No. 16-5202

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; JACOB J. LEW, in his official capacity as Secretary of the Treasury,
Defendants – Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (Hon. Rosemary M. Collyer, U.S. District Judge)

OPPOSITION TO MOTION TO SUSPEND ABEYANCE

Appellee the United States House of Representatives ("House"), by counsel, respectfully opposes the Intervenor-Movants' Emergency Motion to Suspend Abeyance for Limited Purpose of Adjudicating the Mot. to Intervene, (Dec. 27, 2016) (ECF No. 1652945) ("Emergency Motion"). No "emergency" exists, and any seeming appearance of exigency is the result of Movants' own inexcusable delay rather than any factors beyond their control, so emergency action is not warranted. Even leaving aside Movants' unjustified dilatoriness, moreover, there is no basis for lifting the abeyance previously ordered by this Court. By their own

admission, Movants are statutorily eligible for and scheduled to receive cost-sharing reductions in 2017, which will remain true as a matter of law regardless of the outcome of this litigation. Movants therefore have no cognizable legal interest at stake in this appeal, because the hypothetical and attenuated theory of indirect harm upon which they rest their motion is unsubstantiated and entirely speculative, and would not be affected by the relief they seek in any event.

For the reasons set forth below, the Emergency Motion should be denied.

ARGUMENT

1. As an initial matter, Movants have failed to demonstrate the existence of an "emergency," and if there were one, it would be of Movants' own making. The stated concern motivating Movants' belated claim of an "emergency" – namely, the speculative fear that the new Administration may dismiss its appeal and allow the district court's injunction to go into effect – has been a matter of public discussion in the media for nearly seven weeks. Indeed, immediately after the November 2016 presidential election, a nationwide media outlet noted that the President-Elect could "drop the administration's appeal" in this case.[1] Further, the House's statement to this Court concerning the possibility of settlement, relied

[1] Julie Rovner, Nat'l Pub. Radio, *How A President Trump Could Derail Obamacare By Dropping Legal Appeal*, Nov. 9, 2016, http://www.npr.org/sections/health-shots/2016/11/09/501421924/how-president-trump-could-derail-obamacare-by-dropping-legal-appeal.

upon by Movants, *see* Emergency Mot. at 2, was filed on November 21 – over a month ago. *See* Mot. to Hold Briefing in Abeyance or, in the Alternative, to Extend the Briefing Schedule (Nov. 21, 2016) (ECF No. 1647228). If the speculative possibility of a dismissal of the appeal created an emergency, Movants knew or should have known of that alleged emergency weeks ago, and would have had ample time, both prior to and during briefing on the abeyance request, to bring their concerns to the Court.

Instead, however, Movants did not even file their motion to intervene until December 21, a full month after the House filed its motion to hold the case in abeyance, and six weeks after the hypothetical possibility they fear had arisen. And even then, they did not claim the existence of an "emergency," instead waiting six more days, until the week between the Christmas and New Year's holidays, to seek emergency relief from this Court on an expedited basis. *See* Emergency Mot. at 1. Movants should not be permitted to sit on their hands for weeks and then impose the burden of expedited briefing and "emergency" decisionmaking on the Court and the parties. The facts and circumstances justifying the stay of proceedings in this appeal have remained static since November 21. Movants failed to act in a timely manner, and should not be permitted to transform their own inexcusable delay into an "emergency."

2. The sole basis for Movants' Emergency Motion is the unsupported claim 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 Intervenor-Movants described in the motion to intervene." Emergency Mot. at 3-4 (footnote omitted). Movants' assertion is, at best, unsubstantiated conjecture regarding a hypothetical chain of speculative future events, none of which has been shown to be likely to occur. Movants cite no evidence to substantiate their stated fear that dismissal of the appeal and immediate reinstatement of the injunction is a plausible outcome of settlement negotiations, and the available evidence in fact contradicts it. For example, House Speaker Paul Ryan's website states that once a repeal of the Affordable Care Act is enacted "there will be a stable transition period to ensure no one has the rug pulled out from under them as we get on the path to a #BetterWay for your health care …." Paul Ryan, Speaker of the House, The Tools it Takes to Repeal Obamacare, http://www.speaker.gov/general/tools-it-takes-repeal-obamacare?Source=GovD (Dec. 20, 2016). Movants provide no evidence to the contrary.

3. Movants will not be prejudiced by denial of their Emergency Motion and adherence to the Abeyance Order. First, denial of the Emergency Motion will cause Movants no harm because the District Court's stay, which remains in effect,

means that the Executive Branch continues to pay insurers the funds at issue on a monthly basis. *See* J.A. 63-100, 101.

Second, it is uncontested that federal law requires insurers offering qualifying plans on health care exchanges to provide cost-sharing reductions to eligible individuals, regardless of whether the Executive Branch separately makes cost-sharing payments to insurers. *See, e.g.*, Appellant Br. at 7 (citing 42 U.S.C. § 18071(c)(2), (f)(2)). As Movants concede in their Intervention Motion, the "cost-sharing reimbursements are paid to insurers," not to beneficiaries such as themselves. Mot. For Leave to Intervene at 18 (Dec. 20, 2016) (ECF No. 1651939) ("Intervention Motion"); *see also id*. at 13. In other words, the unsubstantiated and utterly speculative outcome that Movants claim to fear – namely, that settlement negotiations between the parties will lead to reinstatement of the injunction with no alternative in place – would not actually harm Movants, because their statutory rights to receive cost-sharing reductions from insurers would remain fully enforceable. 42 U.S.C. § 18071(c)(2). Indeed, it is undisputed that Movants would continue to receive cost-sharing reductions even in this purely hypothetical scenario. *See, e.g.*, J.A. 112 at ¶ 26; Pl.'s Mem. In Supp. of Mot. for Summ. J. at 6 n.4 (Dec. 2, 2015) (ECF No. 53); Defs. Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 9 (Jan. 15, 2016) (ECF No. 65); Br. for Econ. & Health Policy

Scholars as Amici Curiae Supporting Defendants-Appellants at 11 (Oct. 31, 2016) (ECF No. 1643795).[2]

Third, the specific relief that Movants ask this Court to consider on an emergency basis – intervention – could not prevent the occurrence of the speculative chain of causation they claim to fear, even if that speculation were based in fact (which it is not). If, as Movants posit, the incoming Administration intended to halt cost-sharing funding to insurers forthwith – a highly improbable claim for which Movants cite no evidence – intervention would do nothing to

[2] In their Intervention Motion, Movants also claim to fear that their 2017 policies could be "terminated" because the Center for Medicare and Medicaid Services ("CMS") has allegedly agreed to permit insurers to "seek to leave the exchange mid-year should the House of Representatives prevail in this lawsuit." Intervention Mot. at 13. As shown by the plain language of the agreement they cite (*id*. at 13 n.6), however, their concern is baseless. The cited agreement merely reflects CMS's acknowledgement that an insurer "could have cause to terminate" its participation in the CMS Data Services Hub, "*subject to applicable state and federal law*," if the "assumption that … CSRs [i.e., Cost-sharing Reductions] will be available *to qualifying Enrollees*" during 2017 "ceases to be valid." Ctrs. For Medicare & Medicaid Servs., Qualified Health Plan Certification Agreement and Privacy and Security Agreement Between Qualified Health Plan Issuer and the Centers for Medicare & Medicaid Services 6 (Sept. 1, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Plan-Year-2017-QHP-Issuer-Agreement.pdf (emphases added). The agreement thus says nothing to suggest that a cessation of payments to *insurers* would justify termination. Rather, it merely expresses CMS's acknowledgement that insurers might be able to withdraw (subject to applicable state and federal law) if cost-sharing reductions cease to "be available to qualifying Enrollees." Nothing about this lawsuit or the injunction entered by the district court affects the statutory obligation to provide such reductions to qualifying enrollees, so the provision cited by Movants will not be triggered regardless of the outcome of this case.

prevent that, because the new Administration would have ample authority to take that step without regard to the pendency of this case. This appeal provides no vehicle for Movants to attempt to compel the new Administration to make cost-sharing payments to insurers over its objection, because the only claim at issue here is the House's claim that such payments are precluded, not that they are compelled. Indeed, Movants admit that a separate lawsuit would be required if such a claim were to be asserted. *See* Intervention Mot. at 5 n.4. Movants thus cannot identify any harm arising from postponing consideration of their attempt to intervene, because intervention cannot prevent the result they fear.

4. Movants suggest that resolution of their Intervention Motion is necessary due to "the prospect of collusion between the House and the new Administration to permit the District Court's injunction to take effect …." Emergency Mot. at 4. This argument is absurd. Movants' argument not only relies on the wholly unsupported and speculative assertion that any agreement reached will "permit the District Court's injunction to take effect," but it also wrongly suggests that there would be some impropriety in settling this litigation in a manner acceptable to the litigants. Far from being sinister or collusive, "[s]ettlement is highly favored," *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 199 (D.D.C. 2015), as "[n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation." *Citizens*

for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983). The mere fact that the parties may reach a settlement does not constitute an "emergency" and, therefore, cannot be considered grounds for granting Movants' motion.

5. Finally, Movants have admitted that "[u]p to this point, the interests of the Executive Branch have been aligned with those of Movants," Intervention Mot. at 21, but speculate that those interests "will not be represented adequately in this appeal after January 20, 2017." *Id.* The theoretical nature of this concern alone augurs in favor of the Emergency Motion's denial. Even if Movants are correct that the incoming Administration will shift its legal position, it makes no sense for the parties to respond to the Intervention Motion at this time. Until the new Administration has taken office and determined its position, there is no basis for concluding that it will not adequately represents Movants' interests, and the current Administration is obviously in no position to address that question. Accordingly, delaying responsive briefing on the Intervention Motion is eminently reasonable and serves to prevent unnecessary and inefficient expenditure of valuable public resources that would result from the premature briefing and judicial consideration of this motion.

CONCLUSION

For the above stated reasons, the Court should deny the Emergency Motion, and the parties should not be required to respond to the Intervention Motion until a

further order of the Court issued in response to the parties' submissions on February 21, 2017.

Respectfully submitted,

/s/Thomas G. Hungar
THOMAS G. HUNGAR, D.C. Bar No. 447783
General Counsel
TODD B. TATELMAN, VA Bar No. 66008
Associate General Counsel
ELENI M. ROUMEL, NY Bar No. 3978863
Assistant General Counsel
KRISTIN SHAPIRO, D.C. Bar No. 1007010
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Appellee United States House of Representatives

December 28, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, undersigned counsel certifies that this Opposition:

(i) Complies with the type-volume limitation of Rule 27(d)(2), as it contains 1,840 words; and

(ii) Complies with the typeface requirements of Rule 27(d)(1)(E) as it has been prepared with Microsoft Office Word 2016 and is set in Times New Roman, 14pt font.

December 28, 2016

/s/*Todd B. Tatelman*
Todd B. Tatelman

CERTIFICATE OF SERVICE

I certify that on December 28, 2016, I filed the foregoing Opposition to Motion to Suspend Abeyance for Limited Purpose of Adjudicating the Motion to Intervene via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/Todd B. Tatelman
Todd B. Tatelman