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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE STATE OF CALIFORNIA, et al., Plaintiffs, v. DONALD J. TRUMP, President of the United States, et al., Defendants.	**MEMORANDUM OF THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE** 3:17-cv-05895-VC Hearing Date: October 23, 2017 Time: 1 pm

[1] Attorneys in the U.S. House of Representatives Office of General Counsel are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Foremost among Congress's core constitutional powers is its exclusive control over public funds. This power of the purse is expressed most clearly in the Appropriations Clause, which imposes a sweeping prohibition that admits of no exceptions: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This Clause not only vests Congress with exclusive authority to permit (or decline to permit) government spending, but also affirmatively limits the power of the Executive and the Judiciary by expressly barring the expenditure of any public funds absent enactment of a law appropriating such funds. A judicial order mandating the payment of federal funds in the absence of an appropriation would strike at the heart of the separation of powers.

In litigation brought by the United States House of Representatives, the United States District Court for the District of Columbia has correctly rejected the States' claim that cost-sharing-reduction ("CSR") payments are the subject of a permanent congressional appropriation. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D. C. 2016). Indeed, as noted *infra*, such permanent appropriations are exceedingly rare. Though the States neglect to address the *Burwell* court's cogent analysis (in fact, they do not even cite the decision), that court's reasoning confirms what even a cursory review of the relevant statutes reveals: any contention that Congress appropriated funds such that this Court could order defendants to make CSR payments to insurers is plainly wrong. As the *Burwell* court concluded, the Affordable Care Act ("ACA") "unambiguously appropriates money for Section 1401 premium tax credits *but not for Section 1402 reimbursements to insurers. Such an appropriation cannot be inferred*." *Id*. at 168 (emphasis added). The unambiguous statutory text precludes the recognition of any judicially enforceable obligation to make CSR payments to insurers. No appropriated funds are – or ever have been – available for that purpose. *Id*. at 174-77.

The States are thus entreating this Court to order the Executive to pay billions of dollars of unappropriated funds to non-party insurance companies. Yet "the assent of the House of Representatives is required before *any* public monies are spent." *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (emphasis retained) (citing *Dep't of the Navy v. Fed. Labor Relns. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012)); The Federalist No. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961). "Disregard for that reservation [of Congressional control over Treasury funds] works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution." *Id.* at 77. Accordingly, the House has a strong interest in denial of the relief sought by the States, and the House's participation as an amicus is necessary to vindicate one of Congress's core constitutional powers.[2] The States' arguments, if accepted, would lead to an enormous concentration of power in the Judiciary and Executive, at the expense of Congress. *See Zivotofsky ex rel Zivotosfsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (one branch of government "may not 'aggrandiz[e] its power at the expense of another branch ….'" (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991))). The States' motion represents nothing less than an invitation for this Court to usurp the appropriations authority that the Constitution assigns exclusively to Congress. This Court should reject the States' invitation.

[2] The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has authorized the filing of this brief on behalf of the House. The BLAG is comprised of the Honorable Paul Ryan, Speaker of the House, the Honorable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the United States House of Representatives, *available at* https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf. The Democratic Leader and Democratic Whip decline to support the Group's position in this case.

BACKGROUND

I. Congress Enacted the ACA with No Appropriation for the Section 1402 Offset Program.

Section 1402(a)(2) of the Patient Protection and Affordable Care Act ("ACA") (codified at 42 U.S.C. § 18071(a)(2)) requires all health insurance issuers offering qualified health plans through the ACA ("Insurers") to provide reduced deductibles, co-pays, and co-insurance levels to qualified policyholders enrolled in such plans ("Beneficiaries"). These reductions are referred to in the ACA as cost-sharing reductions ("CSRs"). By law, Insurers that participate in an ACA health insurance marketplace exchange must provide CSRs to qualifying Beneficiaries, without regard to the receipt by Insurers of any offsetting payments from the government. *Burwell*, 185 F. Supp. 3d at 171; ACA § 1402(a)(2).

The ACA also establishes a program by which the federal government is authorized to make direct payments to Insurers to offset costs that Insurers incur in providing CSRs to Beneficiaries ("Section 1402 Offset Program"). However, *nowhere in the ACA – or anywhere else – did Congress appropriate any funds for the Section 1402 Offset Program*. *Burwell*, 185 F. Supp. 3d at 168, 174-75; *see also* Mem. from Cong. Research Serv. to Senator Tom Coburn, at 9-10 (July 29, 2013) ("2013 CRS Mem.") (annual appropriation from Congress necessary to fund Section 1402 Offset Program), attached as Ex. A.[3]

Congress knows how to appropriate funds when it so intends, as demonstrated by the terms of the ACA itself. For example, in the provision immediately preceding Section 1402, the ACA authorized refundable tax credits to be paid to qualified individuals to reduce the cost of their health insurance premiums ("Section 1401 Premium Tax Credits"). *See Burwell*, 185

[3] Section 1412(c)(3) of the ACA (codified at 42 U.S.C. § 18082(c)(3)) establishes the mechanism by which Section 1402 Offset Program payments would be made, were funds to be appropriated for that program. *See Burwell*, 185 F. Supp. 3d at 177-79.

F. Supp. 3d at 170-71. In stark contrast to the Section 1402 Offset Program, Congress chose to fund the Section 1401 Premium Tax Credits directly in the ACA, by amending 31 U.S.C. § 1324, the permanent appropriation for refunds and credits due under the Internal Revenue Code ("IRC"), to encompass such payments. *See* ACA §§ 1401(a), 1401(d)(1), 1412(c)(2) (codified at 26 U.S.C. § 36B(a); 26 U.S.C. § 1324(b)(2); 42 U.S.C. § 18082(c)(2)) (payment of Section 1401 Premium Tax Credits to be made through IRC). By contrast, Congress did not amend the permanent appropriation for tax refunds to encompass payments under the Section 1402 Offset Program. *See* ACA §§ 1402, 1412(c)(3) (codified at 42 U.S.C. §§ 18071, 18082(c)(3)) (no authority for Section 1402 Offset Program payments to be paid through IRC, or anywhere else).[4]

The permanent appropriation established by 31 U.S.C. § 1324(b) is *expressly* restricted to the specific payments referenced in that provision, and may not be used for any other payments: "Disbursements may be made from the appropriation made by this section *only* for" certain specified purposes listed therein, including "section … 36B … of [the IRC]." *Id.* § 1324(b) (emphasis added). Section 36B of the IRC – the Section 1401 Premium Tax Credit Program – is therefore covered by the permanent appropriation. The Section 1402 Offset Program is not. *See Burwell*, 185 F. Supp. 3d at 176-77.

II. Congress Again Declines to Appropriate Funds for the Section 1402 Offset Program.

The absence of an appropriation for the Section 1402 Offset Program is obvious on the face of the ACA. Consequently, in March 2013, the Obama Administration sought a non-

[4] Throughout the ACA, Section 1401 is referred to as a "premium *tax credit*" under "section 36B of the Internal Revenue Code," while the Section 1402 CSR program is referred to as "reduced cost-sharing" or simply "section 1402," and *not* by any reference to the IRC. *See, e.g.*, ACA §§ 1411(a)(2), (b)(3), 1412(a), (c)(2), (c)(3) (codified at 42 U.S.C. §§ 18081(a)(2), (b)(3), 18082(a), (c)(2), (c)(3)).

permanent, annual appropriation to fund that program for Fiscal Year 2014. In particular, in the section of its Fiscal Year 2014 budget dealing with the Centers for Medicare and Medicaid Services ("CMS") the Administration specifically requested, "'[f]or carrying out … sections 1402 and 1412 of the [ACA], such sums as necessary,' and, '[f]or carrying out … such sections in the first quarter of fiscal year 2015[,] … $1,420,000,000.'" OMB, Fiscal Year 2014 Budget of the U.S. Government, App. at 448 (Apr. 10, 2013), attached as Ex. B. In its underlying budget justification, the U.S. Department of Health and Human Services ("HHS"):

- expressly recognized that it required an annual (non-permanent) appropriation for CMS' "five annually-appropriated accounts," including, in particular, a new, "annually-appropriated" account for Section 1402 Offset Program payments to begin in Fiscal Year 2014, the "Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans (Cost Sharing Reductions)" account;
- said CMS needed an "annual" appropriation for Section 1402 Offset Program payments in the amount of "$4.0 billion in the first year of [ACA Exchange] operations . . . [and] a $1.4 billion advance appropriation for the first quarter of Fiscal Year 2015 . . . to permit CMS to reimburse [certain insurance] issuers;" and
- explained that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014."

HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees, at 2, 4, 7, 183-84, attached as Ex. C. In other words, when it submitted its Fiscal Year 2014 budget to Congress, in March 2013, the Administration correctly recognized that it could not make Section 1402 Offset Program payments to Insurers *unless and until* Congress specifically appropriated funds for that purpose. *See Burwell*, 185 F. Supp. 3d at 186-88.

In July 2013, the Senate Appropriations Committee declined to approve the Administration's request. *See* S. Rep. No. 113-71, at 123 (2013) (recommending that request for annual appropriation to fund Section 1402 Offset Program payments for Fiscal Year 2014 not be adopted). In fact, neither the House nor the Senate ever adopted a bill approving the

Administration's request, and no bill containing an appropriation to fund the Section 1402 Offset Program was presented to the President for his signature. *See Burwell*, 185 F. Supp. 3d. at 173-75; 2013 CRS Mem. at 9-10 (confirming that no funds appropriated for Section 1402 Offset Program payments, and that annual appropriation would be necessary to fund program). Nor did Congress appropriate funds for the Section 1402 Offset Program in any subsequent Fiscal Year.

Notwithstanding the absence of any appropriation, in January 2014, the Administration began making Section 1402 Offset Program payments to Insurers. *See id.* at 174. In response, the House filed a federal lawsuit contending that Section 1402 Offset Program payments were unconstitutional and in violation of Article I, § 9, cl. 7 of the Constitution. *See* Compl., *U.S. House of Representatives v. Burwell*, No. 1:14:cv-01967 (D.D.C. Nov. 21, 2014) (ECF No. 1). As discussed above, the district court ruled in favor of the House, holding that 31 U.S.C. § 1324 does not permanently appropriate money for Section 1402 Offset Program payments. *See Burwell*, 185 F. Supp. 3d at 175-78. The court enjoined the payments, but stayed its injunction pending appeal. *Id.* at 189. The appeal is presently pending before the D.C. Circuit, but is being held in abeyance.

On August 1, 2017, the D.C. Circuit granted the motion of 17 States and the District of Columbia to intervene in that appeal, but continued the abeyance through at least October 30, 2017. *See* Order, *U.S. House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Aug. 1, 2017).[5]

[5] Defendants err in suggesting that "the Plaintiffs could ask the D.C. Circuit to provide the same emergency relief they have asked this Court to furnish." Def.'s Mem. At 9. The only cause of action at issue in the D.C. Circuit appeal is the House's claim that the Appropriations Clause precludes the Executive Branch from funding CSR offset payments because Congress has not appropriated funds to make such payments, and the only infringement at issue in that appeal is the Executive Branch's infringement of the Appropriations Clause. *See id.* at 6; *Burwell*, 185 F.3d at 168, 189. Here, the States request an order compelling Defendants to affirmatively make CSR payments to Insurers. *See* Pl.'s Mem. at 1, Def.'s Mem. at 7; Pl.'s Compl. (ECF No. 1) at Prayer for Relief. No such claim is at issue in the D.C. Circuit appeal, nor could such a claim

On October 13, 2017, the Executive Branch filed a notice informing the parties and the D.C. Circuit "that [HHS] has directed that cost-sharing reduction payments be stopped because it has determined that those payments are not funded by the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, or by any other appropriation." ECF Notice, at 1, *U.S. House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Oct. 13, 2017). Attached to the notice was an October 11 legal opinion of Attorney General Sessions explaining in detail that "section 1324 does not appropriate funds for the Affordable Care Act's Cost-Sharing Reduction program," *id.* at 9, and an October 12 directive from the Acting Secretary of HHS to the Administrator of Centers for Medicare and Medicaid Services ordering that "CSR payments to issuers must stop, effective immediately," and that "CSR payments are prohibited unless and until a valid appropriation exists," *id.* at 5. Five days later, on October 18, 2017, 18 States and the District of Columbia filed the instant complaint in this Court.

ARGUMENT

I. THE CONSTITUTIONAL AND STATUTORY CONTEXT.

A. The Constitution Expressly Bars the Expenditure of Public Funds Absent a Congressionally Enacted Appropriation.

The power of the purse is a core aspect of Congress's legislative authority and an essential element of the separation of powers established by the Constitution. Congress's exclusive authority over the expenditure of federal funds is enshrined in stark and unambiguous terms in the Appropriations Clause: "No Money shall be drawn from the Treasury, but in

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now be asserted by the States. *Illinois Bell Tel. Co. v. FEC*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("An intervening party may join issue only on a matter that has been brought before the court by another party.); *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues").

Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "Authorization and *appropriation by Congress are nonnegotiable prerequisites to government spending* …." *Burwell*, 185 F. Supp. 3d at 168 (emphasis added)).

The Supreme Court and the lower courts have repeatedly emphasized the importance of this exclusive congressional power: "Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)); *see, e.g.*, *Reeside v. Walker*, 52 U.S. 272, 291 (1850) ("No officer, however high, ... is empowered to pay debts of the United States generally, when presented to them. … However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned."); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds is proper only when authorized by Congress . . . ."); *Dep't of the Navy*, 665 F.3d at 1348 ("Congress's control over federal expenditures is 'absolute.'" (citation omitted)); *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (Congress has "exclusive power over the federal purse"); *Hart's Adm'r v. United States*, 16 Ct. Cl. 459, 484 (1880) ("[A]bsolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886).

Courts have particularly emphasized the importance of the Appropriations Clause as a check on the powers of the other two branches of government. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425; *see also*

Cincinnati Soap, 301 U.S. at 321 ("The [Appropriations Clause] was intended as a restriction upon the disbursing authority of the Executive department …."); *Dep't of the Navy*, 665 F.3d at 1347 ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers …."). "The command of the Clause" extends to, but "is not limited to," a "judicial proceeding seeking payment of public funds." *Richmond*, 496 U.S. at 425. Thus, the Judiciary "cannot grant … a money remedy that Congress has not authorized." *Id*. at 426. "Indeed, it would be most anomalous for a judicial order to require a Government official … to make an extrastatutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *Id*. at 430 (citing 31 U.S.C. §§ 1341, 1350).

B. Congress Exercises Its Appropriations Clause Authority by Enacting, or Declining To Enact, Appropriations Legislation, as Well as by Selecting Different Forms of Appropriation.

Given the fundamental importance of the Appropriations Clause to the structure and durability of our form of government – as well as, ultimately, to the liberty of our people – it is no surprise that the legal rules regarding what is and is not a constitutionally valid appropriation are precise and well-developed. Those rules begin with an important distinction between authorizing legislation and appropriations legislation. *See Burwell*, 185 F. Supp. 3d at 168-69 ("The distinction between authorizing legislation and appropriating legislation is relevant here ….").

"Authorizing legislation establishes or continues the operation of a federal program or agency, either indefinitely or for a specific period." *Id.* at 169 (citing U.S. Gov't Accountability Office ("GAO"), GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* at

15 (2005) ("GAO Glossary")).[6] Authorizing legislation alone, however, does not provide the legal authority required by the Appropriations Clause to expend public funds to effectuate a program, agency, or function. Only an "appropriations" enactment can do that. *See* GAO, *Principles of Federal Appropriations Law* at 2-41 (3d ed. 2004) ("GAO Red Book") ("An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act.").

"Appropriations" legislation, which *does* implement the authority vested in Congress by the Appropriations Clause, is legislation that designates *an amount and source* of public funds to pay for a program, agency, or function that Congress has authorized, and permits expenditure of such funds in support of such program, agency, or function. *See Nevada*, 400 F.3d at 13-14 (appropriation requires specific direction to pay and designation of funds to be used).

Appropriations legislation has "the limited and specific purpose of providing funds for authorized programs." *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)). An "appropriation" is "'[a]n authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.'" *Id*. at 359-60 n.18 (quoting Comptroller General of the United States ("Comp. Gen."), PAD-77-9, Terms Used in the Budgetary Process 3 (1977)). To qualify as an "appropriation," legislation must designate an amount and source of public funds to pay for a program, agency, or function that Congress has authorized, and must contain a specific

[6] While "GAO decisions are not binding, [courts] give special weight to [GAO's] opinions due to its accumulated experience and expertise in the field of government appropriations." *Burwell*, 185 F. Supp. 3d at 169 n.2 (citations and quotation marks omitted). *See also Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Court "regard[s] the assessment of the GAO as an expert opinion, which [the courts] should prudently consider … ."); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971) (recognizing GAO's "accumulated experience and expertise").

direction to expend those designated funds in support of such program, agency, or function. *See Nevada*, 400 F.3d at 14 ("[A] statute may 'be construed as making an appropriation if it contains a specific direction to pay … and a designation of the [f]unds to be used'" (quoting 63 Comp. Gen. 331, 335 (1984))); GAO Red Book at 2-17 (private relief act that contained authorization and direction to pay, but no designation of funds, not an appropriation); 67 Comp. Gen. 332, 333 (1988) (designation of source of funds without specific direction to pay, not an appropriation). Thus, "a direction to pay without a designation of the source of funds is not an appropriation." GAO Red Book at 2-17; *Burwell*, 185 F. Supp. 3d at 169.

Importantly for purposes of this case, moreover, "[a]n appropriation must be expressly stated; it cannot be inferred or implied." *Burwell*, 130 F. Supp. 3d at 59. Federal law expressly mandates that "[a] law may be construed to make an appropriation ... *only if the law specifically states that an appropriation is made*." 31 U.S.C. § 1301(d); *see* GAO Red Book at 2-16 ("[T]he rule is that the making of an appropriation must be expressly stated.").

The most common form of appropriation is a non-permanent (usually annual) appropriation for a particular agency, program, or function. The least common is a permanent appropriation, which (i) remains in effect until Congress repeals or modifies it, and (ii) permits a federal agency to expend public funds without the need for passage of a non-permanent appropriations bill in the current Congress. For an appropriation to be considered permanent, the law must clearly and expressly so provide. *See* GAO Red Book at 2-14; *Burwell*, 185 F. Supp. 3d at 185 ("a permanently authorized benefit program was made dependent on non-permanent appropriations. That approach is perfectly consonant with principles of appropriations law; most

federal entities operate in the same fashion."). The distinction between permanent and non-permanent appropriations is well established.[7]

As it did for some programs in the ACA, Congress may combine authorizations and appropriations in a single enactment. More commonly, however, it enacts them separately.[8] Moreover, Congress may choose to appropriate amounts different from the amount (if any) provided for in an authorization, *see, e.g.*, 36 Comp. Gen. 240, 242 (1956) ("It is fundamental … that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act."); or it may limit the purposes for which appropriated funds may be used, *see, e.g.*, *City of Los Angeles v. Adams*, 556 F.2d 40, 48-51 (D.C. Cir. 1977) (giving full effect to appropriations provisions containing limitations resulting in less funding than previously enacted authorizations).

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[7] Permanent appropriations are unusual, and few in number. In addition to 31 U.S.C. § 1324, the permanent appropriation for tax refunds, they include 31 U.S.C. § 1304(a) (providing funding for payment of certain money judgments); 31 U.S.C. § 1305(2) (providing funding for payment of interest on national debt); 42 U.S.C. § 401(a) (providing funding for payments to Social Security recipients); and 42 U.S.C. § 1395i(a) (providing funding for payments of Medicare benefits).

[8] This is true even when the authorizing legislation states that specified payments "shall" be made. Indeed, there are innumerable cases involving claims against the United States arising from statutory programs that mandated payments for which Congress never appropriated sufficient funds. *See, e.g.*, *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940) (statute provided that reenlistment bonuses "shall be paid" without permanently appropriating funds; Congress subsequently declined to fund the payments); *United States v. Mitchell*, 109 U.S. 146 (1883) (statute provided that salary "shall be" $400 annually without permanently appropriating funds; Congress subsequently appropriated only $300 annually); *Nevada*, 400 F.3d at 13 (statute mandated that agency "shall make grants to the State of Nevada" without permanently appropriating funds; court held that "[f]or Nevada to prevail, … it must identify not just a command to make grants, but an appropriation of … money that DOE may use for that purpose"); *Highland Falls–Fort Montgomery Cent. School Dis. v. United States*, 48 F.3d 1166, 1168-69 (Fed. Cir. 1995) (statute provided that school district "shall be entitled to receive" funds without permanently appropriating funds; Congress subsequently declined to appropriate full funding).

Finally, and importantly here, Congress may elect not to appropriate funds for a program it has authorized. For example, in 1978, Congress permanently authorized Treasury to make prepayments to certain U.S. territories for amounts they were expected to collect from taxes, duties, and fees. However, because neither that statute nor any other contained an appropriation, the prepayments could not be made. *See* GAO Red Book at 2-17 (citing GAO, B-114808 (Aug. 7, 1979) (permanent authorization insufficient to constitute appropriation)). Another example: Congress never appropriated funds for the Department of Transportation's toll-free air travel consumer complaint hotline which was authorized by the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 415, 126 Stat. 11, 95 (2012). *See also* n.8, *supra* (citing cases).

II. THE REQUESTED ORDER WOULD VIOLATE THE APPROPRIATIONS CLAUSE BY REQUIRING THE EXECUTIVE TO MAKE SECTION 1402 OFFSET PROGRAM PAYMENTS TO INSURERS DESPITE THE ABSENCE OF ANY APPROPRIATION FOR SUCH PAYMENTS.

A. The Premium Tax Credit Program and the CSR Offset Program Are Separate and Distinct Programs, and Congress Never Appropriated Funds for the Latter.

The States incorrectly assert, without support, that "Congress intended to treat premium tax credits and cost-sharing reduction payments as interrelated components of a single, integrated, and permanently appropriated subsidy program." Pl.'s Mem. 10. ACA sections 1401 and 1402 are separate and distinct: they are structured differently, they serve different purposes, and, critically, they are funded differently.

Section 1401 Premium Tax Credit Program: Section 1401(a) is structured as a refundable tax credit available to qualified individuals for the purpose of reducing the cost of their health insurance premiums. The ACA accomplished this by adding to the Internal Revenue Code ("IRC") a new section 36B entitled "Refundable Credit for Coverage Under a Qualified

Health Plan." *See* ACA 1401(a) ("Subpart C of part IV of subchapter A of chapter 1 of the [IRC] (relating to refundable credits) is amended by inserting after section 36A the following new section [36B]."). Section 1412(c)(2) of the ACA (codified at 42 U.S.C. § 18082(c)(2)) authorizes the Secretary of the Treasury to make advance payment of the new tax credits allowed under new IRC section 36B to issuers of qualified health plans. In the ACA itself, Congress provided funding for the Section 1401 Premium Tax Credit Program by amending 31 U.S.C. § 1324. *See* ACA § 1401(d)(1), 124 Stat. 220 ("Paragraph (2) of section 1324(b) of title 31, United States Code, is amended by inserting '36B,' after '36A,'."). Section 1324 permanently appropriates "[n]ecessary amounts … for refunding internal revenue collections as provided by law …." 31 U.S.C. § 1324(a).

IRC § 36B, like all other tax credits listed in 31 U.S.C. § 1324(b)(2), is a refundable tax credit. It (i) reduces the tax liability of eligible taxpayers; (ii) permits eligible taxpayers to claim the full value of the credit, even if full value exceeds the taxpayer's total tax liability; and (iii) permits cash payment from the Treasury for any negative balance in the form of a refund (even if the taxpayer does not otherwise pay any tax). *See, e.g.*, *Burwell*, 185 F. Supp. at 175-76.

Section 1402 Offset Program: Entirely separately, the ACA obligates health insurance companies that offer qualified plans through the ACA to provide CSRs to certain beneficiaries in the form of specified reductions in non-premium out-of-pocket health insurance costs, i.e., deductibles, co-pays, and co-insurance. *See* ACA § 1402 (codified at 42 U.S.C. § 18071). ACA section 1412(c)(3) (codified at 42 U.S.C. § 18082(c)(3)) *authorizes* the Executive to make payments directly to such insurers to offset costs they incur in providing these CSRs.

As explained above, however, Treasury payments require both an authorization *and* an appropriation. And, in stark contrast to the Section 1401 Premium Tax Credit Program,

Congress in the ACA (i) did not amend the IRC to make the Section 1402 Offset Program part of the IRC; (ii) did not structure the payments authorized by the Section 1402 Offset Program as tax credits; (iii) did not amend the permanent appropriation in 31 U.S.C. § 1324 to cover Section 1402 Offset Program payments; and (iv) did not otherwise appropriate any funds for the Section 1402 Offset Program. Put another way, while the States assert that the permanent appropriation of 31 U.S.C. § 1324 is available for Section 1402 Offset Program payments, Pl.'s Mem. at 10, that contention is conclusively refuted by the text of the ACA and the IRC.[9]

The one paramount principle of appropriations law is that for there to be an appropriation, Congress must have enacted a law making an appropriation. That is, there must be an "Appropriation[] made by Law." U.S. Const. art. I, § 9, cl. 7; *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied *only* to the objects for which the appropriations were made except as otherwise provided by law.") (emphasis added); *id.* § 1301(d) ("A law may be construed to make an appropriation out of the Treasury … *only* if the law specifically states that an appropriation is made or that such a contract may be made.") (emphasis added). Congress did not do that in the ACA with respect to the Section 1402 Offset Program, nor did it do so otherwise through amendment to the permanent appropriation for tax refunds.

Importantly, moreover, the permanent appropriation established by 31 U.S.C. § 1324(b) is *expressly* restricted to the specific payments referenced in that provision, and may not be used for any other payments:

> Disbursements may be made from the appropriation made by this section *only* for – (1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the Internal Revenue Code … [including] section … 36B … of such Code.

[9] *See* 2013 CRS Mem. at 9-10 (July 29, 2013) (Section 1402 Offset Program not funded through 31 U.S.C. § 1324; annual appropriation necessary) (Ex. A).

Id. § 1324(b) (emphasis added). Congress amended the permanent appropriation to fund Section 1401 Premium Tax Credit Program payments under section 36B; it did not amend the permanent appropriation to fund Section 1402 Offset Program payments, and thus "[d]isbursements may be made from the [permanent] appropriation ... *only* for" section 36B payments, not for Section 1402 Offset Program payments.

The plain language of the ACA and the IRC thus compel rejection of the States' claim that Congress appropriated funds to make CSR offset payments, and governing principles of statutory construction further buttress that conclusion. *First*, an "[a]n appropriation must be expressly stated; it cannot be inferred or implied." *Burwell*, 185 F. Supp. 3d at 169 (citing 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation ... *only if the law specifically states that an appropriation is made*") (emphasis added)). The ACA nowhere "specifically states that an appropriation is made" to fund CSR offset payments.

Second, Congress knows how to enact specific appropriations when it intends to do so. *See, e.g.*, *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (Congress' inclusion of specific type of legislative language "demonstrate[s] that [Congress] knows how to impose such a requirement when it wishes to do so"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally"). The ACA itself is proof of this. The ACA is littered with examples of specific appropriations, leaving no doubt that Congress knew, when it enacted the ACA, how to appropriate money when it so intended.

For example, Congress in the ACA appropriated $30,000,000 "for the first fiscal year for which this section applies" for a grant program to enable States to establish offices of health insurance consumer assistance, or health insurance ombudsman programs. ACA § 1002(e)(1)

(amending Public Health Service Act). Congress appropriated $250,000,000 for FY 2010-14 for another grant program to enable States to study unreasonable increases in premiums for health insurance. *See id.* § 1003 (amending Public Health Service Act). And Congress appropriated $5,000,000,000 to "pay claims against (and the administrative costs of) [a] high risk pool" created by the ACA. *Id.* § 1101(g)(1). This non-permanent appropriation covered "the period beginning on the date on which such program is established and ending on January 1, 2014." *Id.* § 1101(a).[10]

Congress also knows how to provide for permanent appropriations in the rare circumstances in which it intends to achieve that result, as demonstrated in the ACA itself by Congress's decision to amend 31 U.S.C. § 1324, the existing permanent appropriation for tax refunds due from IRC credit provisions, to encompass the Section 1401 Premium Tax Credit Program. By contrast, Congress did not amend the permanent appropriation to fund the immediately adjacent Section 1402 Offset Program. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

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[10] *See also* ACA § 1102(e) (appropriating $5,000,000,000 for reinsurance for early retirees); *id.* § 1311(a)(1) (appropriating "to the Secretary, out of any moneys in the Treasury not otherwise appropriated, an amount necessary to enable the Secretary to make awards" for assistance to states to establish American health benefit exchanges); *id.* § 1322(g) (appropriating $6,000,000,000 for federal program to assist establishment and operation of non-profit, member-run health insurance issuers); *id.* § 2405 (appropriating "$10,000,000 for each of fiscal years 2010 through 2014" for expansion of state aging and disability resource centers); *id.* § 2701(e) (appropriating "for each of fiscal years 2010 through 2014, $60,000,000" for development of health care quality measures for adults eligible for Medicaid benefits); *id.* § 2707(e)(1)(A) (appropriating "$75,000,000 for fiscal year 2011" for Medicaid emergency psychiatric demonstration project); *id.* § 2801(a)(5)(C) (appropriating "for fiscal year 2010, $9,000,000" for Medicaid and CHIP Payment and Access Commission); *id.* § 2951(j)(1) (appropriating various amounts for FY 2010-14 for maternal, infant, and early childhood home visitation programs); *id.* § 2953(f) (appropriating "$75,000,000 for each of fiscal years 2010 through 2014" for personal responsibility education); *id.* § 3021(f)(1)(B) (appropriating $10,000,000,000 for FY 2011-19 for establishment of center for Medicare and Medicaid innovation within CMS); *id.* § 4002(b) (appropriating various amounts for FY 2010-15 for prevention and public health fund).

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (internal punctuation omitted).

As discussed above, three elements must be present for there to be a valid appropriation: (i) a direction to pay; (ii) a source of funds; and (iii) language that "specifically states that an appropriation is made," 31 U.S.C. § 1301(d). The plain text of Sections 1402 and 1412 satisfies, at most, the first element (direction to pay). It most assuredly does not satisfy the second or third elements.

Even if Sections 1402 and 1412 *authorize* payments to be made to Insurers under the Section 1402 Offset Program, *an authorization is not an appropriation*. "[A]uthorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by Congress actually appropriating the funds." GAO Red Book at 2-40 (citing 35 Comp. Gen. 306 (1955) & 27 Comp. Dec. 923 (1921))). GAO recently applied this principle to another ACA program known as the "Risk Corridors Program." *See* GAO, B-325630, HHS – Risk Corridors Program (Sept. 30, 2014) ("GAO Opinion Letter"), attached as Ex. D. Like the Section 1402 Offset Program, the statutory language creating the Risk Corridors Program directs that the "Secretary shall pay" to qualified health plans an amount necessary to compensate for certain losses incurred as a result of costs exceeding permitted premiums. ACA § 1342(b)(1). Applying both the Appropriations Clause and 31 U.S.C. § 1301(d), GAO concluded that, because "*[i]t is not enough for a statute to simply require an agency to make a payment …* [ACA] Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." GAO Op. Ltr. at 3 (emphasis added).

Accordingly, it is clear that *nothing* in the ACA appropriates funds for the Section 1402 Offset Program. Rather, Congress intended that the program would be funded, if at all, only through the annual appropriations process.

B. Statutory Structure and Legislative History Confirm The Conclusion Compelled By The Plain Statutory Text: There Is No Appropriation For CSR Offset Payments.

Notwithstanding the clarity of the statutory text (which the States conveniently ignore), the States contend that the inclusion of Section 36B in the permanent appropriation somehow appropriated funds for the Section 1402 Offset Program (which is not codified in Section 36B) as well as the Section 1401 Premium Tax Credit Program (which is). Pl.'s Mem. at 6, 10-12. According to the States, payments to Insurers under the Section 1402 Offset Program are properly regarded as "refunds due from" Section 36B because they are compensatory payments made to subsidize an individual's insurance coverage under one "unified program." *Id.* at 6. As shown above, the States err in conflating these two separate and distinct programs. In fact, there are numerous statutory, structural, funding, eligibility and operational differences between the two programs. For the Court's convenience, a table summarizing selected differences is attached as Exhibit E. Notably, the Supreme Court has identified "three reforms" that are "closely intertwined" with the overall purpose of the ACA: the "guaranteed issue and community rating requirement"; the mandatory individual health insurance requirement; and the premium tax credits for individuals. *King v. Burwell*, 135 S. Ct. 2480, 2486-87 (2015); *see also id.* at 2494. Unlike the Section 1401 Premium Tax Credit Program, CSR benefits and the Section 1402 Offset Program did not even make the list.

The States also rely on the assertion that ACA §§ 1411 and 1412 somehow combine the Section 1401 Premium Tax Credit Program and the Section 1402 Offset Program into "an

integrated scheme to pay insurers at the same time and the same manner." Pl.'s Mem. at 11. Section 1411 of the ACA authorizes the Secretary of Health and Human Services ("HHS") to make eligibility determinations for individuals "claiming a premium tax credit or reduced cost-sharing," and details the mechanics of that process. ACA § 1411(a)(1), (2). Section 1412 *authorizes* advance payments to Insurers for both programs, and deals with the mechanics of that process. *See* ACA § 1412(c)(2) (premium tax credits), 1412(c)(3) (CSR reimbursements).

The States' focus on eligibility determinations and the mechanics of the advance payment process misses the point. As relevant here, Sections 1411 and 1412 of the ACA merely reinforce the self-evident reality that the Section 1401 Premium Tax Credit Program and the Section 1402 Offset Program are separate and distinct programs. *See, e.g.*, ACA § 1411(a)(1)-(4) (repeatedly and consistently using disjunctive "or" in referring to the two programs); *id.* § 1412(c)(2), (3) (treating the two programs separately for advance payment purposes).

In any event, Sections 1411 and 1412 do not create substantive programs that confer benefits (as do ACA §§ 1401 and 1402), and they do not appropriate funds (as does ACA § 1401, but not ACA § 1402). Sections 1411 and 1412 concern only (i) the particulars of how and when eligibility determinations are made for the two underlying substantive programs, and (ii) how and when any money that has been appropriated for those two underlying substantive programs may flow to Insurers. Accordingly, when the States characterize these eligibility and payment processes as the same "single, integrated, and permanently appropriated subsidy program" or "integrated scheme" which is supposedly funded by 31 U.S.C. § 1324, *see* Pl.'s Mem. at 10-11, they are playing a highly misleading semantic game. The *only* relevant appropriation made by the ACA is the one set forth in ACA § 1401(d), 124 Stat. 220. And that appropriation expressly flows *only* to the underlying Section 1401 Premium Tax Credit Program.

See ACA § 1401(a), (d); 31 U.S.C. § 1324(b)(2); *see Burwell*, 185 F. Supp. 3d at 178 (Section 1412 "evidences the lack of contressional intent to fuse Sections 1401 and 1402 together through a 'unified program' … reflect[ing] the reality that Section 1402 reimbursements are subject to the annual appropriations process … Section 1412 was [not] meant to unify Sections 1401 and 1402.").

The agencies charged with administering the ACA have similarly recognized the distinct nature of these two separate programs. *See Burwell*, 185 F. Supp. 3d. at 186-88. As early as 2012, HHS treated the two programs as separate and distinct. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73118, 73120-22 (Dec. 7, 2012). In its FY 2014 Budget, the Administration treated the two programs as separate and distinct.[11] Shortly thereafter, OMB treated the programs as separate and distinct by reporting that the Section 1402 Offset Program was subject to sequestration, while making no mention of the Section 1401 Premium Tax Credit Program.[12] OMB further confirmed that they were separate and distinct by noting that the Section 1402 Offset Program had its own Treasury account number (no. 009-38-0126, a CMS account), *see* OMB FY 2014 Sequestration Report at 23, which differs from the Treasury account number for the Section 1401

[11] *See, e.g.*, Office of Management & Budget ("OMB"), Fiscal Year 2014 Budget of the U.S. Government, App. at 448 (Apr. 10, 2013) ("FY 2014 Budget"), attached as Ex. B, (requesting annual appropriation for Section 1402 Offset Program for FY 2014 and first quarter of FY 2015; no mention of Section 1401 Premium Tax Credit Program, or any suggestion that the two programs were one); HHS, Fiscal Year 2014, Centers for Medicare and Medicaid Services ("CMS"), Justification of Estimates for Appropriations Committees at 2, 4, 7, 183-84 (Apr. 10, 2013) ("FY 2014 CMS Justification"), attached as Ex. C (same).

[12] *See* OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version at 23 (May 20, 2013) ("OMB FY 2014 Sequestration Report"), attached as Ex. F.

Premium Tax Credit Program (no. 015-45-0949), *see* Joint OIG/TIGTA Report: Review of the Accounting Structure Used for the Administration of Tax Cuts, at 3 (Mar. 31, 2015).

Unlike the Section 1401 Premium Tax Credit, moreover, which the ACA expressly declared to be a tax credit and codified in the Internal Revenue Code, the ACA nowhere describes the Section 1402 Offset Program as a tax credit and did not codify it in the IRC. *Burwell*, 185 F. Supp. 3d at 170-72. It is therefore entirely to be expected that Congress chose to fund the former, but *not* the latter, using the permanent appropriation for "refunds due from [specified] credit provisions of the Internal Revenue Code." 31 U.S.C. § 1324(b); *see Burwell*, 185 F. Supp. 3d at 177 ("That Section 1402 goes unmentioned [in § 1324(b) suggests no error or maladroit drafting; only Section 1401 provides a refund or credit under the [IRC]."). Indeed, the outcome advocated by the States – funding a non-credit, non-IRC program through a permanent appropriation for IRC tax credit refunds – would have been nonsensical and bizarre.

A "refundable tax credit" is a unique type of tax provision characterized by the following attributes: it (i) reduces the tax liability of eligible taxpayers; (ii) permits eligible taxpayers to claim the full value of the credit, even if full value exceeds the taxpayer's total tax liability; and (iii) permits cash payment from the Treasury for any negative balance.[13] The Section 1402

[13] *See, e.g.*, IRS, *IRS Tax Tip 2013-33, Five Tax Credits that Can Reduce Your Taxes* (updated Aug. 4, 2015) ("A refundable tax credit not only reduces the federal tax you owe, but also could result in a refund."), https://www.irs.gov/uac/Newsroom/Five-Tax-Credits-that-Can-Reduce-Your-Taxes; Tax Policy Center, *The Tax Policy Briefing Book* at II-2-4 (Aug. 20, 2009) (tax credits termed "refundable because they can generate cash refunds that exceed the taxpayer's tax liability"), http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf; Kathleen Krueger, U.S. Tax Center, *Refundable v. Non-Refundable Tax Credits* (Feb. 20, 2015) ("A refundable tax credit . . . can reduce your tax liability to below zero. If the amount of a refundable tax credit is more than the amount of taxes due, the difference will be given back to you as a tax refund."), http://www.irs.com/articles/refundable-vs-non-refundable-tax-credits; Erika K. Lunder, Cong. Research Serv., R44290, *Legal Authority for Aliens to Claim Refundable Tax Credits: In Brief* at 1 (2015) ("Refundable credits, unlike nonrefundable credits, can be larger than a taxpayer's income tax liability, with the taxpayer receiving the difference as a cash

Offset Program contains none of these elements. Section 1402 Offset Program payments do not reduce anyone's tax liability. Moreover, the payments are unrelated to Insurers' (and policyholders') tax liabilities, and thus neither Insurers nor policyholders claim a tax credit of any kind for the payments (or for the underlying CSR benefits provided by Insurers to policyholders) on any IRS form. By contrast, to claim any tax credit enumerated in 31 U.S.C. § 1324(b)(2) – including the Section 1401 Premium Tax Credit (IRC § 36B) – taxpayers are required to submit to the IRS an appropriate tax credit form. *See* Exhibit G. Finally, Congress has not authorized cash payments for any negative credit balance for the Section 1402 Offset Program – obviously, because the program creates no such negative credit balances.

The legislative history of 31 U.S.C. § 1324 further undercuts defendants' contention. The statutory language expressly limiting the universe of uses for the funds made available via this permanent appropriation was added in 1978. *See* Second Supplemental Appropriations Act, 1978, Pub. L. No. 95-355 § 303, 92 Stat 523, 563-64 (1978). The limiting language was added because Congress was "concerned that [31 U.S.C. § 1324] could be used to an even greater extent in the future and in ways never contemplated when the statute was enacted …." S. Rep. No. 95-1061, at 153 (1978). In other words, Congress amended 31 U.S.C. § 1324 precisely in order to prevent what the States seek to do here, namely, to invade the permanent appropriation in order to fund programs and make expenditures not sanctioned by Congress.

At bottom, the States' argument that Section 1402 Offset Program payments to Insurers are "refunds due from" IRC § 36B, Pl.'s Mem. at 10, reduces to this: the "refunds due from"

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payment from the IRS in the form of a tax refund."), https://www.fas.org/sgp/crs/misc/R44290.pdf.

language in 31 U.S.C. § 1324 means whatever they choose it to mean. The constitutional mandate of the Appropriations Clause cannot be evaded by such sophistry.

III. *KING V. BURWELL* DOES NOT SUPPORT DEFENDANTS' CONTENTION THAT THIS COURT MUST ENGAGE IN A CONTORTED INTERPRETIVE EXERCISE.

The States' attempt to morph Section 1324 into something it clearly is not rests ultimately on their interpretation of *King v. Burwell*, 135 S. Ct. 2480 (2015), as a license to rewrite the ACA at will in order to achieve their desired end. *See* Pl.'s Mem. at 11-12, 13. But *King* provides no support for that effort. *See Burwell*, 185 F. Supp. 3d at 182-83. *King* does not even address, much less alter, the central precept of this case, namely that both the Executive and the Judiciary are constitutionally prohibited from "draw[ing] from the Treasury" *any* monies, absent an express appropriation from Congress. U.S. Const. art. I, § 9, cl. 7; *see also* 31 U.S.C. § 1301(d). Nor does *King* address, much less purport to override, the governing rule of construction applicable here, which is that "[a] law may be construed to make an appropriation … *only if the law specifically states that an appropriation is made*." 31 U.S.C. § 1301(d) (emphasis added). Arguments about implications to be drawn from musings about what Congress must have intended have no place in this setting.

Furthermore, *King* affirmatively rejects the type of elaborative interpretive analysis urged by the States. "If the statutory language is plain" – as it unquestionably is with respect to the question whether the ACA appropriated monies for the Section 1402 Offset Program – courts "must enforce it according to its terms." *King*, 135 S. Ct. at 2489 (citation omitted); *see also id.* at 2495-96 ("Reliance on context and structure in statutory interpretation is a subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." (quotation marks and citation omitted)).

What the States advocate here is precisely what *King* forbade: judicial "legislation itself" via elaborate interpretative analysis. Worse, their proposed interpretative analysis derives from turning *King* upside down. The States start with clarity – a statute that, on its face, appropriates no funds for the Section 1402 Offset Program – and then struggle mightily (and unsuccessfully) to manufacture ambiguity by (i) mischaracterizing the Section 1402 Offset Program as inseparable from the Section 1401 Premium Tax Credit Program; (ii) speculating that consequences the States regard as undesirable will follow if they do not have their way; and (iii) ignoring the express language of 31 U.S.C. §§ 1301 and 1324. There is no ambiguity here, and even if there were, Section 1301(d) would preclude a ruling in favor of the States.

In short, far from helping States, *King* stands for the proposition that this Court is precluded from even engaging in the distorted interpretive rewriting of the ACA that they urge. This case begins and ends with the plain language of ACA §§ 1402 and 1412, which establishes that no appropriation for the Section 1402 Offset Program was provided.

CONCLUSION

This Court should deny the States' motion and decline to issue an order directing the Executive to pay billions of dollars in CSR offset payments to Insurers, because the Constitution precludes such payments absent a congressional appropriation, and no such appropriation exists.

Respectfully submitted,

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