

No. 16-5202

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

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff-Appellee,

v.

ERIC D. HARGAN, Acting Secretary of Health and Human Services, et al.,
Defendants-Appellants,

and

THE STATES OF CALIFORNIA, NEW YORK, et al.,
Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-01967
Honorable Rosemary M. Collyer

STATUS REPORT

This case centers on whether the Patient Protection and Affordable Care Act includes a permanent appropriation for cost-sharing reduction (CSR) payments. Those payments reduce out-of-pocket costs for insured individuals by lowering deductibles, co-payments, and similar expenses. 42 U.S.C. §§ 18022(c)(3), 18071. Between January 2014 and September 2017, the Treasury made CSR reimbursement funds available each month on the authority of the permanent appropriation provided by 31 U.S.C. § 1324. *See* Exec. Branch Opening Br. 9-10.

In July 2014, the House filed this suit, alleging that the ACA's permanent appropriation does not extend to CSR payments, and that they are thus unconstitutional without a specific later appropriation. *Id.* at 11-12. The district court held that the House had standing to maintain this suit and enjoined the Executive Branch from making CSR reimbursement payments without a specific appropriation, but stayed its injunction pending this appeal. *Id.* at 13-16.

The Executive Branch appealed that decision under the prior Administration. At the federal parties' request, this case has remained in abeyance since December 5, 2016. On May 18, 2017, the States moved to intervene in the appeal in order to protect their interests in the event that the Executive Branch changed its legal position. ECF No. 1675816. This Court granted that motion on August 1, and ordered the parties to file status reports on October 30. ECF No. 1686857.

On October 12, the Executive Branch abruptly announced that it would not make the CSR payments that were due the following week. The next day, the federal defendants filed a notice in this Court confirming that the Executive Branch was changing the position it had formerly maintained in this litigation, and would now argue that CSR payments are not covered by the permanent appropriation in 31 U.S.C. § 1324, or by any other appropriation. ECF No. 1698827 at 1. The notice attached a copy of an opinion from the Attorney General articulating the Administration's new position. *Id.* at 6-9.

On October 13, the States filed a complaint in the Northern District of California, alleging that the Administration's decision to stop making CSR payments is based on an improper interpretation of the ACA and violates the Administrative Procedure Act and the Take Care Clause of the Constitution. *See* Complaint, *California v. Trump*, Case No. 3:17-cv-5895-VC, N.D. Cal., Dkt. No. 1.¹ The States also moved for a preliminary injunction. *Id.*, Dkt. No. 10. On October 25, the district court declined to order that the defendants continue making CSR payments while the litigation proceeds. *Id.*, Dkt. No. 76. It rejected, however, the Executive Branch's argument that the States, having already intervened in this appeal, should have pursued any further relief only in this Court. *Id.* at 8-10. On the contrary, the court recognized that commencing a new suit directly raising the core statutory appropriations issue was both "justifiable" and "prudent," because of the "serious question[]" as to whether the House ever had standing to obtain the judgment and injunction at issue in this appeal. *Id.* at 10. If the House lacked standing to bring this lawsuit, the district court reasoned, then this Court would "lack[] jurisdiction to do anything other than dismiss the appeal," and could not reach or resolve the statutory issue. *Id.* at 10. A case management

¹ Hawaii, which is an intervenor here, is not a plaintiff in the new litigation. Oregon and Rhode Island are plaintiffs in the new action but are not parties here.

conference in the new litigation is currently scheduled for November 21, 2017. *Id.* at 29.

In light of these developments, the States see no reason for this Court to continue to hold this appeal in abeyance. For the reasons recognized by the district court in the new action, the States continue to have a substantial interest in a resolution of this appeal that will result in vacatur or reversal of the judgment below, whether because this Court finds that the House lacks standing or because this Court concludes that CSR reimbursement payments are supported by a statutory appropriation. Moreover, the Administration's decision to change the Executive Branch's position on the statutory question means that the harms the States highlighted in their intervention motion are not only continuing, but will become more severe as the States begin to plan for the 2019 plan year.

The federal parties have previously argued that this case should be held in abeyance to afford them time to seek some "resolution that would obviate the need for judicial determination of this appeal, including potential legislative action." ECF No. 1662158 (February 21, 2017 joint motion to continue abeyance); *see also* ECF No. 1676133 (same in May 22, 2017 joint status report). But the case has now been held for almost a year, and no such resolution has been forthcoming. The statutory question is now clearly joined between the States and the federal parties; the standing issue remains in dispute between the federal parties; serious

disruption and damage has already occurred with respect to the 2018 plan year; and there is a pressing need for final resolution of the important issues pending before this Court.² It is time to resume the proceedings on this appeal.

Dated: October 30, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
HOWARD MASTER
*Senior Enforcement
Counsel*
LISA LANDAU
Bureau Chief, Health Care Bureau
ERIC HAREN
Special Counsel and Senior Advisor

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
KATHLEEN BOERGERS
Deputy Solicitor General
GREGORY BROWN
Deputy Attorney General

/s/ Samuel P. Siegel

SAMUEL P. SIEGEL
Associate Deputy Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6312
Barbara.Underwood@ag.ny.gov

1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov

² In opposing preliminary relief in the States' new action, the Executive Branch made clear that it would "continue to press [its] view" that the House never had standing to bring this lawsuit. *Trump*, Case No. 3:17-cv-5895-VC, N.D. Cal., Dkt. No. 35 at 8, n. 5.

FOR THE STATE OF
CONNECTICUT

GEORGE JEPSEN
Attorney General of Connecticut
ROBERT W. CLARK
*Special Counsel to the Attorney
General*
JOSEPH RUBIN
Associate Attorney General
55 Elm Street
Hartford, CT 06106

FOR THE STATE OF DELAWARE

MATTHEW P. DENN
Attorney General of Delaware
AARON R. GOLDSTEIN
State Solicitor
SARAH FISHMAN GONCHER
JOHN H. TAYLOR
Deputy Attorneys General
820 North French Street
Wilmington, DE 19801

FOR THE STATE OF HAWAII

DOUGLAS S. CHIN
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601

FOR THE STATE OF IOWA

THOMAS J. MILLER
Attorney General of Iowa
JEFFREY THOMPSON
Solicitor General
1305 East Walnut Street
Hoover State Office Building, Second
Floor
Des Moines, IA 50319

FOR THE COMMONWEALTH OF
KENTUCKY

ANDY BESHEAR
Attorney General of Kentucky
LA TASHA BUCKNER
*Executive Director, Office of Civil
and Environmental Law*
S. TRAVIS MAYO
TAYLOR PAYNE
Assistant Attorneys General
700 Capitol Avenue
Capitol Building, Suite 118
Frankfort, Kentucky 40601

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland
STEVEN M. SULLIVAN
Solicitor General
200 Saint Paul Place
Baltimore, MD 21202

FOR THE COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
Attorney General of Massachusetts
ROBERT E. TOONE
MARY BECKMAN
ERIC GOLD
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108

FOR THE STATE OF MINNESOTA

LORI SWANSON
Attorney General of Minnesota
ALAN GILBERT
Solicitor General
JASON PLEGGENKUHLE
KATHERINE KELLY
Assistant Attorneys General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101

FOR THE STATE OF NEW
MEXICO

HECTOR H. BALDERAS
Attorney General of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

FOR THE STATE OF NORTH
CAROLINA

JOSH STEIN
Attorney General of North Carolina
MATTHEW W. SAWCHAK
Solicitor General
RYAN Y. PARK
Deputy Solicitor General
Post Office Box 629
Raleigh, NC 27602

FOR THE COMMONWEALTH OF
PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
BENJAMIN D. BATTLES
Solicitor General
109 State Street
Montpelier, Vermont 05609

FOR THE COMMONWEALTH OF
VIRGINIA

MARK R. HERRING
Attorney General of Virginia
TREVOR S. COX
Acting Solicitor General
202 North Ninth Street
Richmond, VA 23219

FOR THE STATE OF
WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington
JEFFREY T. SPRUNG
Assistant Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

FOR THE DISTRICT OF
COLUMBIA

KARL A. RACINE
*Attorney General of the District of
Columbia*
TODD S. KIM
Solicitor General
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I certify that on October 30, 2017, the foregoing Status Report was served electronically via the Court's CM/ECF system upon all counsel of record.

October 30, 2017

/s/ Samuel P. Siegel
Samuel P. Siegel