[NOT SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

U.S. HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

THOMAS E. PRICE, Secretary of Health & Human Services, et al.,

Defendants-Appellants.

No. 16-5202

RESPONSE OF DEFENDANTS-APPELLANTS TO MOTION TO INTERVENE IN APPEAL

INTRODUCTION AND SUMMARY

This suit, brought by one House of Congress against the Executive Branch, seeks to enjoin certain payments under the Patient Protection and Affordable Care Act on the ground that the payments are not covered by a permanent appropriations provision that was amended by that statute. The district court held that the House of Representatives had standing to bring the suit and accepted its contentions regarding the scope of the permanent appropriation. The district court enjoined further payments, referred to as "cost-sharing reduction" payments, but sua sponte stayed its order. After the Executive Branch filed its opening brief on appeal, this Court granted the House's motion to put the appeal in abeyance on December 5, 2016.

The States have offered no sound basis for permitting them to intervene in this appeal at any time, but for present purposes it is sufficient to recognize that there is certainly no basis for intervention at this time. On March 2, 2017, this Court granted the parties' joint motion to continue the abeyance of this appeal, with status reports due every 90 days beginning May 22. The purpose of the abeyance is to allow time for a resolution that would obviate the need for judicial determination of this appeal, including potential legislative action. *See* Joint Motion to Continue Abeyance (filed Feb. 21, 2017). There is currently pending legislation, which the Executive Branch supports, that if enacted would render the case moot.[1] The abeyance should continue as provided under this Court's March 2 order.

The States' intervention motion does not address the possibility that new legislation will render this case moot. In any event, their motion also fails on its own terms. The gist of the States' argument is that intervention is appropriate because "the current parties appear ready to agree to allow the injunction to stand, without giving this Court the opportunity to determine whether the district court had either jurisdiction to enter it or a legal basis to enjoin the permanent appropriation that Congress intended to provide." Motion 24. That assertion rests on speculation rather than evidence. More important, however, even assuming that the Executive Branch

[1] *See* Amendment in the Nature of a Substitute to H.R. 1628, §§ 208-209, https://www.budget.senate.gov/imo/media/doc/BetterCareReconciliationAct.6.26.17.pdf.

were in the future to move to dismiss its appeal, this Court could consider motions for intervention in light of the circumstances that exist at that time, including any new legislation that bears on the payments at issue.

Implicitly recognizing the conjectural basis for their motion, the States argue that the Court should grant their request because of the impact of the "uncertainty threatened by this case" on insurance-market decisions for 2018. Motion 2. But permitting intervention cannot alleviate the uncertainties to which they repeatedly refer. The States' intervention cannot provide any certainty as to the fate of the payments in the ongoing legislative process. Nor can it provide any certainty as whether this Court will ultimately reverse the injunction. In sum, the States have demonstrated no basis for allowing intervention at this time, and thus there is no reason to grapple now with the novel standing questions and other procedural issues that their motion presents.

STATEMENT

This suit concerns the Executive Branch's administration of the insurance subsidy program established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA or Act). The Act authorizes cost-sharing reduction payments, which subsidize copayments and other types of out-of-pocket costs for certain individuals. Since January 2014, Treasury has been making these

payments to insurers from the permanent appropriation in 31 U.S.C. § 1324, which the ACA amended.

In November 2014, the House of Representatives of the 113th Congress filed this suit, alleging (as relevant here) that the Section 1324 permanent appropriation is not available for the cost-sharing reduction component of the ACA's insurance subsidy program. The district court held that the House has Article III standing and a cause of action and adopted the House's view on the merits, but stayed the injunction pending appeal. JA93-94.

Defendants-appellants filed their opening appellate brief on October 24, 2016. Before the House's responsive brief was filed, the Court granted the House's motion to hold this appeal in abeyance until February 2017.

Shortly after the appeal was placed into abeyance, two individuals sought to intervene, claiming that they would be injured if, in the future, the incoming House and incoming Administration were to agree to allow the district court's injunction to take effect. This Court denied the motion to intervene on January 12, 2017.

On March 2, 2017, this Court ordered that the abeyance be continued and instructed the parties to file status reports on May 22 and every 90 days thereafter. The parties' joint status report of May 22 indicated that the parties continue to discuss measures that would obviate the need for judicial determination of this appeal, including potential legislative action.

ARGUMENT

1. This Court and other courts of appeals have repeatedly made clear that "[a] court of appeals may allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l, AFL–CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C.Cir.1985) (per curiam) (internal quotation marks omitted); *accord Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017); *Peruta v. Cty. of San Diego*, 771 F.3d 570, 572 (9th Cir. 2014); *Hall v. Holder,* 117 F.3d 1222, 1231 (11th Cir. 1997); *McKenna v. Pan Am. Petroleum Corp.,* 303 F.2d 778, 779 (5th Cir. 1962).

The States mistakenly rely on *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), for the proposition that a party "is entitled to intervene in an appeal as of right if" its motion is timely, it has a legally protected interest, the outcome of the action threatens to impair that interest, and no existing party adequately represents that interest. Motion 5. That case, like the other decisions cited in the States' motion, addressed a motion to intervene filed in district court, which is governed by Rule 24 of the Federal Rules of Civil Procedure. The Federal Rules of Appellate Procedure have no general provision for intervention as of right.

Here, moreover, the appeal has been placed in abeyance at the joint request of the parties. The States cite no case in which a stayed appeal was reactivated at the behest of third parties, over the objection of the parties to the dispute. The purpose

of the abeyance of this appeal is to allow time for a resolution that would obviate the need for judicial determination of this appeal, including potential legislative action. *See* Joint Motion to Continue Abeyance (filed Feb. 21, 2017). Indeed, there is pending legislation, which the Executive Branch supports, that if enacted would render this case moot. The pending Senate bill contains a specific appropriation for cost-sharing reduction payments through 2019 and thereafter eliminates the program.[2] The abeyance should continue as provided under this Court's March 2 order.

2. The States' motion also fails on its own terms. Although the States seek to bring themselves within a category of cases that have allowed intervention because no existing party adequately represents a putative intervenor's interests, they cite no case that resembles the circumstances here. The Executive Branch appealed the district court's injunction and the States identify no argument that they would offer that is not set out in the Executive Branch's opening brief. Indeed, the States saw no need to file a brief as amicus curiae.

The States' argument is not that they have anything to add to the Executive Branch filing, but that they are uncertain as to the contents of future filings and are particularly concerned that the Executive Branch may move to dismiss its appeal and leave the district court injunction in place. *See* Motion 24 ("[T]he current parties

[2] *See* Amendment in the Nature of a Substitute to H.R. 1628, §§ 208-209, https://www.budget.senate.gov/imo/media/doc/BetterCareReconciliationAct.6.26.17.pdf.

appear ready to agree to allow the injunction to stand, without giving this Court the opportunity to determine whether the district court had either jurisdiction to enter it or a legal basis to enjoin the permanent appropriation that Congress intended to provide.").

Speculation of this kind is not a basis for intervention. Assuming *arguendo* that the Executive Branch were to seek to dismiss its appeal, the States or other entities could move to intervene at that time. This Court would then be confronted with the scenario that the States now only hypothesize. At that conjectural juncture, the Court could consider requests to intervene in light of the circumstances that exist at that time, including any new legislation that bears on the payments at issue here as well as the Executive Branch's policy concerning the payments. The Court at that time could also better assess the alleged standing of any putative intervenors, as well as determine the now-hypothetical question whether an intervenor can insist on continued appellate review of a district court order when the only party to have filed a notice of appeal seeks to dismiss that appeal.

3. Implicitly recognizing that their asserted basis for intervention rests on speculation about future events, the States argue that existing market uncertainty about this case is itself a basis for granting intervention. They declare that the "uncertainty threatened by this case would lead at least to higher health insurance costs for consumers, and more likely to many insurers abandoning the individual

health insurance market," Motion 2, and they argue that the States "must know . . . that someone will continue to defend this appeal," *id.* at 7.

But allowing the States to intervene cannot provide any certainty as to the fate of cost-sharing reduction payments in the ongoing legislative process. Nor can it provide any certainty as to whether this Court will ultimately reverse the injunction. Therefore, allowing the States to preemptively intervene could not alleviate uncertainties of insurers or "State insurance and health regulators [who] face deadlines in the next few months[.]" Motion 7.

The States are similarly wide of the mark in asserting that their status as sovereigns weighs in favor of granting intervention on the theory that they "have unique sovereign interests—in administering their insurance markets and safeguarding their residents—that the current parties cannot represent." Motion 8. The Supreme Court has long made clear that a "State does not have standing as *parens patriae* to bring an action against the Federal Government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923)). "[I]t is no part of its duty or power to enforce [its citizens] rights in respect of their relations with the Federal Government." *Id.* (quoting *Mellon*, 262 U.S. at 485-86). "In that field it is the United States, and not the State, which represents

them as *parens patriae*." *Id.* (quoting *Mellon*, 262 U.S. at 486).[3] The States' sovereign status certainly gives no more force to their motion for intervention than the motion of private individuals who were beneficiaries of cost-sharing reduction payments provided to insurers for their coverage, a motion that this Court previously denied.

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In sum, this is not an "exceptional case" in which intervention on appeal should be granted "for imperative reasons," *Amalgamated Transit Union Int'l,* 771 F.2d at 1552, especially at this time.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to intervene.

Respectfully submitted,

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[3] In contrast, in *Fund For Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), relied on by the States, Motion 8, this Court held that the government of Mongolia could properly intervene in district court because the federal government's "obligation is to represent the interests of the American people," while the Mongolian government's "concern is for Mongolia's people and natural resources." *Id.* at 736.

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this response complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 2,025 words, according to the count of Microsoft Word.

/*s*/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Carleen M. Zubrzycki
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