[NOT SCHEDULED FOR ORAL ARGUMENT]

No. 16-5202

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff-Appellee,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of Health & Human Services; JACOB J. LEW, in his official capacity as Secretary of the Treasury,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer)

BRIEF FOR APPELLANTS

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIR. R. 28(a)(1)

A. Parties and *Amici*

1. Parties

The original plaintiff was the U.S. House of Representatives of the 113th Congress. The House of Representatives of the 114th Congress later voted to act as successor plaintiff and is the appellee here.

Defendants-appellants are Sylvia M. Burwell, as Secretary of Health & Human Services; the U.S. Department of Health & Human Services; Jacob J. Lew, as Secretary of the Treasury; and the U.S. Department of the Treasury.

2. Amici

Amicus briefs were filed in district court by the following groups:

Members of Congress: Rep. Nancy Pelosi; Rep. Steny H. Hoyer; Rep. James E. Clyburn; Rep. Xavier Becerra; Rep. Joseph Crowley; Rep. Nita Lowey; Rep. Robert C. "Bobby" Scott; Rep. Frank Pallone; Rep. John Conyers, Jr.; Rep. Louise Slaughter; and Rep. Sander M. Levin.

Economic and health policy scholars: Henry J. Aaron, Ph.D.; Linda Blumberg, Ph.D.; David Cutler, Ph.D.; Douglas Elmendorf, Ph.D.; Judith Feder, Ph.D.; Sherry Glied, Ph.D.; Mark Hall, J.D.; John Holahan, Ph.D.; Timothy Jost, J.D.; John McDonough, DrPH; Marilyn Moon, Ph.D.; Harold Pollack, Ph.D.; Sara Rosenbaum, J.D.; William Sage, M.D., J.D.; and Stephen Zuckerman, Ph.D.

States: West Virginia, Oklahoma, Arizona, Louisiana, South Carolina, and Texas.

B. Rulings Under Review

Defendants have appealed the final order (R.73) and opinion (R.74) entered on May 12, 2016, and the order (R.42) entered on September 9, 2015, denying in part defendants' motion to dismiss. The rulings were issued by the Honorable Rosemary M. Collyer in No. 14-cv-1967 (D.D.C.).

C. Related Cases

This case was not previously before this Court. We are unaware of any pending case that involves substantially the same issues.

s/ Alisa B. Klein
Alisa B. Klein
Counsel for Appellants

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GLOSSARY

ACA	Patient Protection and Affordable Care Act
APA	Administrative Procedure Act
CBO	Congressional Budget Office
CMS	Centers for Medicare & Medicaid Services
GAO	Government Accountability Office
HHS	Department of Health & Human Services
OMB	Office of Management and Budget
OSTP	Office of Science and Technology Policy

INTRODUCTION

For the first time in our Nation's history, the district court allowed one House of Congress to invoke the jurisdiction of an Article III court to resolve a disagreement between the political branches over the Executive Branch's execution of a federal statute. Such disagreements are routine, but they have always been resolved through the give-and-take of the political process—not by resort to the Judiciary. That unbroken history reflects the fundamental separation-of-powers principles embodied in Article III's case-or-controversy requirement and the "restricted role for Article III courts" in our constitutional structure. *Raines v. Byrd*, 521 U.S. 811, 828 (1997). It also reflects the distinct powers of the Legislative and Executive Branches under the Constitution. As this Court and the Supreme Court have made clear, the House's belief that the Executive Branch is misinterpreting a federal statute does not confer Article III standing or create a case or controversy fit for judicial resolution. The district court's contrary conclusion cannot be reconciled with the structure of the Constitution, controlling precedent, and historical practice, and would "improperly and unnecessarily plunge[]" the Judiciary into a host of disputes between the political branches. *Id.* at 827.

This suit concerns the Executive Branch's administration of the insurance subsidy program established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA or Affordable Care Act). The Act requires the Department of the Treasury to make payments to health insurers to subsidize

health coverage for eligible low- and moderate-income Americans. These mandated payments have two components: premium tax credits, which subsidize insurance premiums for eligible individuals, and cost-sharing reductions, which subsidize copayments and other types of out-of-pocket costs for certain individuals determined eligible to receive the tax credits. Since January 2014, Treasury has been paying both components of the subsidy program from the permanent appropriation in 31 U.S.C. § 1324, which the ACA amended. Congress has taken no legislative action to restrict these ongoing payments—to the contrary, it has enacted legislation predicated on the understanding that the payments would be made. Nonetheless, the House brought this suit asserting that the Section 1324 appropriation covers only the premium tax-credit component of the subsidy program, and that no appropriation is available to pay for the cost-sharing reduction component. After holding that the House had Article III standing and a cause of action, the district court adopted the House's view on the merits. The court enjoined the Executive Branch from making further cost-sharing reduction payments but issued a *sua sponte* stay pending appeal.

That injunction epitomizes the "separation-of-powers problems inherent in legislative standing," *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000), by interfering with the proper functioning of all three branches of government. First, it "meddl[es] in the internal affairs of the legislative branch" by allowing one House of Congress to use litigation to circumvent the legislative process. *Id.* (citation omitted). If the House wants to achieve the result it obtained in district court, the course

prescribed by the Constitution would be to enact new legislation providing that the Section 1324 appropriation may not be used to make cost-sharing reduction payments. That would require the House to obtain the agreement of the Senate and to accept responsibility for the results. By filing this suit, the House seeks to achieve the same result without obtaining the concurrence of the Senate or accepting the political accountability attendant to legislation.

Second, this suit arrogates to the House a role that the Constitution assigns to the Executive Branch. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). The power "to seek judicial relief" to enforce federal law lies at the heart of that executive authority and "cannot possibly be regarded as merely in aid of the legislative function of Congress." *Id.* To the contrary, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

Third, this suit unmoors the Judiciary from "the traditional understanding of a case or controversy," a doctrine developed "to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Raines*, 521 U.S. at 820). The district court deemed irrelevant "the history of non-litigiousness between the political branches, recounted in *Raines*," JA56, declaring that "there will never be a history of litigation

until the first lawsuit is filed." *Id.* The Supreme Court, by contrast, admonished that this history shows that "[o]ur regime contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828.

Those fundamental separation-of-powers principles, and the House's lack of a statutory cause of action or any basis for equitable relief, should have prevented the district court from reaching the merits of the House's claim at all. But the court further compounded its errors by adopting a misguided interpretation of the ACA's amendment of 31 U.S.C. § 1324 that would thwart the structure and design of the ACA's carefully calibrated system of subsidies, severely disrupt the insurance markets, and—perversely—lead to substantially *greater* federal expenditures from the Section 1324 appropriation. If the government stopped making cost-sharing reduction payments, insurers would still be required by statute to reduce the cost-sharing charges they impose on eligible individuals. Instead of recouping those costs as required by the statute, the insurers would make up the difference by raising their premiums. And because of the structure of the Act's subsidy program, Treasury would then be required to pay considerably *more* from the Section 1324 appropriation, because the increased silver plan premiums would trigger a commensurate increase in the premium tax credits available to *all* individuals who receive them—a much larger population than the individuals eligible for cost-sharing reduction subsidies.

The district court did not dispute the perverse and self-defeating consequences of its holding. But the court incorrectly declared that these results are compelled by

the unambiguous statutory text of Section 1324. Section 1324 provides a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law," including "refunds due … from" a list of provisions that the ACA amended to include 26 U.S.C. § 36B. Section 36B sets forth conditions necessary to qualify for cost-sharing reductions as well as premium tax credits. The text, structure, design, and legislative history of the ACA demonstrate that both components of the subsidy program—tax credits and cost-sharing reductions—are "refunds due … from" Section 36B because they are inter-related compensatory payments made available through the application of Section 36B. Accordingly, when Congress amended Section 1324 to provide for "refunds due … from" Section 36B, Congress appropriated funds for both components of the ACA's program of insurance subsidies. Thus, even if this suit were not barred as a threshold matter, it would be necessary to reverse the judgment of the district court.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1345. Jurisdiction was contested. The district court entered final judgment on May 12, 2016. Defendants filed a timely notice of appeal on July 6, 2016. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether this suit presents a judicially cognizable controversy.

2. Whether the House of Representatives has a cause of action.

3. Whether the district court erred in ruling that the unambiguous text of the ACA's amendment of 31 U.S.C. § 1324 compels an interpretation that would produce a substantial increase in expenditures from the Section 1324 permanent appropriation.

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. This case concerns the integrated program of subsidies established by the Affordable Care Act to make health insurance more affordable for eligible low- and moderate-income Americans. For insured individuals, health care expenses generally fall into two categories. Health insurance companies charge monthly premiums for the coverage they provide. In addition, insurance plans typically require insured individuals to make out-of-pocket payments to health care providers in the form of copayments, coinsurance, and deductibles (collectively known as "cost sharing"). *See* Congressional Budget Office (CBO), *Key Issues in Analyzing Major Health Insurance Proposals* 15-17 (2008).

Section 1401 of the ACA (26 U.S.C. § 36B) provides premium tax credits for qualified individuals with household income between 100% and 400% of the federal poverty level who purchase health insurance through the Exchanges established by the Act. Because these tax credits are refundable, they can subsidize insurance purchased by individuals who have no income tax liability. *See* CBO, *Refundable Tax*

Credits 1 (2013). The vast majority of individuals who buy insurance on an Exchange rely on advance payments of these premium tax credits. *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

Section 1402 of the ACA (42 U.S.C. § 18071) requires insurers to provide cost-sharing reductions to individuals who are determined eligible to receive tax credits under Section 1401 and whose household income is below 250% of the federal poverty level. 42 U.S.C. § 18071(c)(2), (f)(2).[1] An insurer must reduce cost sharing for such individuals if they enroll in "silver plans" through an Exchange. *Id.* § 18071(c)(2).[2] The Act directs the government to compensate insurance issuers for these cost-sharing reductions by making "periodic and timely payments to the issuer equal to the value of the reductions." *Id.* § 18071(c)(3)(A).

Section 1412 of the ACA directed the government to establish a single program under which the Secretary of the Treasury makes "advance payments" that reflect both components of the subsidy program—the tax credits and the cost-sharing

[1] The ACA includes special cost-sharing reduction provisions for Indians. *See* 42 U.S.C. § 18071(d).

[2] The ACA classifies plans offered on the Exchanges into one of four metal levels based on their cost-sharing requirements. 42 U.S.C. § 18022(d). A "silver" plan is a plan structured so that the insurer pays 70% of the average enrollee's health care costs, leaving the enrollee responsible (before the application of the subsidy) for the other 30% through cost sharing. *Id.* In a "gold" or "platinum" plan, the insurer bears a greater portion of health care costs, while the insurer is responsible for a lower portion of those costs in a "bronze" plan. *Id.* An insurer that offers coverage on an Exchange is required to offer at least one plan at both the "silver" and "gold" levels of coverage. *Id.* § 18021(a)(1)(C)(ii).

reduction payments. 42 U.S.C. § 18082(a)(3). These advance payments are made directly to health insurance issuers. *Id.*

To fund this integrated system of health insurance subsidies, the Act amended the pre-existing appropriation in 31 U.S.C. § 1324. Section 1324 provides a permanent appropriation of "[n]ecessary amounts … for refunding internal revenue collections as provided by law," including "refunds due … from" specified provisions of the tax code. 31 U.S.C. § 1324(a), (b)(2). Section 1401 of the ACA amended the list of funded provisions to include "refunds due … from" Section 36B. ACA § 1401(d)(1), 124 Stat. at 220.

2. As a result of the ACA's structure, there is a direct economic relationship between the premium tax credit component and the cost-sharing reduction component of the Act's subsidy program. If cost-sharing reduction payments were not made, the result would be a disproportionate increase in Treasury's payments of premium tax credits from the Section 1324 permanent appropriation. There is no dispute that insurers must comply with the ACA's mandate to reduce cost sharing for eligible individuals who enroll in silver plans. JA112 ¶ 26 (complaint); JA69 (summary judgment opinion). If insurers were not compensated by the government for making the required cost-sharing reductions for eligible individuals enrolled in silver plans, insurers would raise silver plan premiums to fund these required reductions.

Such premium increases, in turn, would increase the amount that Treasury is required to pay in tax credits. The statutory formula establishing the amount of the

tax credit ensures that eligible enrollees are not required to pay more than a specified percentage of their household income in order to purchase the second-lowest-cost silver plan available in their rating area. 26 U.S.C. § 36B(b). As a result, an increase in the amount of the premiums for silver plans would trigger a commensurate increase in the amount of the tax credit available for *all* individuals eligible for tax credits—not just the lower-income subset that receives cost-sharing reductions. Accordingly, if the government were to cease paying the cost-sharing reduction component of the subsidy program, the consequent rise in premiums would result in an increase in expenditures for the premium tax-credit component that would be significantly greater than the amount of the forgone cost-sharing reduction payments, totaling billions of dollars in net additional expenditures annually. *See* U.S. Dep't of Health & Human Servs. (HHS), Office of the Assistant Sec'y for Planning & Evaluation, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* 4 (2015) (*ASPE Issue Brief)* (JA471); *see also* Linda J. Blumberg & Matthew Buettgens, Urban Inst., *The Implications of a Finding for the Plaintiffs in House v. Burwell* 1, 8 (2016) (JA513, 520) (projecting that federal spending would rise by $47 billion over the next ten years if spending for cost-sharing reductions were enjoined); Amicus Br. of Economic & Health Policy Scholars 8-14 (R.64).

B. Post-ACA Developments

Since January 2014, Treasury has been using the permanent appropriation established by Section 1324 to make monthly advance payments to insurers for both

the premium tax credit component and the cost-sharing reduction component of the ACA's subsidy program. Complaint ¶ 35 n.10 (JA114). Section 1324 provides a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law," including "refunds due … from" a list of provisions that the ACA amended to include 26 U.S.C. § 36B. Section 36B sets forth conditions that are necessary to qualify for cost-sharing reductions as well as premium tax credits, and the Executive Branch determined that that both components are encompassed by the ACA's amendment of the Section 1324 permanent appropriation.

In April 2013, before the ACA's subsidy program went into effect, the Office of Management and Budget (OMB) submitted to Congress a budget request for fiscal year 2014 that, *inter alia*, sought a line item appropriation designating funds for the payment of cost-sharing reductions by HHS's Centers for Medicare & Medicaid Services (CMS). *See* Fiscal Year 2014 Budget of the United States Government 448 (Apr. 10, 2013) (JA216). The underlying CMS justification indicated that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014." HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees 184 (Apr. 10, 2013) (JA223).

Congress did not provide the requested line item appropriation for HHS. *See* S. Rep. No. 113-71, 113th Cong., at 123 (July 11, 2013) (JA314) (explaining that the Senate committee recommendation did not include the requested appropriation for

reduced cost-sharing assistance). Although the Senate committee report did not provide a contemporaneous explanation, a subsequent House committee staff report indicated that an Executive Branch official had advised the Senate Committee on Appropriations prior to the July 2013 report that the requested line-item appropriation was in fact not needed. *See* Joint Congressional Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program, at 44 (July 2016).

In October 2013, in the only post-ACA statute that expressly addressed cost-sharing reduction payments, Congress included a provision that presupposed that such payments would be made. In the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, div. B, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013), Congress enacted a requirement that HHS certify that a program was in place to verify that applicants are eligible for both premium tax credits and cost-sharing reductions before "making such credits and reductions available." HHS promptly submitted the required certification to Congress, satisfying the precondition for payment of cost-sharing reductions. Letter from Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Servs., to the Hon. Joseph R. Biden, Jr. at 1 (Jan. 1, 2014) (JA198).

C. Procedural Background

In July 2014, a majority of the House of Representatives of the 113th Congress voted to adopt a resolution purporting to authorize its Speaker to bring suit against any Executive Branch official regarding any alleged failure to act in accordance with

the official's duties in implementing any provision of the Affordable Care Act. Complaint ¶ 7 (JA108) (quoting H.R. Res. 676). Acting on the authority of that resolution, the Speaker filed this suit on behalf of the House of Representatives. After the original House plaintiff ceased to exist at the end of the 113th Congress, the House of Representatives of the 114th Congress voted to act as its successor. H.R. Res. 5, § 3(f)(2)(A), 114th Cong. (2015).

The House's complaint alleged that the Executive Branch's ongoing cost-sharing reduction payments exceed the scope of the Section 1324 permanent appropriation, as amended by the ACA, and violate the Appropriations Clause. *See, e.g.*, Complaint ¶¶ 59, 64-70 (JA121-123). The complaint acknowledged that insurers must comply with the ACA's mandate to reduce cost sharing for eligible individuals. *Id.* ¶ 26 (JA112). It is not disputed that the ACA directs the government to compensate issuers for these cost-sharing reductions by making "periodic and timely payments to the issuer equal to the value of the reductions," 42 U.S.C. § 18071(c)(3)(A), and to make advance payments of the cost-sharing reductions to issuers along with advance payments of tax credits, *id.* § 18082(a)(3). The complaint alleged, however, that the ACA did not appropriate funds to allow the government to comply with these statutory directives. Complaint ¶ 29 (JA112).

The complaint also included unrelated constitutional claims involving 26 U.S.C. § 4980H, which provides that applicable large employers may be subject to a tax if they fail to offer health coverage that meets specified standards. Complaint ¶¶ 42-50

(JA117-120). The complaint alleged that the Treasury Department had contravened the statute and thereby usurped Congress's constitutionally prescribed legislative power by announcing that the Section 4980H tax would not be imposed on any large employer during a transitional period, *see* 79 Fed. Reg. 8544, 8569-70 (Feb. 12, 2014), and that certain large employers would not be subject to the Section 4980H tax for the 2015 tax year, *id.* at 8574-75.

D. District Court Decisions

1. Threshold rulings

The government moved to dismiss the complaint for lack of standing or a cause of action, and on prudential grounds. The district court denied the motion with respect to the cost-sharing reduction payments, but granted it with respect to the large-employer tax. JA16-58.

The district court acknowledged "the history of non-litigiousness between the political branches, recounted in *Raines* [*v. Byrd*, 521 U.S. 811 (1997)]," but stated that "there will never be a history of litigation until the first lawsuit is filed." JA56. The court dismissed as "*obiter dictum*" the Supreme Court's admonition that "a suit between Congress and the President would raise separation-of-powers concerns." JA37 (quoting *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2665 n.12 (2015)).

The district court distinguished between "statutory claims" (which it held to be non-justiciable) and "constitutional claims" (which it believed it could properly

resolve). The court recognized that all of the House's claims were couched in constitutional terms, but rejected that characterization with respect to the claims regarding the large-employer tax. The court declared that "the heart of the alleged violation remains statutory, not constitutional: the House alleges not that [the Treasury Secretary] has disobeyed the Constitution, but that he disobeyed the ACA as enacted." JA38.

In contrast, the court declared that the question whether expenditures for cost-sharing reductions can be paid from the Section 1324 permanent appropriation presented a constitutional, rather than a statutory, issue. The court stated that "the Non-Appropriation Theory is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution." JA39. The court acknowledged that "the merits of the constitutional claim will inevitably involve some statutory analysis" because it would be necessary to determine whether "an appropriation *has* been made, which will require reading the statute." JA45 n.24 (court's emphasis). That the dispute hinged on the interpretation of a statute was immaterial to the court, however, because the statutory issue "is an antecedent determination to a constitutional claim." *Id.*

The district court believed that its ruling would "open no floodgates." JA57. It emphasized that this suit was "the result of an historic vote" by the House, *id.*—a

reference to the House resolution that purported to give the Speaker authority to sue any Executive Branch official over the implementation of any ACA provision, *see* JA26 (citing H.R. Res. 676, 113th Cong. (2014)).

With respect to the House's cause of action, the district court held that both the Declaratory Judgment Act and the Administrative Procedure Act (APA) provide statutory authority for the House to bring this suit. JA51-53. Alternatively, the court held that no statutory cause of action is needed because "the House has an implied cause of action under the Constitution itself." JA53.

The district court acknowledged that there was "substantial ground for disagreement" with its order, JA61, but declined to certify the order for interlocutory appeal, JA62.

2. Summary judgment decision

After summary judgment briefing, the district court enjoined the Executive Branch from making further cost-sharing reduction payments, but issued a *sua sponte* stay of the injunction pending appeal. JA101.

The district court did not dispute that its order might result in "[h]igher premiums, more federal debt, and decreased enrollment" in health insurance, JA93, but stated that "[t]hose results would flow—if at all—from Congress's continuing refusal to appropriate funds for Section 1402 reimbursements." JA93-94. The court declared: "That is Congress's prerogative; the Court cannot override it by rewriting 31 U.S.C. § 1324(b)," JA94, which, the court believed, confines use of the Section

1324 appropriation to "refunds" that "reduce the tax liability of a taxpayer." JA76. The court ruled that cost-sharing reduction payments cannot be made from the Section 1324 appropriation because they "do not reduce anyone's tax liability." JA77.

The district court declined to reconsider its standing ruling. JA99-100. It reasoned that, "[w]hile it is true that the Secretaries' defense in this case requires interpreting federal statutes, the House of Representatives' claim under the Appropriations Clause does not," and reiterated its conclusion that the House has standing to bring the constitutional claim. JA100.

SUMMARY OF ARGUMENT

1. The House of Representatives in this suit seeks to have the Judicial Branch assume the unprecedented task of "general supervision of the operations of government," *Raines v. Byrd*, 521 U.S. 811, 828-29 (1997), and to do so at the behest of a subset of the Legislative Branch. Such an approach cannot be reconciled with the limited role of Article III courts and the fundamental structure of the Constitution. Indeed, this suit presents in sharp relief the "separation-of-powers problems inherent in legislative standing." *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000). No authority suggests that legislators may call upon the courts to referee a dispute about the meaning of a statute enacted by a previous Congress. The Constitution contemplates that disagreements of this kind will be resolved by enactment of legislation, a process that requires the participation of both Houses and promotes political accountability for the result—which, under the injunction issued in this case,

would be substantially increased expenditures from the 31 U.S.C. § 1324 appropriation. This dispute is "fully susceptible to political resolution," and the district court should have "dismiss[ed] the complaint to avoid 'meddl[ing] in the internal affairs of the legislative branch.'" *Campbell*, 203 F.3d at 21 (quoting *Chenoweth v. Clinton,* 181 F.3d 112, 116 (D.C. Cir. 1999)).

"The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Allowing such a suit to proceed is irreconcilable with the "restricted role for Article III courts" in our constitutional structure and history. *Raines v. Byrd*, 521 U.S. 811, 828 (1997). And faithful adherence to these constraints ensures that the Judiciary is not "unnecessarily plunged" into "political battle[s] being waged between" the political branches. *Id.* at 827. Indeed, even if the House could establish standing, dismissal would be required under this Court's pre-*Raines* precedents as a matter of equitable discretion.

2. Dismissal is also required because the House has no cause of action. Congress knows how to provide an express cause of action for legislators and has done so on certain occasions, such as the cause of action for "either House of Congress" to challenge census methodologies, *see* Pub. L. No. 105–119, § 209, 111 Stat. 2440, 2482 (1997), or the cause of action for Members to challenge the Line Item Veto Act, *see Raines*, 521 U.S. at 815-16. But Congress has not taken that step here,

and the district court erred in deriving a cause of action for the House from the general provisions of the APA, the Declaratory Judgment Act, and the Constitution.

3. The district court compounded its errors by adopting an interpretation of the ACA's amendment of 31 U.S.C. § 1324 that would undermine the ACA's calibrated system of subsidies and result in vastly greater expenditures of federal funds from the Section 1324 permanent appropriation. The court wrongly declared that this counterproductive result is compelled by the unambiguous text of the ACA's amendment to 31 U.S.C. § 1324, which allows the Section 1324 appropriation to be used for "refunds due . . . from section . . . 36B." The Section 1324 appropriation funds both the premium tax credit component and the cost-sharing reduction component of the ACA's subsidy program because both components are "refunds due … from" Section 36B within the meaning of that statutory phrase. This phrase does not, as the district court believed, limit the Section 1324 appropriation to "refunds" that "reduce the tax liability of a taxpayer." JA76. To the contrary, the uncontested premium tax credits provided by Section 1401 can subsidize insurance for individuals with no tax liability. Nor are the uncontested expenditures for advance payment of premium tax credits "refunds" in the colloquial sense. Like the payments for cost-sharing reductions, they are payments to insurance issuers that simply make health insurance more affordable for eligible individuals.

The district court gave short shrift to the text, structure, and legislative history that show that the ACA's amendment of the Section 1324 permanent appropriation

encompasses both components of the ACA's subsidy program. The House's claim thus would fail even if this suit were not barred as a threshold matter.

STANDARD OF REVIEW

The district court's legal rulings are subject to de novo review.

ARGUMENT

I. This Suit Does Not Present A Judicially Cognizable Controversy.

The decision of the district court allowing one House of Congress to invoke the jurisdiction of an Article III court to resolve a disagreement between the political branches over the Executive Branch's execution of a federal statute is unprecedented. Allowing such a suit to proceed is irreconcilable with the "restricted role for Article III courts" in our constitutional structure and history. *Raines v. Byrd*, 521 U.S. 811, 828 (1997). Under our system of separated powers, Article III courts may resolve only cases or controversies instigated by a party suffering particularized and legally cognizable injury. Disagreements between the political branches are resolved through the political process, not through litigation instigated by a single House of Congress. The district court's decision fundamentally undermines that constitutional design and would vastly expand the role of the judicial branch, enmeshing courts in a limitless number of political disputes.

A. This Suit Epitomizes the Separation-of-Powers Problems Inherent in Suits by the Legislative Branch.

1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "One element of the case-or-controversy requirement" is that all plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

To establish "the irreducible constitutional minimum" of Article III standing, a plaintiff must show an injury in fact that is fairly traceable to the defendant's challenged actions and likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As the Supreme Court has stressed, an asserted injury does not constitute an Article III injury in fact unless it is "legally and judicially cognizable." *Raines*, 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered an invasion of a legally protected interest which is concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process." *Id.* (citations, quotation marks, and ellipsis omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("We have always

taken [Article III's case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.").

The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement." *Raines*, 521 U.S. at 819. And the standing inquiry is "especially rigorous" where, as here, "reaching the merits of the dispute would force [the Article III courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 819-20.

2. It is a foundational principle that a mere interest in the "vindication of the rule of law" is not a legally cognizable interest that can establish Article III standing. *Steel Co.*, 523 U.S. at 106. But, at bottom, that is the asserted basis for the House's suit.

Congressional plaintiffs cannot establish an Article III injury by asserting that the Executive Branch's purported failure to abide by an earlier-enacted statute results in the "abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826. "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.* at 733-34; *see also Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978) ("Once a bill becomes law, a

Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public.").

In our constitutional system, therefore, Congress, its Houses, and its Members have no legally or judicially cognizable interest in the Executive Branch's execution of the laws, and Congress's belief that the Executive is acting in excess of its statutory authority or violating a statutory restriction does not give rise to the sort of dispute that is "capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

More than two centuries of constitutional tradition confirm that understanding. Our Nation's history is filled with "confrontations between one or both Houses of Congress and the Executive Branch," yet not one of those confrontations has been resolved through a suit "brought on the basis of claimed injury to official authority or power." *Id.* at 826; *see id.* at 826-28 (describing examples).

As the Supreme Court has explained, "[t]here would be nothing irrational about a system that granted standing in these cases"—for example, "some European constitutional courts" have jurisdiction to resolve this sort of intra-governmental dispute. *Raines*, 521 U.S. at 828. But that "is obviously not the regime that has obtained under our Constitution to date." *Id.*

"Our regime contemplates a more restricted role for Article III courts." *Id.* It does not extend to the "amorphous general supervision of the operations of government." *Id.* at 828-29; *see also Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2665 n.12 (2015) (reaffirming that "a suit

between Congress and the President would raise separation-of-powers concerns"). But that is exactly what the House has asked for here.

3. This suit is a stark departure from that constitutional foundation and established tradition, and it is a paradigmatic example of the "separation-of-powers problems inherent in legislative standing." *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000). Indeed, allowing the House's suit to proceed would interfere with the proper functioning of all three branches of government.

First, the order "meddl[es] in the internal affairs of the legislative branch" by allowing one House of Congress to use litigation to circumvent the legislative process. *Campbell*, 203 F.3d at 21 (quoting *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999)). Although the district court perceived this suit as a vindication of legislative prerogatives, the effect of its ruling is to approve a departure from the method established by the Constitution for the Legislative Branch to work its will. To secure a legislative bar of the ongoing expenditures for cost-sharing reductions, it would be necessary for the House to obtain the concurrence of the Senate and present the resulting measure to the President. It would thus be necessary for majorities in both chambers to assume political responsibility for the consequences of the bar, including the resulting increase in tax-credit expenditures, and the reactions of insurers (the direct recipients of cost-sharing reduction payments) and eligible individuals (the indirect recipients). The expedient of filing a lawsuit—here, by a single House of Congress—frustrates the constitutional design and undermines legislative

accountability. "[W]hen the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *I.N.S. v. Chadha*, 462 U.S. 919, 955 (1983). "To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.* at 958.

There is no doubt that Congress could enact an express bar on use of the Section 1324 permanent appropriation for cost-sharing reduction payments, "were a sufficient number in each House so inclined." *Campbell*, 203 F.3d at 21. Express restrictions on the use of federal funds are a familiar feature of federal legislation. In the ACA context, for example, Congress has repeatedly enacted express restrictions on the use of certain appropriated funds for the "risk corridors" program established by Section 1342. In appropriations statutes enacted for fiscal year 2015 and again for fiscal year 2016, Congress explicitly provided that "[n]one of the funds made available" from specified appropriations "may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, § 227, 128 Stat. 2130, 2491 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 225, 129 Stat. 2242, 2624 (2015). A review of the appropriations

legislation for fiscal year 2015 alone reveals an array of other provisions expressly restricting the use of appropriated funds.[3]

Although Congress conducted oversight of cost-sharing reduction payments at the same time as its oversight of the risk corridors program,[4] Congress has not chosen to enact legislation that halts spending on cost-sharing reductions and to take legislative responsibility for such a bar. Under this Court's precedent, the House's failure to avail itself of the constitutionally prescribed legislative process is dispositive. "Because the parties' dispute is . . . fully susceptible to political resolution," it must be resolved through "political self-help"—not resort to the Article III courts. *Campbell*, 203 F.3d at 21, 24.

These principles apply with full force to claims implicating Congress's appropriations power. *Raines* itself involved a dispute over the President's authority to cancel spending authorized by Congress. *See* 521 U.S. at 813-15. *Chenoweth* involved a

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[3] *See*, *e.g.*, 128 Stat. at 2141 ("no funds shall be used to formulate or administer a brucellosis eradication program for the current fiscal year that does not require minimum matching by the States of at least 40 percent"); *id.* at 2187 ("no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco, Firearms and Explosives to other agencies or Departments"); *id.* at 2503 ("No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.").

[4] *See*, *e.g.*, Letter from Sen. Ted Cruz and Sen. Michael S. Lee to the Hon. Sylvia M. Burwell (May 16, 2014) (JA336-337); Letter from the Hon. Sylvia M. Burwell to Sen. Ted Cruz and Sen. Michael S. Lee (May 21, 2014) (JA341-342).

claim that an Executive Branch program was unlawful because, among other things, it "violate[d] the Anti-Deficiency Act, 31 U.S.C. § 1301 *et seq.*" and the "Spending Clause[] of … the Constitution" by spending federal funds without an appropriation. 181 F.3d at 113. And in dismissing a legislator's Appropriations Clause claim for lack of standing in *Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977), this Court emphasized that an agency's misuse of funding "does not invade the lawmaking power of Congress or [one of its Members]; all the traditional alternatives related to the 'power of the purse' remain intact."

Second, the district court's order allowed one chamber of Congress to assume for itself the President's responsibility for the execution of federal law. The Constitution entrusts "to the President, and not to the Congress," "the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). The "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States'" within the Executive Branch. *Id.* at 140 (quoting U.S. Const., art. II, § 2, cl. 2). That responsibility "cannot possibly be regarded as merely in aid of the legislative function of Congress." *Id.* at 138.

Third, the district court's order untethers the Judiciary from the traditional understanding of an Article III case or controversy. Standing doctrine, as an integral feature of the separation of powers, reflects the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere."

Raines, 521 U.S. at 820. The Supreme Court has repeatedly admonished that federal courts should not extend the doctrine of standing beyond its traditional bounds. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy," and the doctrine was developed "to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Raines*, 521 U.S. at 820); *see also Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000).

The district court nonetheless found the "the history of non-litigiousness between the political branches, recounted in *Raines*," to be uninstructive. JA56. The court declared: "The refrain by either branch from exercising one of its options does not mean that the option was unavailable; there will never be a history of litigation until the first lawsuit is filed." *Id.*

But as the Supreme Court emphasized in *Raines*, the history of non-litigiousness between the political branches demonstrates that "[o]ur regime contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828. The district court turned the Supreme Court's review of history on its head, pointing to the House majority's "historic vote" for Resolution 676, and declaring that "the rarity of these circumstances itself militates against dismissing this case as non-justiciable." JA57. That the House chose to make an unprecedented departure from tradition is not a basis to expand the scope of its standing to institute an inter-branch lawsuit. And, insofar as the district court believed that the "historic vote" signaled a unique reaction

to the funding dispute at issue here, it was plainly incorrect. The House resolution purported to grant the Speaker unfettered authority to sue any Executive Branch official over any dispute regarding the implementation of any ACA provision. *See* Complaint ¶ 7 (JA108) (citing H.R. Res. 676). The House thus would "improperly and unnecessarily plunge[]" the Judiciary into an open-ended "bitter political battle" between the House majority and the President over signature legislation. *Raines*, 521 U.S. at 827.

B. The District Court Offered No Persuasive Reason for Departing From the Teachings of This Court and the Supreme Court.

1. The district court did not identify any sound basis for allowing this unprecedented suit to proceed. The court recognized that if "the invocation of Article I's general grant of legislative authority to Congress were enough to turn every instance of the Executive's statutory non-compliance into a constitutional violation, there would not be decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law." JA46. The court nevertheless dismissed the Supreme Court's guidance that our "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." JA39 (quoting *Bowsher*, 478 U.S. at 722).

That principle, the district court declared, was relevant only to "statutory" and not to "constitutional" claims. JA39-40. On this basis, the court ruled that the House lacked standing to assert claims regarding the Executive Branch's implementation of

the tax on large employers that fail to provide prescribed health coverage. Although the House framed that claim in constitutional terms, the district court declared that "the heart of the alleged violation remains statutory, not constitutional: the House alleges not that [the Treasury Secretary] has disobeyed the Constitution, but that he disobeyed the ACA as enacted." JA38.

In contrast, the district court believed that it could properly adjudicate the claim that the Executive Branch was mistaken in concluding that expenditures for cost-sharing reductions could be paid from the permanent appropriation established by 31 U.S.C. § 1324. The court declared that "the Non-Appropriation Theory is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution." JA39.

The district court offered no authority for premising standing on this novel theory. Nor did it identify any meaningful difference between the statutory and constitutional claims alleged here. The court acknowledged that "the merits of the constitutional claim will inevitably involve some statutory analysis. The Secretaries' primary defense will be that an appropriation *has* been made, which will require reading the statute." JA45 n.24 (court's emphasis). The court nonetheless believed that the statutory dispute was inconsequential because "that is an antecedent determination to a constitutional claim." *Id.*

But the statutory issue is not merely "antecedent" to the constitutional claim; it is the essential premise of the constitutional claim. There are no Appropriations Clause principles in dispute here. The Executive Branch does not claim that it could make payments for cost-sharing reductions without an appropriation. Nor is there any doubt that 31 U.S.C. § 1324 establishes a permanent appropriation. The only question the House's suit raised on the merits was thus whether the Executive Branch misinterpreted the scope of 31 U.S.C. § 1324, as amended by the ACA. As the district court ultimately recognized: "No one disputes that 31 U.S.C. § 1324 is an appropriation; the question is whether that statute, as amended by ACA § 1401(d)(1), permanently appropriates money for Section 1402 reimbursements." JA98. That is an issue of statutory interpretation. The district court's distinction between constitutional and statutory claims thus has no principled basis.

The district court's approach would "improperly and unnecessarily plunge[]" the Judiciary into a host of disputes between the political branches. *Raines*, 521 U.S. at 827. Even by the district court's own reckoning, its theory would enmesh the Judiciary in any dispute in which a House of Congress asserts that the Executive Branch has misunderstood the scope of an appropriations statute—creating a new law of congressional standing for any claim that could be fashioned as a dispute about whether federal monies were spent consistent with statute. A legislative plaintiff could always plead that any Executive Branch spending violated the Appropriations Clause, leaving the Executive Branch to raise Congress's appropriation of the funds at

issue as a "defense." Moreover, any claim that an Executive Branch agency has erroneously interpreted a substantive statute tied to the expenditure of funds could easily be recast as a violation of the Appropriations Clause, on the theory that the applicable appropriations law did not permit the expenditure of funds for an allegedly unlawful purpose. *See OPM v. Richmond*, 496 U.S. 414, 424 (1990) (holding that "the straightforward and explicit command of the Appropriations Clause" barred payment of a claim for federal benefits not authorized by the relevant substantive statute). The claim in *King v. Burwell*, for example, was that the Treasury Department's expenditures for premium tax credits in States with Exchanges operated by the federal government were contrary to the unambiguous text of 26 U.S.C. § 36B. *See* 135 S. Ct. 2480, 2488-89 (2015). That claim could have been characterized as a claim that the Treasury Department's payment of those tax credits violated the Appropriations Clause because Congress had not appropriated funds for the payment of credits except as authorized in Section 36B. Indeed, Members of Congress argued as *amici* in *King* that the Treasury Department was usurping Congress's appropriations power.[5]

To allow Congress to institute suits of that kind plainly would open the "floodgates" that the district court concluded it had not disturbed. JA57. Disputes between the political branches over restrictions on Executive Branch spending often

[5] *See* Brief of Amici Curiae Senators John Cornyn *et al.* in Support of Petitioners at 23-24, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2014 WL 7474064, at *23-24.

arise.[6] They are, and have always been, resolved through the political process. Thus, when Congress was concerned about unauthorized Executive Branch spending in the aftermath of World War I, it responded not by threatening litigation, but by creating the General Accounting Office (now named the Government Accountability Office) to provide independent oversight of the Executive Branch's use of appropriated funds. *See* Budget and Accounting Act, 1921, Pub. L. No. 67-13, § 312(a), 42 Stat. 20, 25 (creating the GAO); *see also, e.g.*, 67 Cong. Rec. 987 (1921) (statement of Rep. James William Good).

Even on occasions when the Executive Branch has disregarded an explicit restriction on spending on the ground that it is unconstitutional, Congress has not enlisted the aid of the courts. For example, after the Office of Legal Counsel determined that restrictions on the use of federal funds for technology collaborations with China interfered with the President's foreign relations power, the White House's Office of Science and Technology Policy (OSTP) disregarded those restrictions.[7]

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[6] *See*, *e.g.*, Brief for the Respondent at 6, *Zivotofsky v. Kerry*, 132 S. Ct. 1421 (No. 10-699), 2014 WL 4726506, at *6 (describing history of disputes over funding restrictions pertaining to the official treatment of Jerusalem); *see also, e.g.,* Constitutional Issues Raised by Commerce, Justice & State Appropriations Bill, 2001 WL 34907462 (O.L.C. Nov. 28, 2001); Section 609 of the Fiscal Year 1996 Omnibus Appropriations Act, 20 O.L.C. 189 (1996); Issues Raised by Section 102(c)(2) of H.R. 3792, 14 O.L.C. 37 (1990).

[7] *See* Unconstitutional Restrictions on Activities of the Office of Sci. & Tech. Policy in Section 1340(a) of the Dep't of Def. & Full-Year Continuing Appropriations Act, 2011, 2011 WL 4503236 (O.L.C. Sept. 19, 2011).

Congress did not bring suit; it responded by cutting OSTP's budget. *See* Jeffrey Mervis, *Congress Slashes Budget of White House Science Office*, Science, Nov. 15, 2011.

The district court's suggestion that Congress is powerless when it comes to disputes over Executive Branch spending is incorrect. As this Court emphasized in *Harrington*, the Executive Branch's alleged misuse of funding "does not invade the lawmaking power of Congress"; "all the traditional alternatives related to the 'power of the purse' remain intact." 553 F.2d at 213.

2. The district court declared that it would "not consider separation of powers in the standing analysis," believing that "[t]he doctrine of separation of powers is more properly considered in determining whether the case is 'justiciable.'" JA31. That too was error.

Prior to the Supreme Court's decision in *Raines*, this Court had concluded that it should "[k]eep[] distinct [its] analysis of standing and [its] consideration of the separation of powers issues raised when a legislator brings a lawsuit concerning a legislative or executive act." *Chenoweth*, 181 F.3d at 114. But this Court explicitly recognized that this feature of its prior legislative standing cases was "untenable in the light of *Raines*." *Id.* at 115. Instead, this Court explained, *Raines* "require[d] [it] to merge [its] separation of powers and standing analyses." *Id.* at 116.

Failing to give effect to the most relevant (and recent) precedents of the Supreme Court and this Court, the district court relied instead on this Court's pre-*Raines* decision in *United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), in which

the United States sued AT&T to enjoin the company from complying with a subpoena issued by a House subcommittee. This Court allowed the House to intervene as a defendant, noting that it was "the real defendant in interest since AT&T, while prepared to comply with the subpoena in the absence of a protective court order, has no stake in the controversy beyond knowing whether its legal obligation is to comply with the subpoena or not." *Id.* at 385. Intervention to defend a subpoena provides no support for the proposition that the House has standing to sue to compel the Executive Branch, in its execution of the law, to comply with the House's understanding of a previously enacted statute.[8]

3. The district court did not discuss the reasoning of *Campbell* or *Chenoweth*, which emphasized that legislators may not short-circuit the legislative process by bringing suit against the Executive Branch. The court opined, however, that the House has no legislative recourse here because "[e]liminating funding for Section 1402 is *exactly* what the House tried to do." JA44 (court's emphasis).

Although the district court did not elaborate on this pronouncement, it was apparently equating Congress's mere failure to make a line-item appropriation for cost-sharing reductions to HHS with a statutory bar on the use of the Section 1324 permanent appropriation for cost-sharing reduction payments. The court declared

[8] Whether the House has standing or a cause of action to bring subpoena-enforcement suits against the Executive Branch is at issue in the appeal pending in *Committee on Oversight and Gov't Reform, U.S. House of Representatives v. Lynch*, No. 16-5078 (D.C. Cir.).

that "Congress cannot fulfill its constitutional role if it specifically denies funding and the Executive simply finds money elsewhere without consequence." JA44.

But Congress's failure to enact a line-item appropriation for HHS for cost-sharing reductions is manifestly not the same thing as a bar on the use of the Section 1324 permanent appropriation for such payments. As the district court acknowledged, the Supreme Court has repeatedly rejected the argument that a negative inference can be drawn from Congress's failure to enact legislation that an agency requested. *See* JA97 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950); *Federal Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 609-10 (1966)). Moreover, a subsequent House committee staff report indicated that an Executive Branch official had advised the Senate appropriations committee that the requested line-item appropriation was in fact not needed. *See* Joint Congressional Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program, at 44 (July 2016).

The only post-ACA statute that expressly addressed cost-sharing reduction payments presupposed that such payments would be made. In the Continuing Appropriations Act, 2014, Pub. L. No. 113-46, div. B, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013), Congress required HHS to certify that a program was in place to verify that applicants are eligible for both premium tax credits and cost-sharing reductions before "making such credits and reductions available." HHS fulfilled that requirement before any payments for cost-sharing reductions were made. JA198.

After two years of cost-sharing reduction payments, the House and Senate passed a bill (subsequently vetoed) that would have repealed the ACA but preserved cost-sharing reduction payments through 2017. H.R. 3762, 114th Cong. § 202(e)(2) (2016). The House has made no effort to explain why it voted to continue cost-sharing reduction payments if, as it urges here, such payments are not funded.

* * *

For all the reasons discussed above, this suit should be dismissed for lack of Article III standing. But even if the Court were to conclude that the House has standing—or if it wished to avoid passing on that constitutional question—the suit should be dismissed under the doctrine of equitable discretion. Given the momentous separation of powers concerns that this suit presents, the House should, at a minimum, be required to exhaust its legislative remedies by enacting legislation prohibiting the expenditure that it seeks to enjoin here before calling upon the Judiciary to resolve an inter-branch dispute.

In this case, of course, the enactment of such legislation would end the controversy without the need for further judicial involvement. The Executive Branch is making the challenged payments only because, as demonstrated below, they fall within the permanent appropriation provided in 31 U.S.C. § 1324, as amended by the ACA. If Congress were to enact legislation making that appropriation unavailable, the cost-sharing reduction payments would cease. But if, in different circumstances, the Executive were to persist in making disputed payments in contravention of an express

legislative prohibition—for example, because it took the position that the challenged restriction was unconstitutional—it could at least be said that Congress had attempted to resolve the matter through the constitutionally prescribed legislative process.

This case is different. Congress has not resolved the inter-branch disagreement over the proper interpretation of Section 1324 by enacting new legislation. Indeed, the House has not even *attempted* to enact legislation to achieve the result it asks the Article III courts to impose. Accordingly, even if this Court were to conclude that the House could have Article III standing to assert a claim like that involved here, it should decline as a prudential matter to take the unprecedented step of wading into this inter-branch dispute unless and until the House exhausts its constitutionally prescribed legislative tools to bring about the result it seeks.

This Court's precedents strongly support such a dismissal on prudential or equitable grounds. Before *Raines*, this Court had applied a broader conception of legislative standing than the one reflected in the Supreme Court's later decisions. In *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), for example, this Court held that "congressmen had standing to object to the purportedly unconstitutional origination of a revenue-raising bill in the Senate." *Chenoweth*, 203 F.3d at 115 (discussing *Moore*). But despite finding Article III standing, this Court's pre-*Raines* decisions recognized the serious separation-of-powers concerns presented and dismissed the suits in the exercise of equitable discretion because the congressional plaintiffs had not exhausted their legislative remedies. Thus, in *Moore*,

this Court held that "the district court properly dismissed [the plaintiffs'] complaint [under circuit precedent] because their 'rights [could] be vindicated by congressional repeal of the [offending] statute.'" *Id.* (quoting *Moore*, 733 F.2d at 956). This Court's "conclusion that the plaintiffs had standing to sue, in other words, got them into court just long enough to have their case dismissed because of the separation of powers problems it created." *Id.*

Raines has since made clear that suits like *Moore* do not satisfy Article III, and the same is true here. But this Court's pre-*Raines* decisions also show that even if a case brought by a congressional plaintiff could satisfy Article III, it nonetheless should be dismissed where legislative remedies are available but have gone unused. Under those precedents, dismissal would be appropriate even if the House could satisfy Article III. Here, as in those cases, the House's rights could "be vindicated by congressional" action. *Chenoweth*, 203 F.3d at 115. Here, as in those cases, the House's suit presents separation of powers problems of the highest order. And here, as in those cases, dismissal of the complaint is the proper course of judicial restraint.

II. The House Lacks A Cause Of Action.

A. Congress Has Not Legislated a Cause of Action that Purports to Authorize this Suit.

As discussed above, this suit seeks to obtain a result that House Members should seek through the legislative process set out in the Constitution, with its attendant safeguards and political accountability. In this case, moreover, Congress has

not even taken the predicate step of legislating a cause of action that could arguably furnish the basis for this suit. The resolution purporting to authorize this suit was passed by the House alone; it was not an Act of Congress.

Congress is well aware of how to create an express cause of action for legislators. In *Raines*, for instance, legislators brought suit pursuant to a statutory provision that expressly authorized Members of Congress to sue to challenge the Line Item Veto Act. *See Raines*, 521 U.S. at 815-16 (explaining that the Line Item Veto Act authorized suit by "[a]ny Member of Congress or any individual adversely affected by" the Act) (quoting 2 U.S.C. § 692(a)(1)). Similarly, Congress expressly authorized "either House of Congress" or "any Representative or Senator in Congress" to bring suit to challenge the methodology for conducting the Census. Pub. L. No. 105–119, § 209(b), (d)(2)-(3), 111 Stat. 2440, 2482 (1997). And another statute provides jurisdiction for the Senate—but not the House—to seek civil enforcement of a subpoena against the Executive Branch in specified circumstances. 28 U.S.C. § 1365.

Of course, Congress's enactments cannot circumvent the constitutional separation of powers or the limits on judicial power established by Article III. But a specific cause of action would at least demonstrate Congress's intent to take the extraordinary step of allowing one of its chambers to sue the Executive Branch. As the Supreme Court explained in *Raines*, an express cause of action such as the one provided by the Line Item Veto Act "significantly lessens the risk of unwanted

conflict with the Legislative Branch," 521 U.S. at 820 n.3, that occurs when one House of Congress seeks unilaterally to affect conduct outside the Legislative Branch.

The House itself acknowledged these principles before the Supreme Court. In its brief filed in *Department of Commerce v. House of Representatives*, the House advised the Supreme Court that "Congress has rarely authorized litigation to protect its interests, and has no authority to file suit under the myriad of general laws authorizing aggrieved persons to challenge agency action." Brief for U.S. House of Representatives at 22, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 767637 at *22. The House explained that "[h]ere, however, Congress has afforded the House an express cause of action" to challenge the Census methodology. *Id.* And the House explained that, by enacting "legislation specifically authorizing the Court to resolve this controversy," Congress had "thereby 'significantly lessen[ed] the risk of unwanted conflict with the Legislative Branch,'" *id.* at *21-22 (quoting *Raines*, 117 S. Ct. at 2318 n.3), or "inappropriate interference in the business of other branches of Government," *id.* at *22 (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990)). Accordingly, the House assured the Supreme Court that its suit was not "an attempt by Congress to impinge upon the Executive's general authority to execute and enforce the law." *Id.*

B. The District Court Erred In Ruling that a Cause of Action for the House Can Be Found in the Declaratory Judgment Act or the APA, or Implied Under the Constitution Itself.

The district court did not suggest that any statutory provision gives the House an express cause of action to bring this suit. Instead, the court ruled that the general provisions of the Declaratory Judgment Act and the APA implicitly allow the House to bring this suit. Alternatively, the court ruled that a cause of action to bring this suit may be implied under the Constitution itself. The court was mistaken in all respects, and its reasoning cannot be squared with the House's own representations to the Supreme Court in *Department of Commerce*.

1. The Declaratory Judgment Act, 28 U.S.C. § 2201, neither independently vests courts with jurisdiction nor "provide[s] a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Instead, for any pre-existing "case of actual controversy within [a federal court's] jurisdiction" it authorizes the Judiciary to issue discretionary declaratory relief. 28 U.S.C. § 2201. Its operation is "procedural only." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007). The Declaratory Judgment Act thus cannot provide the House with a cause of action if one is otherwise lacking.

The district court recognized that "[t]he parties agree that the Declaratory Judgment Act does not itself create a cause of action," JA51, but nevertheless believed that the House need not identify another cause of action if it could demonstrate the existence of an Article III case or controversy. In the court's view, the question of a cause of action "collapse[s] into" the question of Article III standing. JA52 (stating

that "[t]he House has standing under the Non-Appropriation Theory" and that "[t]he House accordingly may pursue a remedy under the Declaratory Judgment Act coextensive with its standing under the Non-Appropriation Theory"). But as the Supreme Court has emphasized, Article III standing and the existence of a cause of action are distinct questions. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (noting that the court of appeals had "confus[ed] the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action").

2. The district court likewise erred in construing the APA to authorize the House to sue the Executive Branch. The APA creates a cause of action for a "person" who is "aggrieved by" or suffers "legal wrong because of" federal agency actions. 5 U.S.C. § 702. It thus incorporates "the universal assumption" that laws authorizing suits by "'person[s] adversely affected or aggrieved' leave[] private interests (even those favored by public policy) to be litigated by private parties." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding*, 514 U.S. 122, 132 (1995). Neither the House nor the district court has identified any case in which Congress or one of its chambers was permitted to bring suit under such a general provision in the absence of express statutory authorization for a congressional plaintiff's suit. In light of the "long lineage" of statutes authorizing judicial review for persons aggrieved by agency actions, that absence is "significant." *Id.* at 130.

In light of *Newport News*, the House explicitly represented to the Supreme Court that it has "no authority to file suit under the myriad of general laws authorizing aggrieved persons to challenge agency action." Brief for U.S. House of Representatives at 22 & n.25, *U.S. Dep't of Commerce v. U.S. House of Representatives*, 1998 WL 767637 at *22 & n.25 (citing *Newport News*). And the House dismissed as "speculative" the possibility that Congress might attempt "to afford itself broad standing to challenge the lawfulness of Executive conduct." *Id.* at *17.

Nothing material has changed with respect to such a cause of action since the House made these representations to the Supreme Court. The same House that brought this lawsuit attempted to enact an express cause of action that would provide general authority for it to sue the Executive Branch, but that attempt did not succeed. In March of 2014, the House of Representatives of the 113th Congress passed a bill called the "ENFORCE the Law Act of 2014," H.R. 4138, 113th Cong. (2014), which would have provided statutory authority for one or both chambers of Congress to bring suit to challenge an alleged failure by the Executive Branch to faithfully implement the law. One of the bill's sponsors acknowledged that, without passage of the bill, "there is no standing of individual Members of Congress or even the entire body of the Senate or the body of the House to go to court" to have the law enforced. 160 Cong. Rec. S1612 (Mar. 13, 2014) (Sen. Blunt). That bill was not passed by the Senate and thus did not become law.

In concluding that the APA nevertheless authorizes this suit, the district court declared that "there *is* precedent for the House filing suit to vindicate its rights in other contexts." JA53 (court's emphasis). The court principally relied on this Court's decision in *AT&T*, 551 F.2d at 390-91, but that case was brought by the Department of Justice against a private company and did not implicate the APA. The district court also cited other district court decisions arising out of suits to enforce congressional subpoenas, but those decisions did not rely on the APA and, in any event, are not controlling precedent.

3. The district court alternatively ruled that the House does not need a statutory cause of action because a cause of action can be "implied" under the Constitution. JA53. This ruling underscores the degree to which the court departed from the separation of powers and interfered with Congress's prerogatives.

Even with respect to suits by private parties, the Supreme Court has emphasized that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation." *Bush v. Lucas*, 462 U.S. 367, 389 (1983); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("a decision to create a private right of action is one better left to legislative judgment in the great majority of cases").

That principle applies with particular force when, as here, the Judiciary is asked to create a new cause of action for the benefit of a component of Congress itself, such as one House or individual Members. This suit was brought on the basis of a resolution passed by a House majority, without the concurrence of the Senate. It

allowed the House to achieve, via litigation, a result that it has not been able to achieve via new legislation with the concurrence of the Senate. And it enabled the House to embroil the Judiciary in a battle between the political branches that no Act of Congress authorized. The creation of a cause of action for a chamber of Congress should be the exclusive prerogative of Congress itself.

III. The District Court Erred In Ruling That The Unambiguous Text Of The ACA's Amendment Of 31 U.S.C. § 1324 Compels An Interpretation That Would Produce A Substantial Increase In Expenditures From The Section 1324 Permanent Appropriation.

For the foregoing reasons, the district court should not have reached the merits of this dispute at all. The court compounded its errors by issuing an injunction that would, for reasons discussed below, result in a substantial *increase* in expenditures from the Section 1324 appropriation. Contrary to the district court's premise, the statute's "unambiguous text" (JA83) does not compel this bizarre result. The clarity perceived by the district court was achieved only by disregarding the text, structure, and legislative history of the ACA in a manner at odds with the Supreme Court's admonitions in *King v. Burwell*, 135 S. Ct. 2480 (2015), and other precedents.

The district court mistakenly believed that the statutory analysis is governed by 31 U.S.C. § 1301(d), which concerns the circumstances under which "[a] law may be construed to make an appropriation out of the Treasury." It is common ground that 31 U.S.C. § 1324 makes an appropriation out of the Treasury, as the district court itself recognized. *See* JA98 ("No one disputes that 31 U.S.C. § 1324 is an appropriation.").

The only contested issue concerns the scope of that appropriation, which is an ordinary issue of statutory interpretation that is unaffected by section 1301(d). *See*, *e.g.*, 55 Comp. Gen. 307, 317 (Oct. 1, 1975) ("in construing appropriations acts, we have consistently applied … traditional statutory interpretation principles so as to give effect to the intent of Congress").

A. The Text and Structure of the ACA Demonstrate that Cost-Sharing Reductions Are Properly Paid from the Section 1324 Appropriation.

1. As amended by the ACA, Section 1324 provides a permanent appropriation for "refunds due … from" 26 U.S.C. § 36B. The beginning and end of the argument advanced by the House is that Section 36B authorizes tax credits, and that the ACA's amendment of Section 1324 therefore encompasses tax credits alone.

This argument disregards the text, structure, and legislative history that show that the Section 1324 appropriation funds both the premium tax credit component and the cost-sharing reduction component of the ACA's subsidy program. Cost-sharing reductions, like premium tax credits, are compensatory payments made to subsidize an individual's insurance coverage based in part on the eligibility requirements standards in Section 36B. The only individuals eligible for the Act's mandatory cost-sharing reductions based on household income, and the only such individuals as to whom an insurer obtains a right to cost-sharing reduction payments, are those to whom "a credit is allowed … under section 36B." 42 U.S.C. 18071(f)(2). Eligibility for a premium tax credit under Section 36B is thus a statutory precondition

for receipt of the cost-sharing reductions, and the reductions are therefore "due from" that provision in a common sense of that phrase. *See* 42 U.S.C. § 18071(f)(2) (providing that an individual is eligible for a cost-sharing reduction if "a credit is allowed … under section 36B" for that individual); *National Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1125 (D.C. Cir. 2013) ("Among the dictionary definitions of 'from' is 'a function word to indicate the source or original or moving force of something: as … the place of origin, source, or derivation of a material or immaterial thing.'") (quoting *Webster's Third New International Dictionary* 913 (1981)).

Furthermore, the ACA specifically requires that advance payments for cost-sharing reductions and tax credits be made as part of a unified program. 42 U.S.C. § 18082(a). Under that program, the Department of the Treasury makes monthly advance payments for both portions of the subsidy—premium tax credits and cost-sharing reductions—to health insurance issuers. *Id.* § 18082(c). And as the ACA makes explicit, both components of these payments serve the same purpose: to reduce premiums payable by eligible individuals. *See id.* § 18082(a)(3) (providing that "the Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit").

Other ACA provisions confirm that cost-sharing reduction payments are permanently funded. For example, the ACA includes a restriction on the use of cost-sharing reduction payments for certain abortion services. 42 U.S.C.

§ 18023(b)(2)(A)(ii). As the district court acknowledged (JA82-85), this provision would be entirely superfluous unless cost-sharing reduction payments were permanently funded, because appropriations provided in the annual Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts have long been subject to the identical restrictions of the Hyde Amendment. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-176, Div. H, §§ 506-07, 128 Stat. 5, 409 (2014). Indeed, Congress added this restriction to the ACA because Members expressed concern that the ACA itself had "appropriated money" that required a special ACA-specific spending restriction. 156 Cong. Rec. H2449, H2450 (Mar. 25, 2010) (Rep. Gohmert); *see also* 156 Cong. Rec. H1891, H1910 (Mar. 21, 2010) (Rep. Smith) (payments "are both authorized and appropriated" in the ACA).

Because cost-sharing reductions are permanently funded, Congress omitted from the cost-sharing reduction provisions the language that it ordinarily uses when it intends payments to be subject to annual appropriations. In such cases, it typically enacts an "authorization of appropriations" provision, as it did in dozens of other provisions in the ACA. *See, e.g.*, Pub. L. No. 111-148, § 2705(f), 124 Stat. 119, 325 (2010) ("There are authorized to be appropriated such sums as are necessary to carry

out this section.").[9] The use of this language indicates that Congress did not appropriate funding in the authorizing law itself and instead expected that funding would be provided through the annual appropriations. By contrast, the absence of such language indicates that annual appropriations are not contemplated. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

Accordingly, during deliberations on the ACA, the Congressional Budget Office advised Congress that cost-sharing reductions were "direct spending" rather than potential expenditures that "would be subject to future appropriation action." Letter of Douglas W. Elmendorf, Director, CBO to the Hon. Nancy Pelosi, at 12 (Mar. 20, 2010); *see*, *e.g.*, *id.* at tbl. 2 (listing "Premium and Cost Sharing Subsidies" as "direct spending"). The CBO's scoring was critical to the ACA's framing and passage, and was referenced in the text of the Act itself. Pub. L. No. 111-148, § 1563(a), 124 Stat. 119, 270-71 (2010); *see also* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010, at A16.

[9] *See also, e.g.*, *id.*, §§ 1002, 2706(e), 3013(c), 2015, 2501, 3504(b), 3505(a), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

2. The broader structure of the ACA confirms that its amendment of 31 U.S.C. § 1324 encompasses cost-sharing reductions as well as premium tax credits. Payments for premium tax credits and cost-sharing reductions are inextricably linked. Premiums provide income to insurers; deductibles and copayments reduce insurers' outlays. Thus, all other factors remaining equal, a decrease in cost sharing necessitates a rise in premiums. Section 1402 of the ACA requires that insurers reduce cost sharing for a subset of tax-credit recipients. And Sections 1402 and 1412, by requiring the government to compensate the insurers for these cost-sharing reductions, ensure that these cost-sharing reductions will not spark a rise in premiums. *See* 42 U.S.C. §§ 18071(c)(3), 18082(c)(3).

If the government were unable to compensate insurers for cost-sharing reductions as required by the ACA, insurers would increase premiums in silver plans to cover the cost of providing the cost-sharing reductions while maintaining actuarially justified rates. *See* 45 C.F.R. § 156.80(d)(2)(i) (permitting plan-level premium adjustments based on "[t]he actuarial value and cost-sharing design of the plan").

As a direct consequence, Treasury would be required to pay more for premium tax credits, which are calculated on the basis of silver-plan premiums. 26 U.S.C. § 36B(b)(2)(B). The tax credit provisions of the ACA are structured to protect enrollees from rising premiums, and, if silver-plan premiums rise, federal payments for tax credits "would have to rise to make up the difference." CBO, *An Analysis of*

Health Insurance Premiums Under the Patient Protection and Affordable Care Act 20 (Nov. 30, 2009). Thus, Treasury would subsidize coverage for eligible individuals solely through premium tax credits rather than through a combination of premium tax credits and cost-sharing reduction payments. The government would pay for cost-sharing reductions through the Section 1324 appropriation—but it would do so through increased premium tax credit outlays, rather than through cost-sharing reduction reimbursements that the ACA requires, and it would do so in an inefficient way.

In altering the statute's structure in this fashion, the district court's order would result in expenditures from the Section 1324 appropriation far in excess of those that Congress intended and that would result from the Executive Branch's implementation of the statute. Because silver-plan premiums are the benchmark for *all* of the ACA's premium tax credits, the increases in premiums for silver plans would correspondingly increase the premium tax credits available to all persons eligible for the credits, rather than to the subset of those individuals who are also eligible for cost-sharing reductions. The total increase in the amount paid in premium tax credits would greatly exceed the amounts that would have been paid to compensate for cost-sharing reductions. Indeed, it is estimated that adoption of the district court's interpretation would result in billions of dollars in net additional expenditures annually from the very Section 1324 appropriation that the order is ostensibly designed to protect. *ASPE Issue Brief* 4 (JA471); Linda J. Blumberg and Matthew Buettgens, Urban Inst., *The Implications of a Finding for the Plaintiffs in House v. Burwell* 1, 8 (Jan. 2016) (JA513, 520)

(projecting that federal spending would rise by $47 billion over the next ten years if spending for cost-sharing reductions were enjoined).

In compelling greater expenditures from the Section 1324 appropriation, the district court's order also would severely distort the ACA's graduated system of subsidies. Congress indexed the ACA's premium tax credits to silver-plan premiums to ensure that a plan providing silver-level coverage—that is, covering 70% of the total expected cost of care—would not cost eligible individuals more than a specified percentage of their household income in premiums. 26 U.S.C. § 36B(b). Congress then enacted cost-sharing reductions to subsidize more generous coverage by requiring that silver plans sold to certain individuals cover 73%, 87%, or 94% of the total expected cost of care, even though a silver plan nominally covers only 70% of the cost of care. 42 U.S.C. § 18071(c)(2). Those more generous subsidies are available only to individuals with incomes below 250% of the federal poverty level. *Id.* Under the district court's order, however, the Act would subsidize coverage more generous than silver-level coverage for all recipients of the credits: silver-plan premiums would spike, rising to exceed the premiums for gold plans. Tax credits would increase accordingly, and recipients of the credits who are not eligible for cost-

sharing reductions could use them to buy more generous plans such as gold plans—that is, plans covering 80% of the total cost of care. *ASPE Issue Brief* 3 (JA470).[10]

Because Congress created a structure in which failure to appropriate funds for cost-sharing reductions would have the effect of increasing net expenditures, there was no reason for it to leave the funding of cost-sharing reductions to subsequent appropriations acts. Indeed, because insurers set premiums for the next year before Congress typically completes annual appropriations acts, uncertainty over funding would have prompted higher premiums. Accordingly, Congress did not rely on appropriations acts to fund one component of the ACA's subsidy program; it funded both cost-sharing reductions and tax credits through the ACA's amendment to the Section 1324 permanent appropriation.

B. Contrary to the District Court's Premise, the Section 1324 Appropriation Is Not Confined to "Refunds" that "Reduce the Tax Liability of a Taxpayer."

The district court believed that the bizarre consequences of its order posed no impediment to its ruling. The court declared that "[h]igher premiums, more federal debt, and decreased enrollment are not consequences of the ACA's text or structure. Those results would flow—if at all—from Congress's continuing refusal to appropriate funds for Section 1402 reimbursements." JA93-94.

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[10] The district court's order also could expose the United States to damages actions by insurers under the Tucker Act, based on the statutory requirement that the government compensate insurers for cost-sharing reductions. *See* JA90 (noting the risk of Tucker Act litigation).

Even if the relevant statutory provisions were unambiguous, a judicial order requiring billions of dollars of additional expenditures in the name of protecting the power of the purse would be extraordinary. Indeed, the consequences of the injunction should have prompted the district court to revisit its novel standing ruling, which was premised on an ostensible need to protect congressional control over appropriations.

In any event, the district court's belief that its hands were tied by "unambiguous text" (JA83) reflects a basic misunderstanding of the Section 1324 appropriation. The district court reasoned that the phrase "refunds due . . . from section . . . 36B" limits the availability of the Section 1324 permanent appropriation to "refunds" that "reduce the tax liability of a taxpayer." JA76. It declared that "[t]o provide a refund or credit under the Internal Revenue Code means to reduce the tax liability of a taxpayer." *Id.* It stated that "[t]hat is precisely what Section 1401 does," and that premium tax credits thus "are quite naturally appropriated through 31 U.S.C. § 1324." JA76-77. The court declared that "[t]he cost-sharing reductions mandated by Section 1402, by contrast, do not reduce anyone's tax liability," and concluded for that reason that "[t]hese reimbursements simply are not 'refunds' as that term is used in 31 U.S.C. § 1324(b)." JA77.

The district court's premises are incorrect. Although the court assumed that premium tax credits "reduce the tax liability of a taxpayer," JA76, premium tax credits are "refundable," 26 U.S.C. §§ 36B, 6401(b)(1), which means that they can subsidize

premiums for individuals with no tax liability. As the CBO has explained, in the federal budget, the portion of refundable tax credits that reduces the amount of taxes owed is treated as a reduction in revenues, whereas the portion that exceeds persons' tax liability is treated as an outlay. CBO, *Refundable Tax Credits* 1 (Jan. 24, 2013). The CBO has projected that, by 2021 that 84% of premium tax credit spending will be attributable to outlays ($57 billion in outlays and $11 billion in revenue reductions). CBO, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026*, March 2016, tbl. 2. Thus, the bulk of the (unchallenged) premium tax credits would not meet the standard that the district court deemed unambiguous.

Nor are the uncontested expenditures for advance payment of premium tax credits "refunds" in the colloquial sense. Like the payments for cost-sharing reductions, they are payments to insurance issuers that simply make health insurance more affordable for eligible individuals.

In sum, even if this suit were not barred as a threshold matter, it would be necessary to set aside the judgment of the district court.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,847 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I electronically filed the foregoing brief and accompanying joint appendix with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein

ADDENDUM

ADDENDUM CONTENTS

CONTINUING APPROPRIATIONS ACT, 2014, PL 113-46,
October 17, 2013, 127 Stat 558

SEC. 1001. (a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Health and Human Services (referred to in this section as the "Secretary") shall ensure that American Health Benefit Exchanges verify that individuals applying for premium tax credits under section 36B of the Internal Revenue Code of 1986 and reductions in cost-sharing under section 1402 of the Patient Protection and Affordable Care Act (42 U.S.C. 18071) are eligible for such credits and cost sharing reductions consistent with the requirements of section 1411 of such Act (42 U.S.C. 18081), and, prior to making such credits and reductions available, the Secretary shall certify to the Congress that the Exchanges verify such eligibility consistent with the requirements of such Act.

CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT, 2015,
PL 113-235, December 16, 2014, 128 Stat 2130

SEC. 227. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

CONSOLIDATED APPROPRIATIONS ACT, 2016,
PL 114-113, December 18, 2015, 129 Stat 2242

SEC. 225. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

26 U.S.C.A. § 36B

§ 36B. Refundable credit for coverage under a qualified health plan

(a) In general.--In the case of an applicable taxpayer, 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.

(b) Premium assistance credit amount.--For purposes of this section--

(1) In general.--The term "premium assistance credit amount" means, with respect to any taxable year, the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year.

(2) Premium assistance amount.--The premium assistance amount determined under this subsection with respect to any coverage month is the amount equal to the lesser of--

(A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent (as defined in section 152) of the taxpayer and which were enrolled in through an Exchange established by the State under 1311[1] of the Patient Protection and Affordable Care Act, or

(B) the excess (if any) of--

(i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over

(ii) an amount equal to $^1/_{12}$ of the product of the applicable percentage and the taxpayer's household income for the taxable year.

(3) Other terms and rules relating to premium assistance amounts.--For purposes of paragraph (2)--

(A) Applicable percentage.--

(i) In general.--Except as provided in clause (ii), the applicable percentage for any taxable year shall be the percentage such that the applicable percentage for any taxpayer whose household income is within an income tier specified in the following table shall increase, on a sliding scale in a linear manner, from the initial premium percentage to the final premium percentage specified in such table for such income tier:

In the case of household income (expressed as a percent of poverty line) within the following income tier:	The initial premium percentage is--	The final premium percentage is--
Up to 133%	2.0%	2.0%
133% up to 150%	3.0%	4.0%
150% up to 200%	4.0%	6.3%
200% up to 250%	6.3%	8.05%
250% up to 300%	8.05%	9.5%
300% up to 400%	9.5%	9.5%

(ii) Indexing.--

(I) In general.--Subject to subclause (II), in the case of taxable years beginning in any calendar year after 2014, the initial and final applicable percentages under clause (i) (as in effect for the preceding calendar year after application of this clause) shall be adjusted to reflect the excess of the rate of premium growth for the preceding calendar year over the rate of income growth for the preceding calendar year.

(II) Additional adjustment.--Except as provided in subclause (III), in the case of any calendar year after 2018, the percentages described in subclause (I) shall, in addition to the adjustment under subclause (I), be adjusted to reflect the excess (if any) of the rate of premium growth estimated under subclause (I) for the preceding calendar year over the rate of growth in the consumer price index for the preceding calendar year.

(III) Failsafe.--Subclause (II) shall apply for any calendar year only if the aggregate amount of premium tax credits under this section and cost-sharing reductions under section 1402 of the Patient Protection and Affordable Care Act for the preceding calendar year exceeds an amount equal to 0.504 percent of the gross domestic product for the preceding calendar year.

[**(iii) Repealed.** Pub.L. 111-152, Title I, § 1001(a)(1)(B), Mar. 30, 2010, 124 Stat. 1031]

(B) Applicable second lowest cost silver plan.--The applicable second lowest cost silver plan with respect to any applicable taxpayer is the second lowest cost silver plan of the individual market in the rating area in which the taxpayer resides which--

(i) is offered through the same Exchange through which the qualified health plans taken into account under paragraph (2)(A) were offered, and

(ii) provides--

(I) self-only coverage in the case of an applicable taxpayer--

(aa) whose tax for the taxable year is determined under section 1(c) (relating to unmarried individuals other than surviving spouses and heads of households) and who is not allowed a deduction under section 151 for the taxable year with respect to a dependent, or

(bb) who is not described in item (aa) but who purchases only self-only coverage, and

(II) family coverage in the case of any other applicable taxpayer.

If a taxpayer files a joint return and no credit is allowed under this section with respect to 1 of the spouses by reason of subsection (e), the taxpayer shall be treated as described in clause (ii)(I) unless a deduction is allowed under section 151 for the taxable year with respect to a dependent other than either spouse and subsection (e) does not apply to the dependent.

(C) Adjusted monthly premium.--The adjusted monthly premium for an applicable second lowest cost silver plan is the monthly premium which would have been charged (for the rating area with respect to which the premiums under paragraph (2)(A) were determined) for the plan if each individual covered under a qualified health plan taken into account under paragraph (2)(A) were covered by such silver plan and the premium was adjusted only for the age of each such individual in the manner allowed under section 2701 of the Public Health Service Act. In the case of a State participating in the wellness discount demonstration project under section 2705(d) of the Public Health Service Act, the adjusted monthly premium shall be determined without regard to any premium discount or rebate under such project.

(D) Additional benefits.--If--

(i) a qualified health plan under section 1302(b)(5) of the Patient Protection and Affordable Care Act offers benefits in addition to the essential health benefits required to be provided by the plan, or

(ii) a State requires a qualified health plan under section 1311(d)(3)(B) of such Act to cover benefits in addition to the essential health benefits required to be provided by the plan,

the portion of the premium for the plan properly allocable (under rules prescribed by the Secretary of Health and Human Services) to such additional benefits shall not be taken into account in determining either the monthly premium or the adjusted monthly premium under paragraph (2).

(E) Special rule for pediatric dental coverage.--For purposes of determining the amount of any monthly premium, if an individual enrolls in both a qualified health plan and a plan described in section 1311(d)(2)(B)(ii)(I)[2] of the Patient Protection and Affordable Care Act for any plan year, the portion of the premium for the plan described in such section that (under regulations prescribed by the Secretary) is properly allocable to pediatric dental benefits which are included in the essential health benefits required to be provided by a qualified health plan under section 1302(b)(1)(J) of such Act shall be treated as a premium payable for a qualified health plan.

(c) Definition and rules relating to applicable taxpayers, coverage months, and qualified health plan.--For purposes of this section--

(1) Applicable taxpayer.--

(A) In general.--The term "applicable taxpayer" means, with respect to any taxable year, a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved.

(B) Special rule for certain individuals lawfully present in the United States.--If--

(i) a taxpayer has a household income which is not greater than 100 percent of an amount equal to the poverty line for a family of the size involved, and

(ii) the taxpayer is an alien lawfully present in the United States, but is not eligible for the medicaid program under title XIX of the Social Security Act by reason of such alien status,

the taxpayer shall, for purposes of the credit under this section, be treated as an applicable taxpayer with a household income which is equal to 100 percent of the poverty line for a family of the size involved.

(C) Married couples must file joint return.--If the taxpayer is married (within the meaning of section 7703) at the close of the taxable year, the taxpayer shall be treated as an applicable taxpayer only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year.

(D) Denial of credit to dependents.--No credit shall be allowed under this section to any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which such individual's taxable year begins.

(2) Coverage month.--For purposes of this subsection--

(A) In general.--The term "coverage month" means, with respect to an applicable taxpayer, any month if--

(i) as of the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act, and

(ii) the premium for coverage under such plan for such month is paid by the taxpayer (or through advance payment of the credit under subsection (a) under section 1412 of the Patient Protection and Affordable Care Act).

(B) Exception for minimum essential coverage.--

(i) In general.--The term "coverage month" shall not include any month with respect to an individual if for such month the individual is eligible for minimum essential coverage other than eligibility for coverage described in section 5000A(f)(1)(C) (relating to coverage in the individual market).

(ii) Minimum essential coverage.--The term "minimum essential coverage" has the meaning given such term by section 5000A(f).

(C) Special rule for employer-sponsored minimum essential coverage.--For purposes of subparagraph (B)--

(i) Coverage must be affordable.--Except as provided in clause (iii), an employee shall not be treated as eligible for minimum essential coverage if such coverage--

(I) consists of an eligible employer-sponsored plan (as defined in section 5000A(f)(2)), and

(II) the employee's required contribution (within the meaning of section 5000A(e)(1)(B)) with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income.

This clause shall also apply to an individual who is eligible to enroll in the plan by reason of

a relationship the individual bears to the employee.

(ii) Coverage must provide minimum value.--Except as provided in clause (iii), an employee shall not be treated as eligible for minimum essential coverage if such coverage consists of an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) and the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs.

(iii) Employee or family must not be covered under employer plan.--Clauses (i) and (ii) shall not apply if the employee (or any individual described in the last sentence of clause (i)) is covered under the eligible employer-sponsored plan or the grandfathered health plan.

(iv) Indexing.--In the case of plan years beginning in any calendar year after 2014, the Secretary shall adjust the 9.5 percent under clause (i)(II) in the same manner as the percentages are adjusted under subsection (b)(3)(A)(ii).

[**(D) Repealed.** Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(1), Apr. 15, 2011, 125 Stat. 168]

(3) Definitions and other rules.--

(A) Qualified health plan.--The term "qualified health plan" has the meaning given such term by section 1301(a) of the Patient Protection and Affordable Care Act, except that such term shall not include a qualified health plan which is a catastrophic plan described in section 1302(e) of such Act.

(B) Grandfathered health plan.--The term "grandfathered health plan" has the meaning given such term by section 1251 of the Patient Protection and Affordable Care Act.

(d) Terms relating to income and families.--For purposes of this section--

(1) Family size.--The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(2) Household income.--

(A) Household income.--The term "household income" means, with respect to any taxpayer, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(B) Modified adjusted gross income.--The term "modified adjusted gross income" means adjusted gross income increased by--

(i) any amount excluded from gross income under section 911,

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax, and

(iii) an amount equal to the portion of the taxpayer's social security benefits (as defined in section 86(d)) which is not included in gross income under section 86 for the taxable year.

(3) Poverty line.--

(A) In general.--The term "poverty line" has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

(B) Poverty line used.--In the case of any qualified health plan offered through an Exchange for coverage during a taxable year beginning in a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of the regular enrollment period for coverage during such calendar year.

(e) Rules for individuals not lawfully present.--

(1) In general.--If 1 or more individuals for whom a taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year (including the taxpayer or his spouse) are individuals who are not lawfully present--

(A) the aggregate amount of premiums otherwise taken into account under clauses (i) and (ii) of subsection (b)(2)(A) shall be reduced by the portion (if any) of such premiums which is attributable to such individuals, and

(B) for purposes of applying this section, the determination as to what percentage a taxpayer's household income bears to the poverty level for a family of the size involved shall be made under one of the following methods:

(i) A method under which--

(I) the taxpayer's family size is determined by not taking such individuals into account, and

(II) the taxpayer's household income is equal to the product of the taxpayer's household income (determined without regard to this subsection) and a fraction--

(aa) the numerator of which is the poverty line for the taxpayer's family size determined after application of subclause (I), and

(bb) the denominator of which is the poverty line for the taxpayer's family size determined without regard to subclause (I).

(ii) A comparable method reaching the same result as the method under clause (i).

(2) Lawfully present.--For purposes of this section, an individual shall be treated as lawfully present only if the individual is, and is reasonably expected to be for the entire period of enrollment for which the credit under this section is being claimed, a citizen or national of the United States or an alien lawfully present in the United States.

(3) Secretarial authority.--The Secretary of Health and Human Services, in consultation with the Secretary, shall prescribe rules setting forth the methods by which calculations of family size and household income are made for purposes of this subsection. Such rules shall be designed to ensure that the least burden is placed on individuals enrolling in qualified health plans through an Exchange and taxpayers eligible for the credit allowable under this section.

(f) Reconciliation of credit and advance credit.--

(1) In general.--The amount of the credit allowed under this section for any taxable year shall be reduced (but not below zero) by the amount of any advance payment of such credit under section 1412 of the Patient Protection and Affordable Care Act.

(2) Excess advance payments.--

(A) In general.--If the advance payments to a taxpayer under section 1412 of the Patient Protection and Affordable Care Act for a taxable year exceed the credit allowed by this section (determined without regard to paragraph (1)), the tax imposed by this chapter for the taxable year shall be increased by the amount of such excess.

(B) Limitation on increase.--

(i) In general.--In the case of a taxpayer whose household income is less than 400 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed the applicable dollar amount determined in accordance with the following table (one-half of such amount in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year):

If the household income (expressed as a percent of poverty line) is:	The applicable dollar amount is:
Less than 200	$600
At least 200% but less than 300	$1,500
At least 300% but less than 400	$2,500.

(ii) Indexing of amount.--In the case of any calendar year beginning after 2014, each of the dollar amounts in the table contained under clause (i) shall be increased by an amount equal to--

(I) such dollar amount, multiplied by

(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2013" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(3) Information requirement.--Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act) shall provide the following information to the Secretary and to the taxpayer with respect to any health plan provided through the Exchange:

(A) The level of coverage described in section 1302(d) of the Patient Protection and Affordable Care Act and the period such coverage was in effect.

(B) The total premium for the coverage without regard to the credit under this section or cost-sharing reductions under section 1402 of such Act.

(C) The aggregate amount of any advance payment of such credit or reductions under section 1412 of such Act.

(D) The name, address, and TIN of the primary insured and the name and TIN of each other individual obtaining coverage under the policy.

(E) Any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.

(F) Information necessary to determine whether a taxpayer has received excess advance payments.

(g) Regulations.--The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section, including regulations which provide for--

(1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and

(2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

31 U.S.C.A. § 1324

§ 1324. Refund of internal revenue collections

(a) Necessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law, including payment of--

(1) claims for prior fiscal years; and

(2) accounts arising under--

(A) "Allowance or drawback (Internal Revenue)";

(B) "Redemption of stamps (Internal Revenue)";

(C) "Refunding legacy taxes, Act of March 30, 1928";

(D) "Repayment of taxes on distilled spirits destroyed by casualty"; and

(E) "Refunds and payments of processing and related taxes".

(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 credit provisions of the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.) enacted before January 1, 1978, or enacted by the Taxpayer Relief Act of 1997, or from section 25A, 35, 36, 36A, 36B, 168(k)(4)(F), 53(e), 54B(h), or 6431 of such Code, or due under section 3081(b)(2) of the Housing Assistance Tax Act of 2008.

42 U.S.C.A. § 18023

§ 18023. Special rules

(a) State opt-out of abortion coverage

(1) In general

A State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such prohibition.

(2) Termination of opt out

A State may repeal a law described in paragraph (1) and provide for the offering of such services through the Exchange.

(b) Special rules relating to coverage of abortion services

(1) Voluntary choice of coverage of abortion services

(A) In general

Notwithstanding any other provision of this title (or any amendment made by this title)--

(i) nothing in this title (or any amendment made by this title), shall be construed to require a qualified health plan to provide coverage of services described in subparagraph (B)(i) or (B)(ii) as part of its essential health benefits for any plan year; and

(ii) subject to subsection (a), the issuer of a qualified health plan shall determine whether or not the plan provides coverage of services described in subparagraph (B)(i) or (B)(ii) as part of such benefits for the plan year.

(B) Abortion services

(i) Abortions for which public funding is prohibited

The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.

(ii) Abortions for which public funding is allowed

The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.

(2) Prohibition on the use of Federal funds

(A) In general

If a qualified health plan provides coverage of services described in paragraph (1)(B)(i), the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services:

(i) The credit under section 36B of Title 26 (and the amount (if any) of the advance payment of the credit under section 18082 of this title).

(ii) Any cost-sharing reduction under section 18071 of this title (and the amount (if any) of the advance payment of the reduction under section 18082 of this title).

(B) Establishment of allocation accounts

In the case of a plan to which subparagraph (A) applies, the issuer of the plan shall--

(i) collect from each enrollee in the plan (without regard to the enrollee's age, sex, or family status) a separate payment for each of the following:

(I) an amount equal to the portion of the premium to be paid directly by the enrollee for coverage under the plan of services other than services described in paragraph (1)(B)(i) (after reduction for credits and cost-sharing reductions described in subparagraph (A)); and

(II) an amount equal to the actuarial value of the coverage of services described in paragraph (1)(B)(i), and

(ii) shall[1] deposit all such separate payments into separate allocation accounts as provided in subparagraph (C).

In the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit.

(C) Segregation of funds

(i) In general

The issuer of a plan to which subparagraph (A) applies shall establish allocation accounts described in clause (ii) for enrollees receiving amounts described in subparagraph (A).

(ii) Allocation accounts

The issuer of a plan to which subparagraph (A) applies shall deposit--

(I) all payments described in subparagraph (B)(i)(I) into a separate account that consists solely of such payments and that is used exclusively to pay for services other than services described in paragraph (1)(B)(i); and

(II) all payments described in subparagraph (B)(i)(II) into a separate account that consists solely of such payments and that is used exclusively to pay for services described in paragraph (1)(B)(i).

(D) Actuarial value

(i) In general

The issuer of a qualified health plan shall estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for including coverage under the qualified health plan of the services described in paragraph (1)(B)(i).

(ii) Considerations

In making such estimate, the issuer--

(I) may take into account the impact on overall costs of the inclusion of such coverage, but may not take into account any cost reduction estimated to result from such services, including prenatal care, delivery, or postnatal care;

(II) shall estimate such costs as if such coverage were included for the entire population covered; and

(III) may not estimate such a cost at less than $1 per enrollee, per month.

(E) Ensuring compliance with segregation requirements

(i) In general

Subject to clause (ii), State health insurance commissioners shall ensure that health plans comply with the segregation requirements in this subsection through the segregation of plan funds in accordance with applicable provisions of generally accepted accounting requirements, circulars on funds management of the Office of Management and Budget, and guidance on accounting of the Government Accountability Office.

(ii) Clarification

Nothing in clause (i) shall prohibit the right of an individual or health plan to appeal such action in courts of competent jurisdiction.

(3) Rules relating to notice

(A) Notice

A qualified health plan that provides for coverage of the services described in paragraph (1)(B)(i) shall provide a notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage.

(B) Rules relating to payments

The notice described in subparagraph (A), any advertising used by the issuer with respect to the plan, any information provided by the Exchange, and any other information specified by the Secretary shall provide information only with respect to the total amount of the combined payments for services described in paragraph (1)(B)(i) and other services covered by the plan.

(4) No discrimination on basis of provision of abortion

No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions[2]

(c) Application of State and Federal laws regarding abortion

(1) No preemption of State laws regarding abortion

Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding

the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor.

(2) No effect on Federal laws regarding abortion

(A)[3] In general

Nothing in this Act shall be construed to have any effect on Federal laws regarding--

(i) conscience protection;

(ii) willingness or refusal to provide abortion; and

(iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.

(3) No effect on Federal civil rights law

Nothing in this subsection shall alter the rights and obligations of employees and employers under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.].

(d) Application of emergency services laws

Nothing in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including section 1867 of the Social Security Act [42 U.S.C. 1395dd] (popularly known as “EMTALA”).

42 U.S.C.A. § 18071

§ 18071. Reduced cost-sharing for individuals enrolling in qualified health plans

(a) In general

In the case of an eligible insured enrolled in a qualified health plan--

(1) the Secretary shall notify the issuer of the plan of such eligibility; and

(2) the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c).

(b) Eligible insured

In this section, the term "eligible insured" means an individual--

(1) who enrolls in a qualified health plan in the silver level of coverage in the individual market offered through an Exchange; and

(2) whose household income exceeds 100 percent but does not exceed 400 percent of the poverty line for a family of the size involved.

In the case of an individual described in section 36B(c)(1)(B) of Title 26, the individual shall be treated as having household income equal to 100 percent for purposes of applying this section.

(c) Determination of reduction in cost-sharing

(1) Reduction in out-of-pocket limit

(A) In general

The reduction in cost-sharing under this subsection shall first be achieved by reducing the applicable out-of pocket[1] limit under section 18022(c)(1) of this title in the case of--

(i) an eligible insured whose household income is more than 100 percent but not more than 200 percent of the poverty line for a family of the size involved, by two-thirds;

(ii) an eligible insured whose household income is more than 200 percent but not more than 300 percent of the poverty line for a family of the size involved, by one-half; and

(iii) an eligible insured whose household income is more than 300 percent but not more than 400 percent of the poverty line for a family of the size involved, by one-third.

(B) Coordination with actuarial value limits

(i) In general

The Secretary shall ensure the reduction under this paragraph shall not result in an increase in the plan's share of the total allowed costs of benefits provided under the plan above--

(I) 94 percent in the case of an eligible insured described in paragraph (2)(A);

(II) 87 percent in the case of an eligible insured described in paragraph (2)(B);

(III) 73 percent in the case of an eligible insured whose household income is more than 200 percent but not more than 250 percent of the poverty line for a family of the size involved; and

(IV) 70 percent in the case of an eligible insured whose household income is more than 250 percent but not more than 400 percent of the poverty line for a family of the size involved.

(ii) Adjustment

The Secretary shall adjust the out-of pocket limits under paragraph (1) if necessary to ensure that such limits do not cause the respective actuarial values to exceed the levels specified in clause (i).

(2) Additional reduction for lower income insureds

The Secretary shall establish procedures under which the issuer of a qualified health plan to which this section applies shall further reduce cost-sharing under the plan in a manner sufficient to--

(A) in the case of an eligible insured whose household income is not less than 100 percent but not more than 150 percent of the poverty line for a family of the size involved, increase the plan's share of the total allowed costs of benefits provided under the plan to 94 percent of such costs;

(B) in the case of an eligible insured whose household income is more than 150 percent but not more than 200 percent of the poverty line for a family of the size involved, increase the plan's share of the total allowed costs of benefits provided under the plan to 87 percent of such costs; and

(C) in the case of an eligible insured whose household income is more than 200 percent but not more than 250 percent of the poverty line for a family of the size involved, increase the plan's share of the total allowed costs of benefits provided under the plan to 73 percent of such costs.

(3) Methods for reducing cost-sharing

(A) In general

An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.

(B) Capitated payments

The Secretary may establish a capitated payment system to carry out the payment of cost-sharing reductions under this section. Any such system shall take into account the value of the reductions and make appropriate risk adjustments to such payments.

(4) Additional benefits

If a qualified health plan under section 18022(b)(5) of this title offers benefits in addition to the essential health benefits required to be provided by the plan, or a State requires a qualified health plan under section 18031(d)(3)(B) of this title to cover benefits in addition to the essential health benefits required to be provided by the plan, the reductions in cost-sharing under this section shall not apply to such additional benefits.

(5) Special rule for pediatric dental plans

If an individual enrolls in both a qualified health plan and a plan described in section 18031(d)(2)(B)(ii)(I)[2] of this title for any plan year, subsection (a) shall not apply to that portion of any reduction in cost-sharing under subsection (c) that (under regulations prescribed by the Secretary) is properly allocable to pediatric dental benefits which are included in the essential health benefits required to be provided by a qualified health plan under section 18022(b)(1)(J) of this title.

(d) Special rules for Indians

(1) Indians under 300 percent of poverty

If an individual enrolled in any qualified health plan in the individual market through an Exchange is an Indian (as defined in section 5304(d) of Title 25) whose household income is not more than 300 percent of the poverty line for a family of the size involved, then, for purposes of this section--

(A) such individual shall be treated as an eligible insured; and

(B) the issuer of the plan shall eliminate any cost-sharing under the plan.

(2) Items or services furnished through Indian health providers

If an Indian (as so defined) enrolled in a qualified health plan is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services--

(A) no cost-sharing under the plan shall be imposed under the plan for such item or service; and

(B) the issuer of the plan shall not reduce the payment to any such entity for such item or service by the amount of any cost-sharing that would be due from the Indian but for subparagraph (A).

(3) Payment

The Secretary shall pay to the issuer of a qualified health plan the amount necessary to reflect the increase in actuarial value of the plan required by reason of this subsection.

(e) Rules for individuals not lawfully present

(1) In general

If an individual who is an eligible insured is not lawfully present--

(A) no cost-sharing reduction under this section shall apply with respect to the individual; and

(B) for purposes of applying this section, the determination as to what percentage a taxpayer's household income bears to the poverty level for a family of the size involved shall be made under one of the following methods:

(i) A method under which--

(I) the taxpayer's family size is determined by not taking such individuals into account, and

(II) the taxpayer's household income is equal to the product of the taxpayer's household income (determined without regard to this subsection) and a fraction--

(aa) the numerator of which is the poverty line for the taxpayer's family size determined after

application of subclause (I), and

(bb) the denominator of which is the poverty line for the taxpayer's family size determined without regard to subclause (I).

(ii) A comparable method reaching the same result as the method under clause (i).

(2) Lawfully present

For purposes of this section, an individual shall be treated as lawfully present only if the individual is, and is reasonably expected to be for the entire period of enrollment for which the cost-sharing reduction under this section is being claimed, a citizen or national of the United States or an alien lawfully present in the United States.

(3) Secretarial authority

The Secretary, in consultation with the Secretary of the Treasury, shall prescribe rules setting forth the methods by which calculations of family size and household income are made for purposes of this subsection. Such rules shall be designed to ensure that the least burden is placed on individuals enrolling in qualified health plans through an Exchange and taxpayers eligible for the credit allowable under this section.

(f) Definitions and special rules

In this section:

(1) In general

Any term used in this section which is also used in section 36B of Title 26 shall have the meaning given such term by such section.

(2) Limitations on reduction

No cost-sharing reduction shall be allowed under this section with respect to coverage for any month unless the month is a coverage month with respect to which a credit is allowed to the insured (or an applicable taxpayer on behalf of the insured) under section 36B of such title.

(3) Data used for eligibility

Any determination under this section shall be made on the basis of the taxable year for which the advance determination is made under section 18082 of this title and not the taxable year for which the credit under section 36B of Title 26 is allowed.

42 U.S.C.A. § 18082

§ 18082. Advance determination and payment of premium tax credits and cost-sharing reductions

(a) In general

The Secretary, in consultation with the Secretary of the Treasury, shall establish a program under which--

(1) upon request of an Exchange, advance determinations are made under section 18081 of this title with respect to the income eligibility of individuals enrolling in a qualified health plan in the individual market through the Exchange for the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title;

(2) the Secretary notifies--

(A) the Exchange and the Secretary of the Treasury of the advance determinations; and

(B) the Secretary of the Treasury of the name and employer identification number of each employer with respect to whom 1 or more employee[1] of the employer were determined to be eligible for the premium tax credit under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title because--

(i) the employer did not provide minimum essential coverage; or

(ii) the employer provided such minimum essential coverage but it was determined under section 36B(c)(2)(C) of Title 26 to either be unaffordable to the employee or not provide the required minimum actuarial value; and

(3) the Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit.

(b) Advance determinations

(1) In general

The Secretary shall provide under the program established under subsection (a) that advance determination of eligibility with respect to any individual shall be made--

(A) during the annual open enrollment period applicable to the individual (or such other enrollment period as may be specified by the Secretary); and

(B) on the basis of the individual's household income for the most recent taxable year for which the Secretary, after consultation with the Secretary of the Treasury, determines information is available.

(2) Changes in circumstances

The Secretary shall provide procedures for making advance determinations on the basis of information other than that described in paragraph (1)(B) in cases where information included with an application form demonstrates substantial changes in income, changes in family size or other household circumstances, change in filing status, the filing of an application for unemployment benefits, or other significant changes affecting eligibility, including--

(A) allowing an individual claiming a decrease of 20 percent or more in income, or filing an application for unemployment benefits, to have eligibility for the credit determined on the basis of household income for a later period or on the basis of the individual's estimate of such income for the taxable year; and

(B) the determination of household income in cases where the taxpayer was not required to file a return of tax imposed by this chapter for the second preceding taxable year.

(c) Payment of premium tax credits and cost-sharing reductions

(1) In general

The Secretary shall notify the Secretary of the Treasury and the Exchange through which the individual is enrolling of the advance determination under section 18081 of this title.

(2) Premium tax credit

(A) In general

The Secretary of the Treasury shall make the advance payment under this section of any premium tax credit allowed under section 36B of Title 26 to the issuer of a qualified health plan on a monthly basis (or such other periodic basis as the Secretary may provide).

(B) Issuer responsibilities

An issuer of a qualified health plan receiving an advance payment with respect to an individual enrolled in the plan shall--

(i) reduce the premium charged the insured for any period by the amount of the advance payment for the period;

(ii) notify the Exchange and the Secretary of such reduction;

(iii) include with each billing statement the amount by which the premium for the plan has been reduced by reason of the advance payment; and

(iv) in the case of any nonpayment of premiums by the insured--

(I) notify the Secretary of such nonpayment; and

(II) allow a 3-month grace period for nonpayment of premiums before discontinuing coverage.

(3) Cost-sharing reductions

The Secretary shall also notify the Secretary of the Treasury and the Exchange under paragraph (1) if an advance payment of the cost-sharing reductions under section 18071 of this title is to be made to the issuer of any qualified health plan with respect to any individual enrolled in the plan. The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice.

(d) No Federal payments for individuals not lawfully present

Nothing in this subtitle or the amendments made by this subtitle allows Federal payments, credits, or cost-sharing reductions for individuals who are not lawfully present in the United States.

(e) State flexibility

Nothing in this subtitle or the amendments made by this subtitle shall be construed to prohibit a State from making payments to or on behalf of an individual for coverage under a qualified health plan offered through an Exchange that are in addition to any credits or cost-sharing reductions allowable to the individual under this subtitle and such amendments.