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' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF EXHIBITS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Legislative Authorities

Other Authorities

INTRODUCTION

In moving for summary judgment on its claims that defendants are violating the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, and the Administrative Procedure Act ("APA"), by paying Insurers billions of taxpayer dollars under the Section 1402 Offset Program, created by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"), plaintiff United States House of Representatives ("House") advanced four principal propositions:

First, Congress's exclusive power of the purse is critically important to our system of governance. *See* Mem. . . . in Supp. of [House's] Mot. for Summ. J. at 12-14 (Dec. 2, 2015) (ECF No. 53) ("House's Memorandum").

Second, because Congress's power of the purse is vital to our system of governance, the legal rules – both statutory and judicial – that govern the determination of whether a constitutionally valid appropriation exists are precise, formal, and well-established. *See id.* at 14-18. They include, most particularly, the rule 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 . . . .")).

Third, the ACA contains no language that expressly or specifically appropriates funds for the Section 1402 Offset Program. *See* House's Mem. at 18-22.

Fourth, Congress thereafter has enacted no law appropriating funds for the Section 1402 Offset Program. *See id.* at 7-11, 25.

In now responding, defendants effectively concede three of these four propositions. They do not challenge Congress's power of the purse or dispute its exclusivity. *See* Defs.' Mem. in

Opp'n to Pl.'s Mot. for Summ. J. (Jan. 15, 2016) (ECF No. 65) ("Defendants' Opposition"). They do not take issue with the legal rules governing the determination of whether a constitutionally valid appropriation exists; indeed, they acknowledge that "[a] law may be construed to make an appropriation . . . *only* if the law specifically states that an appropriation is made." *Id.* at 14 (quoting 31 U.S.C. § 1301(d) (emphasis added)). And they nowhere maintain that Congress ever appropriated any funds for the Section 1402 Offset Program *after* the ACA was enacted. *See id.* at 1-21; *see also* Tr. of Oral Arg. at 24, 27 (May 28, 2015) (ECF No. 31).

Defendants quarrel *only* with the House's contention that the ACA itself did not appropriate funds for the Section 1402 Offset Program. But defendants never say – as they *must show* to prevail here – that the ACA expressly or specifically appropriated funds for that program. Moreover, 31 U.S.C. § 1324 – the permanent appropriation defendants are tapping to make Section 1402 Offset Program payments – *on its face* is unavailable for that purpose. That statute says "[d]isbursements may be made from the appropriation made by this section *only for* – . . . (2) *refunds due from [specified] credit provisions of the Internal Revenue Code,*" 31 U.S.C. § 1324(b) (emphases added), and there simply is no Internal Revenue Code ("IRC") credit provision listed in § 1324(b)(2) that concerns the Section 1402 Offset Program.

That leaves defendants contending, illogically, that reliance on the plain language of the ACA is "superficial," Defs.' Opp'n at 2, and insisting that the Court (i) engage in an elaborate "interpretive" exercise, *id.* at 13, entailing an analysis of the "text, structure, design, and history" of the ACA, *id.* at 1,[1] and (ii) then do what the Court has stated it may not do, i.e., infer an appropriation for the Section 1402 Offset Program. *See* Mem. Op. at 4. This is twice wrong.

[1] *See also* Defs.' Mem. in Supp. of Their Mot. for Summ. J. at 11 (Dec. 2, 2015) (ECF No. 55-1) ("Defendants' Memorandum") (Court should examine "text of the complete Act and subsequent appropriations legislation . . . the structure and design of the Act . . . [a]nd the history of the Act . . . .").

First, defendants' analytical framework is inconsistent with controlling appropriations law. The legal requirement that "[a]n appropriation . . . be expressly stated; [and] cannot be inferred or implied," *id.*,[2] derives directly from the Appropriations Clause and the critical importance of that Clause to our system of governance. *See* House's Mem. at 12-14, 16 (citing 18 Op. Att'y Gen. 174, 176 (1885)). As a result, the whole point of that requirement is that courts must avoid the type of interpretive exercise defendants urge the Court to undertake. By law, an appropriation is made "only if the [statute in question] specifically states that an appropriation is made," 31 U.S.C. § 1301(d), as the ACA did, for example, with respect to the Section 1401 Refundable Tax Credit Program. *See* ACA § 1401(d); House's Mem. at 19 & n.10 (identifying other specific appropriations in ACA). If the Court must go beyond the plain language of the statute to answer the question of whether Congress appropriated funds, then the answer is that Congress did not.

Second, even if the analytical framework defendants propose were available here – which it is not, as we explain below – their specific arguments still would not support recognition of an inferred appropriation for the Section 1402 Offset Program, as we also explain below.

ARGUMENT

Defendants' Opposition is largely composed of recycled versions of arguments defendants advanced in their original summary judgment papers. *See* Defs.' Mem. Since the House already has responded to those arguments, *see* Pl. [House's] Opp'n to Defs.' Mot. for

[2] *See also, e.g.*, *Nevada v. Dep't of Energy*, 400 F.3d 9, 14 (D.C. Cir. 2005) (appropriation requires a "'designation of the [f]unds to be used'" (quoting 63 Comp. Gen. 331, 335 (1984))); *Stitzel-Weller Distillery v. Wickard*, 118 F.2d 19, 23 (D.C. Cir. 1941) ("without such *specific* appropriation, there can be no withdrawal of the money." (emphasis added, quotation marks omitted)); 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); General Accountability Office ("GAO"), Principles of Federal Appropriations Law at 2-16 (3d ed. 2004) ("GAO Red Book") ("[T]he rule is that the making of an appropriation must be expressly stated.").

Summ. J. (Jan. 15, 2016) (ECF No. 66) ("House's Opposition"), this Reply is organized in a manner that largely tracks the organization of the House's Opposition. Where possible, we cross-reference, rather than repeat, responses that appear in our Opposition.

I. *King v. Burwell* Does Not Support Defendants' Contention That This Court Must Engage in an Elaborate Interpretive Exercise.

Defendants' contention that the Court must undertake an elaborate interpretative exercise rests entirely on *King v. Burwell*, 135 S. Ct. 2480 (2015). *See* Defs.' Opp'n at 1-3, 9 (quoting isolated, out-of-context snippets from *King*). In defendants' telling, *King* renders the ACA unique among all federal statutes, immune from the precise and highly formalized laws that govern appropriations issues, *see infra* at 9, including the rule that "[a]n appropriation must be expressly stated; it cannot be inferred or implied," Mem. Op. at 4.

But *King* does not do that. As we have explained, *see* House's Opp'n at 12-15, *King* does not even address, much less does it alter, the central precept of this case, namely that defendants are constitutionally prohibited from "draw[ing] from the Treasury" *any* monies, absent an express appropriation from Congress. U.S. Const. art. I, § 9, cl. 7; *see also* 31 U.S.C. § 1301(d).

Furthermore, *King* affirmatively rejects the type of elaborative interpretive analysis defendants urge. "If the statutory language is plain [as it is with respect to the question of whether the ACA appropriated monies for the Section 1402 Offset Program], [the courts] must enforce it according to its terms." *King*, 135 S. Ct. at 2489; *see also id.* at 2495-96 ("Reliance 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." (quotation marks omitted)).

What defendants advocate here is precisely what *King* forbade: judicial "legislation itself" via elaborate interpretative analysis. Worse, their proposed interpretative analysis derives

from turning *King* upside down. Defendants start with clarity – a statute that, on its face, appropriates no funds for the Section 1402 Offset Program – and then struggle mightily (and ultimately unsuccessfully) to manufacture ambiguity by (i) mischaracterizing the Section 1402 Offset Program as inseparable from the Section 1401 Refundable Tax Credit Program; (ii) speculating that consequences defendants regard as undesirable must follow if they do not have their way; (iii) drawing unsupported conclusions from other, unrelated parts of the ACA; (iv) contorting the language of 31 U.S.C. § 1324 beyond recognition; and (v) rooting through the *post-ACA* record in search of something – anything – that might suggest an ambiguity on a question that admits of none. *See* House's Opp'n at 14-15.

In short, far from helping defendants, *King* stands for the proposition that this Court is precluded from even engaging in the elaborate interpretative analysis of the "text, structure, design, and history" of the ACA, Defs.' Opp'n at 1, that defendants urge. This case begins and ends with the plain language of ACA §§ 1402 and 1412, which establishes that no appropriation for the Section 1402 Offset Program was provided.

In the remainder of this Reply, we address defendants' various interpretative arguments and explain that, even if this Court were to consider them (which it should not), those arguments do not support defendants' demand that this Court infer an appropriation.

II. Defendants' "Unified Advance Payment Program" Theory Does Not Establish That Congress, in the ACA, Appropriated Funds for the Section 1402 Offset Program.

In their original summary judgment papers, defendants repeatedly asserted that the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program were "inextricably intertwined," Defs.' Mem. at 1, "inextricably linked," *id.* at 16, and/or "integrated," *id.* at 16, 21, 29. According to defendants, because they view the programs as linked, the Court should simply deem the appropriation that indisputably is available to fund the former also

available to fund the latter. *See id.* at 10 ("31 U.S.C. § 1324, as amended by the [ACA], is available to fund all components of the Act's integrated system of subsidies . . . .").

The House rebutted the premise that the two programs are "inextricably intertwined" by identifying and explaining the many statutory, structural, funding, eligibility, and operational differences between them. *See* House's Opp'n at 2-11.[3] We also rebutted the conclusion, for which defendants provided no authority, that the Court could infer an appropriation for the Section 1402 Offset Program, even assuming the two programs are linked. *See id.* at 11-12.[4]

Defendants' argument now seems to have morphed into the notion that they may tap the § 1324 appropriation to make Section 1402 Offset Program payments to Insurers because ACA §§ 1411, 1412 "combine" that program and the Section 1401 Refundable Tax Credit Program into "a single, unified advance payment program." Defs.' Opp'n at 7-8. Section 1411 of the ACA *authorizes* the Secretary of Health and Human Services ("HHS") to make eligibility determinations for individuals "claiming a premium tax credit or reduced cost-sharing," and details the mechanics of that process. ACA § 1411(a)(1), (2). Section 1412 *authorizes* advance

[3] For the Court's convenience, a table summarizing selected differences is attached as Exhibit Y.

Notably, *King* identified "three reforms" as "closely intertwined" with the overall purpose of the ACA: the "guaranteed issue and community rating requirement"; the mandatory individual health insurance requirement; and tax credits for individuals. *King*, 135 S. Ct. at 2486-87; *see also id.* at 2494 ("Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and the tax credits."); Cost-Sharing Reductions and the Section 1402 Offset Program did not make the list of provisions essential to the purpose of the ACA, or even merit a mention. This omission is particularly striking in light of the *King* Court's extensive discussion of the operation and meaning of IRC § 36B.

[4] The potential consequences of defendants' theory are staggering. Section 1324 is an unlimited permanent appropriation. *See* 31 U.S.C. § 1324(a) ("[n]ecessary amounts are appropriated"). If defendants were correct, that appropriation would be available to fund *any* program that, in the Executive's view, was "linked" to the Section 1401 Refundable Tax Credit Program. And the § 1324(b) limitation of "[d]isbursements . . . from the appropriation made by this section only" to "(1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the [IRC]," would be read out, contrary to Congress's clear intent. *See* House's Opp'n at 26 n.21 (explaining that § 1324(b) was amended in 1978 to prevent Executive from doing exactly what defendants doing here, i.e., using that appropriation to pay for a program that Congress has not funded).

payments to Insurers for both programs, and deals with the mechanics of that process. *See* ACA § 1412(c)(2) (premium tax credits), 1412(c)(3) (Cost-Sharing Reduction reimbursements).

Defendants' myopic focus on eligibility determinations and the mechanics of the advance payment process, *see, e.g.*, Defs.' Opp'n at 8 ("to the same recipient," by "the same payer"), misses the point. Sections 1411 and 1412 of the ACA are important here because both reinforce the common sense conclusion that the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program are separate and distinct programs. *See, e.g.*, ACA § 1411(a)(1)-(4) (repeatedly and consistently using disjunctive "or" in referring to two programs); *id.* § 1412(c)(2), (3) (treating two programs separately for advance payment purposes).

But ACA §§ 1411 and 1412 do *not* create substantive programs that confer benefits (as do ACA §§ 1401 and 1402). Sections 1411 and 1412 *only* concern, respectively, (i) the particulars of how and when eligibility determinations are made for the two underlying substantive programs (the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program), and (ii) how and when any money that has been appropriated for those two underlying substantive programs may flow to Insurers. Accordingly, when defendants characterize these eligibility and payment processes as the "program" which is funded by 31 U.S.C. § 1324, *see* Defs.' Opp'n at 8, they are playing a very misleading semantic game. The *only* relevant appropriation made by the ACA is the one made by ACA § 1401(d). And that appropriation, on its face, flows *only* to the underlying Section 1401 Refundable Tax Credit Program. *See* ACA § 1401(a), (d); 31 U.S.C. § 1324(b)(2).

Put another way, the fact that the ACA, in §§ 1411 and 1412, *authorizes* defendants to make eligibility determinations and write checks, does not provide the *appropriation* upon which those checks may be drawn. *See also* House's Opp'n at 5-6 (explaining that ACA § 1412 is, at

best, an authorizing provision); Mem. Op. at 3 (noting important "distinction between authorizing legislation and appropriating legislation").

Finally, we note that defendants' "one program" notion is a recent, made-for-litigation, construct. For example, as early as 2012, HHS treated the two programs as separate and distinct. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73118, 73120-22 (Dec. 7, 2012). Then, in its FY 2014 Budget, the Administration treated the two programs as separate and distinct.[5] Shortly thereafter, OMB treated the programs as separate and distinct by reporting that the Section 1402 Offset Program was subject to sequestration, while making no mention of the Section 1401 Refundable Tax Credit Program.[6] OMB further confirmed that they were separate and distinct by noting that the Section 1402 Offset Program had its own Treasury account number (no. 009-38-0126, a CMS account), *see* OMB FY 2014 Sequestration Report at 23, which differs from the Treasury account number for the Section 1401 Refundable Tax Credit Program (no. 015-45-0949), *see* House's Mem. at 26 n.14.

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

In their original summary judgment papers, defendants said the Court should infer an appropriation because otherwise what defendants regard as "undesirable results," Defs.' Mem. at

[5] *See, e.g.*, Office of Management & Budget ("OMB"), Fiscal Year 2014 Budget of the U.S. Government, App. at 448 (Apr. 10, 2013) ("FY 2014 Budget") (House's Mem. Ex. D) (requesting annual appropriation for Section 1402 Offset Program for FY 2014 and first quarter of FY 2015; no mention of Section 1401 Refundable Tax Credit Program, or any suggestion that two programs were one); HHS, Fiscal Year 2014, Centers for Medicare and Medicaid Services ("CMS"), Justification of Estimates for Appropriations Committees at 2, 4, 7, 183-84 (Apr. 10, 2013) ("FY 2014 CMS Justification") (House's Mem. Ex. E) (same).

[6] *See* OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version at 23 (May 20, 2013) ("OMB FY 2014 Sequestration Report") (House's Mem. Ex. F).

17, "anomalies," *id.* at 20, "[in]efficien[cies]," *id.*, and "implausible consequences," *id.* at 21, might follow. Defendants now add the phrase "disruptive consequences," Defs.' Opp'n at 10, but their argument otherwise is unchanged, and it is one to which we already have responded, *see* House's Opp'n at 15-21.

In so arguing, defendants say, in effect, that they should be permitted to spend freely to make the ACA function in a manner they deem optimal. But that is wholly inconsistent with existing appropriations law which is precise and highly formalized. *See, e.g.*, 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); *id.* § 1301(d) ("A law may be construed to make an appropriation . . . only if the law specifically states that an appropriation is made . . . ."); GAO Red Book at 2-16 ("[T]he making of an appropriation must be expressly stated."); Mem. Op. at 4 ("An appropriation must be expressly stated; it cannot be inferred or implied."). This precision and formality arises directly out of the Appropriations Clause, and the centrality of Congress's exclusive control over the power of the purse to our system of governance. "In view of the [Appropriations Clause] . . . a statute should not be construed as making an appropriation . . . unless the language is sufficiently explicit to clearly justify it . . . ." 18 Op. Att'y Gen. 174, 176 (1885); *see also* House's Mem. at 12-14 (citing numerous authorities); *see generally Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" (quoting *U.S. v. Locke*, 471 U.S. 84, 95 (1985))).

The Court should reject defendants' proposed rewrite of our appropriations laws for two principal reasons. *First*, the Supreme Court already has rejected the idea that the Executive may

spend freely until Congress affirmatively and explicitly says no, which is the import of defendants' argument. *See, e.g.*, *U.S. v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (same); *see also* Mem. Op. at 10 n.8 ("The absence of a restriction . . . is not an appropriation."). *Second*, because the President presumably would veto any legislation that restricted spending he favored, Congress would be required to muster a two-thirds supermajority to override his veto and stop Executive spending, *see* U.S. Const. art. I, § 7, cl. 2, which would turn the Appropriations Clause completely upside down.

IV. Neither the Text, Nor the Absence, of Other ACA Provisions Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants next say the House's position regarding the absence of an appropriation for the Section 1402 Offset Program is "impossible to square with several other ACA provisions," Defs.' Opp'n at 11, although they actually identify only one such provision, *see id.* (asserting that ACA § 1303, as amended by ACA § 10104(c), was "premised on the explicit understanding that the [ACA's] entire program of subsidies – including cost-sharing reduction payments – is covered by a permanent appropriation"). Defendants made the same argument in their original summary judgment papers, and we refuted it. *See* House's Opp'n at 27-29.

Defendants now add, to their original argument, only this assertion:

> [w]ere the cost-sharing reduction payments subject to annual appropriations, they would be covered by the annual Hyde Amendment, and it would have been unnecessary to include them in the scope of the special restriction directed at permanently funded expenditures.

Defs.' Opp'n at 11 (citing no authority). This new gloss assumes that the Hyde Amendment (i) applies to all annual appropriations, and (ii) will be reenacted each year in perpetuity. Both assumptions are wrong.

The so-called "Hyde Amendment" refers to a legislative appropriations rider (the language of which has changed somewhat over time) that restricts the use of certain federal funds to pay for abortions. Since 1976, the Hyde Amendment has been included as a rider to just one of the annual appropriations bills, traditionally the bill that funds the Departments of Labor, HHS, Education, and related agencies.[7] This means the Hyde Amendment does not apply to *all* annual appropriations, as defendants suggest. Rather, it applies only to funds appropriated by the particular annual appropriations bill to which it is attached.

Accordingly, defendants' contention that if "cost-sharing reduction payments [were] subject to annual appropriations," those payments "would be covered by the annual Hyde Amendment," Defs.' Opp'n at 11, is speculative at best, for two reasons. *First*, there is no guarantee that the Hyde Amendment will be enacted in the future. *Second*, in the past, the Hyde Amendment has applied to one annual appropriations bill only and, in the future, Congress, if it wished to appropriate funds for the Section 1402 Offset Program, could do so in any manner it chose, including in an annual appropriation bill not subject to the Hyde Amendment.

Given these uncertainties about the Hyde Amendment, it made sense for Congress to include § 1303 in the ACA if it wished to ensure that funds appropriated in the ACA (as well as funds that might be appropriated in future annual appropriations bills for the two programs)

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[7] *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Tit. V, § 506(a), ___ Stat. ___, (2015) ("None of the funds appropriated in this Act [referring only to Division H – Departments of Labor, HHS, and Education, and Related Agencies Appropriations Act, 2016], and none of the funds in any trust fund to which funds are appropriated in this Act [also referring only to same Division H], shall be expended for any abortion.").

could not be used to pay for abortions. Thus, inclusion of that provision says nothing whatsoever about whether the ACA elsewhere appropriated funds for the Section 1402 Offset Program.[8]

V. The Text of 31 U.S.C. § 1324 Still Does Not Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants next recycle two arguments based on the text of 31 U.S.C. § 1324. The first is that defendants' payments to Insurers under the Section 1402 Offset Program are "'refunds due from' [IRC] Section 36B," within the meaning of 31 U.S.C. § 1324(b)(2). Defs.' Opp'n at 2. The House already has rebutted this bizarre argument. *See* House's Opp'n at 21-24.

The second argument –which is facially inconsistent with the first –originally was articulated as follows: notwithstanding the explicit language of 31 U.S.C. § 1324(b)(2), the appropriation made by that statute "is *not* limited to payments made under the [IRC credit] provisions listed in" § 1324(b)(2). Defs.' Mem. at 26 (emphasis added); *see also* House's Opp'n at 24-26 (rebutting that argument).

The new recycled version of this second argument posits that defendants are justified in tapping the § 1324 appropriation to make Section 1402 Offset Program payments because "advance payments . . . attributable to premium tax credits . . . are not themselves refunds of an individual's tax payments," and "[t]hus, whether a compensatory payment is expressly denominated a tax 'refund' is not dispositive of the scope of [§] 1324[(b)(2)] . . . ." Defs.' Opp'n at 13. The recycled version fares no better than the original.

[8] Defendants also recycle their argument that the absence from the ACA of "authorization of appropriations language" is somehow significant. *See* Defs.' Opp'n at 12 ("when Congress directs the executive branch to take some action, but wants to maintain control over the executive branch's compliance with that direction, there is a well-established means by which it does that" (quoting Br. of *Amici Curiae* Members of Congress . . . at 21 (Dec. 16, 2015) (ECF No. 63))). It is not significant, as we already have explained. *See* House's Opp'n at 29-32, 3 n.3.

The notion that Section 1401 Refundable Tax Credits are not "refunds due from [IRC § 36B]," within the meaning of 31 U.S.C. § 1324(b)(2), because they may be paid in advance to Insurers, *on behalf of an individual entitled to the credit* – at the option of the individual entitled to the credit, *see* House's Opp'n at 7-8, & Exs. Q, U – is self-evidently wrong. IRC § 36B, like all other tax credits listed in 31 U.S.C. § 1324(b)(2), is a refundable tax credit because 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 in the form of a refund (even if they do not otherwise pay any tax). *See* House's Opp'n at 22.

The fact that, under ACA § 1412(c)(2), Section 1401 Refundable Tax Credits *may* be paid in advance to an Insurer (to reduce the premium the policyholder owes to his Insurer), instead of to the policyholder himself (who then would pay the full amount of the premium to his Insurer), is of no consequence from any perspective. Financially, these alternatives are indistinguishable. Operationally, they are handled by defendant Treasury Department in exactly the same manner. *See* House's Opp'n Exs. T, Q (IRS Form 8962 and Instructions). And legally, there is no material difference between a tax refund paid to an individual policyholder and a tax refund advanced to an Insurer *on behalf of* the policyholder; both are "refunds of an individual's tax payments," Defs.' Opp'n at 13, as well as "refunds due from [IRC § 36B]," within the meaning of 31 U.S.C. § 1324(b)(2).[9]

[9] The Section 1401 Refundable Tax Credit Program is not the first refundable tax credit program to include a convenience option of the tax refund being paid either to the individual taxpayer or to another entity on behalf of the individual taxpayer. *See, e.g.*, 26 U.S.C. §§ 7527, 6431; *see also* House's Opp'n at 24-26 (discussing these two provisions).

Finally, and in any event, even if advance payments for the Section 1401 Refundable Tax Credit Program were not "refunds due from [IRC § 36B]," that would not help defendants because it still would not make the 31 U.S.C. § 1324 appropriation available for Section 1402 Offset Program payments. In other words, this argument goes precisely nowhere.

VI. Defendants' Post-ACA "Legislative Record" Contentions Do Not Support Inferring an Appropriation for the Section 1402 Offset Program.

Defendants next identify various "Post-ACA Legislative Developments" which, they say, "Confirm That Cost-Sharing Reduction Payments Are Permanently Appropriated." Defs.' Opp'n at 14. In fact, none of these "developments" do any such thing. The only thing defendants' heavy and repeated reliance on such post-ACA "developments" confirms is the fact that they are asking to have this Court infer an appropriation for the Section 1402 Offset Program.

A. THE CONGRESSIONAL BUDGET OFFICE'S CHARACTERIZATIONS OF THE SECTION 1402 OFFSET PROGRAM HAVE NO BEARING ON WHETHER CONGRESS ACTUALLY APPROPRIATED FUNDS FOR THAT PROGRAM.

Defendants say first that the Congressional Budget Office ("CBO") "from 2010 forward . . . has continued to score cost-sharing reduction payments as mandatory payments that do not depend on annual appropriations." Defs.' Opp'n at 18; *see also id.* at 12. This is the same argument defendants made in their original summary judgment papers, except that the first time around the argument was limited to CBO's March 20, 2010 score of the ACA which classified as "direct spending" payments that would be made pursuant to the Section 1402 Offset Program.

See Defs.' Mem. at 23.[10] This argument was wrong before, *see* House's Opp'n at 33-37, and, for the same reasons, it is wrong now.

In brief, 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 35. Most importantly, when CBO scores a program that meets the statutory definition of "direct spending," like the Section 1402 Offset Program, *see id.* at 36 (citing 2 U.S.C. § 900(c)(8)(B)), CBO is statutorily *required* to assume that funding is "adequate to make all payments required by those laws," 2 U.S.C. § 907(b)(1).

As a result, CBO's characterizations simply have no bearing on whether Congress appropriated funds for the Section 1402 Offset Program.[11]

B. SECTION 1001 OF THE CONTINUING APPROPRIATIONS ACT, 2014 STILL DOES NOT SUPPORT DEFENDANTS' REQUEST FOR AN INFERRED APPROPRIATION.

In their original summary judgment papers, defendants asserted that § 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.

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[10] The term "mandatory spending," which defendants now use, *see* Defs.' Opp'n at 18, is synonymous with "direct spending," *see* CBO, Glossary at 12 ("Mandatory spending: Synonymous with *direct spending* . . . ." (emphasis in original)) (Defs.' Mem. Ex. 7).

[11] Defendants cite various House Budget Committee reports, *see* Defs.' Opp'n at 18 & n.11, and then misconstrue them in the same manner they misconstrue CBO's score of the ACA. The Budget Committee reports concern only the potential budgetary impact of proposed legislation and do not concern appropriations; in particular, they do not concern the question of whether constitutionally valid appropriations are available to pay for the programs discussed. *See* House's Opp'n at 35-36 (citing 2 U.S.C. § 907(b)(1)). Accordingly, and consistent with congressional budget rules, when the repeal of such programs is proposed, the full projected funding amount is considered *budget* savings. *See, e.g.*, H.R. Rep. No. 113-17 at 82 (Mar. 15, 2013) ("[R]epeal of the insurance subsidies and other exchange-related spending would save roughly $1.1 trillion over ten years.").

Section 1001 did no such thing, as we already have explained. *See* House's Opp'n at 37-38; House's Mem. at 7-8, 32-33.

Defendants now have tweaked their argument slightly. Section 1001, they say, is "[t]he best evidence of *Congress's understanding*" that an appropriation existed. Defs.' Opp'n at 7 (emphasis added); *see also id.* at 15. Even assuming, however, that "Congress's understanding" in 2013 is relevant to the question of whether a previous Congress appropriated funds for the Section 1402 Offset Program, § 1001 cannot possibly be construed to reflect an understanding on the part of anyone that the ACA expressly made the 31 U.S.C. § 1324 appropriation available for Section 1402 Offset Program payments.

Section 1001 says nothing about appropriations. It is an anti-fraud provision, designed to ensure that individuals who apply for premium tax credits and Cost-Sharing Reductions actually are eligible to receive them. *See* Pub. L. No. 113-46, § 1001.[12] And defendants' claim that "Congress would have had no reason to enact this provision if it did not anticipate that cost-sharing reduction payments would be made," Defs.' Opp'n at 15, is wrong. *First*, § 1001 applies both to Section 1401 Refundable Tax Credits, funds for which *already* had been appropriated by the ACA, as well as to Cost-Sharing Reductions. And even though Congress had not appropriated funds for the Section 1402 Offset Program at the time § 1001 was enacted (October 2013), a future Congress might choose to do that. *Second*, Insurers are obligated to provide Cost-Sharing Reductions to qualified individuals, regardless of whether the Insurers receive reimbursements, *see* ACA § 1402(a)(2) ("[T]he issuer shall reduce the cost-sharing under the

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

plan at the level and in the manner specified in subsection (c).”), and Congress also had an interest in reducing fraud vis-à-vis Insurers.

In short, Congress’s enactment of § 1001 simply does not bear in any way on the question of whether the ACA appropriated funds for the Section 1402 Offset Program.[13]

C. THE ABSENCE OF AN AFFIRMATIVE RESTRICTION ON DEFENDANTS’ USE OF 31 U.S.C. § 1324 TO MAKE SECTION 1402 OFFSET PROGRAM PAYMENTS DOES NOT MAKE THAT APPROPRIATION AVAILABLE FOR THOSE PAYMENTS.

Defendants say that “[a]t the end of 2014, Congress imposed explicit restrictions on the use of certain appropriated funds for risk corridor payments . . . [and] did not impose any such restriction on the use of funds for cost-sharing reduction payments . . . .” Defs.’ Opp’n at 19-20.

The Appropriations Clause prohibits defendants from making Section 1402 Offset Program payments (absent an express appropriation); under the Constitution, Congress does not have to do anything. *See* U.S. Const. art. I, § 9, cl. 7. Thus, to the extent defendants suggest that

[13] Defendants cherry-pick a floor statement from a single House Member which statement, they say, “reflected Members’ understanding that cost-sharing reduction payments would soon begin and were not awaiting further appropriations.” Defs.’ Opp’n at 16 (referring to 159 Cong. Rec. H5517 (Sept. 12, 2013) (statement of Rep. Ellmers)). As a matter of simple logic, the statement of a single Member cannot reflect the “understanding of [the 535 Members of] Congress” about anything. Moreover, under the law of this Circuit, such statements are not a reliable source for determining the meaning and/or purpose of legislation to which they pertain, let alone as a guide to legislation enacted years earlier. *See* House’s Opp’n at 29 n.24 (citing cases). Finally, and in any event, Rep. Ellmers statement, when read in full and in context, does not support the contention that she or anyone else understood that a permanent appropriation already was available to fund the Section 1402 Offset Program.

Defendants also cite two Administration communications reflecting the Administration’s position on the legislation that ultimately became § 1001. *See* Defs.’ Opp’n at 17 (referencing Statement of Administration Policy (Sept. 10, 2013), reprinted in 159 Cong. Rec. H5525 (Sept. 12, 2013), and Letter from Jim R. Esquea, Ass’t Sec’y for Leg., HHS, to Hon. Fred Upton, Chairman, House Comm. on Energy & Commerce (Aug. 22, 2013) (“Esquea Letter”), reprinted in 159 Cong. Rec. H5526-27 (Sept. 12, 2013)). Neither communication supports defendants’ position that § 1001 reflects some sort of congressional understanding, in 2013, that the ACA had appropriated funds for the Section 1402 Offset Program years earlier. Indeed, the Esquea Letter confirms the common sense conclusion that the Section 1401 Refundable Tax Credit Program and the Section 1402 Offset Program are separate and distinct. *See, e.g.*, Esquea Letter at H5526 (noting that “any advance premium tax credit paid is subject to reconciliation by the IRS,” but saying nothing similar about Cost-Sharing Reductions).

the *absence* of an explicit congressional restriction on their use of the 31 U.S.C. § 1324 appropriation justifies their use of that appropriation to make Section 1402 Offset Program payments to Insurers, they are wrong. *See* Mem. Op. at 10 n.8 ("The absence of a restriction . . . is not an appropriation."); *see also MacCollom*, 426 U.S. at 321; *Reeside*, 52 U.S. at 291.

To the extent defendants are trying to neutralize the sting of GAO's recent Risk Corridors Program opinion, they also fail. As we explained earlier, *see* House's Mem. at 21-22, GAO's opinion is significant because it reconfirms that a legislative direction to pay, by itself, is not an appropriation. *See* GAO, B-325630, HHS – Risk Corridors Program at 3 (Sept. 30, 2014) ("GAO Opinion Letter") (House's Mem. Ex. I; Defs.' Opp'n Ex. 25). The GAO Opinion Letter concerned ACA § 1342 which, in pertinent part, says 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. The GAO Opinion Letter states that "[i]t is not enough for a statute to simply require an agency to make a payment . . . ; [Thus, ACA] Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)."

Because the Section 1402 Offset Program includes, at most, a direction to pay very similar to that of the Risk Corridors Program, *compare* ACA § 1412(c)(3) *with* ACA § 1342(b)(1), the GAO Opinion Letter is directly on point. It buttresses the House's contention that the ACA did not appropriate funds for the Section 1402 Offset Program, and directly refutes defendants' efforts to extract an appropriation from ACA § 1412. *See* Defs.' Opp'n at 7-8.[14]

[14] GAO went on to opine that certain user fees – which other legislation authorizes HHS to collect – *could be used* to fund the Risk Corridors Program. *See* GAO Opinion Letter at 3-6. Congress subsequently enacted appropriations legislation that prohibits the use of those user fees to fund the Risk Corridors Program. *See* Consolidated and Further Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014).

D. A RECENTLY VETOED BILL DOES NOT SUPPORT DEFENDANTS' REQUEST FOR AN INFERRED APPROPRIATION.

Defendants next interpretative argument – that a recently *vetoed* bill supports their contention that they constitutionally are authorized to tap 31 U.S.C. § 1324 to make Section 1402 Offset Program payments – is truly farfetched. *See* Defs.' Opp'n at 15 n.4, 20 (referencing H.R. 3762, 114th Cong. (2016), which was presented to the President on Jan. 7, 2016, and vetoed the following day, *see* Veto Message from the President – H.R. 3762 (Jan. 8, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/01/08/veto-message-president-hr-3762). This vetoed bill cannot, and does not, create the express appropriation defendants must have to make Section 1402 Offset Program payments to Insurers consistently with the Constitution, nor can that vetoed bill justify inferring such an appropriation. *See* Mem. Op. at 4.

Moreover, and in any event, the conclusions defendants seek to draw from § 202(e)(2) of H.R. 3762 – that the bill "presumed that cost-sharing reduction payments were fully funded," Defs.' Opp'n at 15 n.4, and "would have preserved the payment of cost-sharing reductions through the end of 2017," *id.* at 20 – are both wrong.

H.R. 3762 would have (i) repealed ACA §§ 1402 and 1412, *see* H.R. 3762, § 202(b), (c); and (ii) made the repeal effective December 31, 2017, *see id.* § 202(e)(2). However, H.R. 3762 made no reference to any appropriation for the Section 1402 Offset Program, and it is illogical to infer from the proposed repeal of ACA §§ 1402 and 1412 either that (i) anyone "presumed that cost-sharing reduction payments were fully funded," Defs.' Opp'n at 15 n.4, or (ii) the bill intended to "preserve[] the payment of cost-sharing reductions through the end of 2017," *id.* at 20. These unsupported conclusions simply do not follow. Had H.R. 3762 been signed into law, Insurers would have been obligated by ACA § 1402 to provide Cost-Sharing Reductions to eligible policyholders through December 31, 2017 (but not thereafter), regardless of whether

they received any reimbursements, and the issue of whether the ACA appropriated funds for the Section 1402 Offset Program would have remained where it is today – in litigation.

E. DEFENDANTS' SUGGESTIONS THAT CONGRESS KNEW DEFENDANTS WERE MAKING SECTION 1402 OFFSET PROGRAM PAYMENTS TO INSURERS DOES NOT SUPPORT INFERRING AN APPROPRIATION FOR THAT PROGRAM.

Defendants repeatedly suggest, referring to five different communications, that Congress must have been aware that defendants were making Section 1402 Offset Program payments to Insurers. *See* Defs.' Opp'n at 16 nn.5-7; *id.* at 17 n.8; *id.* at 19 nn.13-14. Defendants never articulate what resulting legal conclusion they believe the Court should draw, but the implication seems to be that Congress somehow has ratified defendants' use of 31 U.S.C. § 1324 to make Section 1402 Offset Program payments. *See, e.g., id.* at 17 ("Congress enacted [§ 1001] in October 2013 . . . with full knowledge that the Executive Branch would be making cost-sharing reduction payments in the coming year.").

If that is what defendants intend, they cite no authority for the proposition, and we are aware of none. Indeed, all known authority is to the contrary. *See, e.g.*, 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 . . . ."); Mem. Op. at 4 ("An appropriation must be expressly stated; it cannot be inferred or implied."); House's Mem. at 12-18 (citing numerous other authorities).

Moreover, defendants' suggestions about Congress's supposed awareness are misleading, at best. Three of the cited communications, *see* Defs.' Opp'n at 16 nn.5-7, 17, occurred between March and August 2013 when the Administration's FY 2014 appropriations request for the Section 1402 Offset Program was pending before Congress. None of the three suggested in any way that defendants would tap the 31 U.S.C. § 1324 appropriation to make Section 1402 Offset

Program payments to Insurers if the Administration's request was not approved. Understood in context, therefore, these communications convey, at most, only the unremarkable intent, on the part of the Administration, to spend money it hoped Congress would appropriate.

One communication – testimony before a House committee – occurred in January 2014 when defendants were beginning to make Section 1402 Offset Program payments to Insurers. *See id.* at 17 n.8. That communication also did not reveal that defendants were using the 31 U.S.C. § 1324 appropriation to make the payments.

The fifth communication is then-OMB Director Burwell's May 2014 letter to two Senators, in the context of her confirmation hearings to be Secretary of HHS. *See id.* at 19 nn.13-14 (referring to Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, Responses at 4 (May 21, 2014) ("Burwell Letter")). That communication, which we discussed earlier, *see* House's Mem. at 27-28, also did not state that defendants were using the 31 U.S.C. § 1324 appropriation to make Section 1402 Offset Program payments to Insurers. Instead, it stated only that defendants were making those payments and Section 1401 Refundable Tax Credit payments from one Treasury account for reasons of "efficiency." Burwell Letter, Responses at 4 (House's Mem. Ex. O). While the House surmised from this letter that defendants might be using the 31 U.S.C. § 1324 appropriation in an unconstitutional manner to make Section 1402 Offset Program payments to Insurers – leading to the filing of this lawsuit several months later – the House did not receive confirmation of that fact until spring 2015 when it obtained the Joint HHS OIG/TIGTA Report: *Review of the Accounting Structure Used for the Administration of Premium Tax Credits* (Mar. 31, 2015) (House's Mem. Ex. A). The House did not receive confirmation from defendants themselves until the May 28, 2015 oral argument in this case. *See* Tr. of Oral Arg. at 8, 25-27.

In short, the cited communications do not support defendants' request for an inferred appropriation. If anything, they undercut defendants' position by suggesting a pattern, on defendants' part, of hiding from Congress the fact that defendants were tapping a permanent appropriation that, constitutionally, was unavailable to them. *See also infra* at n.17.

F. DEFENDANTS' FORMAL REQUEST FOR AN ANNUAL APPROPRIATION FOR FY 2014 AND THE FIRST QUARTER OF FY 2015 UNDERMINES DEFENDANTS' POSITION.

By far and away the most significant post-ACA developments were the Administration's formal request for an annual appropriation for the Section 1402 Offset Program for FY 2014 and the first quarter of FY 2015, and the events relating to that request. *See* House's Mem. at 7-8, 22-24; House's Opp'n at 38-41. Defendants now say these developments "have no bearing on [the] questions . . . now before this Court." Defs.' Opp'n at 5. But defendants cannot have it both ways. They cannot affirmatively cite a patchwork collection of post-ACA developments (CBO pronouncements; § 1001 of the Continuing Appropriations Act, 2014; Congress's non-actions; a vetoed bill), and, at the same time, deem irrelevant their own, post-ACA, *specific admissions* that an annual appropriation for the Section 1402 Offset Program is required. These include:

- the Administration's request for an annual appropriation to fund the Section 1402 Offset Program, *see* FY 2014 Budget at App. 448 (House's Mem. Ex. D);[15]
- HHS's justifications for that request, *see* FY 2014 CMS Justification at 2, 4, 7, 183-84 (House's Mem. Ex. E);

[15] The Administration's FY 2014 budget request was never withdrawn, as we explained earlier. *See* House's Mem. at 7 & n.5.

- OMB's statement to Congress that Section 1402 Offset Program payments to Insurers *were* subject to sequestration, *see* OMB's FY 2014 Sequestration Report at 23 (House Mem. Ex. F), which necessarily meant that 31 U.S.C. § 1324 *could not* be the funding source for such payments, *see* House's Mem. at 22-24.[16]

At the very least, these developments constitute a clear admission from the Administration, at the most pertinent possible time, that the ACA did not appropriate funds for the Section 1402 Offset Program. As we also discussed earlier, this was an admission from which defendants backpedaled only *after* Congress rejected their request for an annual appropriation. *See* House's Mem. at 25-26. At a minimum, therefore, these admissions are wholly inconsistent with defendants' belated, stitched-together claim that they always were entitled to tap the 31 U.S.C. § 1324 appropriation to make Section 1402 Offset Program payments to Insurers.[17]

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[16] *See also PPACA Pulse Check, Hr'g Before the House Comm. on Energy & Commerce*, 113th Cong. at 104-05, 201-02 (2013) (testimony of then-CMS Director Marilynn Tavenner) (not denying that Section 1402 Offset Program payments would be subject to sequester: "Of course it is our strong preference that the issue of sequestration go away entirely."), attached as Ex. Z; *Dep'ts of Labor, HHS, Educ., & Related Agencies Appropriations for Fiscal Year* 2014, *Hr'g Before the S. Comm. on Appropriations*, 113th Cong. 141 (2013) (statement of Sen. Patty Murray, Chairwoman, S. Comm. on Budget: "Unlike [§ 1401] premium assistance subsidies, [§ 1402] cost-sharing subsidies are not provided to individual taxpayers, but paid directly to insurers. As such, they appear to be subject to sequestration."), (statement of then-HHS Sec'y Kathleen Sebelius in response: not denying that Section 1402 Offset Program subject to sequester), attached as Ex. AA.

[17] Defendants never have explained to this Court when, how, or under what circumstances, they came to reverse themselves, and conclude that they were justified in tapping the 31 U.S.C. § 1324 appropriation to make Section 1402 Offset Program payments to Insurers. They also have refused to answer Congress's questions about that decision. *See, e.g.*, *Examining the Fiscal Year 2016 HHS Budget, Hr'g Before the House Comm. on Energy & Commerce, Subcomm. on Health*, 114th Cong. 63-67, 73-75 (Feb. 26, 2015) (testimony of Sec'y Burwell) (refusing to answer questions), attached as Ex. BB; Letter from Hon. Fred Upton, Chairman, House Comm. on Energy & Commerce, and Hon. Paul Ryan, Chairman, House Comm. on Ways & Means, to Hon. Sylvia Burwell, Sec'y of HHS, at 3 (Feb. 3, 2015) (asking for explanation of "1. The administration's decision to make Section 1402 Offset Program payments to insurers, despite the lack of appropriations to do so; and 2. The administration's abrupt reversal in course from its FY 2014 budget submission to Congress, in which it requested an 'annual' appropriation to fund the Section 1402 Offset Program payments . . . ."), and Letter from Randall DeValk, Acting Ass't Sec'y

(*Continued. . .*)

In any event, even if the Court concludes that defendants' admissions are not pertinent here, that would not change the outcome because the ACA still does not expressly appropriate money for the Section 1402 Offset Program. That is, while certainly material, the developments discussed above are not essential to the House's case; they buttress a conclusion we believe the Court must reach even in the absence of these developments.

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

As they did in their original summary judgment papers, *see* Defs.' Mem. at 33-34, defendants once again urge the Court to revisit the issue of the House's standing, *see* Defs.' Opp'n at 20 n.16. As we did before, *see* House's Opp'n at 44-45, we again urge the Court to reject this invitation.

CONCLUSION

Although this case arises in the context of the ACA, it is not about the ACA. As we said at the outset, this case concerns a much more fundamental question: whether the separation of powers doctrine upon which "the whole American fabric has been erected," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), shall remain intact and vital in the face of aggressive Executive overreach.

The Appropriations Clause is the very touchstone of the separation of powers doctrine. As the D.C. Circuit has explained, "[t]he Appropriations Clause is thus a bulwark of the

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for Leg. Affairs, & Jim R. Esquea, Ass't Sec'y for Leg., HHS, to Hon. Fred Upton, Chairman, House Comm. on Energy & Commerce (Feb. 25, 2015) (refusing to answer questions put to Secretary Burwell by Chairmen Upton and Ryan), attached collectively as Ex. CC.

What is clear is that defendants kept hidden, for at least 14 months after Section 1402 Offset Program payments began flowing to Insurers, the fact that they were using the 31 U.S.C. § 1324 appropriation. *See* House's Mem. at 3 n.3 (referencing Joint HHS OIG/TIGTA Report (House's Mem. Ex. A)). The Joint HHS OIG/TIGTA Report was the first acknowledgement by the Administration – to become public – that defendants actually were using the 31 U.S.C. § 1324 appropriation to make Section 1402 Offset Program payments to Insurers.

Constitution's separation of powers . . . [because it operates] as a restraint on Executive Branch officers . . . [who may seek] 'unbounded power over the public purse . . . .'" *U.S. Dep't of the Navy v. Fed. Labor Relns. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-214 (1833)).

So it is here. Defendants know the ACA does not appropriate funds for the Section 1402 Offset Program because there is *no language* in that law that expressly or specifically appropriates such funds; indeed, they acknowledged as much in the course of the FY 2014 budget cycle. Yet, notwithstanding, defendants for more than two years have been paying to Insurers billions of taxpayer dollars under that program. The Executive's effort to exercise that "unbounded power over the public purse," of which Justice Story and the D.C. Circuit warned, is manifest most clearly in the mélange of porous arguments to which defendants have resorted in an effort to justify their unconstitutional actions.

At bottom, this case is simple and straightforward. The Constitution says defendants may "draw[] [No Money] from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. There is no "Appropriation[] made by Law" for the Section 1402 Offset Program. Defendants nevertheless are drawing money from the Treasury and spending it on that program. Ergo, they are violating the Constitution and the APA.

The Court should grant the House's motion for summary judgment and deny defendants' motion for summary judgment.

Respectfully submitted,

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February 5, 2016

CERTIFICATE OF SERVICE

I certify that on February 5, 2016, I served one copy of the foregoing Plaintiff United States House of Representatives' Reply in Support of Its Motion for Summary Judgment by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse