[NOT SCHEDULED FOR ORAL ARGUMENT]

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 & HUMAN SERVICES; 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 (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer)

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* members of Congress represent that all parties have been sent notice of the filing of this brief, and all parties have consented to the filing of the brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certify that a separate brief is necessary. *Amici* are Democratic leaders in the House of Representatives who were actively involved in the enactment of the Patient Protection and Affordable Care Act ("ACA") and are thus particularly well-suited to provide the Court with background on the text, structure, and history of the statute. In particular, *amici* can provide insight into how the structure of the law was designed to achieve its goal of expanding access to affordable health insurance through the reform of state individual health insurance markets. *Amici* are also familiar with the appropriations process and the ways in which Congress provides funding for provisions of law, including the cost-sharing subsidies at issue in this case. *Amici* thus have unique knowledge about, and a strong interest in, the question in this case, and they know that funding for the cost-sharing subsidies that are critical to the effective operation of the ACA is provided in the same permanent appropriation that funds the ACA's premium tax credits.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

By virtue of their long service in the House of Representatives, including in leadership positions, *amici* also have a strong interest in the other question presented in this case: whether, consistent with Article III of the U.S. Constitution and constitutional separation of powers principles, the House of Representatives should be granted standing to sue in this case. As *amici* well know, Congress has at its disposal a number of tools to resolve routine disputes, like this one, about the interpretation of provisions of federal law. For that reason, *amici* know that it would not only be contrary to established Supreme Court precedent for the courts to wade into inter-branch disputes such as this one, but also unnecessary and destabilizing to the separation of powers among the three branches.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for any *amici* who had not yet entered an appearance in this case as of the filing of Appellants' brief, all parties and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: October 31, 2016

By: /s/ Elizabeth Wydra
Counsel for Amici Curiae

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GLOSSARY

ACA	Patient Protection and Affordable Care Act
CBO	Congressional Budget Office
HHS	Health and Human Services

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Brief for Appellants filed with this Court on October 24, 2016.

INTEREST OF *AMICI CURIAE*

Amici are Democratic leaders in the House of Representatives who were actively involved in the enactment of the Patient Protection and Affordable Care Act ("ACA") and are thus particularly well-suited to provide the Court with background on the text, structure, and history of the law. In particular, *amici* can provide insight into how the law was designed to achieve its goal of expanding access to affordable health insurance through the reform of state individual health insurance markets. *Amici* are also familiar with the ways in which Congress provides funding for provisions of law, including the provision at issue in this case. *Amici* thus have unique knowledge about, and a strong interest in, the question whether funding for the cost-sharing subsidies that are critical to the effective operation of the ACA is provided in the same permanent appropriation that funds the law's premium tax credits.

By virtue of their long service in the House of Representatives, including in leadership positions, *amici* also have a strong interest in protecting the prerogatives of the House of Representatives and are familiar with the array of tools that Congress has historically used to resolve the various interpretive disputes that routinely arise between the executive branch and Congress. Indeed, *amici* submit this brief, in part, to demonstrate that the House has, contrary to the decision of the district court, "'effective means other than the judiciary'" to resolve this dispute. Joint

Appendix ("J.A.") 54. *Amici* thus also have unique knowledge about, and a strong interest in, the other question pressed in this case: whether, consistent with the Constitution, the House of Representatives should be allowed to seek judicial resolution of what *amici* know from long experience is a commonplace dispute over the meaning of a federal statute.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "the Act"), a landmark law dedicated to achieving widespread, affordable health care. To help achieve the statute's goal of "near-universal coverage," 42 U.S.C. § 18091(2)(D), without regard to pre-existing health conditions or health status, the Act provides that individuals not covered by group health plans can purchase competitively-priced individual health insurance policies on American Health Benefit Exchanges ("Exchanges"), and, for moderate and low-income individuals, it ensures the affordability of such individual policies through an interlocking program of premium tax credits and cost-sharing reductions. Because the availability of these credits and cost-sharing reductions is critical to the ACA's effective operation, the ACA provides common funding for them in a permanent appropriation, 31 U.S.C. § 1324, thereby ensuring that access to the necessary funds would not be subject to the vicissitudes of the annual budget process.

The current House leadership now takes a different view and argues that the executive branch has no statutory authority to comply with the mandatory reimbursement of insurers for the cost-sharing reductions that are so important to the ACA's effective operation. *Amici* believe this interpretation is wrong, and, in any event, it is a dispute that should be addressed through traditional legislative processes, not the courts. As *amici* well know, the House and Senate have used these traditional means to challenge aspects of the Administration's implementation of other provisions of the ACA, and these traditional tools for resolving inter-branch disagreements remain available to the current House leadership. It would be destabilizing to the separation of powers among the three branches for the courts to displace these traditional processes and wade into inter-branch interpretive disputes such as this one. *See, e.g.*, *Chenoweth v. Clinton*, 181 F.3d 112, 113-14 (D.C. Cir. 1999) ("Historically, political disputes between Members of the Legislative and the Executive Branches were resolved without resort to the courts.").

Significantly, it is well-established that legislators, just like any other litigant, must satisfy Article III's requirement of "concrete and particularized" injury, *Raines v. Byrd*, 521 U.S. 811, 819 (1997), and legislators' allegations that a member of the executive branch has not complied with a statutory requirement are insufficient to satisfy those requirements. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large

in the proper application of the Constitution and laws will not do."); *Raines*, 521 U.S. at 826 ("abstract dilution of institutional legislative power" not sufficient to establish standing). Further, even if there were an institutional injury here sufficient to merit standing (which there is not), it would be one that could be vindicated only in a suit brought by both houses of Congress, not simply the House of Representatives. Indeed, if courts routinely recognized standing in cases like this one, it would encourage party leadership in one house of Congress, or, more precisely, factions within dominant parties, to bring lawsuits over a virtually limitless number of partisan disputes heretofore resolved through legislative-executive processes. That is exactly what the Supreme Court held impermissible in *Raines*, 521 U.S. at 824, when it denied standing to a group of members of Congress seeking to prevent the President from using the line-item veto. Accordingly, this Court should reverse the district court's judgment and dismiss on the ground that plaintiff lacks standing.

If this Court should nonetheless reach the merits, it should conclude that the executive branch was acting lawfully when it reimbursed insurers for cost-sharing reductions, as the ACA expressly required it to do. *Amici* members of Congress all served while the ACA was being passed and are thus familiar with the law, as well as with Congress's plan for its effective operation. They know, as the Supreme Court held last year, that the ACA "adopts a series of interlocking reforms de-

signed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). These reforms are interdependent, and all are essential to the effective operation of the law.

Critically, the law creates a package of two complementary benefits: premium assistance tax credits to ensure that eligible individuals can afford health insurance, 26 U.S.C. § 36B, and subsidies to reduce the "cost-sharing under the plan" (for example, co-payments and deductibles) to ensure that lower-income eligible individuals can defray the costs of seeking health care once they purchase insurance, 42 U.S.C. § 18071. In addition, the law provides that the government will reimburse insurers for those benefits. Significantly, the law does not merely *authorize* the executive branch to make these payments, but instead mandates that it do so, repeatedly using the obligatory word "shall." *See, e.g.*, 26 U.S.C. § 36B(a); 42 U.S.C. § 18071(a)(2), (c)(3)(A). The law also directs the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury, to establish a program for the advance determination of the "income eligibility" of insured individuals for these benefits and for their unified payment. 42 U.S.C. § 18082. In short, the law reflects what everyone understood at the time: the premium tax credits and cost-sharing reductions are both integrally connected and critical to the law's effective operation. Congress thus structured these complementary measures as a package and provided that they would both be funded out of the same perma-

nent appropriation, 31 U.S.C. § 1324. Tellingly, analyses conducted by the Congressional Budget Office (CBO), the nonpartisan office responsible for analyzing budgetary and economic issues relevant to the congressional budget process, repeatedly reflected the widely-held understanding that the cost-sharing reductions, just like the premium tax credits, would be covered by a permanent appropriation.

Subsequent actions by Congress confirm what everyone understood at the time the law was enacted. In 2014, for example, Congress passed H.R. 2775, which conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by the Department of Health and Human Services ("HHS") that the Exchanges verify that applicants meet the eligibility requirements for such subsidies, Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, Div. B, § 1001(a) (2013), a certification requirement with which HHS subsequently complied, Letter from Kathleen Sebelius to Hon. Joseph R. Biden, Jr. (Jan. 1, 2014), https://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf. Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments. Moreover, although the executive branch has been using this permanent appropriation to reimburse insurers for these cost-sharing reductions, the House has at no point considered, and Congress has never passed, a law

specifically prohibiting the executive branch from making these payments. As *amici* are well aware, in the years since the ACA was enacted, Congress has passed numerous provisions otherwise restricting the executive branch's use of funds related to the ACA. *See infra* at 14-15. Indeed, those sorts of restrictions are among the tools that Congress routinely uses to advance its view as to the proper implementation of governing law.

In sum, *amici* believe that this Court should, consistent with governing precedent, not reach the merits and instead allow the political branches to resolve this dispute in the same manner they have historically resolved such disputes. But if the Court does reach the merits, *amici* believe this Court should conclude that the Section 1324 permanent appropriation appropriates funds for the cost-sharing reductions that are essential to the ACA's effective operation.

ARGUMENT

I. This Inter-Branch Interpretive Dispute Should Be Resolved Through Traditional Legislative Processes, Not By the Courts

Amici members of Congress have collectively spent decades serving in the House of Representatives and, based on that experience, they know that political disputes between the President and Congress about the implementation of federal law have always arisen, and no doubt will continue to arise. They also know that the courts are only rarely the appropriate forum for resolving such disputes, and they are certainly not the proper forum in this case.

As the Supreme Court has long recognized, "[o]ur system of government leaves many crucial decisions to the political processes," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974), and Article III standing doctrine "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Article III of the U.S. Constitution provides that the "judicial Power shall extend" to "Cases ... [and] Controversies," U.S. Const. art. III, § 2, and the Supreme Court has interpreted Article III to require that a plaintiff adequately allege that it has suffered an "'injury in fact'"—one that is "concrete and particularized" and one that is fairly traceable to the defendant's challenged actions and redressible by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This "irreducible constitutional minimum," *id.* at 560, applies to legislators just as it applies to any other plaintiff, and thus requires that the plaintiff in this case establish that it has suffered a "concrete and particularized injury." *Raines*, 521 U.S. at 819; *see Chenoweth*, 181 F.3d at 114 (separation of powers "concerns are present—indeed, are particularly acute—when a legislator attempts to bring an essentially political dispute into a judicial forum"). This it cannot do.

It is well-established that legislators' allegations that a member of the executive branch has not complied with a statutory requirement do not establish the sort of "concrete and particularized" injury sufficient to satisfy Article III's standing

requirements. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."); *Raines*, 521 U.S. at 826 ("abstract dilution of institutional legislative power" not sufficient to establish standing). After all, "[o]nce a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public." *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *see Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[o]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation").

Plaintiff argued—and the district court agreed—that plaintiff's appropriation claim "is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution." J.A. 38-39. This is wrong. As *amici* know from their substantial experience dealing with appropriations questions as members of Congress, this dispute—like virtually every dispute about appropriations—is simply a dispute about the meaning of a statute and is thus no different than any other claim that the executive is misinterpreting the law.

After all, defendants argue (and *amici* agree) that the permanent appropriation provided in 31 U.S.C. § 1324 funds the cost-sharing subsidies. Plaintiff may disagree, but that is a quintessential disagreement about the proper interpretation of the ACA and Section 1324, no different than countless other disputes that can arise between the executive branch and the Congress over the proper interpretation of federal law. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1363 n.95 (1988) ("Obviously, the scope of funded activities is an issue of statutory interpretation."). To be sure, if the executive branch is wrong (and, again, *amici* do not believe that it is), it would be spending funds that have not been properly appropriated, but that is also true *any* time the executive branch takes some affirmative action based on a misinterpretation of a federal statute. Virtually all provisions of law require an appropriation to be implemented, and virtually all affirmative executive actions entail some spending. This means that if the executive branch misinterprets a provision of federal law, and then spends money to implement that misinterpretation, that spending would also reflect the "draw[ing of] funds from the Treasury without a congressional appropriation— ... in violation of … the Constitution." J.A. 39.

Moreover, appropriation bills frequently contain substantive prohibitions or directives on spending; review of the omnibus appropriation for 2015 makes this clear, as it repeatedly provides that "no funds appropriated under this section can

be spent" on specified activities. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the ''Centers for Medicare and Medicaid Services—Program Management'' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).").[2] Any dispute about whether the executive branch has complied with one of those provisions would also, under plaintiff's theory, involve the "draw[ing of] funds from the Treasury without a congressional appropriation— ... in violation of … the Constitution," J.A. 39, and thus be amenable to judicial resolution. In short, plaintiff's theory of standing would invite the very "specter of general legislative standing" that courts have long "guarded against." *Id.* at 48 (internal quotations omitted).

[2] *See also, e.g.*, 128 Stat. at 2141 ("no funds shall be used to formulate or administer a brucellosis eradication program for the current fiscal year that does not require minimum matching by the States of at least 40 percent"); *id.* at 2187 ("no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco, Firearms and Explosives to other agencies or Departments"); *id.* at 2375 ("No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions."); *id.* at 2503 ("No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.").

It also bears emphasis that even if there were an institutional injury here sufficient to merit standing (which there is not), it would be one that could be vindicated only in a suit brought by both houses of Congress, not simply the House of Representatives. To the extent the House is attempting to vindicate its Article I legislative power, that is a power it shares with—and cannot exercise without—the Senate. *See* U.S. Const. art. I, § 7 (enactment of a law requires passage of a bill by both houses of Congress and presentment to the President); *see also Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954-55 (1983) (Congress makes policy "in only one way": "bicameral passage followed by presentment to the President"). Even if the House were seeking to vindicate its more specific Article I power to originate revenue-raising bills, *see* U.S. Const. art. I, § 7, the Senate shares in the power to *enact* such bills, *see id.* (noting that "the Senate may propose or concur with Amendments as on other Bills"); *see also Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (Senate has broad power to amend revenue-raising bills consistent with the Origination Clause), and there is thus no reason to think the House can sue alone to vindicate that power. Were it otherwise, a subcomponent of Congress could bring a lawsuit seeking to restrain the executive branch from acting, even though it would take a majority of both houses to pass legislation similarly limiting the executive branch. That is exactly what the Supreme Court held impermissible in *Raines v. Byrd*, 521 U.S. at 824, when it denied standing to a

group of members of Congress who sued to prevent the President from using the line-item veto.

The district court's conclusion that there is standing in this case was not only inconsistent with judicial precedent, but also completely unnecessary given alternative and more appropriate tools available to legislators to object to executive branch actions that they view as inconsistent with governing law. As *amici* well know from their long experience serving in the House of Representatives, Congress spends a significant proportion of its time and energy overseeing and responding to executive branch action, including executive branch actions that implement federal statutes. By virtue of this oversight responsibility, Congress has numerous tools at its disposal to resolve routine disputes over the scope of applicable spending authority such as this one.

To start, legislators may always challenge executive action by enacting corrective legislation that either prohibits the disputed executive action or clarifies the limits on such action. In this case, if both houses of Congress had concluded that Section 1324 did not provide the necessary appropriation, they could have passed a bill that specifically prohibited the executive branch from expending funds to reimburse insurers for cost-sharing subsidies. To be sure, use of that tool would have required both houses of Congress to concur (and would likely have faced the hurdle of a presidential veto), but the Supreme Court has recognized that the power

to enact corrective legislation is an important tool that obviates the need for judicial resolution of political disputes between the branches. *See, e.g.*, *Raines*, 521 U.S. at 824 (no legislator standing because, in part, "a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act").

Further, Congress has other means to challenge disputed interpretive policies, including many that do not require the concurrence of both houses. For example, Congress can hold oversight hearings, initiate legislative proceedings, engage in investigations, and, of course, appeal to the public. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (plaintiff legislators lacked standing to sue the President for sending forces into Yugoslavia because, in part, they could have passed a law forbidding that use of troops, they could have cut off funds for the operation, or they could have sought the President's impeachment).

The current House leadership is, of course, familiar with all of these tools and has used them frequently in other contexts. In fact, with respect to the ACA itself, "Congressional appropriators have used a number of legislative options available to them through the appropriations process in an effort to defund, delay, or otherwise address implementation of the ACA." C. Stephen Redhead & Ada S. Cornell, Congressional Research Service, *Use of the Annual Appropriations Process To Block Implementation of the Affordable Care Act (FY2011-FY2016)*, at 5

(Oct. 13, 2015), https://www.fas.org/sgp/crs/misc/R44100.pdf. Among other things, House appropriators "repeatedly have added limitations," provisions "that restrict the use of funds provided by the bill." *Id.*; *see id.* (limitations either "cap[] the amount of funding that may be used for a particular purpose or ... prohibit[] the use of any funds for a specific purpose"). They have also added "several reporting and other administrative requirements regarding implementation of the ACA," including "instructing the HHS Secretary to establish a website with information on the allocation of [specified] funds and to provide an accounting of administrative spending on ACA implementation." *Id.* at 6.[3] The current House leadership may not have chosen to employ these tools to address this particular executive branch action, but their unwillingness to do so provides no cause to dramatically expand the scope of federal court jurisdiction beyond what Article III permits. *See, e.g.*, *Chenoweth*, 181 F.3d at 116 (no jurisdiction where "the parties' dispute is ... fully susceptible to political resolution").

In sum, no court has ever previously concluded that there was standing on the basis of the sort of injury that plaintiff alleges here, and with good reason: it would disturb long-settled and well-established practices by which the political

[3] These appropriations riders only underscore that plaintiff does not—and cannot—allege that it has been divested of its appropriations authority. The House's authority to carry out its appropriation function has not been affected at all by the executive branch actions at issue in this case. *See Raines*, 521 U.S. at 824 (no legislator standing where "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process").

branches mediate interpretive disputes about the meaning of federal law, and it would empower political factions within Congress to advance political agendas by embroiling the courts in political disputes that are appropriately resolved using those long-established practices. As members of Congress, *amici* have an obvious interest in protecting the House of Representatives' institutional prerogatives, but they also appreciate that allowing suit in this case would undermine, rather than advance, those interests—inevitably subjecting Congress to judicial intervention never contemplated by the Framers and compounding opportunities for legislative obstruction in ways that could greatly increase congressional dysfunction.

II. The Executive Branch Has Not Violated the Law Because Section 1324 Provides a Permanent Appropriation for Cost-Sharing Subsidies

As the ACA's text makes clear, its goal was to achieve "near-universal coverage" and to ensure that that "near-universal coverage" would be affordable for all Americans. 42 U.S.C. § 18091(2)(D); *King*, 135 S. Ct. at 2485 (ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (ACA adopted "to increase the number of Americans covered by health insurance and decrease the cost of health care").

A critical part of Congress's plan to ensure affordable, "near-universal coverage" was to enact an interlocking system of premium tax credits and cost-sharing

reduction payments to reduce the costs of both health insurance and health care purchased with that insurance. 26 U.S.C. § 36B; 42 U.S.C. §§ 18071, 18082. Under the terms of the ACA, the premium tax credits "shall be allowed" for individuals with household incomes from 100% to 400% of the federal poverty line to help them purchase insurance, 26 U.S.C. § 36B(a), (c)(1)(a), and insurance issuers "shall reduce the cost-sharing under the plan" for individuals with household incomes from 100% to 250% of the federal poverty line to help them defray the costs of health care purchased with that insurance (*i.e.*, expenses such as co-payments and deductibles), 42 U.S.C. § 18071(a)(2); 45 C.F.R. § 155.305(g). Congress also gave the insurance issuer a legal right to payment from the federal government for the amount of those mandatory cost-sharing reductions, providing that "the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A); *id.* § 18082(c)(3) (advance payments "shall" be made).

The current House leadership now argues that there is no appropriation for the cost-sharing reductions, even though, as it concedes, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. This assertion is at odds with the ACA's plan for reforming and restructuring individual insurance markets, as well as with the mechanisms Congress adopted to effectuate that plan. Likewise, plaintiff's interpretation conflicts with subsequent congressional action that

confirms what everyone understood at the time: the ACA provides that the premium tax credits and cost-sharing reductions are commonly funded by the permanent appropriation in Section 1324.

A. At the Time the ACA Was Enacted, Everyone in Congress Understood that Tax Credits and Cost-Sharing Reductions Would Both Be Funded Out of the Same Permanent Appropriation.

Amici members of Congress served in Congress while the ACA was drafted and enacted, and they were actively involved in the debates concerning the ACA. They know from this experience that the tax credits and the cost-sharing reductions have always been viewed as integrally connected, and that both are indispensable to the restructuring of individual insurance markets that the statute prescribes to make affordable health insurance and health care available for all Americans. Given the identical goals served by these complementary subsidies and their centrality to the ACA's legislative plan, the law makes funding available for both subsidies from the same permanent appropriation, 31 U.S.C. § 1324, obviating the need to seek an annual appropriation. Plaintiff's argument to the contrary is wrong, and it is inconsistent with the way everyone in Congress understood the law to operate at the time it was enacted.

To start, there can be no doubt that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to the effective operation of the ACA. Indeed, it is precisely because both are so critical to the ef-

fective operation of the ACA that Congress established a unified payment system and funded both out of the same permanent appropriation, thereby ensuring that payment would not be subject to the vicissitudes of the annual appropriation process. In concluding otherwise, the district court fundamentally misunderstood the ACA and, contrary to the Supreme Court's decision in *King v. Burwell*, disrupted Congress's legislative plan in enacting it, 135 S. Ct. at 2496.

As the Supreme Court explained in *King*, the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." 135 S. Ct. at 2485. It "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." *Id.* These three reforms, the Court explained, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third. *Id.* at 2487.

As *amici* know from their involvement in deliberations about the ACA, the cost-sharing reductions complement the premium tax credits that *King* held were indispensable to the ACA's legislative plan, and these cost-sharing reductions are no less critical to that plan. Both the premium tax credits and the cost-sharing reductions work in tandem to ensure stable individual insurance markets open to all

individuals, regardless of pre-existing conditions or health status generally, and accessible to moderate and lower-income individuals who, prior to the ACA, went uninsured. Whereas the premium tax credits make it more affordable for an individual to purchase health *insurance*, the cost-sharing reductions make health *care* more affordable by reducing the costs, such as co-payments and deductibles, that even those with health insurance must pay to obtain health care. This is no small thing: studies have shown that if cost-sharing is too high, many individuals will simply choose not to purchase insurance at all, thus undercutting the entire purpose of the premium tax credits. *See* Jon R. Gabel et al., *The ACA's Cost-Sharing Reduction Plans: A Key to Affordable Health Coverage for Millions of U.S. Workers*, The Commonwealth Fund, Oct. 2016, http://www.commonwealthfund.org/publications/issue-briefs/2016/oct/aca-cost-sharing-reduction-plans ("Without the [CSRs] … health plans sold in the marketplaces may be unaffordable for many low-income people."); S.R. Collins et al., *To Enroll or Not To Enroll? Why Many Americans Have Gained Insurance Under the Affordable Care Act While Others Have Not*, The Commonwealth Fund, Sept. 2015, http://www.commonwealthfund.org/publications/issue-briefs/2015/sep/to-enroll-or-not-to-enroll ("Affordability was a key reason people did not enroll in plans."); *cf.* Gabel et al., *supra* ("57 percent of enrollees in plans sold in federally facilitated state marketplaces received cost-sharing reductions").

The text and structure of the ACA make clear that the cost-sharing reductions and the premium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law, which directs the government to "establish a program" for the unified administration of advance payments of both forms of the subsidy. 42 U.S.C. § 18082; *see* Brief of *Amici Curiae* Economic and Health Policy Scholars in Support of Defendants-Appellants at 22-28 [hereinafter Economic and Health Policy Scholars Brief] (identifying the numerous places in the ACA in which the premium tax credits and the cost-sharing reductions are linked). Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing reductions "in order to reduce the premiums payable by individuals eligible for such credit." 42 U.S.C. § 18082(a)(3); Appellants' Br. 50 ("Payments for premium tax credits and cost-sharing reductions are inextricably linked."). Significantly, the ACA does not merely *authorize* the Executive to make these payments, but instead mandates that it do so, repeatedly using the obligatory word "shall." *See, e.g.*, 26 U.S.C. § 36B(a); 42 U.S.C. § 18071(a)(2), (c)(3)(A); *id.* § 18082(c)(2)(A), (c)(3); *see also, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (contrasting "Congress' use of the permissive 'may' in [one section] ... with the legislators' use of a mandatory 'shall' in the very same section" and noting that "[e]lsewhere in [a specified section], Congress used 'shall' to impose discretionless obligations").

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation. 31 U.S.C. § 1324; *see generally* Appellants' Br. 46-47 (discussing text of § 1324); *id.* at 50-53 (discussing the consequences that would result "[i]f the government were unable to compensate insurers for cost-sharing reductions").[4] Although Section 1324 only expressly mentions the provision governing premium tax credits, it was well understood, as *amici* know from their experience in Congress at the time and as other provisions of the statute make clear, that the cost-sharing reductions and the premium tax credits were to be funded out of the same source. As just noted, the government was required to establish a "program" for the unified administration of both forms of the subsidy. 42 U.S.C. § 18082(a) ("[t]he Secretary ... shall establish a program under which ... advance determinations are made ... with respect to the income eligibility of individuals enrolling in a qualified health plan in the individual market through the Exchange for the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title"); *id.* § 18082(a)(3) ("the

[4] The district court dismissed the significance of these results, noting that they "flow not from the ACA, but from Congress' subsequent refusal to appropriate money." J.A. 75. But this misses the point: again, it is precisely because Congress wanted to avoid the undesirable results that would follow if Congress refused to appropriate money that it did not make the advance payments subject to the annual appropriations process.

Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit"); *see id.* § 18083(e) ("the term 'applicable State health subsidy program' means—(1) the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402"). Thus, read consistently with the ACA as a whole (and, in particular, Section 18082), Section 1324 provides a permanent appropriation for reimbursement of insurers' mandated payments for both the premium tax credits and the complementary cost-sharing reductions that are part of the same unified program and equally indispensable to the effective operation of the statute. *See generally* Economic and Health Policy Scholars Brief, *supra*; *see also King*, 135 S. Ct. at 2496 ("A fair reading of legislation demands a fair understanding of the legislative plan.").[5]

Significantly, analyses conducted by the CBO, the nonpartisan office responsible for analyzing budgetary and economic issues relevant to the congressional budget process, have repeatedly reflected the widely-held understanding that

[5] The district court rejected this argument, concluding that "premium tax credits are payable under Section 36B of the Internal Revenue Code, and cost sharing reductions are payable under Section 1402 of the ACA." J.A. 80. But this misunderstands the structure of the statute: Sections 36B and 1402 establish the relevant programs, but neither of those provisions provides the appropriation to fund them. The appropriation for both is provided by Section 1324.

the cost-sharing reductions, just like the premium tax credits, are covered by a permanent appropriation. *See, e.g.*, CBO, The Budget and Economic Outlook: 2015-2025, at 122 tbl.B-3 (2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49892-Outlook2015.pdf (identifying both "[o]utlays for premium credits" and "[c]ost-sharing subsidies" as "[c]hanges in [m]andatory [s]pending"); *see also* CBO, *Frequently Asked Questions About CBO Cost Estimates* (last visited Dec. 1, 2015), https://www.cbo.gov/about/products/ce-faq (contrasting "[m]andatory" spending, i.e., "spending controlled by laws other than appropriation acts," with "[d]iscretionary spending," i.e., "spending stemming from authority provided in annual appropriation acts"); *see generally* Appellants Br. 49 (noting that "during deliberations on the ACA, the [CBO] advised Congress that cost-sharing reductions were 'direct spending' rather than potential expenditures that 'would be subject to future appropriation action'").

It also bears emphasis that when Congress directs the executive branch to take some action, but wants to maintain control over the executive branch's compliance with that direction, there is a well-established means by which it does that. In such circumstances, Congress will often enact an "authorization of appropriations," language which does not itself appropriate funds, but empowers Congress to appropriate funds in the future. *See, e.g.*, Pub. L. No. 113-235, 128 Stat. at 2540 ("There are authorized to be appropriated such sums as may be necessary to carry

out this subchapter."). Congress included such language elsewhere in the ACA, *see, e.g.*, Pub. L. No. 111-148, § 1323(h) (2010), but tellingly did not include it with respect to the cost-sharing reductions. That Congress did not do so only underscores that everyone involved in the law's drafting understood that future appropriations would be unnecessary because those payments would be made out of the permanent appropriation provided in Section 1324.

Finally, another ACA provision also confirms what everyone at the time understood. When Congress was debating the ACA, some members expressed concern that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which under certain circumstances limits the use of annually-appropriated funds to pay for abortions. *See, e.g.*, 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) ("this bill is not subject to appropriations"). To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law; in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations. *See* 42 U.S.C. § 18023(b)(2)(A) ("If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 ... (ii) Any cost-sharing reduction under section 18071 of this title ... .").

In short, the text of the ACA confirms what everyone in Congress understood at the time: the cost-sharing subsidies, like the premium tax credits, were an integral part of the ACA, which is why Congress mandated their payment and provided a permanent appropriation to ensure that the Secretary could comply with that legislative mandate.

B. Subsequent Congressional Action Confirms that Cost-Sharing Reductions Would Be Funded Out of the Same Permanent Appropriation as the Tax Credits.

In the years since the ACA's enactment, congressional action has confirmed that Section 1324 provides a permanent appropriation for the advance payments that the ACA mandates that the Secretary make to insurers for the cost-sharing subsidies.

For example, for FY2014, there was no annual appropriation for these payments, but the House and Senate nonetheless both assumed that an appropriation was available, together passing a bill premised on that assumption. That bill conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the Exchanges verify that applicants meet the eligibility requirements for such subsidies. Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, Div. B, § 1001(a) (2013). To comply with this provision, HHS subsequently certified that the Exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for

such payments and reductions." Letter from Kathleen Sebelius to Hon. Joseph R. Biden, Jr. at 1 (Jan. 1, 2014), https://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf. Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if Congress believed that there was no permanent appropriation available to fund the payments.[6]

Moreover, that certification surely gave Congress additional notice that the executive branch intended to make advance payments of cost-sharing reductions, and Congress never indicated that it viewed those payments as unlawful. In fact, two weeks after that certification, Congress enacted the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014), which imposed numerous explicit restrictions on particular uses of appropriated funds, *see, e.g.*, *id.*, Div. H, tit. V, §§ 502-520, but imposed no limits on the use of federal funds for the advance payment of ACA cost-sharing reductions. As *amici* know from their experience in Congress, members of Congress frequently use restrictions on appropriations to limit executive branch action and to make clear when they disagree with an

[6] In the district court, plaintiff made much of the Administration's request for a line item designating funds for the payment of cost-sharing reductions. *See, e.g.*, Plaintiff's Motion for Summary Judgment, D.E. 53, at 7. *Amici* take no position on why the executive branch made that request, but *amici* do know why Congress did not make an annual appropriation in response: none was necessary. As everyone understood at the time the law was enacted and as the law itself makes clear, those payments were funded out of the Section 1324 permanent appropriation. Tellingly, immediately after the Administration went forward and made the required payments, Congress did not dispute the Administration's action, or its funding both subsidy provisions from the same source, namely 31 U.S.C. § 1324.

executive branch interpretation of the law. *See supra* at 13. That Congress did not do so with respect to these payments underscores that members on both sides of the aisle understood those payments to be lawful in light of the Section 1324 permanent appropriation.

Indeed, Congress's appropriations for subsequent years support the same point. In March 2014, OMB submitted a FY2015 budget request to Congress. OMB, Fiscal Year 2015 Budget of the United States Government, https://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf. Given the Section 1324 permanent appropriation, this budget proposal did not seek an appropriation for the payment of the cost-sharing reductions, and in May 2014, then-OMB Director Sylvia Burwell informed members of Congress that all forms of the ACA's advance payments were being paid from the same source. Compl. ¶¶ 37-39. When Congress subsequently enacted the Consolidated and Further Continuing Appropriations Act, 2015, it once again did not in any way limit the use of federal funds for the advance payment of cost-sharing reductions under the ACA, even though it did once again impose numerous other explicit restrictions on specific uses of appropriated funds, *see, e.g.*, Pub. L. No. 113-235, 128 Stat. 2130, Div. G, tit. V, §§ 502-519 (2014). Similarly, the Consolidated Appropriations Act, 2016, continued to impose numerous restrictions on some uses of appropriated funds, Pub. L. No. 114-113, 129 Stat. 2242, Div. B, tit. V, §§ 502-20

(2015), while imposing no limit on the use of federal funds for the advance payment of ACA cost-sharing reductions.

* * *

In sum, the text and structure of the ACA confirm what everyone in Congress understood at the time the law was enacted: the cost-sharing reductions, like the premium tax credits, are critical to the law's effective operation, and both were to be paid out of the same permanent appropriation, 31 U.S.C. § 1324. The existence of that permanent appropriation is fatal to plaintiff's claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: October 31, 2016

APPENDIX:

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Rep. Nancy Pelosi
Democratic Leader

Rep. Steny H. Hoyer
Democratic Whip

Rep. James E. Clyburn
Assistant Democratic Leader

Rep. Xavier Becerra
Democratic Caucus Chair

Rep. Joseph Crowley
Democratic Caucus Vice-Chair

Rep. Nita Lowey
Ranking Member, Committee on Appropriations

Rep. Robert C. "Bobby" Scott
Ranking Member, Committee on Education and the Workforce

Rep. Frank Pallone
Ranking Member, Committee on Energy and Commerce

Rep. John Conyers, Jr.
Ranking Member, Judiciary Committee

Rep. Louise Slaughter
Ranking Member, Committee on Rules

Rep. Sander M. Levin
Ranking Member, Committee on Ways and Means

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 31st day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 31, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 31st day of October, 2016.

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