

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 and Human Services; and 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

U.S. District Judge Rosemary M. Collyer
Case No. 1:14-cv-01967

**EMERGENCY MOTION TO SUSPEND ABEYANCE
FOR LIMITED PURPOSE OF ADJUDICATING
THE MOTION TO INTERVENE**

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Movants La Trina Patton and Gustavo Parker (“Intervenor-Movants”) respectfully move this Court on an emergency basis for an order (1) suspending this Court’s order holding the case in abeyance, for the limited purpose of ruling upon the pending motion to intervene; and (2) directing Appellants Sylvia Burwell, Jacob Lew, the U.S. Department of Health and Human Services, and the U.S. Department of the Treasury (collectively, “Executive Branch”) and Appellee U.S. House of Representatives (“House”) to respond to the motion to intervene in sufficient time to permit this Court to decide the motion prior to January 20, 2017.

BACKGROUND

This case concerns the legal authority of the Executive Branch to reimburse insurers for the cost-sharing reductions authorized by section 1402 of the Patient Protection and Affordable Care Act. *See* 42 U.S.C. § 18071. The District Court entered an injunction barring those payments and the Executive Branch appealed; the District Court stayed its order pending that appeal.

On November 21, 2016, the House moved this Court to hold in abeyance “all briefing in this matter” pending the Presidential transition, because the House and the President-elect’s transition team were “discussing potential options for resolution of this matter, to take effect after the Pres-

ident-Elect's inauguration on January 20, 2017." On December 5, this Court granted the House's motion, which it construed as a motion to hold the "case" in abeyance.

The "options for resolution" identified in the House's motion included "withdrawal or settlement of the appeal." Withdrawal of the appeal would permit the District Court's injunction to take effect, and a settlement could similarly provide for the injunction to take effect either immediately or at some point in the future. Either action would stop cost-sharing reimbursement payments, and thereby cause very substantial harm to recipients of cost-sharing reductions, such as Intervenor-Movants. *See* Motion to Intervene at 12-18. Intervenor-Movants therefore moved, on December 20, 2016, to intervene in the case on the side of appellants.

On December 23, the Executive Branch and the House filed separate notices stating their views that responses to the motion to intervene were precluded by this Court's December 5 order. The Executive Branch advised the Court that, in light of the December 5 order, it did "not plan to file a substantive response to the intervention motion at this time unless requested to do so by the Court." The House went further, advising the Court that it would request extra time even if the Court "order[ed] the filing of responses to the motion for leave to intervene":

due to the impending holidays, the press of business in the House Office of General Counsel, the transition from the 114th to the 115th Congress, and the pending change in Administration (including the need for the new Administration to take a position on the motion), the House would intend to seek an extension of time to respond until at least February 3, 2017.

ARGUMENT

To avoid irreparable prejudice to the interests of Intervenor-Movants, this Court should partially suspend the abeyance and set a briefing schedule on the motion to intervene that would permit the Court to rule on that motion prior to the Presidential transition. Because the Executive Branch and the House in their respective December 23 filings have already expressed their views on responding to the motion, and relatively little time remains before joint action by the House and the new Administration to dismiss or otherwise settle this appeal could well moot the Motion to Intervene, Intervenor-Movants urge the Court to set the briefing schedule now, without awaiting further submissions from those parties.

If Intervenor-Movants' motion is not resolved by this Court prior to January 20, there is a significant risk that the new Administration and the House could act jointly to dismiss the appeal*—which would allow the District Court's injunction to take effect, triggering the significant harm to

* Federal Rule of Appellate Procedure 42(b) permits the dismissal of an appeal by the Clerk if all parties sign a dismissal agreement.

Intervenor-Movants described in the motion to intervene. The House's suggestion that resolution of the motion await the new Administration is thus quite disingenuous: the prospect of collusion between the House and the new Administration to permit the District Court's injunction to take effect is precisely why Intervenor-Movants have asked to represent their own interests before this Court. Delaying action on the motion until after the change in Administrations would permit the very harm that the motion seeks to prevent. If Intervenor-Movants are permitted to join this case, then the House and the new Administration will not be able to settle this case in a manner that employs the Judicial Power to undermine the interests of Intervenor-Movants, and the millions of other Americans who rely upon the Affordable Care Act's healthcare exchanges for subsidized health insurance—by allowing the District Court's order to take effect without review by this Court.

This Court determined that the impending change in Presidential administration warranted delaying further briefing of the *merits* of the case. It surely did not endorse a delay in resolving an unanticipated motion—a delay that could have the effect of mooting the attempt by cost-sharing recipients to protect their interests against a joint decision by

formerly adverse parties to terminate appellate proceedings and to allow the District Court's injunction to take effect.

The issues presented by the pending motion are not complex. Given that this Court's typical practice is to afford parties ten days to respond to motions—and an even shorter time when a matter arises on an emergency basis—it is more than reasonable to require the Executive Branch and the House to respond to this matter of very significant importance to millions of Americans before the House and the incoming Administration engage in joint action inflicting significant harm on Intervenor-Movants.

Intervenor-Movants therefore respectfully request that this Court suspend the abeyance order for the limited purpose of resolving the motion to intervene; and that a briefing schedule be set that permits the Court to resolve the motion to intervene prior to the Presidential transition on January 20.

December 27, 2016

Respectfully submitted,

/s/ Andrew J. Pincus

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CERTIFICATE OF PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), movants certify that:

Except for Gustavo Parker and La Trina Patton, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Defendants-Appellants and the Brief for *Amici Curiae* Economic and Health Policy Scholars.

December 27, 2016

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for movants certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 1,008 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

December 27, 2016

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that that on December 27, 2016, the foregoing was served electronically via the Court's CM/ECF system upon all counsel of record.

December 27, 2016

/s/ Andrew J. Pincus
Andrew J. Pincus