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 BRIEF IN SUPPORT OF EMERGENCY MOTION TO SUSPEND ABEYANCE FOR LIMITED PURPOSE OF ADJUDICATING THE MOTION TO INTERVENE

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The House of Representatives' opposition confirms that this Court should grant Intervenor-Movants' emergency motion: there is a substantial risk that settlement of this action by the House and the new Administration, after January 20 but before February 21 (when the parties' submissions are due under this Court's December 5 Abeyance Order), could both moot the motion to intervene and inflict significant irreparable injury on Intervenor-Movants. Implicitly acknowledging that fact, the House's arguments relate principally to the merits of the motion to intervene—and provide additional reasons for granting that motion. Most important, the House carefully ***does not*** represent that it and the new Administration will refrain from dismissing or otherwise settling the appeal prior to the February 21 submissions, or until after this Court has had an opportunity to rule on the motion to intervene. Both the emergency motion and the motion to intervene should be granted.

1. Movants La Trina Patton and Gustavo Parker ("Intervenor-Movants") did not create the need for emergency action by this Court. The emergency motion was necessitated entirely by the position of the House and the Executive Branch that this Court's December 5 Abeyance Order bars them from responding to the motion to intervene, and by the House's

additional request for an extension of time to respond to the motion to intervene. *See* Emergency Motion at 2-3.

If the parties had responded to the motion to intervene within the time period specified by the applicable rule, their responses would have been filed on December 30, and Intervenor-Movants' reply would have been filed on January 6. *See* Fed. R. App. P. 27(a)(3)-(4). This Court then would have had ample time to resolve the motion prior to January 20.

The claim that Intervenor-Movants were dilatory in filing the motion to intervene is similarly baseless. Even if, as the House claims, the filing of the House's motion on November 21 put Intervenor-Movants' on notice of the relevant facts, the motion to intervene was filed just thirty days later, and fifteen days after the Court granted the motion. That is a short period for previously-unrepresented parties to obtain counsel and for their counsel—not previously involved in this action—to prepare the necessary motion and declarations. *See* Motion to Intervene at 6-10. Certainly the House cannot claim any prejudice based on the filing date.

2. The House claims that an agreement by the parties to dismiss the appeal and permit the District Court's injunction to take effect is "unsubstantiated conjecture." Opposition at 4. But ***the House itself stated***, in its November 21 motion, that abeyance was warranted so that the new

Administration could "decide whether withdrawal or settlement of the appeal is warranted"; and ***the House itself represented*** that "there is at least a significant possibility of a meaningful change in policy in the new Administration that could either obviate the need for resolution of this appeal or affect the nature and scope of the issues presented for review." House Abeyance Motion at 3-4. Given the House's own characterization of these actions as "significant possibilit[ies]," it is mystifying how the House can now assert that a dismissal of the appeal is "unsubstantiated conjecture."

For these reasons, there is a well-substantiated basis for Intervenor-Movants' position that the motion to intervene could become moot if not decided before January 20—through dismissal of the appeal by agreement of the House and the new Administration. Indeed, while downplaying the possibility of dismissal on page 4 of its Opposition, the House switches course three pages later and states that resolution of the appeal through agreement by the existing parties would be entirely appropriate because "'[s]ettlement is highly favored.'" Opposition at 7.

3. The remainder of the House's opposition attempts to rebut Intervenor-Movants' explanation of the injury they will suffer if the District Court's injunction were permitted to take effect and the cost-sharing

reimbursement payments suspended. Those arguments relate to the merits of the motion to intervene, not to the emergency motion—which merely seeks an order directing the House and the Executive Branch to respond to the motion to intervene on a schedule that would permit the Court to rule on the motion prior to January 20. The weakness of the House's arguments demonstrates why the motion to intervene should be granted.

First, the House says that the District Court's stay maintains the cost-sharing reimbursement payments. Opposition at 4-5. But that stay would be lifted if this appeal were dismissed—and it therefore provides a reason to grant the motion to intervene (and prevent a collusive agreement to dismiss the appeal and lift the stay), not a reason to deny intervention.

Second, the House argues that Intervenor-Movants will continue to receive cost-sharing reductions even if the reimbursement payments to insurers are barred by the District Court's injunction. Opposition at 5-6. The House falsely states (at 5) that it is "undisputed" that the cost-sharing reductions would continue, ignoring the detailed discussion in the motion to intervene of the significant harms that Intervenor-Movants would suffer, including cessation of the reductions. *See* Motion to Intervene at 12-18.

Even if the House were correct that insurers could not terminate their 2017 policies (and it is not, as discussed below), health insurers would not blithely continue making $7 billion in unreimbursed cost-sharing payments (the estimated amount of such payments for 2017, *see* Motion to Intervene at 13 n.5)—and thereby incur $7 billion in unanticipated losses.

The likelihood that insurers would successfully invalidate the payment obligation as an uncompensated taking, or become insolvent, is very high. As explained in the motion to intervene (at page 15):

> Insurers likely would seek judicial relief from their obligation to continue advancing cost-sharing without reimbursement. The industry's amicus brief observes that requiring continued payments by insurers "would foist upon issuers an unfunded mandate that amounts to an unconstitutional taking." AHIP/BCBSA Amicus Br. 24; *see also* Linda J. Blumberg & Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in* House v. Burwell 8 (Urban Inst. Jan. 2016) ("*Implications*") (an immediate cessation of the reimbursement payments to insurers would cause them "to choose among incurring significant near-term financial losses, abruptly leaving the Marketplaces, filing their own legal actions against the federal government, potentially violating notice requirements for exiting the Marketplaces, and causing enormous disruption to their enrollees"), *available at* http://www.urban.org-/research/publication/implications-finding-plaintiffs-house-v-burwell.

Moreover, the House is simply wrong in asserting that insurers would be obliged under the ACA to continue to pay the cost-sharing reduc-

tions. The House claims (Opposition at 6 n.2) that the terms of the agreement between the federal government and insurers permits termination only upon invalidation of the insurers' obligation to advance cost-sharing payments to insureds' health care providers (and not upon invalidation of the government's reimbursement obligation). But that construction is irrational: insurers could not possibly be harmed in that situation, because they would be relieved of the obligation to advance payments. (If anything, insurers would be better off, because the elimination of cost-sharing reductions would mean insureds would be unable to use their insurance and insurers would have lower costs than anticipated.) There would be no reason for insurers to seek and for the government to grant insurers a right to terminate in that context.

The clause makes sense only if it is interpreted to apply when the insurer is subjected to large unanticipated costs. And that can occur only if insurers are obligated to make cost-sharing reduction payments for which they will not be reimbursed by the government—the situation that would obtain if the District Court's injunction were permitted to take effect. Therefore, the clause does permit termination of insurance policies if that

occurs, which would inflict significant harm on Intervenor-Movants. *See* Motion to Intervene at 13-14.*

Finally, even in the very unlikely event that such payments were continued for 2017, Intervenor-Movants would lose the opportunity to obtain health insurance coverage in subsequent years. *See* Motion to Intervene at 16-18.

Third, the House points out that the new Administration could unilaterally eliminate the cost-sharing reimbursement payments by adopting a different interpretation of Section 1324. Opposition at 6-7. But, as explained in the motion to intervene (at 5 n.4), that action would be subject to challenge in court by Intervenor-Movants—as the House acknowledges (Opposition at 7).

If, however, the House and the new Administration sought to accomplish the same result by dismissing this appeal and thereby making the District Court's injunction effective, the reimbursement payments would be barred by judicial order, not by the new Administration's legal interpre-

* The House also points out that the contract clause authorizes termination "subject to applicable federal and state law." Opposition at 6 n.2. But there is no provision of the Affordable Care Act that bars an insurer from terminating a health insurance contract. And, as discussed in the motion to intervene (at 13-14), there is no basis for concluding that state law would protect Intervenor-Movants against termination.

tation, and Intervenor-Movants would not be able to obtain redress in court for the resulting harm. In addition, there is a significant separation of powers concern: the Executive and the House should not be able to enter into an agreement to cause the Judiciary to exercise Judicial Power to injure individuals, but at the same time prevent those individuals from challenging the exercise of Judicial Power. That would be the result of denying intervention, or effectively denying intervention by delaying resolution of the motion until after dismissal or other settlement is entered into by the House and the new Administration.

In sum, Intervenor-Movants have clearly satisfied the applicable standing requirement.

4. The House renews its argument that resolution of the motion to intervene should be delayed until after the new Administration takes office. Opposition at 8. But that discussion is most notable for what it omits: the House never address the argument that the motion to intervene could be mooted by an agreement by the House and the new Administration to dismiss the appeal. In other words, the House seeks to delay resolution of the motion to intervene to preserve its ability to agree with the Administration that the District Court's injunction should take effect, and there-

by inflict significant harm on Intervenor-Movants and 5.9 million other cost-sharing reduction recipients.

This Court should not countenance such gamesmanship.

For the foregoing reasons, and those stated in the emergency motion, Intervenor-Movants respectfully request that this Court suspend the abeyance order for the limited purpose of resolving the motion to intervene; and that a briefing schedule be set that permits the Court to resolve the motion to intervene prior to the Presidential transition on January 20.

December 28, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 1,758 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.

December 28, 2016 /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that that on December 28, 2016, the foregoing was served electronically via the Court's CM/ECF system upon all counsel of record.

December 28, 2016 /s/ Andrew J. Pincus
Andrew J. Pincus