No. 19-10011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; PAUL LEPAGE, Governor of Maine; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE

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The Constitution grants the Executive Branch—not the Legislative Branch—the authority and duty to represent the sovereign interests of the United States in court. Indeed, the Supreme Court has made clear that the House of Representatives has no institutional interest in defending an already-enacted statute. Nor does any statute grant the House a right to intervene. The House may seek to participate as amicus to express its views (and we would not object to such participation). But it has no cognizable legal interest sufficient to support intervention.

Even if the House had some cognizable interest, any such interest would already be represented by the Intervenor States. They, like the House, seek to defend the constitutionality of the Patient Protection and Affordable Care Act's individual mandate and also assert that, even if the individual mandate is unconstitutional, it is severable from the rest of the Act. The House all but admits that its participation is unnecessary when it acknowledges that it "seeks only to adjudicate the rights of the original parties." Br. 20.

The House's motion is also untimely. The House cannot adequately explain why it, unlike the Intervenor States, waited many months before seeking to intervene. Its effort to justify its delay on the ground that the 116th House should be treated as a legally separate entity from its predecessors only underscores the absence of any cognizable institutional interest.

STATEMENT

Plaintiffs-Appellees include several States challenging the constitutionality of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, as amended by the Tax Cuts and Jobs Act of 2017 ("TCJA"), Pub. L. No. 115-97, 131 Stat. 2054 (2017). Plaintiffs asserted that the Act's individual mandate violated the U.S. Constitution and that the balance of the Act was not severable. *See* Dkt. No. 27.

On April 9, 2018, several other States intervened in the proceedings as defendants for the purpose of arguing that the individual mandate is constitutional, and asserting that even if the individual mandate is unconstitutional, it is severable from the rest of the Act. Dkt. Nos. 15 (intervention motion), 74 (May 16, 2018 order granting motion). In contrast to those Intervenor States, the United States agreed that the individual mandate is unconstitutional, and contended that "the individual mandate cannot be severed from the guaranteed-issue and community-rating provisions," but argued that "those three provisions can be severed" from the rest of the Act. Dkt. No. 92, at 9. The United States also argued that the Plaintiffs-Appellees "may only seek to invalidate statutory provisions as inseverable if those provisions themselves injure them." *Id.* at 12 n.3. During the preliminary-injunction hearing, each party offered arguments in support of its position, with the Intervenor States additionally asserting that the individual and state plaintiffs had no standing to challenge the constitutionality of the individual mandate. *See* Dkt. No. 211, at 15 (citing Hr'g Tr. 52-58, 64-68).

The district court ruled that the individual mandate is both unconstitutional and inseverable from the rest of the Act. Dkt. No. 211. On December 30, 2018, the court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) on Count I of the amended complaint (which had sought a declaration that the individual mandate is unconstitutional and not severable from the remainder of the ACA), but stayed the judgment and stayed further district-court proceedings pending appellate proceedings in this Court. Dkt. Nos. 220, 223. The House of Representatives did not intervene during district-court proceedings at any point before the district court granted partial summary judgment.

The Intervenor States filed a notice of appeal on January 3, 2019. Dkt. No. 224. That day, the House of Representatives sought to intervene in the district court. Dkt. No. 226; *see* Br. 2 n.2. The United States filed a notice of appeal a day later. Dkt. No. 230. The House of Representatives now seeks to intervene in this Court pursuant to Rule 24. Dkt. No. 13.[1]

[1] On January 31, 2019, four additional States moved for leave to intervene on appeal. The United States took no position on that motion, which articulated the same interests as the existing Intervenor States and merely sought to join their brief.

ARGUMENT

Although there is no Federal Rule of Appellate Procedure governing appellate intervention in these circumstances, this Court has looked to the factors listed in Federal Rule of Civil Procedure 24 to determine whether an intervention motion should be granted. *See United States v. Bursey*, 515 F.2d 1228, 1239 n.24 (5th Cir. 1975). The House does not meet Rule 24's requirements and its motion should be denied.

I. The House of Representatives is not entitled to intervene as of right.

A. No statute provides the House of Representatives with an unconditional right to intervene.

Rule 24(a)(1) provides in relevant part that, "[o]n timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). The "most important . . . statute of this kind is Section 2403 of Title 28." 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1906 (3d ed. 2007). Section 2403(a) provides that, "[i]n any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene." 28 U.S.C. § 2403(a). But unless a statute speaks in such unambiguous terms, "courts have been hesitant to find an unconditional statutory right of intervention." 7C Wright et al., *supra*, § 1906.

Neither of the two provisions on which the House of Representatives relies—Section 2403(a) and 28 U.S.C. § 530D, *see* Br. 9-11—grants it an unqualified right to intervene in these proceedings. Section 2403(a) authorizes the *United States* to intervene when the United States "is not a party." Here, the United States *is* a party, represented by the Department of Justice. *See Windsor v. United States*, 797 F. Supp. 2d 320, 321-22 (S.D.N.Y. 2011) (holding that 28 U.S.C. § 2403(a) does not apply when the United States is already a party). Moreover, the House of Representatives does not and cannot assert a right to intervene in the name of the United States. *See* p. 12, *infra*.

While Section 2403(a) at least grants a right to intervene (albeit not to the House, and not in the circumstances presented here), Section 530D does not grant any right to intervene, much less an unconditional right. That statute, entitled "Report on enforcement of laws," provides in relevant part that "[t]he Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice" determines to "refrain (on the grounds that the provision is unconstitutional) from defending . . . any Federal statute." 28 U.S.C. § 530D(a)(1)(B)(ii). Section 530D also includes a "[d]eadline," requiring that the report be sent "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding, but in no event later than 30 days after the making of each determination." *Id.* § 530D(b)(2).

A deadline for a reporting requirement is not equivalent to an unconditional right to intervene in judicial proceedings. Unlike Section 2403(a), which states that a court "shall permit" the Executive Branch "to intervene," Section 530D is merely a directive to the Executive Branch to provide information to the Legislative Branch. The House of Representatives does not dispute that the United States has timely complied with that reporting requirement. *See* Br. 3 (citing Letter from Jefferson B. Sessions III, Attorney General, to Paul Ryan, Speaker, U.S. House of Representatives (June 7, 2018)). The statute goes no further. Although it contemplates that the Legislative Branch may respond to the report by trying "to take action . . . to intervene," it does not establish or presuppose that either House has an absolute entitlement to do so, in a way that Section 2403(a) does for the United States. Rather, to intervene in any case, the House or Senate must satisfy applicable intervention standards. Section 530D merely ensures that the House and Senate are not precluded from doing so because of lack of timely notice of litigation.

B. The House of Representatives has no cognizable legal interest that would be impaired by an inability to intervene.

Rule 24(a)(2) further provides that a court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The House has no

"interest" that the disposition of this case could "impair or impede," and any interest it asserts is adequately represented by the Intervenor States in any event. In addition, the House's intervention is untimely. *See Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 512 (5th Cir. 2016) (holding that timeliness and inadequacy of representation are also requirements for intervention under Rule 24(a)(2)).

1. The House of Representatives has no cognizable interest in this litigation.

The House claims an "institutional interest in defending an Act of Congress." Br. 11. But the Constitution assigns to the Executive Branch rather than the Legislative Branch the authority—and the duty—to represent all of the sovereign interests of the United States in court. The Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. And the Take Care Clause "entrusts" to the President the "discretionary power to seek judicial relief." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *see* U.S. Const. art. II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed"). Within the Executive Branch, the authority to represent the interests of the United States in litigation generally resides with the Department of Justice. *E.g.*, 28 U.S.C. § 516 (generally reserving to the Department of Justice "the conduct of litigation in which the United States . . . is a party"). As the Supreme Court has explained, "litigation conducted in the courts of the United States[,] . . . 'so far as the interests of the United States are concerned, [is] subject to

the direction, and within the control of, the Attorney-General.'" *Buckley*, 424 U.S. at 139 (quoting *Confiscation Cases*, 74 U.S. 454, 458-59 (1869)).

By contrast, the Constitution assigns to the Legislative Branch only specifically enumerated "legislative Powers." U.S. Const. art. I, § 1. "Legislative power, as distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement*." *Buckley*, 424 U.S. at 139 (emphasis added). "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const. art. II, § 3).

Although Congress may create offices to assist with legislative tasks, the authority of such an office may not include the "discretionary power to seek judicial relief" on behalf of the United States. *Buckley*, 424 U.S. at 138-40. Such power "cannot possibly be regarded as merely in aid of the legislative function," *id.* at 138, and Congress "may not 'invest itself or its Members with . . . executive power,'" *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

Congress thus has no judicially cognizable interest in the "execution of the Act" it has enacted. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986). That is an "executive function." *Id.* As the Supreme Court has emphasized, "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses

of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Raines v. Byrd*, 521 U.S. 811, 826 (1997). Otherwise, the judiciary could be called upon to "step directly between the other branches and settle disputes," *Barnes v. Kline*, 759 F.2d 21, 53 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot*, 479 U.S. 361 (1987), such that "the system of checks and balances [would be] replaced by a system of judicial refereeship," *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result). Accordingly, the Executive Branch has exclusive "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." *Buckley*, 424 U.S. at 140.

The House proposes an exception to those fundamental separation-of-powers principles in circumstances where the Executive Branch declines to defend the constitutionality of a statute. Br. 11, 15. But it offers no support for the proposition that the Executive Branch's decision about how to enforce or defend a law can transform Congress's "legislative power" into executive power. And if that is true of Congress generally, it is doubly true for a single House of our bicameral Congress, which has no authority to enact legislation without the participation of the Senate.

Those fundamental principles do not mean that the House's arguments will not be heard. Historical practice confirms that any purported interest the House has will be served by its participation in this case as amicus rather than intervenor. For example, in *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court requested

and received amicus participation by a U.S. Senator to defend a federal law the Department of Justice viewed as unconstitutional. *Id.* at 176. And in *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court allowed a Representative to participate as amicus on behalf of the House Judiciary Committee to advance an interpretation of a law allowing the president to "pocket veto" bills presented for signature fewer than 10 days before an adjournment of Congress that was narrower than the Executive's interpretation. *Id.* at 673. Any purported legislative interest was served not through intervention but by participating as amicus. The House identifies no harm it would suffer if it were to follow that longstanding historical practice and participate in this case as amicus.[2]

The House's reliance on *INS v. Chadha*, 462 U.S. 919 (1983), is misplaced. In that case, the Executive Branch itself petitioned for Supreme Court review. The Court recognized that a case or controversy existed, without regard to Congress's participation, because even though the Executive Branch agreed with Chadha that the

[2] *See also United States v. Lovett*, 328 U.S. 303 (1946) (Congress participating as amicus); *Bowsher v. Synar*, 478 U.S. 714 (1986) (House Bipartisan Leadership Group and Senate participating as amicus); *Morrison v. Olson*, 487 U.S. 654 (1988) (same). This Court in *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986), did not grapple with whether a single House of Congress would have any legislative interests served by participating as amicus rather than intervenor. But the Court has long acknowledged the ability of applicants who cannot intervene to participate as amicus. *See Texas v. United States*, 106 F.3d 661, 664 n.1 (5th Cir. 1997) (noting that a school district "was denied intervention but was given amicus status"); *Morin v. City of Stuart*, 112 F.2d 585, 585 (5th Cir. 1939) (per curiam) (denying petition to intervene while noting that "[i]ntervention in an appellate court is certainly unusual," but stating that "[c]ounsel for petitioners may, if they desire, file a brief as amicus curiae").

law at issue was unconstitutional, the Executive Branch continued to enforce the law against him. *Id.* at 939-40. Although the Court stated that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional," that statement was made while discussing "prudential, as opposed to Art[icle] III," concerns about adverse presentation. *Id.* at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *United States v. Lovett*, 328 U.S. 303 (1946)). It thus made no difference whether Congress was an amicus or a party in the court of appeals. Indeed, the Court's citations in *Chadha* to *Cheng Fan Kwok* and *Lovett* demonstrate that it used the phrase "proper party to defend" to refer to amicus participation, as those cases involved amici.

Moreover, *Chadha* involved a statute that specially vested the House and the Senate with procedural rights to veto Executive action. 462 U.S. at 923. Neither the ACA nor the TCJA grants such rights to the House. Even if *Chadha* could be read to approve congressional participation as intervenor, that reading would at most apply to unique circumstances not presented by this case.

The House's reliance on *Chadha* is made all the more anomalous because, in invalidating the provision that purported to provide the House and Senate with veto authority, the Court explained that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." 462 U.S. at 955.

Read in its entirety, *Chadha* refutes rather than supports the proposition that a single House of Congress has a right to intervene in litigation to protect a purported interest of Congress as a whole that is non-legislative in nature.

The Supreme Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013), supports that interpretation of *Chadha*. There, like here, a lower court had invalidated an Act of Congress, the Executive Branch had refused to defend but appealed because it continued to enforce the Act, and the Legislative Branch relied on *Chadha* to argue that it had Article III standing to file its own appeal. *Id.* at 758-59, 761-62. The Supreme Court in *Windsor* relied on *Chadha* instead to ground its Article III jurisdiction on the Executive Branch's appeal. *Id.* at 761-62; *see id.* at 760 ("[T]he words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III."). Moreover, while the majority opinion declined to pass on whether the Legislative Branch had standing in its own right, a three-Justice dissent rejected that position, distinguishing *Chadha* precisely as we have here, *see id.* at 783-85 (Scalia, J., dissenting), and as the government had argued in *Windsor*, *see* U.S. Br. on the Jurisdictional Questions at 34-37, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

The House does not advance its argument by citing previous lower-court cases in which the House's legal advisory group intervened (often near the outset of district-court litigation), no other party was defending the Act of Congress, the Executive Branch did not oppose intervention, and intervention was ultimately granted.

Unopposed intervention decisions are hardly persuasive authority, and moreover, here the House's interests are already adequately represented by a party to the case seeking the same outcome; the House "seeks only to adjudicate the rights of the original parties," Br. 20; and the United States opposes intervention. In these circumstances, the proper role for the House is to participate as amicus.

2. Any interest the House of Representatives has in this litigation is adequately represented by the Intervenor States

Even if the House of Representatives had a cognizable interest in this litigation, "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). As the House acknowledges, this Court adopts "a presumption of adequate representation" where "the proposed 'intervenor has the same ultimate objective as a party to the lawsuit.'" Br. 12 (quoting *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (en banc)). The presumption applies here because the Intervenor States and the House both claim an interest in precisely the same ultimate objective: to "defend the constitutionality of the ACA before this Court and contend that any unconstitutional provision is severable from the remainder of the statute." Br. 4; *see, e.g.*, California et al. Mot. To Intervene, Dkt. No. 15, at 11 (Apr. 9, 2018) ("advocat[ing] in favor of the constitutionality of the ACA"); *id.* at 19-20 (severability). To rebut the presumption, the House "must show adversity of interest, collusion, or nonfeasance on the part of the existing party." *Edwards*, 78 F.3d at 1005; *see Cajun Elec. Power Co-op., Inc. v. Gulf*

States Utils., Inc., 940 F.2d 117, 120 (5th Cir. 1991) (presumption not rebutted where putative intervenor "brings no unique arguments to the litigation").

The House asserts that "the interest of the Intervenor States is potentially adverse to the interest of the House" because "the Intervenor States did not argue *in their briefs* before the district court that the Plaintiffs lack standing." Br. 14 (emphasis added). That carefully worded statement obscures that the Intervenor States argued at length during the district court hearing on the preliminary-injunction motion that the plaintiffs did not have standing. *See* Dkt. No. 211, at 15 (citing Hr'g Tr. 52-58, 64-68). And it ignores the Intervenor States' argument in their post-judgment briefing that they "are likely to establish" on appeal "that the Individual Plaintiffs do not have standing to maintain this action." Dkt. No. 213-1, at 8; *see id.* at 8 n.4 ("Nor is the Fifth Circuit likely to hold that the Plaintiff States have standing."); *id.* at 20 ("[I]f the appellate courts agree with the [Intervenor] States that the Plaintiffs lack standing, that will effectively terminate this litigation."). The House's interests are thus aligned with those of the Intervenor States.

The House speculates (Br. 14) that its interests might diverge with the Intervenor States, who have a "long-term interest in arguing for broad and permissive standing." As this Court has recognized, however, an assertion that a State party "must balance competing goals" does not present an adequate ground for intervention when the State seeks the same ultimate outcome as the putative intervenor. *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994). In *Hopwood*, this Court

rejected a motion to intervene in an affirmative action case, where the putative intervenors asserted that a State would have inadequate incentive to bring in evidence of its own past discrimination. *Id.* at 605-06. Here, the House does not even propose to introduce any evidence, but merely quibbles with the State's incentives regarding the relative weight to place on various arguments. Such subtle and speculative disagreements in litigation strategy cannot give rise to a right to intervention, particularly given that this Court would need to address Article III standing even if no party raised it at all.

Although the House states (Br. 12, 15) that its "burden to establish inadequate representation is 'minimal,'" the cases it cites in support of that proposition are inapposite. Those cases involve situations where the putative intervenor and a party had "differences in . . . objectives," *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016), where there was "sufficient doubt about the adequacy of representation to warrant intervention," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972), or where there was "a sharp disalignment between the parties" and the putative intervenor, *Edwards*, 78 F.3d at 1005. And even in such cases, as this Court has recognized, "[a]lthough the burden is minimal, it cannot be treated as so minimal as to write the requirement completely out of the rule." *Cajun Electric*, 940 F.2d at 120 (quotation marks omitted). By contrast, here, the relevant cases are the ones discussed above establishing a presumption of adequate

representation where the putative intervenor and the party indisputably share the same objective.

3. The motion is untimely.

Whereas the Intervenor States sought to intervene almost ten months ago—which was two weeks before the plaintiffs even filed their amended complaint, *see* California et al. Mot. To Intervene, Dkt. No. 15, at 11 (Apr. 9, 2018)—the House did not move to intervene until after the district court granted partial summary judgment. The House provides no persuasive reason to excuse its delay where denial would cause no prejudice because the House has no cognizable institutional interest and would suffer no harm by participating as amicus.

As the House emphasizes, it was expressly notified of its potential interest in this case by letter on June 7, 2018. The purpose of that notification is to permit the House and Senate to make determinations about whether to seek to participate in litigation. *See* 28 U.S.C. § 530D(b)(2). But the House declined to participate in the district-court proceedings until six months later. In the absence of any justification for the delay, that alone is sufficient to treat its intervention motion as untimely. *See Edwards*, 78 F.3d at 1001 ("[M]ost of our case law rejecting petitions for intervention as untimely concern motions filed after judgment was entered in the litigation.").

In light of the Attorney General's Section 530D letter, the House does not and could not plausibly argue that its need to intervene became apparent only after the district court entered judgment. *See Ross v. Marshall*, 426 F.3d 745, 754-55 (5th Cir.

2005) (noting that "motions for intervention filed after judgment is entered are frequently denied as untimely," but explaining that a "common example of post-judgment intervention that satisfies these criteria is intervention for the purpose of appealing a decision that the existing parties to a suit have decided not to pursue" only after judgment was entered). Instead, the House contends (Br. 17) that its delay should be excused because it "moved to intervene on the first day the 116th House could participate in this appeal" and "before January 3, 2019, the 116th House did not exist and had no interests to assert."

The House's effort to treat the 116th House as a separate entity from its predecessors does not excuse its tardiness, but merely highlights the absence of any cognizable legal interest in this case. The interests asserted are plainly not interests of the 116th House as such. The 116th House did not enact the ACA, the TCJA, or any other legislation that is relevant here. The 115th House did pass the TCJA, but the 115th House declined to intervene in 2018 when it was expressly made aware of this litigation. It is thus particularly clear that the 116th House itself lacks a concrete stake in this case. The 116th House can assert, at most, the purported interest of the House of Representatives as a continuing body in the laws it has enacted, which was not timely asserted by the 115th House and is not cognizable in any event.

Finally, the House does not advance its argument by citing cases involving congressional subpoenas. *See* Br. 17. Unlike those subpoenas, which expired at the end of each Congress, statutes do not expire when new Congresses begin.

II. Permissive intervention should be denied.

The House also cannot meet the standard for permissive intervention. Under Rule 24(b), "[o]n timely motion, the court may permit anyone to intervene" who "is given a conditional right to intervene by a federal statute" or "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(A)-(B). The House's motion is untimely under Rule 24(b) for the same reasons it is untimely under Rule 24(a). Nor does any federal statute gives the House a conditional right to intervene: as discussed, 28 U.S.C. § 530D is only a reporting requirement, not a statute granting a right to permissive intervention. *Compare* pp. 10-11, *supra*, *with*, *e.g.*, 42 U.S.C. § 2000a-3(a) ("[U]pon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance.").

The House also urges (Br. 20) that intervention should be allowed because the House "seeks to address the same questions of law that the original parties to this suit are addressing." It is certainly true that the House—which cannot satisfy Article III standing requirements in this case—may not inject new issues into the litigation, particularly after failing to participate in the district-court proceedings. But the House has no need to intervene merely to present arguments regarding the legal issues presented by the parties. That is what amicus briefs are for.

In addition, the House does not have a "claim or defense," Fed. R. Civ. P. 24(b)(1)(B), at all: The House will not face any different legal or practical obligations

regardless of how this case turns out. Rule 24(b)(1)(B) contemplates intervention by an applicant whose concrete legal interests are at stake—typically in a separate proceeding—but might be prejudiced by the result in the "main action." *See Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994) ("The intervention rule is intended to prevent multiple lawsuits where common questions of law or fact are involved . . . ."). Moreover, this Court has explained that permissive intervention may be denied where, as here, a party will adequately represent the applicant's interests. *See New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (en banc) ("In acting on a request for permissive intervention, it is proper to consider . . . whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit." (quotation marks omitted)). At a minimum, even if the requirements for permissive intervention are satisfied, this Court should exercise its discretion to deny such intervention given that amicus status is both adequate and appropriate. *See id.* at 470-71. For that reason as well, the House's arguments for permissive intervention fare no better than its arguments for intervention as of right.

CONCLUSION

The House of Representatives' intervention motion should be denied.

Respectfully submitted,

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FEBRUARY 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,002 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Calisto MT typeface.

s/Martin V. Totaro
MARTIN V. TOTARO

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I electronically filed the foregoing response with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Martin V. Totaro
MARTIN V. TOTARO