No. 16-5202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee,

v.

THOMAS E. PRICE, in his official capacity as Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury,
Defendants – Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia
(Hon. Rosemary M. Collyer, U.S. District Judge)

OPPOSITION OF THE UNITED STATES HOUSE OF REPRESENTATIVES TO THE MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

The Court should deny intervention. To start with, Movants lack standing to intervene. At bottom, Movants' theory of standing is based on sheer speculation that the Executive Branch *might* allow the district court's injunction to go into effect, that insurers *might* respond by raising premiums or withdrawing from the exchanges, that more individuals *might* become uninsured, and that Movants *might* incur increased costs as a result. This attenuated chain of prophecies is the antithesis of an imminent and particularized injury. And even if it were not hopelessly speculative, Movants' theory would fail because the Executive Branch could cease making cost-sharing offset payments regardless of the disposition of this appeal, so intervention cannot prevent the alleged harm that Movants fear. Accordingly, they have no judicially cognizable interest in this litigation.

Movants also fail to satisfy any of the other requirements for intervention. The net effect of accepting Movants' arguments would be to vest each state with the powers of a "roving constitutional watchdog." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011). Even more disturbing, Movants seek to intervene in order to obstruct a possible settlement and force this Court to decide the merits of this appeal. The judicial power, however, is not properly wielded to fan the flames of a legal dispute between the political branches that those branches are attempting to resolve amicably. Intervention should be denied.

ARGUMENT

I. MOVANTS ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT.

Movants are not entitled to intervene as of right. This Court has "drawn from the language of [Federal Rule of Civil Procedure 24(a)] four distinct requirements that intervenors must demonstrate: '(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'" *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013) (citation omitted). Intervenors also "must demonstrate Article III standing." *Id.* at 193. Moreover, "[a] court of appeals may allow intervention at the appellate stage where none was sought in the district court 'only in an exceptional case for imperative reasons.'" *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (citation omitted). Movants cannot satisfy the normal standards for intervention, let alone this extraordinarily high burden.

A. MOVANTS LACK STANDING.

As an initial matter, Movants lack standing. To establish standing, Movants must identify an injury in fact that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable rul-

ing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 1147 (2013) (quotation marks omitted). Here, Movants fail every requirement.

1. Movants Cannot Establish Injury in Fact.

To start with, Movants lack a cognizable injury in fact.

a. *Asserted Injuries to State Residents* – Movants' primary allegations in support of a cognizable injury do not involve harm to Movants themselves, but rather harm to their residents. *See* Mot. 9-16. Controlling precedent forecloses Movants' attempt to establish standing on this basis.

Generally speaking, "'a litigant must assert his or her own legal rights and interests.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-63 (2013) (citation omitted). To be sure, in certain cases states may represent the interests of their citizens as *parens patriae*. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609-10 (1982). But they may not do so in litigation against federal government entities, because "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Alfred L. Snapp*, 458 U.S. at 610 n.16 (same); *Ctr. for Biological Diversity v. Dep't of the Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009) (same); *Pennsylvania v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976) (same). "[A] state possesses no legitimate interest in protect-

ing … the rights of its individual citizens sufficient to justify such an invasion of federal sovereignty." *Sebelius*, 656 F.3d at 269.

Movants cite *Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984), for the proposition that states may assert *parens patriae* standing against the federal government when they "seek to *defend* a federal statute." Mot. 23. *Abrams*, however, is inconsistent with the decisions of the Supreme Court and of this Court cited above. Indeed, *Abrams* explicitly acknowledged that this Court's precedent is "to the contrary." 582 F. Supp. at 1159 (citing *Kleppe*, 533 F.2d at 677).

In any event, the asserted harm to state residents is not an "imminent" and "particularized" injury. *Clapper*, 133 S. Ct. at 1147. Article III standing is reserved for "those who have a *direct stake* in the outcome." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (citation omitted). Consequently, an indirect injury that is "shared in substantially equal measure by all or a large class of citizens" simply "does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Deutsche Bank*, 717 F.3d at 192 ("[Appellants] are swimming up river. If these bond holders are entitled to intervene, there is no apparent reason why any creditor of Washington Mutual, no matter how small, could be denied a similar opportunity.").

b. *Asserted Injuries to Movants* – Movants' asserted injuries to themselves fare no better. According to Movants, they will suffer three purported injuries if the district court's injunction goes into effect: (1) "the increase in uninsured residents … would cause a direct increase in heathcare costs for the states," Mot. 16; (2) "[t]he district court's decision would … complicate the States' efforts to administer their Exchanges," Mot. 19; and (3) "New York and Minnesota also risk losing hundreds of millions of dollars in direct federal funds," Mot. 17.

None of these claims constitutes an "imminent" and "particularized" injury. *Clapper*, 133 S. Ct. at 1147 (quotation marks omitted). The district court's injunction operates only on the Executive Branch and concerns only cost-sharing offset payments made to insurers. *See Sebelius*, 656 F.3d at 267 ("[T]he sole provision challenged here – the individual mandate – imposes no obligations on the sole plaintiff, Virginia."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("The regulations under challenge here neither require nor forbid any action on the part of respondents."). Movants claim only that *if* they were denied intervention, and *if* the Executive Branch were to decide to abandon this appeal, and *if* the district court's injunction were to go into effect, then the Executive Branch would stop making cost-sharing offset payments to insurers, insurers might then raise premiums or withdraw from the market, more individuals might then become unin-

sured, and Movants might then incur greater healthcare and administrative costs. Mot. 9-21.

To reiterate, however, Article III standing requires a "*direct stake* in the outcome," *Valley Forge*, 454 U.S. at 473 (quotation marks omitted), and an injury must be "certainly impending to constitute injury in fact," *Clapper*, 133 S. Ct. at 1147. Where, as here, litigants claim only that "significant adverse effects … 'may' occur at some point in the future, they fail[] … to establish standing." *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 692 (D.C. Cir. 2015) (en banc).[1]

Moreover, "virtually all federal policies" have "unavoidable economic repercussions" for state governments. *Kleppe*, 533 F.2d at 672. Extending standing to states indirectly affected by such policies "would convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'" *Sebelius*, 656 F.3d at 271 (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)); *see Iowa v. Block*, 771 F.2d 347, 353-54 (8th Cir. 1985) (holding that alleged state injury that "but for the Secretary's implementation of these disaster relief programs, agriculture production will suffer, which will dislocate agriculturally-based industries, forcing unemployment up and state tax revenues down" was "insufficiently proximate to the actions at issue").

[1] Indeed, this Court has already held that a concern "that [litigants] would enter into" an "unfavorable settlement" is "hopelessly conjectural" and cannot support intervention. *Deutsche Bank*, 717 F.3d at 193.

Each of the asserted injuries to Movants suffers from additional fatal defects. As to the claimed "increase in healthcare costs," Mot. 16, and "substantial[] complicat[ion]'" of administrative efforts, Mot. 19, those injuries are "self-inflicted, resulting from decisions by their respective state legislatures." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Federal law does not require Movants to increase their healthcare spending to compensate for a decline in federal subsidies to insurers.[2] Similarly, state regulators review proposed premium increases only because Movants have chosen to engage in that activity, and they are free to adjust their regulatory activities to avoid increased expenditures if they so choose.[3] Simply put, Movants "cannot be heard to complain about damage inflicted by [their] own hands." *Pennsylvania*, 426 U.S. at 664; *see id.* (neighboring states lacked standing to challenge New Hampshire tax on out-of-state residents that reduced plaintiffs' tax revenues, because "[n]othing required Maine, Massachusetts,

[2] Movants contend that federal law requires them to "provide emergency care, regardless of a patient's insurance status or ability to pay." Mot. 16. That is incorrect. Congress "condition[ed] hospitals' continued participation in the federal Medicare program … on acceptance of the dut[y]" to provide emergency care to individuals, *Correa v. Hosp. S.F.*, 69 F.3d 1184, 1189 (1st Cir. 1995), but hospitals are not required to participate in Medicare.

[3] Movants suggest that "the ACA relies on regulators in most states" to review proposed premium increases. Mot. 19. But the ACA in fact requires the federal Centers for Medicare & Medicaid Services ("CMS") to conduct such reviews, and directs CMS to defer to a state's determination only *if* the state has chosen to establish an effective review program that meets the requirements of 45 C.F.R. § 154.210. *See generally* 42 U.S.C. § 300gg-94; 25 C.F.R. §§ 154.200-230.

and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire."); *Kleppe*, 533 F.2d at 672 (no state standing where alleged injury "would appear to proximately result from the action or inaction of the state itself").

Finally, Movants' claim (Mot. 17) that New York and Minnesota "risk losing hundreds of millions of dollars" for their Basic Health Programs (BHPs), which are optional state-run programs for low-income individuals that are partially subsidized by the federal government. 42 U.S.C. § 18051(d). Movants' claim is false.

The House did not challenge the BHP subsides in this action, and the district court's injunction therefore does not affect those subsidies. Movants incorrectly contend that the amount of the BHP subsidies is tied to the cost-sharing offset payments provided "to insurers." Mot. 18. To the contrary, BHP subsidies are calculated based on a formula that includes in part "the *cost-sharing reductions* … that would have been provided … *to eligible individuals* enrolled in standard health plans." 42 U.S.C. § 18051(d)(3)(A)(i) (emphases added). Significantly, the amount of "cost-sharing reductions" that "would have been provided" to "eligible individuals" is unaffected by whether insurers receive cost-sharing offset payments, because the statutory obligation to provide cost-sharing reductions is not contingent on insurers' receipt of those offset payments. *See* 42 U.S.C. § 18071(a)(2) & (c). Thus, a cessation of the cost-sharing offset payments to in-

surers would have no impact on the amount of a state's BHP subsidy. And the district court's injunction does not affect the calculation of cost-sharing reductions for eligible individuals, *see* J.A. 63-64, 101, so it cannot and does not affect the BHP subsidies.

* * *

At bottom, Movants' asserted injuries appear little more than a "smokescreen" for their "attempted vindication of [their] *citizens'* interests," which is decidedly improper in an action against the federal government. *Sebelius*, 656 F.3d at 269. If state standing could rest on such a thin reed, "each state could become a roving constitutional watchdog of sorts; no issue, no matter how generalized or quintessentially political, would fall beyond a state's power to litigate in federal court." *Id.* at 272.

2. Movants Cannot Establish Causation.

Movants also cannot establish that their purported injuries are "fairly … trace[able] to the challenged action." *Clapper*, 133 S. Ct. at 1147 (quotation marks omitted). As explained, Movants' claimed injuries stem from a fear that, in response to an unfavorable resolution of this appeal, insurers might make certain business decisions that could ultimately affect Movants and their residents in a hodge-podge of uncertain ways. Mot. 9-21. But as the Supreme Court has recognized, "[s]peculative inferences" are insufficient to "connect [Movants'] injury to

the challenged actions," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976), and in particular courts should not "endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. Thus, Movants' "highly attenuated chain of possibilities" is patently insufficient to establish causation. *Id.* at 1148-50.

3. Movants Cannot Establish Redressability.

Finally, Movants cannot establish that their purported injuries are "redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147 (quotation marks omitted).

First, Movants' participation in this appeal could not prevent their purported injuries. The "uncertainty" that Movants identify as a source of allegedly ongoing and imminent harm could be alleviated only by a final judgment *compelling* the Executive Branch to continue making cost-sharing offset payments. Not only is such a resolution of this appeal impossible (since no such relief has even been sought in the case), but Movants offer no reason to believe that intervention would lead to *any* resolution in time to alleviate the uncertainty that allegedly threatens imminent injury to Movants. In fact, the April through July window identified by Movants as critical for 2018 is virtually closed already. *See* Mot. 10.

Second, it is undisputed that the Executive Branch could cease making cost-sharing offset payments regardless of the pendency or outcome of this appeal. *Cf. Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Were the Abortion Law to be held

constitutional, Diamond could not compel the State to enforce it against appellees."). This case concerns whether the Executive Branch is *prohibited* from making those payments, not whether the Executive Branch is *required* to make them. Indeed, Movants have correctly conceded that "the Administration could unilaterally decide to … stop making CSR payments without any judicial resolution of this appeal." Mot. to Lift Abeyance Reply 6 (ECF No. 1678058) (June 2, 2017) ("Reply"). Movants contend only that "[i]f the Administration … abandoned this appeal, only intervenors such as Movants would have an interest in asking this Court to vacate the district court's decision." *Id.* But in those circumstances, a vacatur of the district court's decision would not redress Movants' purported injuries, because it would not prevent the Executive Branch from stopping the payments.[4]

Finally, intervention would not allow Movants to block a settlement of this appeal. "[A]n intervenor does not have the right to prevent other parties from entering into a settlement agreement and has no power to veto a settlement by other

[4] Movants argue that "vacatur would remove any basis for the Administration to rely on the district court's decisions here to resist a challenge … by the States or other parties." Reply 7. But the district court's decision is irrelevant to a hypothetical lawsuit by Movants or other third parties, since it does not bind non-parties. And even absent the injunction, a decision by the Executive Branch to cease making cost-sharing offset payments would be unassailable, because it is beyond dispute that Congress has never appropriated funds for such payments. The only asserted "permanent appropriation" for those payments is 31 U.S.C. § 1324 (Reply 5, 7), but that section is expressly inapplicable here, because it authorizes "[d]isbursements ... *only* for" specified tax refunds, not for cost-sharing offset payments. 31 U.S.C. § 1324 (emphasis added).

parties." 25 Fed. Proc., L. Ed. § 59:440 (2017) (footnotes omitted); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) (same); *In re Idaho Conservation League*, 811 F.3d 502, 515 (D.C Cir. 2016) ("Even an intervenor would lack the power to block the order on consent by withholding their consent."); *Lopez v. NLRB*, 655 F. App'x 859, 861 (D.C. Cir. 2016) (same). Accordingly, the House and the Executive Branch could settle this dispute – including on terms objected to by Movants – regardless of Movants' participation in this action.

B. MOVANTS DO NOT SATISFY THE REQUIREMENTS OF RULE 24(a).

Movants also do not satisfy any of the requirements of Rule 24(a) for intervention as of right.

1. The Motion to Intervene Is Not Timely.

To start with, the motion to intervene is untimely. "'[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.'" *United States v. British Am. Tobacco Austl. Servs., Ltd. ("BAT")*, 437 F.3d 1235, 1238 (D.C. Cir. 2006) (citation omitted). These factors all weigh against intervention.

As an initial matter, given the substantial amount of "time elapsed since the inception of the suit," *BAT*, 437 F.3d at 1238, the belated filing of this motion to intervene is inexcusable. Prospective intervenors must "take *immediate* affirmative steps to protect their interests … by way of an *immediate* motion to intervene." *NAACP v. New York*, 413 U.S. 345, 367 (1973) (emphases added). Indeed, the Supreme Court in *NAACP* "readily conclud[ed]" that a denial of intervention "was proper because of the motion's untimeliness" due to a five-week delay. *Id.* at 366.

In this case, Movants' delay is measured not in weeks, but in months and years. The House filed this action over two years ago, and the case has already proceeded to final judgment and appeal. Movants contend that their motion is timely because "[u]ntil recently, the Executive Branch vigorously defended its authority to make [cost-sharing offset] payments." Mot. 6. To the contrary, the possibility that the Executive Branch might adopt a different position was public knowledge by November 9, 2016.[5] Indeed, precisely because of that possibility, the House filed a motion in November 2016 to hold the appeal in abeyance, which this Court granted. Mot. to Hold Briefing in Abeyance (November 21, 2016) (ECF

[5] *See, e.g.*, Julie Rovner, *How A President Trump Could Derail Obamacare By Dropping Legal Appeal*, Nat'l Pub. Radio (Nov. 9, 2016), http://www.npr.org/sections/health-shots/2016/11/09/501421924/how-president-trump-could-derail-obamacare-by-dropping-legal-appeal; Josh Blackman, *The President-Elect Could Very Quickly Dismantle Obama's Legacy of Executive Action*, National Review (Nov. 10, 2016), http://www.nationalreview.com/article/442069/donald-trumps-supreme-court-could-dismantle-obamas-executive-actions.

No. 1647228). Movants, however, did not file their motion to intervene until *over six months* after the election. Movants' delay is fatal here, particularly given that intervention on appeal is permissible "'only in an exceptional case for imperative reasons.'" *Donovan*, 771 F.2d at 1552 (citations omitted).[6] Indeed, Movants do not cite a single case in which this Court has allowed a party to intervene on appeal after such a lengthy delay.

In any event, the remaining timeliness factors confirm that there are no "unusual circumstances warranting intervention." *NAACP*, 413 U.S. at 368. To start with, intervention is not necessary "as a means of preserving [Movants'] rights." *BAT*, 437 F.3d at 1238. This case concerns limits on the Executive Branch's authority; Movants' rights are "not on trial." *Donovan*, 771 F.3d at 1554; *see id.* at 1153-54 (finding that "no exceptional circumstances" supporting intervention because the court's determination of the "statutory limits on the [Secretary of Labor's] discretion" would only indirectly affect the prospective intervenor).

The "purpose for which intervention is sought," *BAT*, 437 F.3d at 1238, also precludes intervention, because Movants' participation would "unduly disrupt[]" the litigation "to the unfair detriment of the existing parties." *Roane v. Leonhart*,

[6] Movants suggest that it would have been "premature or speculative" to file their motion earlier. Mot. 6. But in light of the legislation currently pending in the Senate and the Administration's statements in support of it, Movants' arguments are more speculative now than ever.

741 F.3d 147, 151 (D.C. Cir. 2014). Movants admittedly seek to prevent a settlement and to force this Court to decide this appeal, even if the parties desire to resolve it. *See* Mot. 24. Even if the Court could theoretically adjudicate an appeal that the parties had chosen to settle – which it could not – courts have *denied* intervention where the participation of prospective intervenors would delay (much less prevent) a negotiated resolution. *See Amador Cty. v. U.S. Dep't of the Interior*, 772 F.3d 901, 905-06 (D.C. Cir. 2014) (collecting cases). The same result is appropriate here.

2. Movants Lack a Legally Protectable Interest in This Action.

Movants also lack a legally protected "interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). Movants mistakenly contend that "[t]he requisite interest exists if the movant faces a potential injury sufficient to establish Article III standing." Mot. 5. While Article III standing is necessary to satisfy this requirement, it is not sufficient. Instead, the requirement "that a proposed intervenor must have an interest 'relating to' the property or transaction at issue in the litigation" is "similar" to "prudential standing requirements." *Deutsche Bank*, 717 F.3d at 194 (emphasis omitted).[7] Thus, a "le-

[7] Movants cite *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015), for the proposition that Article III standing is sufficient. *Crossroads*, however, held only that intervenors need not satisfy the zone-of-interests test to establish standing because it "no longer falls under the prudential standing (*Continued…*)

gally protected interest" must be an interest "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (citation and quotation marks omitted); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) ("The rule impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one." (citations omitted)).

Movants have not identified – nor could they – any legally protected interest of theirs relating to this action. The district court's injunction operates only on the Executive Branch and concerns only cost-sharing offset payments to insurers. At most, Movants have shown that the ultimate disposition of this appeal might indirectly affect them, along with millions of other individuals and entities. But to the extent that Movants "wish to be heard on the specific question[s]" at issue here, "they are effectively seeking to enforce the rights of third parties (here, [the Executive Branch]), which the doctrine of prudential standing prohibits." *Deutsche Bank*, 717 F.3d at 194 (citation omitted); *see SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 160 (D.C. Cir. 1998) ("Because … appellants are not intended third par-

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umbrella." *Id.* at 319. *Crossroads* did not purport to overrule *Deutsche Bank*'s analysis of the "relating to" requirement, and in fact reaffirmed that prospective intervenors must satisfy *both* Article III *and* Rule 24(a)'s "relating to" requirement. *See id.* at 320.

ty beneficiaries, appellants have no legally protected interest in enforcing the terms of the consent decree."); *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 466 (5th Cir. 1984) (en banc) ("[A]n economic interest alone is insufficient, as … intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert.").

3. This Action Does Not Threaten to Impair Movants' Ability to Protect Their Interests.

This action also does not threaten to "impair or impede" Movants' "ability to protect" their interests. Fed. R. Civ. P. 24(a)(2). This requirement focuses on "practical consequences of denying intervention." *Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quotation marks and citation omitted). Strikingly, Movants' motion does not address this requirement. Because Movants have wholly failed to satisfy their burden on this point, *see Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981), the Court should deny intervention on this basis alone.

Movants were right to concede this point. *First*, unlike cases in which this Court has found the requisite impairment, *see, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *Fund for Animals*, 322 F.3d at 735, this action does not undermine Movants' ability to bring a separate suit to defend their interests. To be sure, Movants could not prevail in a separate suit, but that is not an impairment imposed by this action. Rather, it results from the fact

that Movants have no legally cognizable claim – much less a meritorious one – that the Executive Branch is obligated to make cost-sharing offset payments to insurers. *See* pp. 2-12 & n.4, *supra*.

Second, even if Movants had identified a future claim that they could actually bring, the district court's decision would not impair Movants' ability to assert it. Certainly, "stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right." *Neusse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). But district court decisions have no stare decisis effect. *See Brooks v. Grundmann*, 748 F.3d 1273, 1279 (D.C. Cir. 2014); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988).

Finally, "denying intervention here will not practically impair [Movants'] ability to protect their interests because … they could not block [a settlement] even if intervention were granted." *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 234 (D.D.C. 2011); *see* pp. 11-12, *supra*. Accordingly, the "practical consequences of denying intervention" here are nonexistent. *Fund for Animals*, 322 F.3d at 735.

4. Movants' Interests Are Adequately Represented by the Existing Parties.

Movants also fail to show that their interests will not be adequately represented by the Executive Branch. Movants incorrectly contend that their burden as to this requirement is "minimal." Mot. 8 (quotation marks omitted). When the

government "is a party to a suit involving a matter of sovereign interest," a "minimal showing … is not sufficient." *Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). Rather, the government "is presumed to represent the interests of all its citizens," and thus "[t]he applicant for intervention must demonstrate that its interest is in fact different from that of the [government] and that that interest will not be represented by the [government]." *Id.* (footnote omitted); *see North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921-22 (8th Cir. 2015) (same).

Movants fail to make such a showing here. Notably, this is not the sort of case where Movants are "seeking to protect a more narrow and parochial … interest not shared by the citizens" of the United States. *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) (quotation marks omitted); *see Fund for Animals*, 322 F.3d at 736. Movants' interest is instead "subsumed within the shared interest" of the millions of individuals and entities whose lives and businesses are affected by the ACA. *Dimond*, 792 F.2d at 193. Movants contend that they "have unique sovereign interests – in administering their insurance markets and safeguarding their residents – that the current parties cannot represent." Mot. 8. But, as explained, this action does not affect the BHPs administered by New York and Minnesota, and Movants do not have a "sovereign interest" in representing their residents in litigation against the federal government. *See* pp. 3-4, *supra*.

II. THE COURT SHOULD NOT GRANT PERMISSIVE INTERVENTION.

Finally, the Court should not grant permissive intervention. Federal Rule of Civil Procedure 24(b) provides that, "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact," and that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Movants make no meaningful effort to satisfy these requirements.

First, Movants do not have standing to intervene. *See* pp. 2-12, *supra*; *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) ("It remains an open question in this circuit whether Article III standing is required for permissive intervention." (alteration, quotation marks, and citation omitted)); *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998) (stating that intervenors need "an independent ground for subject matter jurisdiction"). *Second*, Movants' motion is untimely. *See* pp. 12-15, *supra*. *Third*, intervention would prejudice the parties. *See* pp. 14-15, *supra*.

Fourth, Movants have no "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Movants argue that they "have [a] claim or defense" that "that the House lacks standing to seek the injunction entered below, and that the Executive Branch has the statutory authority

to make CSR payments without congressional appropriations beyond what the Act provides." Mot. 23 (quotation marks and alterations omitted). But this is just a list of the Executive Branch's defenses to this lawsuit; Movants make no effort to explain why these defenses belong to them. *See Diamond*, 476 U.S. at 76 (O'Connor, J., concurring) ("The words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit").

Finally, even if Movants could satisfy the threshold requirements for permissive intervention, the Court should not exercise its discretion to grant such relief. Movants' stated purpose for intervention is to prevent the parties from resolving this dispute in order to force this Court to decide the merits of the appeal, allegedly because "extraordinary circumstances require this Court to review for itself the jurisdictional basis and validity" of the district court's decision.[8] Mot. 24. Movants have it backwards: "When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted." *Unit-*

[8] Movants also imply that the Court has an "independent obligation" to examine the district court's jurisdiction. Mot. 24 (quotation marks omitted). No such obligation exists, however, if the parties choose to settle. And the Court will address "a prospective intervenor's jurisdictional challenge only *after* [it] conclude[s] that [he] had the right to intervene." *Perciasepe*, 714 F.3d at 1328. The fact that a prospective intervenor seeks to raise a jurisdictional challenge in no manner supports his right to intervene. *See id.*

ed States v. House of Representatives of the U.S., 556 F. Supp. 150, 152 (D.D.C. 1983).

CONCLUSION

The Court should deny the motion for leave to intervene.

Respectfully Submitted,

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July 10, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, undersigned counsel certifies that this Opposition:

(i) Complies with the type-volume limitation of Rule 27(d)(2), as it contains 5,119 words; and

(ii) Complies with the typeface requirements of Rule 27(d)(1)(E) as it has been prepared with Microsoft Office Word 2016 and is set in Times New Roman, 14pt font.

/s/ *Kristin A. Shapiro*
Kristin A. Shapiro

July 10, 2017

CERTIFICATE OF SERVICE

I certify that on July 10, 2017, I filed one copy of the foregoing Opposition of the United States House of Representatives to the Motion to Intervene of the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, Pennsylvania, Vermont, and Washington, and the District of Columbia, via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Kristin A. Shapiro
Kristin A. Shapiro