No. 16-5202

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

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff-Appellee,

v.

THOMAS E. PRICE, M.D., in his official capacity as Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury,

Defendants-Appellants.

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

REPLY IN SUPPORT OF THE MOTION TO INTERVENE OF THE STATES OF CALIFORNIA, NEW YORK, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA

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In this case, the House of Representatives attacks a critical feature of the Patient Protection and Affordable Care Act: its stable, permanent appropriation for cost-sharing reduction (CSR) payments. These funds help millions of Americans pay for out-of-pocket healthcare costs like deductibles or copays. The House's suit threatens the availability of health insurance for these residents and others, and its success would burden the States in regulating insurance markets, administering the Act's Exchanges, and funding care for the uninsured. Indeed, the uncertain status of this appeal is already having much the same effect. Meanwhile, the Executive Branch, which once vigorously defended its authority and obligation to make CSR payments, now prefers that this appeal make no progress toward clarifying its responsibility under current law—while the President and Attorney General announce that they agree with the House, and both parties pursue extremely contentious and uncertain efforts to repeal the ACA.

Of course, both the House and the Administration are entitled to try to change current law. So far, their attempts have failed. The Administration is also free to officially change its position and dismiss its appeal—although the States and others should then be left free to pursue future litigation establishing that the ACA requires the Executive Branch to make CSR payments without further appropriations. What the parties may not do is use this Court's processes—

including its willingness to hold this appeal in abeyance—as part of an essentially collusive strategy to *undermine*, rather than clarify or implement, current law.

The parties offer no sound basis for opposing intervention by the States, which are already being harmed by the uncertainty surrounding this litigation, and would be harmed even more should the district court's injunction take effect. While the parties speculate about possible legislative changes or "settlement," the States are ready to move this appeal forward to an adversarially-tested judicial resolution of what *current* law not only permits but requires the Executive Branch to do. Even the parties agree that appellate intervention is allowed "'in an exceptional case for imperative reasons.'" Exec. Br. Opp. 5. This is such an exceptional case.

ARGUMENT

I. THE EXECUTIVE BRANCH

The Executive Branch's opposition is notable for never disputing that the new Administration will not argue—as the prior Administration did, and the States seek to do—that existing law both permits and requires the Executive to make CSR payments without any further appropriations. It argues instead that the States' motion is premature and based on "[s]peculation." Exec. Br. Opp. 6-7. But both the President and the Attorney General have said publicly that CSR payments *do* require specific appropriations, and the President has threatened to reverse

positions in this litigation. *See* Motion 6-7. Nothing in the Executive Branch's opposition disavows those statements.

There is no reason to deny intervention to "allow [more] time for a resolution that would obviate the need for judicial determination of this appeal, including potential legislative action." Exec. Br. Opp. 5-6. The Court has allowed the House to defer filing its brief for nearly eight months, yet there is no new legislation or other non-judicial "resolution."[1] Meanwhile, the uncertain status of this litigation is materially disrupting the Exchanges—directly serving the existing parties' now-shared strategic and political interests in undermining the ACA. *See* Eilperin & Phillip, *White House Touts the ACA's Demise Even as Insurers Seek Help in Stabilizing Its Marketplace*, Wash. Post, June 7, 2017 (while President argues that ACA is in "death spiral," insurers cite Administration's unwillingness to advance this appeal as a reason for Exchange problems).[2] Unless it is actually

[1] A bill passed by the House would repeal CSR payments—but not until 2020 and with no new appropriation language, so the issue here would remain live for years. American Health Care Act of 2017, H.R. 1628, 115th Cong., § 131(b). The very different bill currently before the Senate would expressly fund CSRs through 2019. Better Care Reconciliation Act of 2017, H.R. 1628, 115th Cong., §§ 210-211. Whether any new legislation will ultimately pass both houses and, if so, what it will say is—to borrow the Administration's phrase—a matter "of speculation rather than evidence." Opp. 2.

[2] https://www.washingtonpost.com/politics/white-house-touts-the-acas-demise-even-as-insurers-seek-help-in-stabilizing-its-marketplace/2017/06/07/70cb48be-4a07-11e7-9669-250d0b15f83b_story.html?utm_term=.e13c3ce6cc3a.

repealed, the ACA remains the law, and its proper operation remains critical to providing affordable, high-quality healthcare to millions of Americans. This Court should not allow the parties to use a temporary scheduling forbearance as a means of advancing their now-mutual anti-ACA agenda.

That the States do not intend to interject into this appeal any new argument "not [already] set out in the Executive Branch's opening brief," Exec. Br. Opp. 6, weighs in favor of intervention, not against. *See* D.C. Cir. Rule 28(d)(2) (intervenor must "avoid repetition of facts or legal arguments made" in party's brief). The point is that someone new needs to advance these arguments, because the Executive Branch can no longer be relied on to do so. *Cf. Peruta v. County of San Diego*, 824 F.3d 919, 940-941 (9th Cir. 2016) (en banc) (State intervened at rehearing stage "to fill the void created by the late and unexpected departure of" party that previously advanced position).[3] The Administration also suggests (Opp. 7) that the States should seek intervention only if it actually moves to dismiss this appeal. But the issue is joined now; and further delay undermines the States' interest in timely judicial resolution of the important issues at stake.

[3] The *Peruta* en banc decision reversed the denial of intervention cited by the Executive Branch (Opp. 5).

II. THE HOUSE OF REPRESENTATIVES

A. Timeliness, Inadequate Representation

The House argues that the States' motion comes not too early, but too late. House Opp. 13. It contends that the States should have sought intervention promptly after the 2016 election. *Id*. Had they done so, however, the House surely would have argued that the motion was premature—just as it did when affected individuals moved to intervene in December 2016. *See* ECF No. 1654482. The States waited to intervene until after the new Administration took office, initial attempts to repeal or amend the ACA failed, and the President and Attorney General publicly declared that CSR payments are unconstitutional under current law. That makes their motion prudent and well-founded, not untimely. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001).

Other factors likewise favor intervention. House Opp. 14-15. The States question the district court's jurisdiction in a case that will have an "undeniable impact" on their insurance markets and regulatory systems. *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). On the merits, they seek to ensure vigorous adversary presentation of the proper interpretation of the ACA. *See United States v. Windsor*, 133 S. Ct. 2675, 2687-2688 (2013). And state participation will hardly "'disrupt[]' the litigation 'to the unfair detriment of the existing parties.'" House

Opp. 14-15. Intervention will simply ensure that the House continues to face committed adversaries as it seeks to defend its standing and the propriety of the injunction it secured below.

The House offers no persuasive argument that the current Administration adequately represents the States' interests. House Opp. 18-19. The public record demonstrates that it does not. *See* Motion 6-9. Indeed, the Executive Branch's opposition to intervention—and to moving this appeal forward—shows that it does not share the States' interest in obtaining timely judicial resolution of the issues before this Court. Nor can the federal Executive represent the States' sovereign interests in administering their insurance markets and safeguarding their residents. *See* Motion 19-21. The States have made far more than the necessary "minimal" showing that "representation of [their] interest[s] 'may be' inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).[4]

B. Article III Standing

The States have also demonstrated Article III standing. House Opp. 2-12. The House argues that the harms detailed in the States' motion are not

[4] The House is wrong in claiming that *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979), requires more than a "minimal" showing. Opp. 18-19. *Higginson* addressed efforts by a State's political subdivision to intervene in a case "in which [that] state [was] already a party." *Id.* at 740. That is far from the situation here. Moreover, the States' interests are "in fact different" from those of the existing parties. *Id.*

"'imminent,'" but based on "'speculative inferences'" and "'guesswork.'" *Id.* at 5 9-10. On the contrary, the States have provided ample declarations and reports showing that the district court's injunction would cause insurers to raise premiums and withdraw from the Exchanges, force more residents to forgo insurance, and increase the States' uncompensated care and administrative costs. Motion 9-23 & Addendum.[5] The last few weeks have only bolstered that conclusion. Because the Administration has refused to guarantee that it will make CSR payments in 2018, insurers have sought to raise premiums and announced that they will withdraw from Exchanges. Tajlili, *Premiums to Rise in 2018 for Affordable Care Act Plans*, May 25, 2017 (61% of 22.9% premium increase requested by North Carolina Blue Cross due to CSR uncertainty);[6] Mangan & Coombs, *Anthem pulls out of Obamacare Markets in Wisconsin and Indiana for 2018*, CNBC, June 21, 2017 (Anthem withdrawing from Indiana, Ohio, and Wisconsin Exchanges, partly because of CSR uncertainty).[7] At a minimum, the States have shown a

[5] The States' interests would be directly at stake here even if the Executive Branch decided *not* "to abandon this appeal." House Opp. 5. If the Executive Branch defended its authority and duty to make CSR payments but lost, the resulting injunction would still harm the States.

[6] http://blog.bcbsnc.com/2017/05/premiums-rise-2018-affordable-care-act-plans/.

[7] http://www.cnbc.com/2017/06/21/anthem-pulls-out-of-obamacare-markets-in-wisconsin-and-indiana-for-2018.html.

"'substantial risk' that [these] harm[s] will occur" should the injunction take effect. *Sierra Club v. Jewell*, 764 F.3d 1, 7 (D.C. Cir. 2014).

These harms are also particularized. House Opp. 4-6. The additional fiscal burdens the States would bear under the district court's order give them a direct stake in the outcome of this appeal. *See* Motion 16-21. This Court has recognized state standing to sue the federal government based on far less. *Kansas v. United States*, 16 F.3d 436, 439 (D.C. Cir. 1994). Moreover, while an adverse decision would indeed have significant "'economic repercussions'" for the States, House Opp. 6, their standing rests on direct harms to both their regulatory operations and their fiscs. Similarly, while sustaining the district court's decision would seriously harm millions of state residents, for standing purposes that is not the States' "primary" claim of harm. *Id.* at 3.

Nor are the States' injuries "'self-inflicted.'" House Opp. 7. Both state and federal law require state hospitals to treat individuals without insurance. *See* Motion 16. The option the House suggests (Opp. 7 n.2) of not participating in Medicare and leaving residents without access to emergency care is illusory: threatening loss of Medicare funds "is economic dragooning that leaves the States with no real option but to acquiesce." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012). Similarly, the States have hardly "chosen" to review proposed premiums. House Opp. 7. Designed on the model of cooperative

federalism, the ACA incorporates and relies on the States' longstanding role in reviewing and approving proposed rates. *See* 42 U.S.C. § 300gg-94(a)(1) ("The Secretary, in conjunction with the States, shall establish a process for the annual review … of unreasonable increases in premiums."); 15 U.S.C. §§ 1011-1012 (recognizing States' primary role in regulating insurance).

The House does not deny that New York's and Minnesota's Basic Health Programs (BHPs) receive hundreds of millions of dollars in federal funding pegged to CSR payments. It argues that this direct financial interest does not support intervention because the district court's injunction does not preclude such BHP funding. House Opp. 8-9. The Executive Branch, which administers BHP payments, makes no similar assurance. And even if funding would not be blocked, these States still have an interest in the legal question whether the ACA's permanent appropriation extends beyond premium tax credits—a ruling that may directly affect CSR-pegged BHP payments.

The States' harms would be redressed by a favorable decision from this Court. House Opp. 10-11. A favorable ruling on standing would eliminate the threat of the district court's injunction going into force. And a favorable ruling on the merits would establish the existence of a permanent appropriation for CSR

payments in the ACA itself—and a corresponding statutory duty to make those payments.[8]

It is true that, *without* a decision on the merits from this Court, the Administration could choose to formally change its legal position and assert that it cannot make the CSR payments that the ACA requires without specific appropriations. House Opp. 10. That, however, only highlights why the States should be allowed to intervene. In that scenario, the best vehicle for challenging the Administration's new position might be a new action. But unless the Administration's decision to reverse course also led to vacatur of the district court's injunction, that injunction, far from being "irrelevant" (*id.* at 11 n.4), might stand as a significant impediment to any new challenge. *See Feller v. Brock*, 802 F.2d 722, 727 (4th Cir. 1986) (district court abused discretion by issuing injunction conflicting with earlier injunction entered by another district court). Only genuinely adverse parties to the appeal, such as the States, would have an interest in urging vacatur and a clear way to do so.

[8] It is not correct (let alone "undisputed") that the Executive could stop making CSR payments "regardless of the … outcome of this appeal." House Opp. 10. Indeed, the Executive Branch's Opening Brief argues (at 2) that the ACA "mandate[s]" those payments.

C. Legally Protected Interest, Impairment

For the same reasons they have Article III standing, the States "*a fortiori*" have a "legally protected interest" in this appeal. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *see* Motion 21-22. The House argues (Opp. 15-16) that more is required, citing *Deutsche Bank National Trust Co. v. F.D.I.C.*, 717 F.3d 189 (D.C. Cir. 2013). *Deutsche Bank* involved a very different situation, holding only that the movants did not have Article III standing to intervene in support of a defendant in one action "solely to protect judgment funds" that they wished to recover themselves in a separate action against the same defendant. *Id.* at 195. The Court went on to suggest that additional restrictions might arise from Rule 24's requirement that an intervenor's interest "'relat[e] to'" the property or transaction at issue in a case. *Id.* at 194. Treating that requirement as akin to limits on third-party standing, the Court reasoned that the movants were "effectively seeking to enforce" the defendant's contract rights instead of their own. *Id.* Here, the States do not seek to protect federal judgment funds or the Executive's contract rights. They seek to intervene to avoid the concrete harms that the district court's injunction would impose on them and their residents, and to protect their own legal claim that the Executive Branch must make CSR payments.

Finally, excluding the States from this action obviously threatens to impair their ability to protect their interests. House Opp. 17-18. A decision by this Court rejecting the positions originally advanced by the Executive Branch would make it harder for the States to "succeed on similar claims if [they] brought them in a separate lawsuit of [their] own." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014); *see also Crossroads*, 788 F.3d at 320. And the district court's outstanding injunction would certainly present an obstacle to any such action. *See Feller*, 802 F.2d at 727.

CONCLUSION

The motion to intervene should be granted.

Dated: July 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2), because it contains 2,599 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Times New Roman font.

July 17, 2017 */s/ Edward C. DuMont*
Edward C. DuMont

CERTIFICATE OF SERVICE

I certify that on July 17, 2017, the foregoing Reply in Support of the Motion to Intervene of the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia was served electronically via the Court's CM/ECF system upon all counsel of record.

July 17, 2017 */s/ Edward C. DuMont*
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