No. 16-5202

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 and Human Services; JACOB J. LEW, in his official capacity as Secretary 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. As an initial matter, movants lack standing to intervene. This case concerns the constitutionality of the Executive Branch's cost-sharing offset payments, which are made *only to insurers*; it cannot affect insurers' legally binding obligation to provide cost-sharing reductions to insureds, which exists regardless of whether insurers receive offset payments. At its core, movants' standing argument reduces to their sheer speculation that the incoming Administration may allow the district court's injunction to go into effect, and that movant's insurer may respond to this hypothesized eventuality by withdrawing from the marketplace exchanges. Aside from movants' fatal failure to support this attenuated chain of speculation with evidence, the premise of their argument is fundamentally flawed. If movants' unsubstantiated conjectures about the intentions of the incoming Administration were correct, the Administration could cease making cost-sharing offset payments *regardless of the disposition of this appeal*. Indeed, movants concede as much. Because intervention cannot prevent the very harm that movants fear, they have no judicially cognizable interest in this litigation.

Movants also fail to satisfy any of the other requirements for intervention, let alone the heightened standard applicable to requests to intervene on appeal. The net effect of accepting movants' arguments would be that whenever government

litigation arguably might have a widespread impact, any of the millions of possibly affected individuals could intervene to second-guess the government parties' litigation strategy or objectives. Even more disturbing, movants seek to obstruct a potential settlement of an inter-branch dispute. The judicial power is not properly wielded to fan the flames of a controversy between the political branches that those branches desire to resolve. For those and numerous other reasons, intervention should be denied.

ARGUMENT

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

Movants are not entitled to intervene as of right in this appeal. 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.

Movants "bear[] the burden of establishing [the] existence [of standing]," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998), by establishing three elements: injury in fact; traceability; and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). They fail every requirement.

1. Movants Cannot Establish Injury in Fact.

Movants cannot demonstrate that they have suffered an injury in fact that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Their alleged future injury is too speculative and attenuated to satisfy Article III's rigorous injury-in-fact requirement, and is merely a generalized grievance insufficient to constitute particularized harm that is personal to movants.

a. As an initial matter, movants' theory of harm is entirely speculative. It is undisputed that movants would suffer no economic loss as a direct result of the hypothetical outcome they seek to forestall, namely, a resolution of the appeal that permits the district court's injunction to take effect. Movants claim only that they may suffer an indirect and conjectural economic impact at some unknowable future time if those hypothetical events occur. But regardless of the outcome of this ap-

peal, federal law mandates that insurers must continue to provide movants – and millions of similarly situated insureds – the cost-sharing reductions that movants fear to lose.

The Patient Protection and Affordable Care Act ("ACA") requires insurers that "offer[] qualified health plans through ACA Exchanges to reduce deductibles, coinsurance, copayments, and similar charges for eligible insured individuals enrolled in their plans." J.A. 68; *see* 42 U.S.C. §§ 18022(c)(3)(A)(i); 18071. Separately, the ACA authorizes the Department of Health and Human Services ("HHS") to make cost-sharing offset payments *to insurers* to offset costs they incur in providing cost-sharing reductions to policyholders. 42 U.S.C. §§ 18071(c)(3); 18082(c)(3). This appeal presents the question whether HHS is violating the Constitution by making those payments *to insurers*. J.A. 63-64. It does not involve the rights and benefits of policyholders under the ACA; as movants acknowledge, they do not receive any of the payments to insurers that are the subject of this litigation. *See* Mot. 13, 18.

Regardless of the disposition of this appeal, movants will remain entitled to receive the same cost-sharing reductions they now enjoy. *See, e.g.*, Appellant Br. 7-8 ("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."); J.A. 69, 142; 42 U.S.C. § 18071(c)(2); Families USA Amicus Br. 15-16 ("If the House's inter-

pretation prevails … insurers would still be required to provide cost-sharing reductions to eligible consumers.") (footnote omitted); Am. Health Ins. Plans ("AHIP") Corrected Amicus Br. 21. Even movants recognize that insurers have an "obligation to advance the cost-sharing reductions" in "the absence of any reimbursement." Mot. 13.

Thus, movants' alleged injury reduces to nothing more than their own conjecture of attenuated future harm: *If* the incoming Administration allows the injunction to take effect, and *if* Congress does not appropriate funds for HHS to make cost-sharing offset payments, then insurers *might* seek to withdraw from the ACA exchanges. *See* Mot. 12-18. But movants offer no evidence to substantiate their fear that immediate reinstatement of the injunction is a plausible outcome of settlement negotiations, and the available evidence in fact contradicts it. *See* Opp. to Mot. to Suspend Abeyance ("Opp.") 4.

Likewise, movants offer no evidence that the hypothetical reinstatement of the injunction would cause their insurer, Kaiser Permanente, to withdraw from the California Exchange – one of the biggest ACA exchanges in the Nation – potentially breaching millions of insurance agreements and violating federal and state law.[1] Nor do movants cite any evidence establishing that Kaiser will decide not to

[1] It is unlikely that any insurer would breach its agreements with HHS and millions of insureds by withdrawing mid-year. All marketplace exchange participants must (*Continued…*)

offer policies on the California Exchange in 2018. Notably, the health insurance industry's trade association (of which Kaiser is a member) suggests that insurers might respond to a loss of cost-sharing offset payments by raising premiums in 2018, thereby triggering corresponding increases in the ACA's premium subsidies – which are unaffected by this litigation. *See* AHIP Amicus Br. 17-19.

A "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 133 S. Ct. at 1147 (quotation marks and citation omitted). Thus, it is well-established that attenuated claims of harm, reliant upon a speculative series of future events involving the decisions of third parties, are insufficient. *See Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 692 (D.C. Cir. 2015) (en banc) ("When parties 'only aver that any significant adverse effects … "may" occur at some point in the future, they fail[] to show the actual, imminent, or "certainly impending" injury required to establish standing.'") (citation omitted); *Clapper*, 133 S. Ct. at 1150 (Court will not "abandon" its "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

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provide coverage under silver and gold plans as a condition of participating in the exchanges. *See* 42 U.S.C. § 18021(a)(1)(C)(ii); 45 C.F.R. § 156.200(c). If Kaiser attempted to terminate its silver plan policies mid-year, it would have to *completely* withdraw from the California Exchange, risking violations of federal and state law and triggering policyholder lawsuits. Insurers cannot stop providing cost-sharing reductions or raise their premiums during the policy term. *See* AHIP Amicus Br. 22-23; 42 U.S.C. § 18071(a)(2).

Movants have not even come close to establishing a "certainly impending" injury here. This Court requires movants to "support each element of [their] claim to standing 'by affidavit or other evidence.'" *Sierra Club v. EPA*, 292 F.3d 895, 195 (D.C. Cir. 2002) (citation omitted). Movants have offered *no* evidence to substantiate their speculative fears about the hypothetical resolution of this appeal and Kaiser's hypothetical response. And this Court has already held that a theory of injury premised on "the prospect that [litigants] would enter into" an "unfavorable settlement" is "hopelessly conjectural" and thus cannot support intervention. *Deutsche Bank*, 717 F.3d at 193. Plainly, movants' mere "'[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (citation omitted).

b. Movants also lack cognizable harm because their alleged injury is neither concrete nor particularized. Rather, movants' hypothesized harms would be shared by millions of Americans and the entire health insurance market. Mot. 4 ("approximately 5.9 million people" receive cost-sharing reductions); Mot. 12 ("inevitable destabilization of the marketplace exchanges"); Mot. 3 ("devastating consequences" for "individuals who receive [cost-sharing] reductions" and "the Nation's health insurance and health care systems"). "A litigant 'raising only a generally available grievance about government' … and 'seeking relief that no more directly and tangibly benefits him than it does the public at large' [] 'does not state an Arti-

cle III case or controversy.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (citation omitted). Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Id.* at 2663. For this reason as well, movants lack injury in fact.[2]

2. Movants Cannot Establish Causation.

Movants also cannot establish that their purported injury is "fairly … trace[able] to the challenged action" and not the "result of some independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quotation marks and citation omitted). Movants' claimed injury stems from a fear of potential economic harm that might theoretically result from business decisions that they suspect their insurer could theoretically take in response to a hypothesized litigation outcome. Their theory of harm thus rests on wholly unsubstantiated assumptions about possible independent decisions by Kaiser and the incoming Administration. Such a "highly attenuated chain of possibilities" is patently insufficient to establish causation. *Clapper*, 133 S. Ct. at 1148-50; *see Sierra Club*, 292 F.3d at 900, 902. As the Supreme Court has recognized, "[s]peculative inferences" are insufficient to "connect [movants'] injury to the challenged actions," *Simon v. E. Ky. Welfare*

[2] Movants "seek to *adjudicate* the rights of the original parties, in the face of the possible joint decision to dismiss this appeal." Mot. 23. But "'a litigant must assert his or her own legal rights and interests.'" *Hollingsworth*, 133 S. Ct. at 2662-63 (citation omitted).

Rights Org., 426 U.S. 26, 45 (1976), and accordingly courts should not "endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150.

3. Movants Cannot Establish Redressability.

Movants also cannot establish redressability. "The redressability inquiry poses a simple question: 'If [movants] secured the relief they sought, … would [it] redress their injury?'" *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590 (D.C. Cir. 2006) (citation omitted). The answer here is plainly "no."

Here, movants seek to intervene "to defend their interest in continued ... cost-sharing" offset payments to insurers by preventing the incoming Administration from settling this appeal. Mot. 5. But intervention would not enable movants to prevent the result they fear, because it is undisputed that the incoming Administration could cease making cost-sharing offset payments, regardless of the pendency of this appeal. *See* Mot. 5 n.4.

In fact, intervention would not even allow movants to forestall a settlement. "[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 parties." 25 Fed. Proc., L. Ed. § 59:440 (footnotes omitted); *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) ("It 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."); *Lopez v. NLRB*, 655 F. App'x 859, 861 (D.C. Cir. 2016). Intervention cannot give movants the relief they seek, so redressability is lacking.

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

Even if movants had standing, they would not be entitled to intervention as of right, because they do not satisfy any of the requirements of Rule 24(a).

1. The Motion to Intervene Is Not Timely.

As a threshold matter, 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 to the "time elapsed since the inception of the suit," *id*., the House filed this action over two years ago, and the case has already proceeded to final judgment and appeal. Movants contend that "[t]he potential inadequacy of the representation here" arose only "when the House filed its motion to hold the case in abeyance." Mot. 7-8. Even if that were correct – and it is not, *see* pp. 18-20, *infra*

– the asserted inadequacy arose on November 9, 2016, when the potential impact of the election on this appeal became readily apparent.[3] Movants did not file their motion to intervene until six weeks later. That delay 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). The prospective intervenor in *NAACP* waited nearly five weeks to file its motion, so the Supreme Court "readily conclud[ed]" that denial of intervention "was proper because of the motion's untimeliness." *Id.* at 366. Similarly, here, movants failed to take "immediate affirmative steps," instead waiting six weeks before acting.

Movants' undue delay is fatal here, given this Court's recognition that intervention on appeal is permissible "'only in an exceptional case for imperative reasons.'" *Donovan*, 771 F.2d at 1552 (citations omitted). In any event, the remaining timeliness factors confirm that there are no "unusual circumstances warranting intervention" here. *NAACP*, 413 U.S. at 368.

To start with, intervention is not necessary "as a means of preserving the applicant's rights," *BAT*, 437 F.3d at 1238, because this case (unlike those relied up-

[3] *See, e.g.*, Julie Rovner, *How A President Trump Could Derail Obamacare By Dropping Legal Appeal*, Nat'l Pub. Radio (Nov. 9, 2016), http://tinyurl.com/NPRBurwellArticle; Josh Blackman, *The President-Elect Could Very Quickly Dismantle Obama's Legacy of Executive Action*, National Review (Nov. 10, 2016), http://preview.tinyurl.com/NationalReviewBurwellArticle.

on by movants) cannot adjudicate any of movants' rights. *Compare Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) (case had an "undeniable impact on the Government's conduct of foreign policy"), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2008); *Smoke v. Norton*, 252 F.3d 468, 469-70 (D.C. Cir. 2001) (case involved adjudication of whether intervenors were officers of tribal government). In *Donovan*, "no exceptional circumstances supported by imperative reasons" justified intervention, despite the movant's claim that the outcome of the case could indirectly affect "its entitlement to receive federal funds." 771 F.2d at 1553. This Court explained that "the real party in interest" was "the Secretary [of Labor]," because the case involved "statutory limits on the Secretary's discretion." *Donovan*, 771 F.2d at 1553. Similarly, this case involves constitutional limits on the Executive Branch's authority; movants' rights are "not on trial." *Id.* at 1554.

The "purpose for which intervention is sought," *BAT*, 437 F.3d at 1238, also precludes intervention, because movants' stated goal – to prevent the incoming Administration from settling this dispute – is improper and would "unduly disrupt[]" the litigation "to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Even assuming, arguendo, that movants could obstruct a settlement, courts have *denied* intervention where the participation of prospective intervenors would delay (much less prevent) resolution of

the action. *See Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 905-06 (D.C. Cir. 2014) (collecting cases). Indeed, "[l]itigation will have no end if every time the parties resolve amicably (or drop) a point of contention, someone else intervenes to keep the ball in the air." *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990).

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

As shown above, movants have alleged only a generalized and conjectural economic injury, premised on numerous contingencies, and have failed to substantiate their allegations, so they lack Article III standing. But even if they could satisfy Article III, movants would still be unable to establish a legally protected "interest relating to the property or transaction that is the subject of the action," as required by Rule 24(a). *See Deutsche Bank*, 717 F.3d at 194-95 (rejecting suggestion that Article III standing automatically satisfies the "legally protected interest" requirement).

A "legally protected interest" is not merely *any* interest in the litigation – rather, it must be an interest "of such 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) (emphasis added); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). Here, the district court's injunction operates only on the

Executive Branch, and it concerns cost-sharing offset payments to insurers, not movants' rights to receive cost-sharing reductions.

Movants contend only that they might suffer indirect consequences if the injunction were reinstated. But that hypothesized litigation outcome would operate only on defendants; any potential impact on movants could occur only by virtue of independent actions by third parties, not "the direct legal operation and effect of the judgment."

A legally protected interest must also be "'something more than an economic interest.'" *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) (citation omitted); *see Med. Liab. Mut. Ins. Co. v. Alan Curtis, LLC*, 485 F.3d 1006, 1008-09 (8th Cir. 2007) (same). Similarly, "[a]n interest that is 'contingent upon the occurrence of a sequence of events before it becomes colorable' is also not sufficient to satisfy Rule 24(a)(2)." *Med. Liab.*, 485 F.3d at 1008 (quotation marks and citation omitted). Movants fail on both counts. Their only asserted interest in this appeal is unquestionably "contingent upon the occurrence of a sequence of events," and it is purely economic in nature, rather than one "derive[d] from a legal right" at issue in the case. *Mt. Hawley*, 425 F.3d at 1311. That is precisely the type of indirect economic interest that courts routinely reject as a basis for intervention. *See, e.g., Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 221, 225 (3d Cir. 2005) (no legally protected interest where judgment

would have no "immediate, adverse effect" on potential intervenors); *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 a legally protectable interest is required for intervention under Rule 24(a)(2), and such intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action."); *Parker v. John Moriarty & Assocs.*, 2016 WL 7046635, at *3 (D.D.C. Dec. 2, 2016) (movant's indirect economic interest insufficient to establish a legally protected interest); *see also Donaldson v. United States*, 400 U.S. 517, 530-531 (1971) (no legally protected interest where proposed intervenor had no direct, proprietary interest in financial records relating to him).

Finally, as discussed, movants assert nothing more than a generalized grievance, shared by millions of policyholders. "It is settled beyond peradventure … that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998).

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 omitted). Movants contend

that if they cannot intervene, "[i]t is not clear that [they] would have *any* future opportunity to contest the district court's interpretation of the statutory provisions at issue," and that, "even if such an opportunity were available," the district court's decision "would have persuasive weight with whatever court were to hear [their] claims in the future." Mot. 19-20. This argument misses the mark.

First, even if movants might not have "*any* future opportunity" to contest the district court's decision, Mot. 19, that is not an impairment imposed by this action, but rather one resulting from the fact that movants have no cognizable legal claim that necessitates adjudication of the constitutional limits of the Executive Branch's authority to make cost-sharing offset payments to insurers. This case accordingly stands in stark contrast to those relied upon by movants, where the disposition of the case could affect future litigation that the prospective intervenor might bring. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015) ("An adverse judgment in the district court would impair Crossroads' defense in a new proceeding …."); *Fund for Animals*, 322 F.3d at 735 ("Regardless of whether NRD could reverse an unfavorable ruling by bring a separate lawsuit, there is no question that the task of reestablishing the status quo if the Fund succeeds in this case will be difficult and burdensome.").

Second, even if movants had identified a future claim that they could actually bring, the "persuasive weight" of the district court's decision would not practi-

cally impair movants' ability to assert such a claim, because the decision below is not binding on movants and would not prevent them from relitigating the question presented in a different action. *Neusse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). To be sure, "stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right." *Id.* at 702. But district court decisions have no stare decisis effect. And even if they did, where, as here, "a would-be intervenor says that it fears only the stare decisis effect of a decision[,] … the desire to block a settlement is never a legitimate reason to intervene, because if the case settles the possibility of an authoritative appellate decision vanishes, and with it the only substantial concern of the putative intervenor." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (emphasis omitted).

Movants also argue that the "significant negative consequences" they would suffer "in the period in between the injunction taking effect and the institution of some further action" satisfy the impairment requirement. Mot. 20-21. Movants do not identify what that "further action" might be, however, so they have failed to establish that they could not prevent "significant negative consequences" in that action, such as by seeking a preliminary injunction. Moreover, movants concede that the incoming Administration may cease making cost-sharing offset payments irrespective of any injunction in this action. *Id.* at 5 n.4.

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). As noted above, the motion to intervene is premised on movants' misconception that, as intervenors, they could prevent the incoming Administration from settling this case. *See* pp. 9-10, *supra*. Because intervenors possess no such right, 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 incoming Administration. Movants contend that their burden as to this requirement is "minimal." Mot. 22 (quotation marks omitted). Not true. When the government "is a party to a suit involving a matter of sovereign interest," a "minimal showing that the representation may be inadequate 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 state and that that interest will not be represented by the state." *Id.*; *see also North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 922

(8th Cir. 2015) (same); *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (same).

Movants fail to make such a showing here. Notably, this is not the sort of case where movants are "seeking to protect a 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 who have purchased health insurance through the marketplace exchanges. *Dimond*, 792 F.2d at 193.

Movants' sole argument is that "the House has represented that it and the incoming Administration's officials are 'discussing potential options for resolution' of this appeal." Mot. 22 (citation omitted). But movants offer no evidence of *the terms* on which the incoming Administration might settle this case, and they therefore fail make "a strong showing of inadequate representation" that overcomes the presumption of adequacy. *Stenehjem*, 787 F.3d at 922 (quotation marks omitted).

At best, movants have shown that they might disagree with the incoming Administration's approach to this case. Prospective intervenors, however, cannot "rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives" of the Executive Branch. *Stenehjem*, 787 F.3d at 922. Indeed, a contrary holding would permit any one of millions of individuals purport-

edly affected by the government's litigation to intervene any time they might disapprove of its objectives. Permitting intervention in such circumstances "would turn the court into a forum for competing interest groups, submerging the ability" of the government to control its litigation. *Bethune Plaza*, 863 F.2d at 531.

II. THE COURT SHOULD NOT GRANT PERMISSIVE INTERVENTION.

Finally, the Court should not grant movants permissive intervention in this action. 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' argument in favor of permissive intervention is largely redundant of their argument in favor of intervention as of right, and it fails for essentially the same reasons.

First, movants do not have standing to intervene in this action. *See* pp. 3-10, *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 and quotation marks 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

did not file a timely motion to intervene. *See* pp. 10-13, *supra*. *Third*, permitting intervention would prejudice the parties. *See* pp. 12-13, *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 seemingly acknowledge as much, stating instead that they "seek to adjudicate the rights of the original parties." Mot. 23 (emphasis omitted). Movants cite no authority for the proposition that seeking to assert the rights of a litigant satisfies Rule 24(b)'s requirement that the *intervenor* "ha[ve] a claim or defense that shares with the main action a common question of law or fact." Indeed, such an interpretation would render the requirement meaningless, because the claims and defenses in the main action will necessarily share a common question of law or fact with themselves.

Finally, even if movants could satisfy the threshold requirements for permissive intervention, the Court should not exercise its discretion to grant such relief at this late stage of the proceedings. Movants' stated purpose for intervention is to prevent the Executive Branch from settling this case. Assuming arguendo that defendants chose to settle this action but that movants could obstruct that settlement, the result would be that this Court would decide an inter-branch dispute that no longer exists. That is not an appropriate role for the Court, and the Court should reject movants' attempt to set a precedent that any one of millions of individuals

purportedly affected by government litigation may intervene whenever they disagree with its objectives.

CONCLUSION

The Court should deny the motion for leave to intervene.

Respectfully Submitted,

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January 6, 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 4,972 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 Shapiro*
Kristin Shapiro

January 6, 2017

CERTIFICATE OF SERVICE

I certify that on January 6, 2017, I filed one copy of the foregoing Opposition of the United States House of Representatives to the Motion for Leave to Intervene 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 Shapiro
Kristin Shapiro