IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:14-cv-01967-RMC
	)	
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The House does not seriously dispute that its interpretation of the Affordable Care Act—under which premium tax credit payments are permanently funded but cost-sharing reduction payments are not—would have the perverse effect of vastly *increasing* federal spending from the very appropriation the House purports to be protecting. Significantly, the projections to that effect cited in the defendants' previous briefing have been confirmed by the Urban Institute, which recently determined that federal spending would rise by *$47 billion* over the next ten years under the House's reading of the ACA. *See* Linda J. Blumberg and Matthew Buettgens, Urban Inst., *The Implications of a Finding for the Plaintiffs in House v. Burwell* at 1, 8 (Jan. 2016) (Urban Institute Study) (Defs.' Exh. 26). These consequences flow directly from the structure of the ACA's integrated program of insurance subsidies, in which cost-sharing reductions are hard-wired to premium tax credits. The House tries to dismiss these projections as "speculative," Pl.'s Mem. in Opp'n to Defs.' Mot. for S.J. at 18 (Pl.'s Opp'n) (ECF No. 66), but it offers no explanation for how the increased spending could or would be avoided, given the ACA's structure and design. And these are exactly the sort of projections that the Supreme Court relied on to reject the similarly blinkered reading of the ACA advanced by the plaintiffs in *King v. Burwell*. 135 S. Ct. 2480, 2493-94 (2015) (relying on projections by the Urban Institute, the Department of Health and Human Services' Assistant Secretary for Planning and Evaluation, and an amicus brief filed by many of the same *amici*-economists who filed in this case).

Faced with these structural features of the ACA, the House's argument hinges on an attempt to persuade this Court that the ordinary rules of statutory interpretation do not apply here. Notwithstanding *King*'s instruction to interpret statutory provisions "in their context," "with a

view to their place in the statutory scheme," and in light of the overall "legislative plan," 135 S. Ct. at 2489, the House insists that the Court cast aside those traditional tools of statutory analysis. According to the House, "no *King*-type inquiry is required" when appropriations are at issue. Pl.'s Opp'n at 14. But *King* itself involved an appropriations question, and nothing in appropriations law—which is designed to *protect* the public fisc—compels a reading of the ACA that would drain billions of additional dollars each year from the federal Treasury. The House also repeatedly invokes 31 U.S.C. § 1301(d), which specially restricts the circumstances in which "a law may be construed to make an appropriation out of the Treasury." *See* Pl.'s Opp'n at 1. But Section 1301(d) is inapposite here. There is no dispute that 31 U.S.C. § 1324, as amended by the ACA, "make[s] an appropriation out of the Treasury," 31 U.S.C. § 1301(d). This case concerns the scope of that appropriation, which is an ordinary question of statutory interpretation governed by the usual rules, as described in *King*.

The careful inquiry into the ACA's text, structure, design, and history that is called for by *King* shows that the ACA fully funded both components of the Act's integrated subsidy program—including the advance cost-sharing reduction payments that it mandates. Because the Secretary of Treasury is making advance cost-sharing reduction payments pursuant to a valid permanent appropriation, summary judgment should be awarded to the defendants.

ARGUMENT

I. Appropriations Law Principles Do Not Compel a Reading of the ACA's Amendment to Section 1324 that Would Increase Federal Spending by Billions of Dollars

The effectively undisputed reasons why federal spending would increase dramatically under the House's interpretation of the ACA are described in detail in the defendants' other briefs, the *ASPE Issue Brief*, the recent Urban Institute report, and the amicus brief filed by economists in

this case.[1] As explained there, a failure to reimburse insurers for the cost-sharing reductions mandated by the ACA will inflate insurers' costs and cause them to charge higher premiums. Higher premiums, in turn, will trigger a dollar-for-dollar increase in the size of federal premium tax credits.[2] As a result, the federal government will wind up paying increased amounts not only for the lower-income individuals eligible for cost-sharing reductions, but for millions of additional, comparatively higher-income, individuals who are eligible for the premium tax credits. This increased spending would come from the same appropriation, Section 1324, that the House is trying to limit here. And Congress could not avoid these consequences even by appropriating funds from year to year. Because insurers set premiums before Congress enacts annual appropriations, the House's reading could lead insurers to price for the possibility that they would

[1] *See* Defs.' Mem. in Supp. of Defs.' Mot. for S.J. (Defs.' Mem.) at 5-8, 16-23 (ECF No. 55-1); Defs.' Mem. in Opp'n to Pl.'s Mot. for S.J. (Defs. Opp'n) at 9-11 (ECF No. 65); Dep't of Health & Human Servs., Office of the Ass't Sec'y for Planning and Evaluation, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* at 2-4 (Dec. 2015) (ECF No. 55-6); *Urban Institute Study* at 5-7; Amicus Br. of Economic and Health Policy Scholars at 8-14 (ECF No. 64).

[2] This structural connection was emphasized by both the Congressional Budget Office while the Act was under consideration, and by the Supreme Court-appointed amicus in *NFIB v. Sebelius*. *See* Cong. Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 20 (Nov. 30, 2009), reprinted in Cong. Budget Office, *Selected CBO Publications Related to Health Care, 2009-2010* at 213 (Dec. 2010) (explaining that if premiums rise due to adverse selection, federal payments for tax credits "would have to rise to make up the difference") (ECF No. 55-4); Brief for Court-Appointed Amicus Curiae Supporting Complete Severability at 39, *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-393), 2012 WL 588458, at *39 ("[T]he structure of the premium subsidy—covering the amount of the premium above a stated percentage of the recipient's income—mean[s] that people receiving premium subsidies under the act would be protected against most or even all of the premium increase.") (internal quotations omitted).

not be reimbursed for providing cost-sharing reductions, resulting in the same sequence of unintended consequences. *See* Defs.' Mem. at 22-23.[3]

This state of affairs makes no sense under any reasonable understanding of the ACA's "legislative plan." *King*, 135 S. Ct. at 2489. And contrary to the House's contention, the self-defeating nature of its reading of the ACA—which ultimately would expand, rather than limit, federal expenditures under 31 U.S.C. § 1324(b)—is not simply a "policy" problem that some future Congress might consider fixing. It is, instead, a compelling reason why that reading should be rejected as inconsistent with the context, structure, and design of the Act that Congress enacted.

As the House would have it, *King*'s directive to read statutory provisions "in their context and with a view towards the overall statutory scheme," 135 S. Ct. at 2489, does not apply here, because this case involves an appropriations question rather than an "ordinary question of statutory interpretation," Pl.'s Opp'n at 13. But as multiple Members of Congress (including Members who voted for the resolution purportedly authorizing this lawsuit) recognized at the time, *King* itself was an appropriations case, in which the plaintiffs sought to enjoin payments that they claimed were not provided for in 26 U.S.C. § 36B. *See* Brief of Amici Curiae Senators John Cornyn et. al. at 23-24, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2014 WL 7474064, at *23-24 (arguing that "the government is spending over $1.2 billion unlawfully each and every

[3] Increased federal spending is not the only way in which the House's position would distort the legislative plan. For example, for reasons noted in the text and in prior briefing, it would undermine the ACA's targeting of increased financial assistance to lower-income individuals, causing the government to subsidize higher-income individuals in the same way. *See* Defs.' Opp'n at 11 (citing 42 U.S.C. § 18071(c)(2)). In addition, the Urban Institute premised its study on the assumption that cost-sharing reduction reimbursements would end in an orderly fashion. It cautions, however, that "the timing of such a potential change would be critical," and that additional adverse consequences could ensue "[i]f payments for CSRs are stopped in the middle of a plan year." *Urban Institute Study* at 2, 8.

month on premium subsidies" in violation of U.S. Const. art. I, § 9, cl. 7). And, in any event, no special appropriations-related principles compel an interpretation of the ACA that would make the Act's program of subsidies much costlier.

1. In arguing otherwise, the House relies heavily on 31 U.S.C. § 1301(d), which provides that "[a] law may be construed to make an appropriation out of the Treasury … only if the law specifically states than an appropriation is made[.]" *See, e.g.*, Pl.'s Opp'n at 1. But the House's reliance on Section 1301(d) erroneously conflates two legally distinct questions: (1) whether a statute makes an appropriation out of the Treasury to begin with, and (2) whether an appropriation so made is available to fund a particular expenditure. Section 1301(d), by its express terms, applies only to the first question, namely, whether "[a] law may be construed to make an appropriation out of the Treasury." As the GAO Redbook explains, by requiring that "the making of an appropriation must be expressly stated," Section 1301 limits the range of statutes that are construed in the first instance to permit the expenditure of any Treasury funds at all. 1 U.S. Government Accountability Office, *Principles of Federal Appropriations Law* at 2-16 (3d ed. 2004) ("GAO Redbook") (Exh. 27). Statutes that are construed to do so include "[r]egular annual and supplemental appropriation acts," which typically use express language like "[a]n Act making appropriations," as well as "statutes other than regular appropriation acts" that nevertheless clearly appropriate funds from the Treasury, such as 31 U.S.C. § 1324. *Id.*

This first question, concerning the existence of an appropriation and thus implicating 31 U.S.C. § 1301(d), is not presented in this case, as there is no dispute that 31 U.S.C. § 1324(b) makes a permanent appropriation from the Treasury. *See* Pl.'s Opp'n at 4 (describing Section 1324 as a "permanent appropriation"); *id.* at 11 (same). Instead, this case involves the second question, unrelated to 31 U.S.C. § 1301(d), concerning the scope of an appropriation that has been

made out of the Treasury—specifically, whether the Section 1324 appropriation covers the expenditures at issue here.[4] Traditional principles of statutory interpretation govern that inquiry. *See* 55 Comp. Gen. 307, 317 (Oct. 1, 1975) ("in construing appropriations acts, we have consistently applied … traditional statutory interpretation principles so as to give effect to the intent of Congress"); *see generally* 1 GAO Redbook at 2-74 to 2-113 (providing an overview of ordinary tools of statutory construction to assist in the interpretation of appropriations law) (Exh. 27 & ECF No. 65-2).

Accordingly, the scope of an appropriation requires reference to whatever statutory program may underlie the appropriation:

> Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history. If the appropriation is general, it may also be necessary to consult the legislation authorizing the appropriation, if any, and the underlying program or organic legislation, together with their legislative histories.

1 GAO Redbook at 4-9 (ECF No. 55-11); *see, e.g.*, B-125309 (Dec. 6, 1955) (relying on the purpose and history of legislation to determine scope of an appropriation).[5] This determination,

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[4] *See* Pl.'s Opp'n at 17 (recognizing that defendants argue that "31 U.S.C. § 1324 is available to defendants to make" advance cost-sharing reduction payments); *id.* at 27 (same).

[5] Even where the GAO has cited Section 1301(d), it has done so when considering whether authorizing legislation also provided an appropriation—a question about the *existence* of an appropriation, not its *scope*. *See, e.g.*, B-303961 (Dec. 6, 2004) (considering whether the Anti-Deficiency Act barred payment of certain fringe benefits to temporary employees where a statutory provision authorized such payments "notwithstanding any other provision of law"); B-114808 (Aug. 7, 1979) (concluding that the statutory provisions at issue "do establish permanent authority for future appropriations, [but] do not establish permanent indefinite appropriations."); B-227658 (Aug. 7, 1987) (describing 50 Comp. Gen. 863 (1971), which itself cites Section 1301(d), as merely holding that "authorizing legislation, standing alone, cannot make available expired unobligated balances in appropriation accounts"). Moreover, the D.C. Circuit has only cited Section 1301(d) once, more than seventy years ago, rejecting a claim that a particular statute governing disposition of certain trust funds could be construed as an

of course, often involves reference to the "venerable" whole-text canon, which "virtually always applies and is rarely if ever contradicted." 1 GAO Redbook at 2-85; *see* B-302335 (Jan. 15, 2004) (applying whole-text canon in determining scope of appropriation); *see also* B-4843 (July 14, 1939) (concluding that a "literal interpretation" of an appropriation act "should be avoided" when it would be inconsistent with other statutory provisions).

A recent Comptroller General decision regarding the scope of another ACA appropriation illustrates that statutory context plays its usual vital role in such an inquiry. When it enacted the ACA, Congress created a Health Insurance Reform Implementation Fund ("Fund"), located the Fund "within" HHS, and made an appropriation to the Fund for "Federal administrative expenses to carry out" the ACA. Pub. L. No. 111-152, § 1005, 124 Stat. 1029, 1036 (Mar. 30, 2010) (codified at 42 U.S.C. § 18121). This led to a question about "the scope of availability of the [Fund]," namely, "whether amounts from the Fund are available to pay for administrative expenses incurred by other agencies, in addition to HHS." B-321823 (Dec. 6, 2011). In resolving that question, the Comptroller General considered not only the "plain meaning" of the appropriation but also "the context in which Congress established the Fund" under the ACA, noting that the ACA "assigned responsibilities and granted authorities to other federal agencies." *Id.* Accordingly, the Comptroller General concluded that "the Fund is available to other federal agencies as well." *Id.* This is just one example of numerous cases in which the Comptroller General has approached the scope of an appropriation as an ordinary question of statutory

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appropriation for the refund of payments made under a regulatory program. *See Stitzel-Weller Distillery v. Wickard*, 118 F.2d 19, 24 (D.C. Cir. 1941). We are not aware that any court, or the GAO, has ever cited it for the proposition that Section 1301(d) applies to the scope of an appropriation.

interpretation. *E.g.*, B-302335 (Jan. 15, 2004); B-289209 (May 31, 2002); B-251189 (Apr. 8, 1993); *see also Edwards v. Bowen*, 785 F.2d 1440, 1441 (9th Cir. 1986).[6]

2. The House also hypothesizes that appropriations-law principles could explain the purpose behind a decision to fund part, but not all, of the ACA's program of insurance subsidies. In particular, the House suggests that Congress might have chosen to do so simply to "keep control of federal spending through the annual appropriations process." Pl.'s Opp'n at 33. That suggestion is misguided. As an initial matter, the ACA's legislative record provides no support for the House's conjecture. And in any event, the House's interpretation of the Act would *undermine*, not enhance, congressional control over the federal Treasury. Rather than requiring that Congress affirmatively act to loosen the federal purse strings, it would create a situation in which congressional *inaction* would result in billions of dollars of additional federal spending each year, due to increased premiums and increased premium tax credits.

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[6] The House's misplaced approach to interpreting the scope of an appropriation also is inconsistent with other principles of federal appropriations law. For example, the "necessary expense" doctrine provides that "where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object." 1 GAO Redbook at 4-20 (ECF No. 55-11); *see Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214, 1221-22 (D.C. Cir. 2004) (faulting agency for failing to consider the possibility that an expenditure not "expressly authorized in an appropriations act" was nonetheless "implicitly authorized" by the same act). Similarly, it is well settled that pre-existing appropriations are available for newly-enacted duties so long as the new duties "bear a sufficient relationship to the purposes for which the previously enacted appropriation was made." 1 GAO Redbook at 4-14. Finally, interpretation of the scope of appropriations law often involves deference to the agency implementing an appropriation, notwithstanding the House's mistaken assertion to the contrary. *See id.* at 4-23 ("Generally, the interpretation of a statute by the agency that Congress has charged with the responsibility for administering it is entitled to considerable weight"); B-223128 (Sept. 8, 1986) (deferring to D.C. Department of Corrections' determination that appropriation to pay for "emergency needs" was available to pay for two 400-bed modular housing facilities). None of these principles concerning the purposes for which appropriations may be used would be tenable if, as the House contends, traditional tools of statutory analysis do not apply here.

It would also effectively cede significant control over the federal fisc to the vagaries of litigation. As explained in previous briefs, the House's interpretation of the ACA—under which the Act would require the government to make the cost-sharing payments but provide no appropriation for doing so directly—would invite potentially costly lawsuits under the Tucker Act, 28 U.S.C. § 1491(a)(1). The House asserts that insurers could not prevail in such suits "[a]bsent a valid appropriation." Pl.'s Opp'n at 19. But courts have held that the absence of an appropriation does not necessarily preclude recovery from the Judgment Fund (31 U.S.C. § 1304) in a Tucker Act suit. *See*, *e.g.*, *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.") (citation omitted). The House does not explain how, given this precedent, the government could avoid Tucker Act litigation by insurers in the wake of a ruling that the ACA did not permanently fund the cost-sharing reduction payments that the Act directs the government to make.

Indeed, as explained in previous briefs, insurers might bring Tucker Act lawsuits to seek windfall double recoveries from the government, in which they would potentially recoup their cost-sharing expenses from the government once through increased premium tax credits and then again through litigation. But whether insurers recovered just once, through premium tax credits, or twice, through a combination of premium tax credits and litigation, the House's reading would mean that such recoveries would occur with no congressional "control" at all.

II. Congress Permanently Funded Both Components of the ACA's Integrated Subsidy Program

The defendants' previous briefs explained how a careful examination of the ACA's text, structure, design, and history, as required by *King*, demonstrates that Congress permanently

funded both the premium tax credits and the interrelated cost-sharing payments. The House has not supported its contrary interpretation with any such careful examination of its own. *See* Pl.'s Opp'n at 14-15. Instead, the House insists that no such inquiry is needed here, because in its view *King* instructs courts to consider statutory context solely to resolve evident statutory ambiguities, and not to determine in the first instance whether a statute is ambiguous. *King*, however, expressly admonished that "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," and it determined that the relevant statutory text was ambiguous only *after* reading "the words in their context and with a view to their place in the overall statutory scheme." 135 S. Ct. at 2489 (internal quotation omitted); *see also, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context."). Under the correct approach, which employs the full suite of statutory-interpretation tools at all stages of the analysis, the ACA is best read to fully fund both components of the Act's integrated subsidy program—including the advance cost-sharing reduction payments that it mandates.

1. The ACA amended 31 U.S.C. § 1324(b) so that it would provide funds for "refunds due from … section … 36B." As the defendants' briefing has demonstrated, that language can readily be construed to encompass both the premium tax credits and the cost-sharing payments, as both subsidies depend on eligibility standards set forth in Section 36B. *See Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1125 (D.C. Cir. 2013) (noting that "from" may "indicate the source or original or moving force of something," as opposed to its proximate cause). Eligibility for cost-sharing reductions flows from the Section 36B tax credit; the Act specifies that receipt of the tax credit is a condition for eligibility for cost-sharing reductions. 42 U.S.C. § 18071(f)(2). And the Act specifically directs that advance payments of both components of the

integrated subsidy system shall be made as part of a single program. 42 U.S.C. § 18082(a). The House's observation that not all premium tax-credit recipients receive cost-sharing reductions, *see* Pl.'s Opp'n at 6-7, does not change the fact that eligibility for cost-sharing reductions is textually dependent on eligibility for premium tax credits as determined under Section 36B, *see* 42 U.S.C. § 18071(f)(2), or that the subsidies are both legally and economically integrated.[7]

The House's effort to bifurcate the payment of premium tax credits and cost-sharing reductions into "separate and distinct" programs is equally misguided. To start, the House fails to address the various textual features of the ACA that show that Congress integrated the two subsidies. For example, the House contends that advance payments of premium tax credits and of cost-sharing reduction payments may be treated differently because the credits and the reductions serve different purposes. Pl.'s Opp'n at 3-4. But the ACA's text expressly specifies that advance payments for both subsidies are made for the *same* purpose: to reduce insurance premiums. 42 U.S.C. § 18082(a)(3). And in focusing narrowly on the fact that the two subsidies do not operate identically in all respects, *see* Pl.'s Opp'n at 7-11, the House disregards the Act's multiple references to the subsidies as part of a single "program" for purposes of both eligibility and payment. *See* 42 U.S.C § 18081(a) (establishing a "program" for determining eligibility for both premium tax credits and cost-sharing reductions); 42 U.S.C. § 18082(a) (establishing a "program" for making both advance premium tax credit and cost-sharing reduction payments to

[7] The House also notes the ACA's "[s]pecial rules for Indians" under which a qualified health plan is not permitted to impose cost sharing on services provided by or through the Indian Health Service (IHS). Pl.'s Opp'n at 6-7 (citing 42 U.S.C. § 18071(d)). This provision reflects that Indians are not charged for services provided through the IHS, a benefit that the ACA did not eliminate. *See* 77 Fed. Reg. 73,118, 73,178 (Dec. 7, 2012); *see also* 25 U.S.C. § 458aaa-14(c) (IHS may not require Indian tribes to charge individual Indians for care); 25 U.S.C. § 1621u (no charge may be imposed on a patient for contract care approved by IHS).

insurers "in order to reduce the premiums payable by individuals eligible for such credit"). Furthermore, and just as importantly, the House also disregards the economic integration of the subsidies within the ACA's structure and design, *see* Defs.' Mem. at 16-22, in violation of *King*'s instruction to consider "the way different provisions in the statute interact," *King*, 135 S. Ct. at 2490.

The House fares no better in its attempts to explain away the various textual features, throughout the ACA, indicating that Congress understood the Act to have permanently funded the cost-sharing payments. As explained in the defendants' earlier summary judgment briefs, the ACA includes a restriction on the use of cost-sharing reduction payments for certain abortion services. 42 U.S.C. § 18023(b)(2)(A)(ii). This restriction would be wholly superfluous if those payments were funded by annual appropriations that would be subject to the identical restrictions of the Hyde Amendment. Indeed, the restriction was added to the text of the ACA in response to Members' concern that the ACA itself had "appropriated money" that required a special ACA-specific spending restriction. 156 Cong. Rec. H2449, H2450 (Mar. 25, 2010) (Rep. Gohmert); *see also* 156 Cong. Rec. H1891, H1910 (Mar. 21, 2010) (Rep. Smith) (payments "are both *authorized and appropriated*" in the ACA itself) (emphasis added). Even if the cost-sharing reduction payments were not specifically mentioned during the debates on the restriction, Pl.'s Opp'n at 28-29, it is indisputable that the *text* of the restriction expressly includes those payments, demonstrating that Congress considered them to be permanently appropriated and thus not subject to future Hyde Amendments. *See* 42 U.S.C. § 18023(b)(2)(A)(ii).[8]

[8] The House misses the mark in its attempt to discount the relevance of the cited floor statements. The point is that the text of the ACA itself was amended in response to these statements; they are therefore highly relevant in establishing that Section 18023 was added to apply the Hyde

And the House is incorrect in viewing the reference in Section 18023 to "the amount (*if any*) of the advance payment of the reduction under section 1412 of the [ACA]," *see* Pl.'s Opp'n at 27 (plaintiff's emphasis), as an indication that the availability of the advance payment would depend on future appropriations decisions. Notably, the same "if any" language is used in the restriction that applies to advance payments of premium tax credits, *see* 42 U.S.C. § 18023(b)(2)(A)(i), which the House acknowledges are fully funded by the permanent appropriation in Section 1324. The House, which omits this subsection when quoting 42 U.S.C. § 18023, cannot reconcile Congress's use of the "if any" language for payments it concedes are fully appropriated with its argument that those exact same words, in the context of the cost-sharing reduction payments, "expressly contemplate[] the possibility … that no appropriation may exist." Pl.'s Opp'n at 28. The words "if any" can be explained as merely reflecting that neither the premium tax credit nor cost-sharing reduction subsidies must always be made in advance. At all events, the House simply does not explain why Congress would have included any restriction on the use of those payments at all, if it believed that they would be funded through annual appropriations already restricted by the Hyde Amendment.

The House's attempts to explain away the CBO's scoring of the cost-sharing payments as mandatory are equally unavailing. *See* Defs.' Mem. at 23-25. Although, as the House notes, the CBO also scores "appropriated entitlements" as direct spending, Pl.'s Opp'n at 36, the defendants' prior briefing has explained why cost-sharing reductions cannot plausibly be read to be an appropriated entitlement, Defs.' Mem. at 21-24, and the House offers no argument in response.

Amendment to provisions that would not be subject to the annual appropriations process (which, in any event, is evident in the text itself). Because the text was amended in response to these floor statements, they are relevant here. *See Harbison v. Bell*, 556 U.S. 180, 191 (2009); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 449 (D.C. Cir. 1989).

Revealingly, the House has no answer to the fact that its own Budget Committee recognizes that the ACA's cost-sharing reduction payments do not fall within its list of "appropriated entitlements and mandatories." Defs.' Mem. at 22.

Nor does the House offer a satisfactory explanation as to why the ACA's cost-sharing reduction provisions lack the "authorization of appropriations" language that Congress elsewhere used to indicate its intent to provide funding through annual appropriations. *See* Defs.' Mem. at 14-15. The House's observation that the absence of "authorization of appropriations" language is not itself an appropriation, Pl.'s Opp'n 29-30, is correct but beside the point. The House cannot refute that the absence of such language provides a strong indication of Congress's understanding that cost-sharing reduction payments were not subject to future appropriation, but instead were permanently funded through other provisions of the ACA, namely, the Act's amendment to Section 1324.[9]

Finally, the House cannot reconcile its interpretation with Congress's post-ACA actions, which illustrate Congress's continued understanding that the cost-sharing payments were permanently funded. The House still cannot explain away the 2013 Continuing Appropriations Act, which expressly conditioned payment of cost-sharing reductions on an eligibility certification by HHS, and thereby presumed an appropriation for the cost-sharing reduction payments. It

[9] The House incorrectly offers the "risk corridors" program as an exception to the ACA's consistent inclusion of "authorization of appropriations" language for programs that the ACA left subject to annual appropriations. Pl.'s Opp'n at 31. But the lack of such language as to the risk corridors program can be explained by the fact that the program involves both payments in by some insurers and offsetting payments out to other insurers, such that the CBO expected no additional funding to be necessary for the program at the time the ACA was enacted. *See* 78 Fed. Reg. 15,410, 15,516 (Mar. 11, 2013) ("CBO did not separately estimate the program costs of risk corridors, but assumed aggregate collections from some issuers would offset payments made to other issuers.").

again attempts to dismiss the relevance of the Act by asserting that Congress could not have known in October 2013 that spending for cost-sharing reductions would soon begin. Pl's Opp'n at 38. But as the defendants have explained, the legislative record contradicts that assertion, *see* Defs.' Opp'n at 15-17, and the House cannot explain why Congress would have perceived a need to enact a condition on spending that it did not believe would or could take place in the foreseeable future. Moreover, just weeks ago, the House and Senate passed a bill (since vetoed) that would have repealed the ACA but preserved cost-sharing reduction payments through 2017. H.R. 3762, 114th Cong. § 202(e)(2) (Jan. 8, 2016). The House makes no attempt to explain why Congress would have preserved cost-sharing payments through 2017 if, as the House contends, those payments are not appropriated.[10]

2. The House's cramped interpretation of Section 1324 also cannot be squared with either the text of the statute or the House's own theory of the case. The House first asserts that the Section 1324 appropriation is available only to pay for "reduc[tions]" in "tax liability." Pl.'s Opp'n at 23. But while the first paragraph of Section 1324(b) is limited to refunds "to the limit of liability of an individual tax account," 31 U.S.C. § 1324(b)(1), the second paragraph, 31 U.S.C.

[10] The House now relegates its reliance on the Executive Branch's budget request for fiscal year 2014 to a few concluding pages in which it asserts that the request is "legally significant," Pl.'s Opp'n at 41, without providing any authority for that proposition. As the defendants have explained in detail, neither the Executive's request for legislation nor Congress's silence in response to that request provides any evidence as to the meaning of the earlier enactment, the ACA. *See* Defs.' Mem. at 29-33; Defs.' Opp'n at 4-7. The House discounts the GAO and OLC opinions that the defendants have cited as not speaking to "the question of whether a valid appropriation existed in the first instance." Pl.'s Opp'n at 40 n.34. But, as previously explained, this case concerns not the *existence* of an appropriation, but instead the *interpretation* of an appropriation that everyone acknowledges exists (Section 1324). The cited opinions address the precise situation here: whether a pre-existing appropriation could be interpreted to cover a particular expenditure, when the Executive had unsuccessfully sought a different appropriation for that expenditure. *See* Defs.' Mem. at 30.

§ 1324(b)(2), contains no such limitation. Indeed, as the House recognizes, numerous payments that are indisputably authorized by Section 1324(b)(2) do not reduce anyone's tax liability. For example, 26 U.S.C. § 6431 provides for subsidized interest payments to municipalities that pay no federal taxes. Similarly, advance premium tax credit payments under 42 U.S.C. § 18082—which the House acknowledges are funded under Section 1324—do not depend on the recipient having any underlying tax liability.[11]

The House's alternative argument that Section 1324(b)(2) is available only for payments made directly under the provisions listed therein, Pl.'s Opp'n at 22, 26, is likewise unsupportable. The statute does not provide for "disbursements … *under*" listed provisions, it provides for "disbursements … for refunds due from" the listed provisions. In limiting Section 1324 to payment of the referenced credits themselves, the House would read "refunds due from" so narrowly as to preclude payments as to which it is common ground that the appropriation applies. *See* Defs.' Mem. at 26-29. Of particular relevance here, the advance payments of the ACA's premium tax credits are provided for under 42 U.S.C. § 18082, not 26 U.S.C. § 36B, so under the House's reading those payments would be forbidden. But the House agrees that those payments are covered by the Section 1324(b) appropriation. Pl.'s Opp'n at 25-26.

[11] The House is wrong to argue that the legislative history of Section 1324(b) supports a strict interpretation of the statute. Pl.'s Opp'n at 26 n.1. The statute was not adopted "because of Congress' concern about the Executive doing exactly what defendants have done here," *id.*, as the House asserts. Instead, the statute was motivated by then-recent *congressional* enactments funding entitlement programs through tax collections. *See* S. Rep. No. 95-1061, at 153 (1978)) (referring to "statutory entitlement[s]" covered by newly-added Section 1324(b)). The addition of Section 1324(b) created the vehicle to fund future entitlement programs through Section 1324—amendment to Section 1324(b). The ACA indisputably amended Section 1324(b), and the legislative history of Section 1324(b) offers no insight into the scope of the statutory program funded by that amendment.

In an effort to reconcile its (incorrect) reading of Section 1324(b)(2) with its (correct) acknowledgment that advance payments of the premium tax credits are funded by the ACA's addition of "36B" to that appropriation, the House argues that the advance payments of the premium tax credits are "the exact same" as the premium tax credits themselves. Pl.'s Opp'n at 24-25. This assertion rests not on plain text but a legal fiction; advance premium tax credit payments are of course not the premium tax credits themselves. *See* 42 U.S.C. § 18082(a)(3), (c)(2); 26 U.S.C. § 36B(f)(1). The House's argument, moreover, reveals its basic misunderstanding of the operation of advance payments of premium tax credits within the ACA's integrated program of insurance subsidies. The House asserts, incorrectly, that an insured individual must pay back the portion of the advance payments attributable to premium tax credits to the extent that it exceeds the amount of the premium tax credit to which he or she becomes entitled (because, for example, the insured's income rose over the course of the year). Pl.'s Opp'n at 8-9. That is incorrect. The statute caps the amount of any potential repayment according to an insured's income, 26 U.S.C. § 36B(f)(2)(B), such that in 2014 insureds were not obligated to repay hundreds of millions of dollars in excess advance payments of premium tax credits.[12] Advance payments of premium tax credits are therefore not "the exact same" as premium tax credits; Congress designed these advance payments within its program of insurance subsidies to be different and significantly more generous.

[12] *See* Letter from John A. Koskinen, Commissioner, IRS, to Members of Congress at 3 (Jan. 8, 2016), *available at* https://www.irs.gov/pub/newsroom/irs_letter_aca_stats_010816.pdf (estimating that of the excess that occurred to date because a taxpayer's ultimate entitlement to the premium tax credit exceeded the advance payment of the premium tax credit made on their behalf, $394 million was above the statutory caps on recovery).

Contrary to the House's theory, advance payments of premium tax credits are funded by Section 1324, not because of some legal fiction that these payments are themselves the "same" as Section 36B's premium tax credits, but because Section 1324(b)(2)'s appropriation for "refunds due from" Section 36B is best read to reach integrally-related payments that depend on the eligibility criteria set forth in Section 36B. Defs.' Mem. at 26-28. Advance cost-sharing reduction payments are funded by Section 1324 for the same reason.

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After its analysis of the ACA's text, structure, design, and history, the Supreme Court concluded its decision in *King*: "Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). The same analysis here leads to the same conclusion. The defendants' interpretation of the ACA and its amendment to 31 U.S.C. § 1324 is consistent with the text of the Act and its legislative plan. The contrary interpretation offered by the House—that the ACA's amendment to Section 1324 permanently funded advance-premium tax credit payments but not advance cost-sharing reduction payments—is consistent with neither.[13]

[13] The defendants have also explained that the House lacks standing at the summary judgment stage under the reasoning of this Court's prior opinion. Defs.' Mem. at 33-34. The House does not respond to that argument except to frame it as asking the Court to "revisit" its prior opinion. Pl.'s Opp'n at 44. To the contrary, the defendants' argument is that "[u]nder this Court's prior decision . . . the House cannot satisfy" its burden of demonstrating standing at the summary judgment stage. Defs.' Mem. at 33.

CONCLUSION

For the reasons offered above and in the defendants' prior briefing, this Court should grant the defendants' motion for summary judgment and enter judgment for the defendants.

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Respectfully submitted,

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