No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; PAUL LePAGE, Governor of Maine; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

On Appeal from the United States District
Court for the Northern District of Texas
(No. 4:18-cv-00167-O)

REPLY IN SUPPORT OF MOTION OF THE U.S.
HOUSE OF REPRESENTATIVES TO INTERVENE

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The United States House of Representatives seeks to exercise its statutory authority to intervene in this case because the Executive Branch has declined to defend the constitutionality of an extremely significant federal law that benefits millions of Americans. Under such circumstances, the opposition by the U.S. Department of Justice ("DOJ") to intervention by a coequal branch of the U.S. Government is difficult to understand, especially because none of the parties will be prejudiced by that intervention.

DOJ's position is especially surprising because the Supreme Court has provided this Court with clear guidance regarding this type of situation, instructing that "Congress is the proper party to defend the validity of a [federal] statute when" the Executive "agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983). Indeed, in finding a "[c]ase or [c]ontroversy" in *Chadha*, the Supreme Court said that "Congress is both a proper party to defend the constitutionality of [the federal statute at issue there] and a proper petitioner [to seek Supreme Court review]." *Id.* at 939.

As explained in the motion to intervene, a federal statute expressly contemplates that the House has authority to intervene when DOJ refuses to defend a federal law's constitutionality. *See* 28 U.S.C. § 530D. And courts, including this one, have routinely recognized intervention by Congress in that circumstance. *See, e.g.*, *In Re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986). DOJ has not cited a single

case in which such intervention has been denied, and is therefore asking this Court to be the first to take that step (so far as we are aware). Such a ruling would inappropriately deprive this Court and the public of having *any* federal entity defending as a party an important federal statute. Intervention by the House should thus be granted.

I. THE HOUSE IS ENTITLED TO INTERVENE AS OF RIGHT.

A. Rule 24(a)(1)

Sections 2403(a) and 530D of Title 28, read together, entitle the House to intervene. Acknowledging the importance of having a federal entity participate in the defense of federal laws, § 2403(a) gives the United States a right to intervene in cases in which the constitutionality of a federal statute is challenged. And § 530D(b)(2) requires that when DOJ declines to defend an Act of Congress, it must timely notify the House so that the latter can "take action … to intervene." When § 530D applies, then, the right to intervene passes from the Executive to the House. As the Supreme Court has observed, "when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative." *United States v. Windsor*, 570 U.S. 744, 762 (2013). DOJ's opposition to intervention here makes that grave separation-of-powers problem worse.

B. Rule 24(a)(2)

1. ***Cognizable interest***. A proposed intervenor satisfies Rule 24(a)'s "interest" requirement if it has an interest "that the law deems worthy of protection, even if the intervenor … would not have standing to pursue her own claim." *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015).

Federal law plainly protects the House's interest in defending a federal statute when DOJ refuses to do so. Consistent with § 530D, the Supreme Court has recognized that the House is a "proper party to defend the validity of a statute when [the Executive] agrees with plaintiffs that the statute is … unconstitutional." *Chadha*, 462 U.S. at 940. That conclusion is in accord with an unbroken line of precedent. *See* Mot. 7-8 & nn.3-4. Indeed, DOJ has cited no case holding, or even implying, that the House lacks a sufficient interest to intervene under such circumstances.

That is not surprising. When a court strikes down a federal law at DOJ's urging, it "completely nullifie[s]" the House's passage of the law. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015). The House has a cognizable interest in avoiding such invalidation. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state senators had cognizable interest in "maintaining the effectiveness of their votes"); *Windsor*, 570 U.S. at 806 (Alito, J., dissenting); *Karcher v. May*, 484 U.S. 72, 84 (1987) (White, J., concurring).

Moreover, the House has an interest in convincing a court not to invalidate a law in a way that could hamper Congress's future lawmaking. *See Arizona State Legislature*, 135 S. Ct. at 2663 (state legislature had standing to challenge initiative that would "strip[] the Legislature of its alleged prerogative to initiate redistricting"). Here, the district court erroneously held that the individual mandate exceeds Congress's enumerated powers. If affirmed, that decision could prevent the House from passing similar laws in the future.

The House also has a systemic interest in correcting the district court's peculiar severability analysis to ensure that the House can legislate against the backdrop of sensible and predictable severability principles. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010) (discussing importance of "preserving a stable background against which Congress can legislate with predictable effects"); *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 424 (5th Cir. 2002) (FDIC has a "broad[] interest in protecting the proper and consistent application of the Congressionally designed framework" which it could not "be assumed that the existing parties to the litigation would protect").

DOJ insists that this Court should nonetheless deny the House intervention, on the theory that the Constitution assigns the House only "legislative Powers" and not the "executive Power." DOJ's apparent argument—that it is unconstitutional for the House to intervene under any circumstances—is remarkable and ignores this

Court's precedent. In *City of Houston v. American Traffic Solutions, Inc.*, this Court held that organizations that had successfully petitioned for adoption of a city-charter amendment could intervene to defend that amendment. 668 F.3d 291, 294 (5th Cir. 2012). Like the House here, the organizations had no power to enforce the law. Nevertheless, this Court held that their interest "in cementing their electoral victory and defending the charter amendment" satisfied Rule 24(a)(2). *Id.* The House's interest here is analogous (albeit more powerful).

As noted at the outset of this reply, DOJ's argument is likewise foreclosed by *Chadha*, and DOJ's efforts to distinguish *Chadha* are unsuccessful. DOJ's suggestion that *Chadha* referred only to participation by the House as *amicus* is incorrect. The Supreme Court expressly approved the House's "formal intervention" as a *party*. *Chadha*, 462 U.S. at 939. Indeed, the Court recognized the House as a "proper petitioner" for certiorari, which cannot be said of an *amicus*. *Id.*

DOJ's attempt to limit *Chadha* to dealing with the House's "procedural right[] to veto Executive action" is similarly unavailing. Opp. 11. *Chadha* recognized the House as a "proper party" not only to defend the one-House veto, but also more generally to "defend the validity of a statute when [the Executive] agrees with plaintiffs that the statute is inapplicable or unconstitutional." 462 U.S. at 940.

DOJ also suggests that *Chadha* "refutes … the proposition that a single House of Congress has a right to intervene." Opp. 12. But in *Chadha*, the House and Senate intervened as *separate* parties. *See* 462 U.S. at 930 n.5.

DOJ further argues that *United States v. Windsor* supports its position, but the opposite is true. There, the Executive declined to defend DOMA, and the House intervened to do so. While the Supreme Court concluded that it need not decide whether the House had standing, it said nothing that cast doubt on the House's right to intervene. 570 U.S. at 761-62.

DOJ's position is not only irreconcilable with precedent but also would have intolerable consequences. Under DOJ's view, the House could *never* intervene to defend a law, even when DOJ attacks that law in court and no party in the case defends it. In addition, because courts depend upon parties' adversarial presentations, DOJ could effectively invalidate a law by agreeing that it should be struck down and forgoing appellate review—an end-run around the constitutionally prescribed process for a law's repeal.

Finally, DOJ's suggestion that the House's interests can be fully vindicated as an *amicus* is wrong. An *amicus* is excluded from the full briefing afforded to parties, and an *amicus* cannot seek appellate review.[1]

[1] DOJ does not make a separate Article III standing argument—and such an argument would not aid DOJ in any event. This Court has held that "Article III does not require intervenors to independently possess standing" when an existing party

2. ***Inadequacy of representation***. DOJ is mistaken in contending that the Intervenor-States adequately represent the House's interests. The "burden to establish inadequate representation is 'minimal,'" as even the cases DOJ cites acknowledge. Opp. 15. That burden does not require the House to show divergent interests that "will *in fact* result in inadequate representation," but only interests that "might" do so. *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014).

The House's interests here are meaningfully different from those of the Intervenor-States. The Intervenor-States cannot represent the institutional interests of the House, which has the authority to interpret the Constitution and to pass laws based on that interpretation. *See* Mot. 13-14.

With regard to severability, while the Intervenor-States' interest is limited to the application of severability law to these facts, as noted above (at p. 4), the House has a systemic interest in the severability principles against which it legislates. Those different outlooks can lead to considerably different arguments, and this Court will benefit from hearing each of them.

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does and the intervenor does not seek different "ultimate relief" than that party. *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). Both conditions are satisfied here. Moreover, the House does have standing here, because striking down the ACA inflicts on the House the concrete injuries discussed above. *See Chadha*, 462 U.S. at 935-36.

Finally, the Intervenor-States' interest in lenient standing requirements for States obviously may inhibit them from making the same standing arguments as the House. That adversity of interest was on full display before the district court. While the Intervenor-States ultimately contended that the Plaintiff-States lacked standing at oral argument, contentions presented for the first time at argument are no substitute for full briefing. Given the Intervenor-States' positions below, the House's concern that its "more extensive interests … might" result in inadequate representation is warranted. *Brumfield*, 749 F.3d at 346.

This Court has repeatedly found that the "minimal" burden to show inadequate representation is met when the intervenor has interests of different breadth than those of the parties. For example, in *Sierra Club v. Glickman*, the Sierra Club sued the USDA for its conservation policies in Texas, and Texas sought to intervene on the side of the USDA. 82 F.3d 106 (5th Cir. 1996). Although Texas and the USDA sought the same result, the Court explained: "The USDA is legally obliged to represent the interests of all U.S. citizens. The State of Texas has a narrower but independently vital interest in representing its residents." *Id.* at 110 (citation omitted). Representation was thus inadequate.

Likewise, in *Texas v. United States*, three potential DAPA beneficiaries were allowed to intervene on the side of the United States because the United States had

broader interests, and distinct views about state standing, that led it to prioritize different arguments—just as in this case. *See* 805 F.3d at 663.

3. ***Timeliness***. DOJ's contention that the House's intervention motion is untimely is incorrect. As described in the motion, this Court has adopted a four-factor timeliness test. *See* Mot. 15-16; *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). No single factor is dispositive, and "[t]he requirement of timeliness is not a tool of retribution," but instead "a guard against prejudic[e]" such that "courts should allow intervention where no one would be hurt and greater justice could be attained." *Id.* (citation omitted).

DOJ does not address that test and ignores three of its four factors. Most significantly, DOJ has not shown why any party would be prejudiced by the House's involvement—even though this Court has made clear that prejudice to the existing parties is the most important factor. The House's involvement will not harm any other party, and the House will meet the briefing schedule that this Court has established.

DOJ focuses only on the length of time between when this suit was filed and when the House filed its intervention motion. But this factor, no less than the others, counsels in favor of intervention. The House is not a continuing body, and it filed its motion on the first day that the 116th House could participate in this appeal. *Cf.*

Ruiz, 161 F.3d at 828 (motion timely when legislators sought intervention as soon as they had statutory authority).

DOJ's response also misunderstands the nature of the House's interests. There are certain interests that transcend each individually constituted House. But otherwise, the authority to pursue legal action resets with each new Congress. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) ("although the legislative power continues perpetual," House's legal authority to imprison for contempt expires when it is reconstituted); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 88 (D.D.C. 1998) (distinguishing House's continuing interest in owning property from its interest in "prosecuting or defending suits"). For that reason, the subpoena cases relied on in the House's motion, which deal with the House's authority to prosecute and defend suits, are relevant here. At the first moment that the 116th House could intervene here, it did.

II. PERMISSIVE INTERVENTION IS ALTERNATIVELY WARRANTED.

The conditions for permissive intervention are met here—and given the well-recognized role of the House in litigation in which no other federal party is defending a federal statute, denial of permissive intervention would be an abuse of discretion.

First, the House satisfies Rule 24(b)(1) on two independent grounds. The House has at least a conditional right to intervene under a federal statute. *See* p. 2, *supra*. And the House's defense of the ACA addresses the same "question of law"

at stake in the "main action." Fed. R. Civ. P. 24(b)(1)(B). DOJ's suggestion that the House lacks a "claim or defense" within the meaning of the rule is contrary to precedent, which states that permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940). It also overlooks the threat to the House's institutional interests.

Second, DOJ does not contend that intervention will unduly delay adjudication. Instead, DOJ advances its view that *amicus* status would be preferable for the House. But amicus status may be more appropriate than permissive intervention *only* if "intervention may materially diminish the original parties' rights." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 473 (5th Cir. 1984) (en banc).

Here, *amicus* participation is far from sufficient. The House is a branch of the federal government with status and dignity equal to that of the Executive Branch, it would offer a uniquely federal defense of the ACA, its participation as a party will cause no prejudice, and its intervention is supported by a wealth of authority and is necessary from a separation-of-powers perspective. This Court should not misuse its discretion to be the first court to deny the House intervention in a case like this one.

CONCLUSION

The motion by the House of Representatives to intervene should be granted.

Dated: February 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, 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: February 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(C), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,591 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman.

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