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 (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer, U.S. District Judge)

RESPONSE IN OPPOSITION TO MOTION TO LIFT ABEYANCE TO CONSIDER STATES' MOTION TO INTERVENE

Appellee the United States House of Representatives ("House") respectfully submits this response in opposition to the States' motion to lift the abeyance (May 18, 2017) (ECF No. 1675842) to permit consideration of their motion to intervene (May 18, 2017) (ECF No. 1675816). The Court should deny the States' motion to lift the abeyance because there are compelling practical and policy reasons for con-

tinuing the abeyance, and because the States will not be prejudiced by deferring consideration of their motion to intervene during the abeyance period.[1]

ARGUMENT

As an initial matter, the continuation of the abeyance in this case is important to afford the parties time to seek a negotiated resolution in light of the new Administration and ongoing legislative efforts. Such abeyances are common in matters that are affected by changes in Presidential Administrations.[2] Consistent with the abeyance in this case, and as the parties stated in their joint status report filed last week, *see* Joint Statues Report (May 22, 2017) (ECF No. 1676460), the parties continue to

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[1] In light of the order continuing the abeyance pending further order of the Court, *see* Order at 1 (Mar. 2, 2017) (ECF No. 1664013), the House understands that its time to respond to the States' motion to intervene has not yet begun to run. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) ("An order granting a motion to hold a petition for review in abeyance *stays all proceedings in our court unless we direct otherwise*." (emphasis added)). Accordingly, the House does not intend to file a response to the motion to intervene at this time.

[2] *See, e.g.*, *California et al. v. Envtl. Prot. Agency*, No. 08-1178 (D.C. Cir.) (staying briefing for several months to permit President Obama to reconsider determinations promulgated by EPA under President Bush); *Envtl. Prot. Agency v. New Jersey*, *Pet. Cert.*, No. 08-512 (S. Ct.) (several extensions granted by the Supreme Court; petition for writ of certiorari voluntarily dismissed approximately two weeks after President Obama's election); *New Jersey v. Envtl. Prot. Agency*, No. 08-1065 (D.C. Cir.) (case held in abeyance for seven years, beginning shortly after President Obama's inauguration, to permit Administration to review regulations promulgated under President Bush); *Mississippi v. Envtl. Prot. Agency*, 744 F.3d 1334, 1341 (D.C. Cir. 2013), Clerk's Order No. 08-1200 (D.C. Cir. Mar. 19, 2009) (granting abeyance motion after President Obama's election to permit agency to review and reconsider Bush Administration rule).

discuss measures that would obviate the need for judicial determination of this appeal, including potential legislative action. Continuing the abeyance during these discussions "[n]ot only . . . protect[s] the expenditure of judicial resources, but it comports with [the Court's] theoretical role as the governmental branch of last resort." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 424 (D.C. Cir. 2007) (quotation marks omitted).

In light of the parties' ongoing discussions, the States' request to lift the abeyance is inappropriate. While the parties are endeavoring to amicably resolve this dispute, the terms of any such potential resolution are necessarily uncertain and subject to negotiation, and thus it is entirely speculative whether the Administration will ever take a position in this litigation that is at odds with the States' preferred position, and whether any portion of the implausible chain of future events hypothesized by the States will ever come to pass.[3] The Administration could ultimately decide to continue the prosecution of this appeal, or the parties could take legislative action that would eliminate the States' concerns, or they could reach a negotiated resolution that would moot this appeal entirely. In light of these realities, the States' motion to

[3] In their motion to intervene, the States contend that "President Trump has made multiple public statements threatening to abandon the positions previously advanced in this case." Mot. to Intervene at 6. The States do not dispute, however, that the Administration is still funding the cost-sharing offset payments during the pendency of this appeal, a practice that could continue throughout the abeyance period. The Administration has made clear that it is still considering its position with respect to this litigation.

intervene is entirely premature, and accordingly the Court should not lift the abeyance in order to consider that motion.

Moreover, the States have not established that they will be prejudiced by the continuation of the abeyance. Indeed, the principal purported harms identified by the States relate to "the district court's injunction go[ing] into effect." Mot. to Intervene at 9. That injunction is stayed pending appeal and will not go into effect during the abeyance period. *See* J.A. 63-101. Thus, the continuation of the abeyance period actually *prevents* the occurrence of the purported harms that the States claim to fear.[4]

In any event, lifting the abeyance would do nothing to forestall any purported harm to the States. It is undisputed that the Administration could cease making cost-sharing offset payments at any time if it so chose, regardless of the status or outcome of this appeal. Thus, even if the States were correct to fear that the Administration

[4] In their motion to intervene, the States briefly contend that "the uncertainty created by this litigation is already imposing . . . harm on the States." Mot. to Intervene at 19; *see also id.* at 19-21. But purported harm arising from "uncertainty" could not be alleviated by lifting the abeyance and granting intervention; it could be alleviated only by a final resolution of the dispute between the parties, and perhaps not even then. Moreover, the States offer no reason to believe either that lifting the abeyance would achieve a final resolution more rapidly than the parties' current negotiations or that an eventual judicial resolution of this appeal would alleviate their purportedly impending injuries. Particularly in light of the strong interests supporting continuation of the abeyance, the States' "mere uncertainty as to the validity" of the district court's ruling does not justify suspending the abeyance and undermining the parties' attempts at settlement. *Devia*, 492 F.3d at 427 (quotation marks and citation omitted).

may drop its defense of the cost-sharing payments and thereby "subvert the ACA, injuring States," Mot. to Intervene at 2, that would provide no justification for lifting the abeyance, because there is no outcome of this appeal that could yield a judgment barring the Administration from deciding to stop making cost-sharing payments. The only question at issue in this appeal is whether the Administration should be *enjoined* from making cost-sharing payments, not whether it should be *compelled* to make such payments. The States (even if they had standing, which they do not) could not intervene on appeal to assert a new cause of action for relief that has not previously been at issue in this case.

What is more, even if the abeyance were lifted and the States were permitted to intervene, they could not prevent the parties from settling this appeal, for the simple reason that "an 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 parties." 25 Fed. Proc., L. Ed. § 59:440 (footnotes omitted). As the Supreme Court has emphasized, "[i]t has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 528-29 (1986); *accord, e.g., Lopez v. NLRB*, 655 F. App'x 859, 861 (D.C. Cir. 2016) ("Only the parties to the dispute need to consent to settlement; no outside entity can

prevent them from resolving their differences."); *see also 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.").

At bottom, the States seek to lift the abeyance to force a premature decision on their motion to intervene, a motion that itself could not assuage the States' purported concerns even if it were granted. And they seek to inject themselves into this case in an attempt to compel this Court to adjudicate a legal dispute between the political branches of the federal government, a dispute that those branches are presently attempting to resolve through negotiation. Because there are compelling institutional interests supporting the abeyance, and no countervailing considerations of substance, the Court should reject the States' request.[5]

[5] If the Court does decide to order briefing on the motion to intervene, the House respectfully requests that it be granted 14 days from the date of such order in which to file its response.

CONCLUSION

The States' motion to lift the abeyance should be denied.

Respectfully submitted,

/s/ Thomas G. Hungar
THOMAS G. HUNGAR, D.C. Bar No. 447783
General Counsel
TODD B. TATELMAN, VA Bar No. 66008
Associate General Counsel
ELENI M. ROUMEL, NY Bar No. 3978863
Assistant General Counsel
KRISTIN A. SHAPIRO, D.C. Bar No. 1007010
Assistant General Counsel

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

Counsel for Appellee United States House of Representatives

May 30, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, undersigned counsel certifies that this Response in Opposition to Motion to Lift Abeyance to Consider States' Motion to Intervene:

(i) Complies with the type-volume limitation of Rule 27(d)(2), as it contains 1,461 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.

May 30, 2017

/s/ *Thomas G. Hungar*
Thomas G. Hungar

CERTIFICATE OF SERVICE

I certify that on May 30, 2017, I caused to be filed the foregoing Response in Opposition to Motion to Lift Abeyance to Consider States' Motion to Intervene via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar