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 and Human Services; and 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

U.S. District Judge Rosemary M. Collyer
Case No. 1:14-cv-01967

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

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MISCELLANEOUS

INTRODUCTION

Weeks ago, the House represented that there was "a significant likelihood of a change in Administration position," including consideration of "whether withdrawal or settlement of the appeal is warranted." House Abeyance Motion 3-4. Based on that representation, this Court stayed the briefing schedule.

The House now says it is "sheer speculation" that the President-Elect would change the Executive's position, withdraw the appeal, and allow the injunction to take effect. The House's new view, adopted after the filing of the Motion to Intervene, lacks credibility.

As a legal matter, Movants' standing does not turn on the President-Elect's intentions; Movants' need only demonstrate that the incoming Administration "may" fail adequately to represent their interests—a low bar plainly satisfied here.

A. Movants Have Standing.

Because of the inevitable injuries they will suffer if $7 billion in cost-sharing reimbursement payments are removed from the Affordable Care Act exchanges, Movants have Article III standing.

Parties who benefit from government action have standing to defend that government action. *E.g.*, *Crossroads Grassroots Policy Strategies v.*

FEC, 788 F.3d 312, 317 (D.C. Cir. 2015). Movants are beneficiaries of the cost-sharing reductions, which enable them to afford necessary medical care. Removing those reductions would subject Movants to greater expenses—and the inevitable consequence of enjoining the reimbursement payments will be the elimination of those cost-sharing reductions.

1. The House responds that Movants "assert nothing more than a generalized grievance, shared by millions of policyholders." Opp. 15.

Movants' injury is also suffered by others who, like them, are enrolled in health-insurance plans that provide cost-sharing reductions. But standing is never "found wanting because an injury has been suffered by many." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974); *see also United States v. SCRAP*, 412 U.S. 669, 687 (1973) ("[S]tanding is not to be denied simply because many people suffer the same injury.").

2. Not only is this harm particularized, it is also "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). In mischaracterizing this injury as speculative, the House fabricates a list of supposedly-requisite events: "*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." Opp. 5.

First, to establish injury-in-fact, Movants need not prove that the President-Elect and the House will permit the injunction to take effect. "For standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor." *Crossroads*, 788 F.3d at 318. If the injunction sought by the House takes effect, Movants will be harmed.

Second, whether Congress might consider legislation to dull the pain of the injunction is irrelevant. The mere possibility that an injury might be alleviated by unrelated future events does not deprive a claimant of standing. *Id.*

Third, Movants plainly would suffer injury-in-fact from entry of the injunction. Even if the $7 billion in unreimbursed cost-sharing reductions would continue for 2017—which they plainly would not, as discussed below—the House does not attempt to dispute that insurers would refuse to provide coverage in 2018, and Movants therefore would lose the health insurance that otherwise would be available under the ACA. Motion 16-17.

The House's blithe assertion that insurers would stand by and absorb $7 billion in loses for 2017 beggars reality: Movants would lose the

cost-sharing reductions in 2017; the only question is how they would be lost. As the Government recognizes, "[t]here is no doubt that allowing the injunction to take effect would cause major disruption of insurance markets." U.S. Opp. 3.

Insurers would either terminate coverage, as permitted by the contract provisions; or obtain an injunction against the cost-sharing payment obligation on the ground that the $7 billion in uncompensated payments constitutes a taking. Motion 13-15; Emergency Motion Reply 5.[1] One insurance company recently explained the harm to policyholders such as Movants, stating that it will "shift customers into less robust coverage," such that individuals making less than $18,000 a year "would go from paying nothing to see a doctor or get a prescription, to having a $1,500 deductible before most of the insurance kicks in." Paul Demko & Adam Cancryn, *Obamacare Repeal's Doomsday Scenario*, Jan. 9, 2017, http://www.politico.com/story/2017/01/obamacare-repeal-doomsday-

[1] This Court has upheld standing based on an identical argument that the intervenor would suffer consequential economic harm from government action directed at other parties. In *Fund for Animals, Inc. v. Norton*, a Mongolian government agency was permitted to defend the government's decision not to list Mongolian argali sheep as an endangered species, because "[t]he threatened loss of tourist dollars [from a decline in tourism due to the absence of sheep], and the consequent reduction in funding for Mongolia's conservation program, constitute[d] a concrete and imminent injury." 322 F.3d 728, 733 (D.C. Cir. 2003).

233335. (The House misrepresents the position of the health-insurance industry. *Compare* House Opp. 5, 6 & n.1, *with* AHIP Amicus Br. 16-18 (explaining that many insurers will leave the marketplace or increase premiums)).

3. The redressability requirement is plainly satisfied. If the District Court's decision were reversed, the cost-sharing reduction payments would continue, preserving Movants' access to affordable health care.

The House argues that Movants' injury is not redressable because an intervenor cannot prevent settlement of an appeal. House Opp. 9. *First*, the redressability element is not concerned with the likelihood of settlement; rather, the question is whether a "decision favorable to [the party] would prevent the loss from occurring." *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003). A decision reversing the district court's injunction means Movants could continue participating in the marketplace on the terms they presently enjoy.

Nor does the fact that the incoming Administration "could cease making cost-sharing offset payments[] regardless of the pendency of this appeal" negate Article III standing. *See* House Opp. 9. Possible future legislation or other Administrative action is irrelevant. *Fund for Animals*,

322 F.3d at 733. (And that is especially true here, because the hypothetical Administrative action itself would be subject to legal challenge, a challenge that would be precluded if the injunction here were to take effect, because the Administration would rely on the injunction to insulate its decision from review. Motion 19–21.) All that matters under Article III is whether the Movants' "requested relief" would be redressed by a favorable decision—which it clearly would. *Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003).

Second, even if the possibility of future settlement by the parties were relevant to standing, the House's own cases demonstrate that settlement would not prevent Movants from continuing to litigate the case. *See, e.g.*, *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("A court's approval of a consent decree between some of the parties … cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor.").[2]

[2] The House relies on *Lopez v. Nat'l Labor Relations Bd.*, 655 F. App'x 859, 861 (D.C. Cir. 2016), but that decision rested on the NLRB's role as "exclusive" prosecutor of unfair labor practices. *See Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456 (D.C. Cir. 1991) (permitting intervenors to defend regulation on appeal notwithstanding agency's decision not to appeal because intervenors "could benefit from an appellate decision

B. Movants Satisfy The Requirements For Intervention As Of Right.

1. The motion is timely.

The key timeliness consideration is whether existing parties will be unfairly prejudiced. *Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014); Motion 8-9. There is no prejudice here. "The only result achieved by denial of the motion to intervene in this case [would be] the effective insulation of the District Court's exercise of jurisdiction from all appellate review." *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004); Motion 9.

Even if Rule 24 mandated a particular timeline, it would be satisfied. This Court has allowed intervention when the intervenors waited longer than six weeks before filing their motions. *Acree*, 370 F.3d at 46-47, 50 (ten weeks); *Fund for Animals*, 322 F.3d at 735 (seven weeks).

2. Movants have a legally protectable interest.

As explained (at 1-6), Movants will be harmed if the District Court's injunction takes effect. That satisfies Rule 24(a)'s second requirement, which "is primarily a practical guide to disposing of lawsuits by involving

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reversing the district court's interpretation of the Act and upholding the current regulation").

as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

First, the House's suggestion (Opp. 13) that *Deutsche Bank* overruled this Court's holding that Article III standing is sufficient to satisfy Rule 24's interest requirement, *see Fund for Animals*, 322 F.3d at 735, is simply wrong. *See Crossroads*, 788 F.3d at 320 (reaffirming—post-*Deutsche Bank*—that "the standards for constitutional standing and the second factor of the test for intervention as of right are the same").

Second, the House cites out-of-Circuit cases for the proposition that an economic interest is insufficient to support intervention. Opp. 14-15. But *this* Court's precedents hold that an economic interest—even an indirect one—*is* sufficient. *Fund for Animals*, 322 F.3d at 733-35 (described in note 1, *supra*); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (holding that insurer had sufficient interest where—if the plaintiffs' constitutional challenge to a statute succeeded—insurer would be required to cover additional accident damage that it could not recoup through increased premiums).

Finally, the House reprises its generalized-grievance argument. Opp. 13. But as explained (at 2), an injury does not become a nonjusticiable grievance just because it is shared by many.

3. Movants' interest is threatened by this action.

The House cites no authority in support of its surprising claim that Movants' ability to intervene *as a defendant* turns on whether they could bring a separate action challenging the District Court's injunction. And for good reason: this argument gets the logic of Rule 24 exactly backwards. The 1966 amendment adding the "impair or impede" language was "obviously designed to liberalize the right to intervene in federal actions." *Nuesse*, 385 F.2d at 701. As the advisory committee notes make clear, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a) advisory committee's note to 1966 amendment.

Thus, when this Court's decisions say that an intervenor's interest may be impaired "even where the possibility of future challenge … remain[s] available," *NRDC v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977), it is *a fortiori* also true that that interest can be impaired where there is *no* possibility of future challenge. *Jones*, 348 F.3d at 1018 (rejecting argument that intervenors need a cause of action).

The Ninth Circuit has explicitly recognized as much, having had "little difficulty concluding" that proposed intervenors' interests in

defending a statute would be impaired because they "ha[d] no alternative forum where they [could] mount a robust defense" of that law. *California* ex rel. *Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006). Similarly, district courts in this Circuit routinely allow intervention in FOIA cases: an adverse outcome results in disclosure of information, and intervenors cannot defend their interests in separate proceedings. *See Gov't Accountability Project v. FDA*, 181 F. Supp. 3d 94, 96 (D.D.C. 2015); *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 278-79 (D.D.C. 2014).

Regardless of whether Movants could in theory bring separate actions—perhaps under the general provisions of the Administrative Procedure Act—they will not be able to unring the bell and reverse the collapse of exchange-based affordable healthcare that the District Court's injunction would trigger, if they are barred from intervening.[3]

4. Movants' interests will not be adequately represented.

The House suggests that it and the incoming Administration will adequately represent Movants' interests.

[3] The House is wrong (Opp. 16-17) that only binding appellate precedent can supply the impairment of a future action that Rule 24(a)(2) contemplates. Persuasive authority is sufficient. *Crossroads*, 788 F.3d at 320. That is especially true here, where the question is a novel one that no other courts have addressed.

It first submits that the showing required for the inadequacy of representation inquiry—which, according to the Supreme Court, is only that the representation "may be" inadequate, and "should be treated as minimal," *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)—ought to be heightened when the government is a litigant. Opp. 18. The House cites a 1979 case for that proposition, overlooking that in the intervening thirty-eight years, this Court has made clear "that [it] look[s] skeptically on government entities serving as adequate advocates for private parties." *Crossroads*, 788 F.3d at 321 (applying the "minimal" standard where government entity was the existing party); *see also Fund for Animals*, 322 F.3d at 736 & n.9 (explaining that "we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors," and collecting cases).

But the incoming Administration's representation of Movants' interests will be inadequate under any standard. The House has represented that it and the incoming Administration may withdraw or settle this appeal. *See* page 1, *supra*. Withdrawal of the appeal would result in the District Court's injunction taking effect, and it is hard to imagine a settlement acceptable to the House that would not do the same.

Finally, the House invokes a parade of horribles, suggesting that if intervention is allowed, the Court will turn "into a forum for competing interest groups" who disagree with the government. Opp. 19-20. But this Court consistently allows intervention by private parties in environmental and other government cases, and the House's hypotheticals have not been realized.

The circumstances of this case—in which an incoming Administration may collusively settle a suit with a coordinate branch of government, invoking the Judicial Power to implement a political agreement—are rare. Indeed, the House has it precisely backward in asserting that intervention is inappropriate because this case involves a dispute between the Branches: intervention is particularly *appropriate* to avoid the use of a judicial injunction to divert accountability away from the Executive and Congress for a policy decision that they could implement on their own—but may wish to avoid for fear of the political consequences from the resulting "major disruption of insurance markets" (U.S. Br. 3).[4]

[4] Movants do not face an "extraordinarily high" burden to intervene on appeal. Opp. 2-3 (citing *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985)). In *Donovan*, "the positions of all interested parties [were] fixed" by the proceedings below. *Id.* at 1553. Here, the

CONCLUSION

The motion to intervene should be granted.

January 11, 2017

Respectfully submitted,

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Executive's position is *not* fixed—which is the reason for the motion to intervene.

CERTIFICATE OF PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), movants certify that:

Except for Gustavo Parker and La Trina Patton, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Defendants-Appellants and the Brief for *Amici Curiae* Economic and Health Policy Scholars.

January 11, 2017 /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for movants certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 2,489 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

January 11, 2017 /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that that on January 11, 2017, the foregoing was served electronically via the Court's CM/ECF system upon all counsel of record.

January 11, 2017 /s/ Andrew J. Pincus
Andrew J. Pincus