provisions of the [IRC]" listed in § 1324(b)(2).

Notwithstanding the explicit language of this statute, defendants argue that the § 1324 appropriation "is *not* limited to payments made under the [credit] provisions listed in that statute." Defs.' Mem. at 26 (emphasis added). In again asking the Court to ignore the plain language of § 1324, defendants say that "it was settled well before the ACA that Section 1324's appropriation for payments of 'refunds due from' the listed provisions is broad enough to encompass payments made under other statutes that are integrally related to the listed provisions." *Id.* at 27. Defendants identify two provisions which they say establish this proposition: IRC §§ 7527, 6431. *See* Defs.' Mem. at 27-28 & n.9. In fact, neither does.

Section 7527 concerns a health insurance tax credit established by IRC § 35, which *is* one of the specified "credit provisions of the [IRC]" listed in § 1324(b)(2), meaning that the § 1324

appropriation may be used to pay refunds due from that credit provision. The only thing IRC § 7527 does is permit Treasury to make those refundable tax credit payments directly to a qualified health insurance provider, *on behalf of the eligible taxpayer*, rather than to the taxpayer himself – nothing more. *See* 26 U.S.C. § 7527(a) (authorizing Treasury to make such payments "on behalf of certified individuals"); *id.* § 7527(c), (d) (defining "certified individuals" as those made eligible by IRC § 35 to receive the credit).

In other words, contrary to defendants' suggestion, IRC § 7527 does not expand the use of the § 1324 appropriation beyond the two specific categories listed in § 1324(b): "(1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the [IRC]." Section 7527 merely permits the "refunds due from [IRC § 35]" to be paid directly to a qualified health insurance provider, rather than to be paid to the taxpayer who then, presumably, would pass the money to his or her health insurance provider. Accordingly, the refunds being paid – regardless of whether *to the taxpayer*, or to the Insurer *on behalf of the taxpayer* – are the exact same "refunds due from [IRC § 35]."[20]

The second provision identified by defendants – 26 U.S.C. § 6431 – is similar. Section 6431 is itself a specified "credit provision[] of the [IRC]" listed in § 1324(b)(2), meaning that the § 1324 appropriation may be used to pay refunds due from that credit provision. Section 6431(a) provides that "[i]n the case of a qualified bond . . . the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary as provided in subsection (b)." Section 6431(b), in turn, authorizes that credit to be

[20] As with the Section 1401 Refundable Tax Credit, taxpayers eligible to receive the IRC § 35 Health Coverage Tax Credit may elect to receive the credit themselves, or to have it paid in advance directly to their qualified health insurance provider. *See* IRS, Instructions for Form 1099-H, https://www.irs.gov/pub/irs-pdf/i1099h.pdf; IRS Form 8885, https://www.irs.gov/pub/irs-pdf/f8885.pdf.

paid "to the issuer of such bond" or "to any person who makes such interest payments on behalf of the issuer." Again, as with IRC § 7527, IRC § 6431 plainly does not expand the use of the 31 U.S.C. § 1324 appropriation beyond the two specific categories listed in § 1324(b).

Sections 7527 and 6431(b) are directly analogous to the Section 1401 Refundable Tax Credit. Section 1401 of the ACA amends the IRC to add a new § 36B to the Code. *See* ACA § 1401(a). And ACA § 1412(c)(2) permits advance payments of the refund due from new IRC § 36B to be paid to Insurers *on behalf of* policyholders made eligible under new IRC § 36B to receive the credit.

But IRC §§ 7527, 6431(b) are wholly unlike the provisions establishing the Section 1402 Offset Program, i.e., ACA §§ 1402, 1412(c)(3), which do *not* create a refundable tax credit or otherwise amend the IRC, and do *not* authorize payment to a third party *on behalf of* anyone. Rather, the ACA authorizes Section 1402 Offset Program payments to be made directly to Insurers, with no intersection with any aspect of the IRC. Accordingly, because the Section 1402 Offset Program is wholly unconnected to any of the specified tax "credit provisions of the [IRC]" listed in 31 U.S.C. § 1324(b)(2), the appropriation established by § 1324 may not be used to make those payments.[21]

B. NEITHER THE TEXT, NOR THE ABSENCE, OF OTHER ACA PROVISIONS SUPPORT INFERRING AN APPROPRIATION.

Defendants do not contend that the ACA provisions mandating Cost-Sharing Reductions to certain policyholders and authorizing Section 1402 Offset Program payments to Insurers – i.e., ACA §§ 1402, 1412(c)(3) – themselves appropriate any funds for such payments to Insurers.

[21] As we previously explained, 31 U.S.C. § 1324(b) was amended in 1978 because of Congress' concern about the Executive doing exactly what defendants have done here, i.e., misuse the § 1324 permanent appropriation to fund programs for which Congress has not appropriated any funds. *See* House Mem. at 30-31 (citing S. Rep. No. 95-1061 (1978)).

However, they argue that other textual aspects of the ACA should lead the Court to infer that the appropriation established by 31 U.S.C. § 1324 is available to make Section 1402 Offset Program payments to Insurers. This is incorrect.

1. Section 1303 of the ACA Does Not Support Defendants' Inferred Appropriation Contention.

Defendants first claim that an ACA provision that restricts use of federal funds for certain abortion services – a provision modeled on the Hyde Amendment – "is predicated on the understanding that cost-sharing reductions are permanently appropriated in the Act itself." Defs.' Mem. at 3; *see also id.* at 14, 13 (reference to "cost-sharing reduction payments" in this provision "confirms that [Section 1401's] amendment to Section 1324 [of the IRC] established a permanent appropriation of funds" for Section 1402 Offset Program payments to Insurers).

The provision at issue provides as follows:

> (A) IN GENERAL. – If a qualified health plan provides coverage of [certain abortion] services . . . the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services:
>
> . . . .
>
> (ii) Any cost-sharing reduction under section 1402 of the [ACA] (and the amount (*if any*) of the advance payment of the reduction under section 1412 of the [ACA].

ACA § 1303(b)(2)(A)(ii) (emphasis added).[22] Even the most cursory review of this language demonstrates that defendants' argument is wrong on multiple levels.

First, ACA § 1303(b)(2)(A)(ii) says nothing about an appropriation of funds generally; says nothing about an appropriation of funds specifically for the Section 1402 Offset Program; and does not link the Section 1402 Offset Program to 31 U.S.C. § 1324(b).

[22] To avoid confusion, we note that ACA § 1303 was amended, *in the ACA itself*, by § 10104(c). All citations in this memorandum to ACA § 1303 are to that provision, as amended by ACA § 10104(c).

Second, defendant's use of muddled language like "predicated on the understanding that," Defs.' Mem. at 3, speaks volumes about the absence of any express appropriation for the Section 1402 Offset Program, and about defendants' goal of having the Court create an appropriation for them.

Third, a statutory restriction on the purpose for which federal funds may be spent does not mean (or even suggest) that Congress is appropriating, or has appropriated, any funds. *See, e.g.*, 31 U.S.C. § 1301(d); General Accountability Office ("GAO"), Principles of Federal Appropriations Law at 2-17 (3d ed. 2004) ("GAO Red Book").

Fourth, ACA § 1303(b)(2)(A)(ii) itself *expressly* contemplates the possibility – through inclusion of the language "if any" – that no appropriation may exist for, and that Insurers may not receive any funds under, the Section 1402 Offset Program. (Defendants failed to recite or even reference the statutory "if any" language. *See* Defs.' Mem. at 3-4, 13-14.)

Fifth, defendants' contention that cherry-picked statements from two House Members and one Senator concerning funding restrictions on abortions mean that the ACA "permanently appropriated" funds for the Section 1402 Offset Program, Defs.' Mem. at 14, is incorrect. None of the three statements even mention ACA § 1402 or Cost-Sharing Reductions and, when read in their entirety, it is clear that the statements concerned solely the Section 1401 Refundable Tax Credit Program (IRC § 36B). For example, Senator Hatch referred to authorized and appropriated "federal premium subsidies" in H.R. 3590. *See* 155 Cong. Rec. S12678 (Dec. 8, 2009) (Sen. Hatch). Section 1402 Offset Program payments to Insurers are not "premium subsidies."[23] Senator Hatch also discussed the proposed Nelson-Hatch-Casey amendment in the

[23] *Compare* ACA § 1401 (reduction of premiums via tax credit), *with* ACA § 1402 (reduction of "out-of-pocket" costs (i.e., co-pays, deductibles and co-insurance), not premiums), and ACA § 1412(c)(3) (reimbursement of "reductions"); *see also supra* at 2-12.

context of tax credits "applied under section 36B of the [IRC]." *Id.* Similarly, Representative Smith expressed concern about "health care plans and policies funded with *tax credits* to pay for abortion . . . ." 156 Cong. Rec. H1911 (Mar. 21, 2010) (Rep. Smith) (emphasis added). No matter how much defendants may wish it were so, the Section 1402 Offset Program payments they are funneling to Insurers are not "tax credits." *See supra* at 22-23.[24]

Finally, defendants do not explain why, if ACA § 1303(b)(2)(A)(ii) establishes that the Section 1402 Offset Program "would not be subject to annual appropriations," Defs.' Mem. at 14, the Administration went to the trouble of seeking a non-permanent appropriation for that program for FY 2014 and the first quarter of FY 2015, *see* House Mem. at 7-8, 22, or why the Office of Management and Budget ("OMB") made clear in May 2013 that 31 U.S.C. § 1324 was *not* available to fund the Section 1402 Offset Program (meaning that it could be funded, if at all, only through the annual appropriations process), *see id.* at 8-9, 22-24.

2. Absence of "Authorization of Appropriations" Language Does Not Establish a Source of Funds for the Section 1402 Offset Program.

Defendants' next textual argument is that "language that is conspicuously absent [from the ACA] demonstrates that the [ACA's] amendment to Section 1324 [i.e., ACA § 1401(d)] permanently appropriated funds for the advance payments of the cost-sharing reductions." Defs.' Mem. at 14. In particular, defendants say that:

[24] Floor statements from a small number of individual Members "cannot amend the clear and unambiguous language of a statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 456-57 (2002). The D.C. Circuit consistently has noted that "legislators' remarks during a floor debate . . . generally are not accorded significant weight." *Blitz v. Donovan*, 740 F.2d 1241, 1247 (D.C. Cir. 1984); *see also, e.g., In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("The general rule is that legislative debates are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body because they are merely expressive of the views and motives of the individual members." (quotation marks omitted)); *Fawn Mining Corp. v. Hudson*, 878 F. Supp. 240, 242 (D.D.C. 1995) ("single reference by a single [Member] during floor debate is entitled to little weight"), *aff'd*, 80 F.3d 519 (D.C. Cir. 1996).

> when Congress intends payments to be subject to annual appropriations, it routinely enacts an 'authorization of appropriations' provision . . . [and] [t]here is no such 'authorization of appropriations' language for cost-sharing reduction payments because Congress understood that the ACA itself provided a permanent appropriation.

Id. at 15. Defendants are correct that ACA §§ 1402, 1412(c)(3) do not contain "authorization of appropriations" language, but their conclusion does not follow.

First, defendants' contention – that the absence of actual appropriations language in the ACA *does not* mean that Congress did not appropriate funds for the Section 1402 Offset Program, but the absence of something called "authorization of appropriations" language (i.e., not actual appropriations language) means that Congress *did* appropriate funds for that program – is so facially illogical that it sinks under its own weight. *See also United States v. MacCollom*, 426 U.S. 317, 321 (1976) (rejecting similar argument as "novel approach to statutory construction"); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (rejecting similar argument); Mem. Op. at 10 n.8 ("absence of a restriction . . . not an appropriation").

As we explained earlier, a valid appropriation requires three elements: (i) a direction to pay; (ii) an amount and source of funds; and (iii) language that "specifically states that an appropriation is made." House Mem. at 15-16 (quoting 31 U.S.C. § 1301(d)). Sections 1402 and 1412(c)(3) of the ACA contain, at most, only a direction to pay, meaning there is no appropriation – and the further absence of something called an "authorization of appropriations" does not change that conclusion. *See also* Mem. Op. at 4 ("An appropriation must be expressly stated; it cannot be inferred or implied.").

Second, while Congress sometimes uses "authorization of appropriations" language when it expects to appropriate funds for an authorized activity or program in a future enactment, it is

not required to do so.[25] Defendants do not, because they cannot, cite any law suggesting that Congress is required to use these magic words when it expects to appropriate in a future enactment, and indeed, all authority is to the contrary.

For example, elsewhere in the ACA itself, Congress authorized the "Risk Corridors Program." *See* ACA § 1342. As with the Section 1402 Offset Program, the statutory language creating the Risk Corridors Program directs only 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. *See* ACA § 1342(b)(1). Section 1342 does not contain the "authorization of appropriations" language to which defendants attach so much importance. Notwithstanding, GAO concluded – when asked to determine whether the ACA had appropriated funds for the Risk Corridors Program – that "*[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, B-325630, HHS – Risk Corridors Program at 3 (Sept. 30, 2014) (emphasis added) (House Mem. Ex. I). The same thing is true of the Section 1402 Offset Program: ACA §§ 1402, 1412(c)(3), by their terms, do not enact an appropriation to make the payments specified in § 1412(c)(3).

Third, the cannon of construction upon which defendants rely – "'[w]here Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally,'" Defs.' Mem. at 15 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("*NFIB*")) – cuts in favor of the House and against

[25] Defendants falsely state that "[t]he House itself recognizes . . . that when Congress intends payments to be subject to annual appropriations, it routinely enacts an 'authorization of appropriations' provision . . . ." Defs.' Mem. at 14-15 (citing House Mot. to Dismiss Opp'n at 8). The House made no such statement in its Motion to Dismiss Opposition, or anywhere else for that matter.

defendants. It is particularly telling that Congress, in ACA § 1401(d), explicitly amended the IRC to make the permanent appropriation established by 31 U.S.C. § 1324 available to fund the Section 1401 Refundable Tax Credit Program. However, 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. Consistent with *NFIB*, the only plausible conclusion is that Congress intended that the Section 1402 Offset Program would be funded, if at all, through the annual appropriations process.

3. Defendants' "Appropriated Entitlements" Argument Is Unavailing.

Defendants' final "textual" argument also derives from the absence of text. Defendants say the Court must infer an appropriation because, if it does not, then Congress would have created what defendants call an "appropriated entitlement" – by which they apparently mean an ongoing program "that depend[s] for [its] funding on annual appropriations," Defs.' Mem. at 21 – and Congress was "unlikely to have *sub silentio* resurrected the dormant appropriated entitlement construct for the ACA's cost-sharing reductions," *id.* at 22.

Whether or not the Section 1402 Offset Program should be characterized as an appropriated entitlement, "[t]he most reliable guide to congressional intent is the legislation the Congress enacted." *Sierra Club*, 294 F.3d at 161. And the ACA contains no language that appropriates funds for the Section 1402 Offset Program, leading to the obvious conclusion that Congress intended that program to be funded, if at all, only through the annual appropriations process. *See* House Mem. at 18-22.

Defendants' "appropriated entitlements" argument is particularly strained because defendants do not deny that Congress is free to create "appropriated entitlements" if it chooses

and, indeed, they concede that "Congress in the past has created 'appropriated entitlements' that depend for their funding on annual appropriations." Defs.' Mem. at 21.

The only basis for defendants' contention that Congress was "unlikely" to have done what it in fact did is that creating a program that relied on annual appropriations "would have resulted in bizarre consequences." *Id.* at 22. However, there is nothing bizarre about Congress desiring to keep control of federal spending through the annual appropriations process. *See* House Mem. at 30-31 (describing 1978 amendments to § 1324 as being driven by Congress' concern that future Administrations might use that permanent appropriation to fund programs and make expenditures not sanctioned by Congress).

Finally, even if defendants believe the Court's failure to infer an appropriation for the Section 1402 Offset Program will lead to "uncertainty [that] would be inefficient and destabilizing," Defs.' Mem. at 23, that is no basis for circumventing the Constitution, as we earlier explained. *See supra* at Argument, Part III.

V. The "Legislative Record" Does Not Support – and Actually Contradicts – Defendants' Argument That This Court Should Infer an Appropriation for the Section 1402 Offset Program.

Defendants next turn to what they call the "legislative record" in their quest to find some support for their contention that the Court should infer that the permanent appropriation established by 31 U.S.C. § 1324 is available to fund the Section 1402 Offset Program. *See* Defs.' Mem. at 23-25, 15-16, 29-32. Here too, the well is dry.

A. THE CONGRESSIONAL BUDGET OFFICE'S CHARACTERIZATION OF THE SECTION 1402 OFFSET PROGRAM AS "DIRECT SPENDING" HAS NO BEARING ON WHETHER CONGRESS APPROPRIATED FUNDS FOR THAT PROGRAM.

Defendants assert that CBO's scoring treatment of the Section 1402 Offset Program "meant that the ACA itself provided the budget authority for the cost-sharing reductions, i.e., that

cost sharing reductions were fully and permanently appropriated by the law itself." Defs.' Mem. at 23-24. This assertion wrongly conflates the *budget* process with the *appropriations* process; misrepresents the nature and meaning of CBO's work; and, not surprisingly, reaches a patently incorrect conclusion.

The Budget Process vs. the Appropriations Process. The annual federal budget process begins with the submission to Congress of the President's budget. *See* 31 U.S.C. § 1105(a) (requiring submission by first Monday in February). The President's budget contains requests for specific spending levels for the various federal programs and agencies. A budget request is only that – a request for funding. It in no way obligates Congress to appropriate the funds requested in either the amount or manner requested. *See* U.S. Const. art. I, § 9, cl. 7.

Subsequently, the House and Senate consider, and often (but not always) adopt, a budget resolution. *See* 2 U.S.C. §§ 621-661f. The budget resolution, among other things, (i) sets total budget authority and outlay levels for the fiscal year covered by the resolution, and (ii) allocates those outlays among approximately 20 functional spending categories (e.g., defense, agriculture, transportation). If a single budget resolution is agreed to by the House and Senate, it is adopted as a concurrent resolution, meaning it is not transmitted to the President for his signature or veto and, therefore, does not become law. *See* U.S. Const. art I, § 7, cl. 2. Rather, such a concurrent budget resolution functions as a guide for the House and Senate as they consider various spending and revenue-raising bills. After a budget resolution – or some other mechanism for setting total budget authority – has been adopted, the House and Senate begin the separate process of drafting and considering appropriations bills.

The Role of CBO. One of CBO's primary functions is to assist with the "scoring" of legislation. "Scoring" is the process of measuring the budgetary effects of pending and enacted

legislation. CBO furthers the scoring process by providing "formal written estimates of the cost of virtually every bill approved by Congressional committees." CBO, *An Introduction to the Congressional Budget Office* at 1 (July 2015), https://www.cbo.gov/sites/default/files/cbofiles/attachments/2015-IntroToCBO-v2.pdf. CBO scoring serves several legislative purposes, including informing Members about the budgetary consequences of legislation, and assisting with the enforcement of congressional budget rules by providing information concerning whether proposed legislation is consistent with the spending and revenue levels set by the budget resolution. *See id.* at 2.[26]

Importantly, CBO does not opine on whether legislative language constitutes a constitutionally-valid appropriation. Rather, CBO is tasked solely with assessing the budgetary *impact* of legislation in a manner consistent with the budget procedures established by law. *See id.* at 3 ("CBO's work follows processes specified in the Congressional Budget and Impoundment Control Act of 1974 . . . .").

CBO's Role with Respect to the ACA. As defendants correctly note, CBO's March 20, 2010 score of the ACA classified as "direct spending" payments made pursuant to the Section 1402 Offset Program. *See* Defs.' Mem. at 23.[27] But that classification does not support

[26] Both houses of Congress have adopted rules to encourage adherence to spending ceilings established by the budget resolution. *See, e.g.*, Rule XXI.2(d), (f), Rules of the House of Representatives, 114th Cong. (2015), http://clerk.house.gov/legislative/house-rules.pdf; *see also* 2 U.S.C. § 633(f) (prohibiting floor consideration of any legislation that provides new budget authority in excess of outlays established by budget resolution); *id.* § 642(a)(1), (2) (prohibiting floor consideration of legislation providing new budget authority exceeding total applicable budget authority).

[27] Defendants otherwise mischaracterize CBO's March 20, 2010 letter. *See* Defs.' Mem. at 24 ("CBO specifically refrained from scoring any discretionary spending items, that is, potential expenditures that 'would be subject to future appropriation action.'"). In fact, the CBO letter expressly states that "CBO *has not completed* an estimate of the potential impact of the legislation on discretionary spending, which would be subject to future appropriation action." Letter of Douglas W. Elmendorf, Director, CBO, to Hon. Nancy Pelosi at 10 (Mar. 20, 2010) (emphasis added) (Defs.' Mem. Ex. 6). Two months later, CBO

(*Continued. . .*)

defendants' conclusion that "that treatment meant that the ACA itself provided the budget authority for cost-sharing reductions, i.e., that cost-sharing reductions were fully and permanently appropriated by the law itself." *Id.* at 23-24.

"Direct spending" is a category of "budget authority" that includes, among other things, "entitlement authority." *See* 2 U.S.C § 900(8)(B). "Entitlement authority" is defined as

> the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law.

Id. § 622(9)(A). The language of ACA §§ 1402, 1412(c)(3) appears to satisfy this definition because it provides budget authority which was not provided for in advance by any appropriation act, and because it directs the government to make a payment to qualifying Insurers who meet the requirements established by that law. *See* ACA § 1402(c)(3)(A) ("[T]he Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.").

Critically, when CBO scores a program that it determines meets the definition of "direct spending" (including "entitlement authority"), such as the Section 1402 Offset Program, CBO is *required by law to assume* that such a program "operate[s] in the manner specified in those laws . . . and funding for entitlement authority *is assumed to be adequate to make all payments required by those laws*." 2 U.S.C. § 907(b)(1) (emphasis added).

In other words, CBO's classification of the Section 1402 Offset Program as "direct spending" does not mean, as defendants claim, that the program was "fully and permanently appropriated by the law itself." Defs.' Mem. at 24. CBO is not charged with making such

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provided to Congress its estimate of the impact of such discretionary spending. *See* Letter of Douglas W. Elmendorf, Director, CBO, to Hon. Jerry Lewis (May 11, 2010), attached as Ex. X.

determinations, and it did not make such a determination here. Rather, CBO's classification of the program as "direct spending" rested solely on, and reflected, its application of statutorily-created budget rules, including the *assumption* mandated by 2 U.S.C. § 907(b)(1) that Congress would provide funding adequate to make all payments required by the program.[28]

B. SECTION 1001 OF THE CONTINUING APPROPRIATIONS ACT, 2014 STILL DOES NOT SUPPORT DEFENDANTS' INFERRED APPROPRIATIONS ARGUMENT.

Defendants next say that "legislation enacted after the ACA [i.e., § 1001 of the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, 566 (2013)] . . . confirms that advance payments of cost-sharing reductions were fully appropriated." Defs.' Mem. at 15. This is an argument defendants have advanced twice before,[29] and it is no more persuasive now than it was earlier.

Section 1001 says nothing about appropriations; it is a simple anti-fraud provision designed only to ensure that individuals who apply for premium tax credits and Cost-Sharing

[28] Defendants' suggestion that "budget authority" provided for by ACA §§ 1402, 1412(c)(3) means that funds are available to be expended, *see* Defs.' Mem. at 24, also is wrong. While "budget authority" may authorize the incurring of an obligation, "the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury." GAO Red Book at 2-5 (citing *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977), and *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966)). That is, whether Congress has provided "budget authority" – including "entitlement authority" – is a question separate and distinct from the question of whether appropriated funds are available to liquidate the obligation.

Defendants also cite snippets of floor statements about CBO's cost-estimates made by a handful of Members. *See* Defs.' Mem. at 24-25. However, "discretion to spend appropriated funds is cabined by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar*, 132 S. Ct. at 2195. The same is true where, as here, there is no appropriation. *See also supra* at 29 n.24.

[29] *See* Defs.' Suppl. Mem. in Supp. of Their Mot. to Dismiss the Compl. at 7 (July 1, 2015) (ECF No. 34) ("Defendants' Supplemental Memorandum"); Defs.' Suppl. Reply Mem. in Supp. of Their Mot. to Dismiss the Compl. at 4 n.5 (July 17, 2015) (ECF No. 35).

Reductions actually are eligible to receive them. *See* Pub. L. No. 113-46, § 1001.[30]

Furthermore, the structure of the Continuing Appropriations Act, 2014 belies defendants' contention that § 1001 evinces some sort of congressional "understanding" that Section 1402 Offset Program payments could be made from 31 U.S.C. § 1324. Defs.' Suppl. Mem. at 7. Division A of the Continuing Appropriations Act, 2014 contains various appropriations (none of which are pertinent here), 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 a non-permanent appropriation was required to make Section 1402 Offset Program payments. *See* House Mem. at 7-8, 32-33 (FY 2014 request for such an appropriation never withdrawn). Accordingly, a provision enacted months (i) before defendants made their first Section 1402 Offset Program payments in January 2014, and (ii) before Congress even discovered what defendants were doing, logically could not "confirm[] that advance payments of cost-sharing reductions were fully appropriated." Defs.' Mem. at 15; *see also* [House's] Resp. to Defs.' Suppl. Mem. at 4, 7-8 (July 17, 2015) (ECF No. 37).

C. DEFENDANTS CANNOT WALK AWAY FROM THEIR FORMAL REQUEST FOR A NON-PERMANENT APPROPRIATION FOR FY 2014 AND THE FIRST QUARTER OF FY 2015.

Defendants' final legislative record argument concerns what is by now undisputed: that the Administration formally requested a non-permanent appropriation for the Section 1402 Offset Program for FY 2014 and the first quarter of FY 2015, and that Congress said no. *See*

[30] Section 1001 does this by requiring the "Secretary [to] submit a report to the Congress that details the procedures employed by . . . Exchanges to verify eligibility for credits and cost-sharing reductions" established by ACA § 1411. Pub. L. No. 113-46, § 1001(b).

House Mem. at 7-8; Defs.' Mem. at 29 ("Congress did not enact such a line item in its appropriation legislation for that fiscal year.").

As we have explained, the Administration's formal request for a non-permanent appropriation[31] – coupled with specific and detailed budget justifications submitted in support of the request,[32] coupled with OMB's FY 2014 Sequestration Report (stating that Section 1402 Offset Program payments to Insurers were subject to sequestration, which necessarily meant that 31 U.S.C. § 1324 could not be the funding source for such payments)[33] – was, at the very least, an admission that the ACA provided no source of funds for the Section 1402 Offset Program. *See* House Mem. at 22-24. And it was an admission from which – the record makes clear – defendants backpedaled *only after* Congress rejected their request for a non-permanent appropriation for the Section 1402 Offset Program. *See id.* at 25-26.

Defendants' request for a non-permanent appropriation for the Section 1402 Offset Program now is the one part of the "legislative record" they do not want the Court to consider. As to that part of the record, they now seem to be saying, "just kidding." *See* Defs.' Mem. at 29-32. But defendants cannot walk away from their actions so easily.

First, the documents at issue are not fly-by-night documents slapped together by budget and appropriation amateurs. Rather, they were extremely detailed government documents that were carefully and extensively vetted over a long period of time by many government officials, and the preparation of which was subject to rigorous and well-established guidelines and

[31] *See* OMB, Fiscal Year 2014 Budget of the U.S. Government (Apr. 10, 2013) (House Mem. Ex. D).

[32] *See* HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees (Apr. 10, 2013) (House Mem. Ex. E).

[33] *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") (House Mem. Ex. F); House Mem. at 22-24.

procedures. *See, e.g.*, OMB, Circular No. A-11, Preparation, Submission, and Execution of the Budget at 1-916 (2015), https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc; GAO Red Book at 1-25 (noting "long and exhaustive administrative process of budget preparation and review"). Nothing in those documents suggests in any way that the Administration believed that 31 U.S.C. § 1324 already provided a source of appropriated funding for the Section 1402 Offset Program. To the contrary, every document, and all the testimony, submitted to Congress regarding funding for the Section 1402 Offset Program was consistent with the Administration's stated position that a non-permanent appropriation was necessary before any payments to Insurers legally could be made.[34]

Second, if the Administration honestly believed 31 U.S.C. § 1324 was available to make Section 1402 Offset Program payments, it would not have a requested a non-permanent appropriation for FY 2014 and the first quarter of FY 2015. As we explained earlier, permanent appropriations are exceedingly rare, in part because they constitute a delegation of substantial discretion to the Executive, thereby making more difficult for Congress to check Executive power. *See* House Mot. to Dismiss Opp'n at 9-10. Non-permanent appropriations, on the other hand, require the Executive to frequently and repeatedly justify its need for funds. *See id.*

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[34] *See, e.g.*, Dep'ts of Labor, HHS, Ed., & Related Agencies Appropriations for 2014: Hearing before the Subcomm. on Labor, HHS, Ed., & Related Agencies of the H. Comm. on Appropriations, 113th Cong. 456 (2013) (QFR responses of Sec. Sebelius: "The FY 2014 request represents updated estimates of the funding needed to successfully operate the Marketplace in FY 2014.").

While defendants assert that Congress' rejection of the Administration's request for a non-permanent appropriation "sheds no light on . . . whether other appropriations are available," Defs.' Mem. at 30, the authorities they cite in support are inapposite because none involved the question of whether a valid appropriation existed in the first instance. *See* 40 Comp. Gen. 694, 697 (June 14, 1961) (question: effect, if any, of intervening congressional action on *existing* no-year appropriation); 37 Op. O.L.C. 1, 1 (Feb. 4, 2013) (question: whether expiration of authorization of appropriations for administrative expenses prevented agency from expending *existing* appropriated funds); 14 Op. O.L.C. 68, 71 (Mar. 29, 1990) (question: whether *existing* "lump sum appropriation" could be used to fund program expenses).

Accordingly, had the Administration believed that a permanent appropriation already existed, there was no logical reason for it to have requested non-permanent funding – none.

Third, defendants' suggestion that the House improperly is attempting to draw meaning from "congressional silence," Defs.' Mem. at 31, is incorrect. The Administration's own affirmative actions in seeking a non-permanent appropriation for the Section 1402 Offset Program for FY 2014 and the first quarter of FY 2015 – along with its promulgation of the OMB FY 2014 Sequestration Report – are legally significant here. And Congress' declination of the Administration's appropriations request is hardly "silence." It is a fact, which defendants have admitted, *see* House Mem. at 9-10, and that also is legally significant here, *see id.* at 31.

VI. There Is No Basis for Deference to an Agency "Interpretation" That Creates an Appropriation Denied by Congress.

In a one-paragraph argument late in their memorandum, defendants assert that their determination that 31 U.S.C. § 1324 provides funds for the Section 1402 Offset Program is "reasonable," and thus must be upheld "[u]nder traditional principles of deference." Defs.' Mem. at 26. This argument lacks any legal grounding whatsoever and would, if accepted, effectively transfer to the Executive a substantial portion of Congress' exclusive power to appropriate federal funds.

First, the sole legal question now before the Court is one of overarching constitutional magnitude: Are the billions of dollars defendants admit they have "drawn from the Treasury" and paid to Insurers "in Consequence of [any] Appropriation[] made by Law," as required by the Constitution? U.S. Const. art. I, § 9, cl. 7. No deference is afforded to agency action that, as here, is alleged to violate the Constitution. *See* House Mem. at 35.

Moreover, we are aware of no law – and defendants have cited none – suggesting that they are entitled to any deference on any issue related to the question of whether an appropriation

exists in the first instance, including with respect to the interpretation of statutes they have interjected into this case in their effort to justify their Section 1402 Offset Program payments to Insurers. Indeed, Congress, by statute, has precluded any such deference argument: "A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . ." 31 U.S.C. § 1301(d).

The GAO Red Book, which defendants do cite, *see* Defs.' Mem. at 26, rejects defendants' deference argument:

> The Appropriations Clause has been described as "the most important single curb in the Constitution on Presidential power." It means that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Regardless of the nature of the payment – salaries, payments promised under a contract, payments ordered by a court, whatever – a federal agency may not make a payment from the United States Treasury unless Congress has made the funds available. . . . This prescription remains as valid today as it was when it was written.
> . . . .
>
> [T]he congressional power of the purse reflects the fundamental proposition that a federal agency is dependent on Congress for its funding. At its most basic level, this means that it is up to Congress to decide whether or not to provide funds for a particular program or activity and to fix the level of that funding.

GAO Red Book at 1-4, 1-5 (footnotes omitted) (citing *Richmond*, 496 U.S. at 425; *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *Reeside*, 52 U.S. at 291, among other cases).[35]

[35] The single page in the GAO Red Book cited by defendants, page 4-23, concerns the "necessary expense" doctrine which involves existing appropriations only, and thus has no relevance to the constitutional question of whether an appropriation exists in the first instance. The necessary expense doctrine holds that "[a]n appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for." GAO Red Book at 4-20. In this specific context, the GAO Red Book states that "[t]he spending agency has reasonable discretion in determining how to carry out *the objects of the appropriation*." *Id.* (emphasis added). The necessary expense doctrine obviously has no relevance here where the question before the

(*Continued. . .*)

Second, two theories underlie the application of the framework articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), neither of which applies here.

(1) The *Chevron* framework may apply where "Congress has explicitly left a gap for the agency to fill, [such that] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843-44. Here, there is no appropriation, ergo, there is no express delegation of authority and no gap to be filled.

(2) The *Chevron* framework also may be "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King*, 135 S. Ct. at 2488 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Here, as we have explained, there is no ambiguity about the absence of an appropriation for the Section 1402 Offset Program. *See supra* at 13-14; House Mem. at 18-25.

Third, even if there were some ambiguity on the question of the existence of an appropriation – which there is not – the *Chevron* analysis still would not apply because, "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *King*, 135 S. Ct. at 2488-89 (quoting *Brown & Williamson*, 529 U.S. at 159). The *King* Court refused to apply *Chevron* because, it concluded,

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Court is whether an appropriation even exists as a constitutional matter; thus, the question of defendants' discretion never arises.

For the same reason, the two cases defendants cite – *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011), and *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228 (D.C. Cir. 2003) (per curium) – do not support their deference argument. In both cases, Congress indisputably had appropriated funds, but then altered the scope of those appropriations by adopting riders restricting the use of the funds under certain limited circumstances. While the courts in both cases considered the reasonableness of the agencies' interpretation of the riders, neither is apposite because the question before this Court – the constitutional question – is whether Congress ever appropriated any funds in the first instance. Accordingly, the issue of the reasonableness of defendants' interpretation of an existing appropriations statute never arises. *Cf. Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 370 F.3d 1214, 1222 (D.C. Cir. 2004) (declining to defer to agency interpretation of existing appropriations statute).

the question of whether premium tax credits were available on federal Exchanges was so important that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* at 2489. So too here. Even assuming for the sake of argument that *Chevron* could apply to the question of the existence of an appropriation, surely that question, which concerns Congress' most fundamental constitutional authority – the power of the purse – would be of such surpassing importance as to qualify as an "extraordinary case" within the meaning of *King* and *Brown & Williamson.*

Finally, even if defendants' views were entitled to some sort of deference – which they are not – their conclusion that 31 U.S.C. § 1324 provides funds for the Section 1402 Offset Program simply is not reasonable in light of the *express* restriction of 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] . . . ," and the fact that Section 1402 Offset Program payments to Insurers plainly are neither. *See supra* at 24; House Mem. at 25-33.

VII. The Court Should Decline to Revisit the Standing Issue.

Finally, the Court should decline defendants' invitation to revisit the already resolved issue of the House's standing. *See* Defs.' Mem. at 33-34.

On September 9, the Court ruled – after extensive briefing, oral argument, and then more briefing – that the House "has standing to pursue its allegations that [defendants] violated Article I, § 9, cl. 7 of the Constitution when they spent public monies that were not appropriated by the Congress." Mem. Op. at 42-43.[36] Subsequently, the Court denied defendants' motion to certify that ruling for immediate interlocutory appeal, reasoning that "this case is presently suited for

[36] The House incorporates here, to the extent necessary, its prior position on the standing issue. *See* House Mot. to Dismiss Opp'n; [House's] Suppl. Mem. Concerning Defs.' Mot. to Dismiss (July 1, 2015) (ECF No. 33); [House's] Resp. to Defs.' Suppl. Mem.

summary disposition: the facts are not in dispute. . . . [When the merits are resolved], both standing and the merits may be appealed. . . . [T]he D.C. Circuit will be best served by reviewing a complete record on standing and the merits." Order at 3 (Oct. 19, 2015) (ECF No. 51).

The parties then moved for summary judgment on the merits, in the midst of which the Court denied a motion for leave to file a proposed amicus brief with respect to that portion of the proposed brief that concerned the House's standing. *See* Order at 1 (Dec. 16, 2015) (ECF No. 62) ("Amici are too late to offer their views on an Article III question that was fully and ably briefed by the Defendants they support.").

In now urging the Court to revisit the standing issue – in the middle of merits briefing that is proceeding in accordance with the Court's prior orders – defendants present no new arguments; point to no changed circumstances; and rest on nothing more than an apparent desire to avoid a merits ruling. The Court should decline to revisit the standing issue.

CONCLUSION

For the reasons stated above and in the House's opening memorandum, the Court should grant the House's motion for summary judgment and deny defendants' motion for summary judgment.

Respectfully submitted,

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January 15, 2016

CERTIFICATE OF SERVICE

I certify that on January 15, 2016, I served one copy of the foregoing Plaintiff United States House of Representatives' Opposition to Defendants' Motion for Summary Judgment by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse