IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	Case No. 1:14-cv-01967-RMC

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI*[1]

Amici are Democratic leaders in the House of Representatives who were actively involved in the enactment of the Patient Protection and Affordable Care Act ("ACA") and are thus particularly well-suited to provide the Court with background on the text, structure, and history of the statute. In particular, *amici* can provide insight into how the structure of the law was designed to achieve its goal of expanding access to affordable health insurance through reforms of state individual health insurance markets. *Amici* are also familiar with the appropriations process and the ways in which Congress provides funding for provisions of law, including the particular ACA provisions at issue in this case. *Amici* thus have unique knowledge about, and a strong interest in, the question in this case: whether funding for the cost-sharing subsidies that are critical to the effective operation of the ACA is provided in the same permanent appropriation that funds the premium tax credits.

By virtue of their long service in the House of Representatives, including in leadership positions, *amici* also have a strong interest in protecting the prerogatives of the House of Representatives and are familiar with the array of approaches and mechanisms that Congress has historically used to resolve the myriad disputes that routinely arise between the executive branch and Congress about statutory interpretation, implementation, and policy matters. Indeed, *amici* submit this brief, in part, to demonstrate that the House does have "'effective means other than the judiciary'" to resolve this dispute. *United States House of Representative v. Burwell*, No. 1:14-cv-

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

01967-RMC, slip op. at 39 (D.D.C. Sept. 9, 2015). *Amici* also have unique knowledge about, and a strong interest in, the question pressed again by the defendants' motion: whether, consistent with constitutional separation of powers principles and, indeed, the institutional interests of the House of Representatives, the House should be granted standing to bypass the traditional approaches to resolving inter-branch interpretive disputes, and allowed to seek judicial resolution of what *amici* know from long experience is a commonplace dispute over the meaning of federal statutes.

A full listing of *amici* appears in the Appendix.

INTRODUCTION

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "the Act"), a landmark law dedicated to achieving the single goal of widespread, affordable health care. To help achieve the statute's goal of "near-universal coverage," 42 U.S.C. § 18091(2)(D), without regard to pre-existing health conditions or health status, the Act provides that individuals not covered by group health plans can purchase competitively-priced individual health insurance policies on American Health Benefit Exchanges ("Exchanges"), and, for moderate and low-income individuals, it ensures the affordability of such individual policies through an interlocking program of premium tax credits and cost-sharing reductions. Because the availability of these credits and cost-sharing reductions is critical to the ACA's legislative plan and effective operation, the ACA provides common funding for them in a permanent appropriation, 31 U.S.C. § 1324, thereby ensuring that access to the necessary funds would not be subject to the vicissitudes of the annual budget process.

The current House leadership now takes a different view and argues that the executive branch has no statutory authority to comply with the mandatory reimbursement of insurers for the cost-sharing reductions that are so important to the effective operation of the ACA. *Amici* believe this interpretation is wrong, and, in any event, it is a dispute that should be addressed through traditional appropriations and other legislative processes, not the courts. As *amici* well know, the House (and Senate) has used these traditional means to challenge aspects of the Administration's implementation of other provisions of the ACA since the law was passed in 2010, and these traditional tools of resolving inter-branch disagreements remain available to the current House leadership. It would be both unnecessary and destabilizing to the separation of powers among the three branches for the courts to displace these traditional processes and wade into inter-branch interpretive disputes such as this one. *See, e.g.*, *Chenoweth v. Clinton*, 181 F.3d 112, 113-14 (D.C. Cir. 1999) ("Historically, political disputes between Members of the Legislative and the Executive Branches were resolved without resort to the courts.").

Amici agree with the defendants that, although this Court determined that plaintiff has standing to bring some of its claims at the motion to dismiss stage, this Court's own decision denying defendants' motion to dismiss makes clear why defendants' motion for summary judgment should be granted on the ground that plaintiff lacks standing. Defendants' Mot. for Summary Judgment, Docket Entry ("D.E.") 55-1, at 33 [hereinafter "Def'ts Mot."]. As this Court recognized in that decision, courts have historically "guarded against 'the specter of "general legislative standing" based upon claims that the Executive Branch is misinterpreting a statute or the Constitution.'" *United States House*

of Representative v. Burwell, No. 1:14-cv-01967-RMC, slip op. at 33 (D.D.C. Sept. 9, 2015) [hereinafter "Slip op."] (quoting *United States House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 89-90 (1998)); *see also Raines v. Byrd*, 521 U.S. 811, 826 (1997) ("abstract dilution of institutional legislative power" not sufficient to establish standing). Indeed, if courts routinely recognized standing in cases like this one, it would encourage party leadership in one house of Congress, or, more precisely, factions within dominant parties, to trigger lawsuits over a virtually limitless number of inter-branch or partisan disputes heretofore resolved through legislative-executive processes. Accordingly, *amici* support the defendants' motion for summary judgment on the ground that plaintiff lacks standing to bring this case.

If this Court should nonetheless affirm its earlier standing decision and reach the merits, *amici* believe that this Court should conclude that the executive branch was acting within its lawful authority when it reimbursed insurers for cost-sharing reductions, as the ACA expressly required it to do. *Amici* members of Congress all served while the ACA was being passed and are thus familiar with the text and structure of the law, as well as with Congress's plan for its effective operation. They know, as the Supreme Court held earlier this year, that the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). These reforms are interdependent, and all are essential to the effective operation of the law as Congress intended.

Critically, to ensure that eligible individuals actually purchase health insurance, the law creates a package of two complementary benefits: premium assistance tax credits

to ensure that eligible individuals can afford health insurance, 26 U.S.C. § 36B, and subsidies to reduce the "cost-sharing under the plan" (for example, co-payments and deductibles) to ensure that lower-income eligible individuals can defray the costs of seeking health care once they purchase insurance, 42 U.S.C. § 18071. And the law provides that the government will reimburse insurers for those benefits. Significantly, the law does not merely *authorize* the executive branch to make these payments, but instead mandates that it do so, repeatedly using the obligatory word "shall." *See, e.g.*, 26 U.S.C. § 36B(a); 42 U.S.C. § 18071(a)(2), (c)(3)(A). The law also directs the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury, to establish a program for the advance determination of the "income eligibility" of insured individuals for these benefits and for their unified payment. 42 U.S.C. § 18082. In short, the law reflects what everyone understood at the time: the premium tax credits and the cost-sharing reductions are both integrally connected and critical to the effective operation of the law. Congress thus structured these complementary measures as a package, and it provided and understood that they would both be funded out of a permanent appropriation, 31 U.S.C. § 1324.

Subsequent actions by Congress only confirm what everyone understood at the time the law was enacted. In 2014, for example, Congress passed a bill—H.R. 2775—that conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by the Department of Health and Human Services ("HHS") that the Exchanges verify that applicants meet the eligibility requirements for such subsidies, Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a)

(2013), a certification requirement with which HHS subsequently complied, Letter from Kathleen Sebelius to Hon. Joseph R. Biden, Jr. (Jan. 1, 2014), *available at* https://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf. Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments. Moreover, although the executive branch has been using this permanent appropriation to reimburse insurers for those cost-sharing reductions, the House has at no point considered, and Congress has never passed, a law prohibiting the executive branch from making these payments. As *amici* are well aware, during the years since the ACA was enacted, Congress has passed numerous provisions modifying Administration interpretations and otherwise restricting the executive branch's use of funds related to the ACA. *See infra* at 12-13. Indeed, those sorts of restrictions are among the tools that Congress routinely uses to advance its view as to the proper implementation of governing law.

In sum, *amici* believe that this Court should, consistent with governing Supreme Court precedent, not reach the merits and instead allow the political branches to resolve this dispute in the same manner they have historically resolved such disputes. But if the Court does reach the merits, *amici* believe this Court should conclude that the permanent appropriation in 31 U.S.C. § 1324 appropriates funds for the cost-sharing reductions that are essential to the ACA's effective operation. Accordingly, *amici* support the defendants' motion for summary judgment and respectfully ask that it be granted.

ARGUMENT

I. This Inter-Branch Interpretive Dispute Should Be Resolved Through Traditional Legislative and Executive Processes, Not By the Courts

Amici members of Congress have collectively spent decades serving in the House of Representatives and, based on that long experience, they know that political disputes between the President and Congress about the implementation of federal law have always arisen, and no doubt will continue to arise. They also know that the courts are only rarely the appropriate forum for resolving such disputes, and they are certainly not the proper forum in this case.

As the Supreme Court has long recognized, "[o]ur system of government leaves many crucial decisions to the political processes," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974), and Article III standing doctrine is one area of law that "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Article III of the U.S. Constitution provides that the "judicial Power shall extend" to "Cases . . . [and] Controversies," U.S. const. art. III, § 2, and the Supreme Court has interpreted Article III to require that a plaintiff adequately allege that it has suffered an "'injury in fact'"—one that is "concrete and particularized" and one that is fairly traceable to the defendant's challenged actions and redressible by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This "irreducible constitutional minimum," *id.* at 560, applies to legislators just as it applies to any other plaintiff and thus requires that plaintiff in this case establish that it has suffered a "concrete and particularized injury." *Raines*, 521 U.S. at 819. This it cannot do.

As this Court recognized in dismissing plaintiff's employer mandate claim, legislators' allegations that a member of the executive branch has not complied with a statutory requirement do not establish the sort of "concrete and particularized" injury sufficient to satisfy Article III's standing requirements. *See* Slip op. at 32-33. After all, "[o]nce a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public." *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *see Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[o]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation"). Conferring standing on the basis of such a statutory claim would, as this Court explained in dismissing plaintiff's employer mandate claim, "contradict decades of administrative law and precedent, in which courts have guarded against 'the specter of "general legislative standing" based upon claims that the Executive Branch is misinterpreting a statute or the Constitution.'" Slip op. at 33 (quoting *House of Representatives*, 11 F. Supp. at 89-90); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."); *Raines*, 521 U.S. at 826 ("abstract dilution of institutional legislative power" not sufficient to establish standing). This same rationale is fatal to plaintiff's claim that the executive branch has acted unlawfully in reimbursing insurers for the cost-sharing reductions that are so important to the ACA's effective operation.

Plaintiff argues—and this Court previously agreed—that plaintiff's appropriation claim is somehow different from its employer mandate claim because it "is not about the implementation, interpretation, or execution of any federal statute. It is a complaint that the Executive has drawn funds from the Treasury without a congressional appropriation—not in violation of any statute, but in violation of Article I, § 9, cl. 7 of the Constitution." Slip op. at 24. *Amici* respectfully disagree. As *amici* know from their substantial experience dealing with appropriations questions as members of Congress, this dispute—like virtually every dispute about appropriations—is simply a dispute about the meaning of a statute and is thus no different than any other claim that the executive is misinterpreting the law.

After all, the defendants argue (and *amici* agree) that the permanent appropriation provided in 31 U.S.C. § 1324 funds the cost-sharing subsidies. Plaintiff may disagree, but that is a quintessential disagreement about the proper interpretation of the ACA and Section 1324, no different than countless other disputes that can arise between the executive branch and the Congress over the proper interpretation of provisions of federal law. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1363 n.95 (1988) ("Obviously, the scope of funded activities is an issue of statutory interpretation."). To be sure, if the executive branch is wrong (and, again, *amici* do not believe that it is), it would be spending funds that have not been properly appropriated, but that is also true *any* time the executive branch takes some affirmative action based on a misinterpretation of a federal statute. All provisions of law require an appropriation to be implemented, and virtually all affirmative executive actions entail some spending. This means that if

the executive branch misinterprets a provision of federal law, and then spends money to implement that misinterpretation, that spending would also reflect the "draw[ing of] funds from the Treasury without a congressional appropriation— . . . in violation of Article I, § 9, cl. 7 of the Constitution." Slip op. at 24.

Moreover, appropriation bills frequently contain prohibitions or directives on spending that are substantive in nature; review of the omnibus appropriation for 2015 makes this clear, as it repeatedly provides that "no funds appropriated under this section can be spent" on specified activities. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the ''Centers for Medicare and Medicaid Services—Program Management'' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).").[2] Any dispute about whether the executive branch has complied with any one of those provisions would also, under

[2] *See also, e.g.*, 128 Stat. at 2141 ("no funds shall be used to formulate or administer a brucellosis eradication program for the current fiscal year that does not require minimum matching by the States of at least 40 percent"); *id.* at 2187 ("no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco, Firearms and Explosives to other agencies or Departments"); *id.* at 2375 ("No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions."); *id.* at 2503 ("No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.").

plaintiff's theory, involve the "draw[ing of] funds from the Treasury without a congressional appropriation— . . . in violation of Article I, § 9, cl. 7 of the Constitution," Slip op. at 24, and thus be amenable to judicial resolution. In short, plaintiff's theory of standing would invite the very "specter of general legislative standing" that this Court rightly acknowledged that courts have long "guarded against." *Id.* at 33 (internal quotations omitted).

Concluding that there is standing in this case is not only inconsistent with judicial precedent, it is also completely unnecessary given alternative and more appropriate tools available to legislators to object to executive branch actions that they view as inconsistent with governing law. As *amici* well know from their long experience serving in the House of Representatives, Congress spends a significant proportion of its time and energy overseeing and responding to executive branch action, including executive branch actions that implement federal statutes. By virtue of this oversight responsibility, Congress has numerous tools at its disposal to resolve routine disputes over the scope of applicable spending authority such as this one.

To start, legislators may always challenge executive action by enacting corrective legislation that either prohibits the disputed executive action or clarifies the limits or conditions on such action. In this case, if both houses of Congress had concluded that 31 U.S.C. § 1324 did not provide the necessary appropriation, they could have passed a bill that specifically prohibited the executive branch from expending funds to reimburse insurers for cost-sharing subsidies. To be sure, use of that particular tool would have required both houses of Congress to concur (and would likely have faced the hurdle of a

presidential veto), but the Supreme Court has recognized that the power to enact corrective legislation is an important tool and one that obviates the need for judicial resolution of political disputes between the branches. *See, e.g.*, *Raines*, 521 U.S. at 824 (holding that there was no legislator standing because, in part, "a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act").

Further, Congress has other means to challenge disputed interpretive policies, including many that do not require the concurrence of both houses. For example, Congress can hold oversight hearings, initiate legislative proceedings, engage in investigations, and, of course, appeal to the public. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (holding that plaintiff legislators lacked standing to sue the President for sending U.S. forces into Yugoslavia because, in part, they could have passed a law forbidding that use of troops, they could have cut off funds for that military operation, or they could have sought the President's impeachment).

The current House leadership is, of course, familiar with all of these tools and has used them frequently in other contexts. In fact, with respect to the ACA itself, "Congressional appropriators have used a number of legislative options available to them through the appropriations process in an effort to defund, delay, or otherwise address implementation of the ACA." C. Stephen Redhead & Ada S. Cornell, Congressional Research Service, *Use of the Annual Appropriations Process To Block Implementation of the Affordable Care Act (FY2011-FY2016)*, at 5 (Oct. 13, 2015), https://www.fas.org/sgp/crs/misc/R44100.pdf. Among other things, House appropriators

"repeatedly have added limitations," provisions "that restrict the use of funds provided by the bill." *Id.*; *see id.* (noting that limitations either "cap[] the amount of funding that may be used for a particular purpose or . . . prohibit[] the use of any funds for a specific purpose"). They have also added "several reporting and other administrative requirements regarding implementation of the ACA," including "instructing the HHS Secretary to establish a website with information on the allocation of [specified] funds and to provide an accounting of administrative spending on ACA implementation." *Id.* at 6.[3] The current House leadership may not have chosen to employ these tools to address this particular executive branch action, but their unwillingness to do so provides no cause to dramatically expand the scope of federal court jurisdiction beyond what Article III permits. *See, e.g.*, *Chenoweth*, 181 F.3d at 116 (no jurisdiction where "the parties' dispute is . . . fully susceptible to political resolution").

Moreover, even if there were an institutional injury here sufficient to merit standing, it would be one that could be vindicated only in a suit brought by both houses of Congress, not simply the House of Representatives. To the extent the House is attempting to vindicate its legislative power under Article I, that is a power it shares with—and cannot exercise without—the Senate. *See* U.S. const. art. I, § 7 (enactment of a law requires passage of a bill by both houses of Congress and its presentment to the President); *see also Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954-55

[3] These appropriations riders only underscore that plaintiff does not—and cannot—allege that it has been divested of its appropriations authority. The House's authority to carry out its appropriation function has not been affected at all by the executive branch actions at issue in this case. *See Raines*, 521 U.S. at 824 (no legislator standing where "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process").

(1983) (Congress makes policy "in only one way": "bicameral passage followed by presentment to the President"). Even if the House is seeking to vindicate its more specific Article I power to originate revenue-raising bills, *see* U.S. const. art. I, § 7, the Senate shares in the power to *enact* such bills, *see id.* (noting that "the Senate may propose or concur with Amendments as on other Bills"); *see also Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (Senate has broad power to amend revenue-raising bills consistent with the Origination Clause), and there is thus no reason to think the House can sue alone to vindicate that power. In other words, with respect to this and similar disputes, one house of Congress is indistinguishable from the group of members of Congress denied standing by the Supreme Court in *Raines v. Byrd*, 521 U.S. at 824.

In sum, no court has ever previously concluded that there was standing on the basis of the sort of injury that plaintiff alleges here, and with good reason: it would disturb long-settled and well-established practices by which the political branches mediate interpretive disputes about the meaning of federal law, and it would encourage political factions within Congress to advance political agendas by embroiling the courts in innumerable political disputes that are appropriately resolved using those long-established practices. As members of Congress, *amici* have an obvious interest in protecting the House of Representatives' institutional prerogatives, but they also appreciate that allowing suit in this case undermines, rather than advances, those interests—inevitably subjecting Congress to judicial second-guessing never contemplated by the Framers of the Constitution and compounding opportunities for legislative obstruction in ways that could greatly increase congressional dysfunction.

II. The Executive Branch Has Not Violated the Law Because Section 1324 Provides a Permanent Appropriation for Cost-Sharing Subsidies

As the text of the ACA makes clear, its goal was to achieve "near-universal coverage" and to ensure that that "near-universal coverage" would be affordable for all Americans. 42 U.S.C. § 18091(2)(D); *King*, 135 S. Ct. at 2485 (2015) (ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (ACA adopted "to increase the number of Americans covered by health insurance and decrease the cost of health care").

A critical part of Congress's plan to ensure affordable, "near-universal coverage" was to enact an interlocking system of premium tax credits and cost-sharing reduction payments to reduce the costs of both health insurance and health care purchased with that insurance. 26 U.S.C. § 36B; 42 U.S.C. §§ 18071, 18082. Under the terms of the ACA, the premium tax credits "shall be allowed" for individuals with household incomes from 100% to 400% of the federal poverty line to help them purchase insurance, 26 U.S.C. § 36B(a), (c)(1)(a), and insurance issuers "shall reduce the cost-sharing under the plan" for individuals with household incomes from 100% to 250% of the federal poverty line to help them defray the costs of health care purchased with that insurance (*i.e.*, expenses such as co-payments and deductibles), 42 U.S.C. § 18071(a)(2); 45 C.F.R. § 155.305(g). Congress also gave the insurance issuer a legal right to payment from the federal government for the amount of those mandatory cost-sharing reductions, providing that "the Secretary shall make periodic and timely payments to the issuer equal to the value of

the reductions." 42 U.S.C. § 18071(c)(3)(A); *id.* § 18082(c)(3) (advance payments "shall" be made).

The current House leadership now argues that there is no appropriation for the cost-sharing reductions, even though, as it concedes, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. This assertion is at odds with the ACA's plan for reforming and restructuring individual insurance markets, as well as with the mechanisms Congress adopted to effectuate that plan. Likewise, plaintiff's interpretation conflicts with subsequent congressional action that confirms what everyone understood at the time: the ACA provides that the premium tax credits and cost-sharing reductions are commonly funded by the permanent appropriation in 31 U.S.C. § 1324.

A. At the Time the ACA Was Enacted, Everyone in Congress Understood that Tax Credits and Cost-Sharing Reductions Would Both Be Funded Out of the Same Permanent Appropriation.

Amici members of Congress served in Congress while the ACA was drafted and enacted, and they were actively involved in the debates concerning the ACA. They know from this experience that the tax credits and the cost-sharing reductions have always been viewed as integrally connected, and that both are indispensable to the restructuring of individual insurance markets that the statute prescribes to make affordable health insurance and health care available for all Americans. Given the identical goals served by these complementary subsidies and their centrality to the ACA's legislative plan, the law makes funding available for both subsidies from the same source, 31 U.S.C. §1324, which provides for a permanent appropriation, obviating the need to seek an annual

appropriation. Plaintiff's argument to the contrary is wrong, and it is inconsistent with the way everyone in Congress understood the law to operate at the time it was enacted.

To start, there can be no doubt that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to the effective operation of the ACA. As the Supreme Court explained in *King v. Burwell*, the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." 135 S. Ct. at 2485. It "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." *Id.* These three reforms, the Court made clear, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third. *Id.* at 2487.

As *amici* know from their involvement in the drafting of and deliberations about the ACA, the cost-sharing reductions at issue in this case complement the premium tax credits that *King v. Burwell* held were indispensable to the ACA's legislative plan, and these cost-sharing reductions are no less critical to that legislative plan. Both the premium tax credits and the cost-sharing reductions work in tandem to ensure stable individual insurance markets open to all individuals, regardless of pre-existing conditions or health status generally, and accessible to moderate and lower-income individuals who, prior to the ACA, went uninsured. Whereas the premium tax credits make it more affordable for an individual to purchase health insurance, the cost-sharing reductions make health *care* more affordable by reducing the costs, such as co-payments and

deductibles that even those with health insurance must pay to obtain health care. This is no small thing: studies have shown that if cost-sharing is too high, many individuals will simply choose not to purchase insurance at all, thus undercutting the entire purpose of the premium tax credits. *See* S.R. Collins et al., *To Enroll or Not To Enroll? Why Many Americans Have Gained Insurance Under the Affordable Care Act While Others Have Not*, The Commonwealth Fund, Sept. 2015, http://www.commonwealthfund.org/publications/issue-briefs/2015/sep/to-enroll-or-not-to-enroll ("Affordability was a key reason people did not enroll in plans."); *cf. id.* (noting, with respect to those who did enroll in plans, that "[p]remiums and out-of-pocket costs figured most prominently in decisions regarding choice of marketplace plan").

The text and structure of the ACA make clear that the cost-sharing reductions and the premium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law, which directs the Government to "establish a program" for the unified administration of advance payments of both forms of the subsidy. 42 U.S.C. § 18082; *see also* Brief *Amici Curiae* for Economic and Health Policy Scholars in Support of Defendants at 14-19 [hereinafter Health Policy Scholars Brief] (detailing the numerous places in the ACA in which the premium tax credits and the cost-sharing reductions are linked). Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing reductions "in order to reduce the premiums payable by individuals eligible for such credit." 42 U.S.C. § 18082(a)(3); Def'ts Mot. at 13, 16-19 (explaining how "[a]dvance payments of the cost-sharing reductions are . . . legally [and] . . . economically . . .

inextricable from the accompanying advance payments of the premium tax credits"). Significantly, the ACA does not merely *authorize* the Executive to make these payments, but instead mandates that it do so, repeatedly using the obligatory word "shall." *See, e.g.*, 26 U.S.C. § 36B(a); 42 U.S.C. § 18071(a)(2), (c)(3)(A); *id.* § 18082(c)(2)(A), (c)(3); *see also, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (contrasting "Congress' use of the permissive 'may' in [one section] . . . with the legislators' use of a mandatory 'shall' in the very same section" and noting that "[e]lsewhere in [a specified section], Congress used 'shall' to impose discretionless obligations").

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation. 31 U.S.C. § 1324; *see generally* Def'ts Mot. at 16-19 (explaining the "cascading series of nonsensical and undesirable results that" would follow "if the Act did not allow the government to comply with the statutory directive to reimburse . . . insurers for the cost-sharing reductions"). Although Section 1324 only expressly mentions the provision governing premium tax credits, it was well understood, as *amici* know from their experience in Congress at the time and as other provisions of the statute make clear, that the cost-sharing reductions and the premium tax credits were to be funded out of the same source. As just noted, the government was required to establish a "program" for the unified administration of both forms of the subsidy. 42 U.S.C. § 18082(a) ("[t]he Secretary . . . shall establish a program under which . . . advance determinations are made . . . with respect to the income eligibility of individuals

enrolling in a qualified health plan in the individual market through the Exchange for the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title"); *id.* § 18082(a)(3) (providing that "the Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit"); *see also id.* § 18083(e) ("the term 'applicable State health subsidy program' means—(1) the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402"). Thus, read consistently with the ACA as a whole (and, in particular, Section 18082), Section 1324 provides a permanent appropriation for reimbursement of insurers' mandated payments for both the premium tax credits and the complementary cost-sharing reductions that are part of the same unified program. *See generally* Health Policy Scholars Brief, *supra*; *see also King*, 135 S. Ct. at 2496 ("A fair reading of legislation demands a fair understanding of the legislative plan.").

Significantly, analyses conducted by the Congressional Budget Office, the nonpartisan office responsible for analyzing budgetary and economic issues relevant to the congressional budget process, have repeatedly reflected the widely-held understanding that the cost-sharing reductions, just like the premium tax credits, are covered by a permanent appropriation. *See, e.g.*, Congressional Budget Office, The Budget and Economic Outlook: 2015-2025, at 122 tbl.B-3 (2015), *available at* https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49892-

Outlook2015.pdf (identifying both "[o]utlays for premium credits" and "[c]ost-sharing subsidies" as "[c]hanges in [m]andatory [s]pending"); *see also* Congressional Budget Office, *Frequently Asked Questions About CBO Cost Estimates* (last visited Dec. 1, 2015), https://www.cbo.gov/about/products/ce-faq (contrasting "[m]andatory" spending, i.e., "spending controlled by laws other than appropriation acts," with "[d]iscretionary spending," i.e., "spending stemming from authority provided in annual appropriation acts"); *see generally* Def'ts Mot. at 23-25 (noting that "[d]uring deliberations on the ACA, the CBO repeatedly provided Members of Congress with budget scoring that treated cost-sharing reductions as unconditional 'direct spending.'").

It also bears emphasizing that when Congress directs the executive branch to take some action, but wants to maintain control over the executive branch's compliance with that direction, there is a well-established means by which it does that. In such circumstances, Congress will often enact an "authorization of appropriations," language which does not itself constitute an appropriation of funds, but empowers Congress to appropriate such funds in the future. *See, e.g.*, Pub. L. No. 113-235, 128 Stat. at 2540 ("There are authorized to be appropriated such sums as may be necessary to carry out this subchapter."). Congress included such language elsewhere in the ACA, *see, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1323(h) (2010), but tellingly it did not include it with respect to the cost-sharing reductions That Congress did not do so only underscores that everyone involved in the drafting of the ACA understood that such future appropriations would be unnecessary because those payments would be made out of the permanent appropriation provided in 31 U.S.C. § 1324.

Finally, another provision of the ACA also confirms what everyone at the time understood. At the time Congress was debating the ACA, some members of Congress expressed concern that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which under certain circumstances limits the use of annually-appropriated funds to pay for abortions. *See, e.g.*, 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) ("this bill is not subject to appropriations"). To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law, and in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations. *See* 42 U.S.C. § 18023(b)(2)(A) ("If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 . . . (ii) Any cost-sharing reduction under section 18071 of this title . . . .").

In short, the text of the ACA confirms what everyone in Congress understood at the time: the cost-sharing subsidies, like the premium tax credits, were an integral part of the legislative plan adopted in the ACA, which is why Congress mandated their payment and provided a permanent appropriation to ensure that the Secretary could comply with that legislative mandate.

B. Subsequent Congressional Action Confirms that Cost-Sharing Reductions Would Be Funded Out of the Same Permanent Appropriation as the Tax Credits.

In the years since the ACA's enactment, congressional action has confirmed that

Section 1324 provides a permanent appropriation for the advance payments that the ACA mandates that the Secretary make to insurers for the cost-sharing subsidies.

For example, for fiscal year 2014, there was no annual appropriation for these payments, but the House and Senate nonetheless both assumed that an appropriation was available, together passing a bill premised on that assumption. That bill conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the Exchanges verify that applicants meet the eligibility requirements for such subsidies. Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a) (2013). To comply with this provision, HHS subsequently certified to Congress that the Exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions." Letter from Kathleen Sebelius to Hon. Joseph R. Biden, Jr. at 1 (Jan. 1, 2014), *available at* https://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf. Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments.[4]

[4] Plaintiff makes much of the Administration's request for a line item designating funds for the payment of cost-sharing reductions by HHS. *See, e.g.*, Plaintiff's Motion for Summary Judgment, D.E. 53, at 7. *Amici* take no position on why the executive branch made that request, but *amici* do know why Congress did not make an annual appropriation in response: none was necessary. As everyone understood at the time the law was enacted and as the law itself makes clear, those payments were funded out of the permanent appropriation provided in 31 U.S.C. § 1324. Tellingly, immediately after the Administration went forward and made the required payments, Congress did not dispute the Administration's action, or its funding the two subsidy provisions from the same source, namely 31 U.S.C. § 1324.

Moreover, that certification surely gave Congress additional notice that the executive branch intended to make advance payments of cost-sharing reductions, and Congress never took any action to indicate that it viewed those payments as unlawful. In fact, two weeks after that certification, Congress enacted the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 (2014), which imposed numerous explicit restrictions on particular uses of appropriated funds, *see, e.g.*, *id.*, Div. H, tit. V, §§ 502-520, but it imposed no limits on the use of federal funds for the advance payment of cost-sharing reductions under the ACA. As *amici* know from their experience serving in Congress, members of Congress frequently use restrictions on appropriations to limit executive branch action and to make clear when they disagree with an executive branch interpretation of the law. *See supra* at 12-13 (Congress has repeatedly done this with respect to other provisions of the ACA). That Congress did not do so with respect to these payments underscores that members on both sides of the aisle understood those payments to be lawful in light of the permanent appropriation provided in Section 1324.

Indeed, Congress's appropriation for the next year supports the same point. In March 2014, OMB submitted a budget request for FY2015 to Congress. Office of Management & Budget, Fiscal Year 2015 Budget of the United States Government, *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf. Given the permanent appropriation in Section 1324, this budget proposal did not seek an appropriation for the payment of the cost-sharing reductions, and in May 2014, then-OMB Director Sylvia Burwell informed members of Congress that all forms of the ACA's advance payments were being paid from the same source. Compl. ¶¶ 37-

39. When Congress subsequently enacted the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (2014), it once again did not restrict or in any way limit the use of federal funds for the advance payment of cost-sharing reductions under the ACA, even though it did once again impose numerous other explicit restrictions on specific uses of appropriated funds, *see, e.g.*, *id.*, Div. G, tit. V, §§ 502-519.

* * *

In sum, the text and structure of the ACA confirm what everyone in Congress understood at the time the law was enacted and in the years since: the cost-sharing reductions, like the premium tax credits, are critical to the effective operation of the ACA, and under the legislative plan established by the ACA, both were to be paid out of the same permanent appropriation, 31 U.S.C. § 1324. The existence of that permanent appropriation is fatal to plaintiff's claim on the merits.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the defendants' motion for summary judgment be granted.

Dated: December 8, 2015

/s/ Elizabeth B. Wydra
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APPENDIX:

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Rep. Nancy Pelosi
Democratic Leader

Rep. Steny H. Hoyer
Democratic Whip

Rep. James E. Clyburn
Assistant Democratic Leader

Rep. Xavier Becerra
Democratic Caucus Chair

Rep. Joseph Crowley
Democratic Caucus Vice-Chair

Rep. Nita Lowey
Ranking Member, Committee on Appropriations

Rep. Robert C. "Bobby" Scott
Ranking Member, Committee on Education and the Workforce

Rep. Frank Pallone
Ranking Member, Committee on Energy and Commerce

Rep. John Conyers, Jr.
Ranking Member, Judiciary Committee

Rep. Louise Slaughter
Ranking Member, Committee on Rules

Rep. Sander M. Levin
Ranking Member, Committee on Ways and Means.

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: December 8, 2015

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra