IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PRELIMINARY STATEMENT **1**

ARGUMENT **4**

I. The House Errs in Relying on the Administration's Fiscal Year 2014 Budget Request and Congress's Failure to Grant that Request **4**

II. A Careful Analysis of the ACA Demonstrates that Congress Permanently Appropriated Funds for All Components of the Act's Integrated Subsidy Program **7**

III. Post-ACA Legislative Developments Confirm That Cost-Sharing Reduction Payments Are Permanently Appropriated **14**

CONCLUSION **21**

TABLE OF AUTHORITIES

CASES

Burns v. United States,
501 U.S. 129 (1991) 6

FCC v. Fox Television Stations,
556 U.S. 502 (2009) 6

**FTC v. Dean Foods Co.*,
384 U.S. 597 (1966) 5

**King v. Burwell*,
135 S. Ct. 2480 (2015) ..... *passim*

N.J. Chapter Inc. of Am. Physical Therapy Ass'n v. Prudential Life Ins. Co. of Am.,
502 F.2d 500 (D.C. Cir. 1974) 6

United States v. E. I. Du Pont De Nemours & Co.,
353 U.S. 586 (1957) 5, 6

United States v. Phila. Nat'l Bank,
374 U.S. 321 (1963) 5

United States v. Sw. Cable Co.,
392 U.S. 157 (1968) 6, 7

Wong Yang Sung v. McGrath,
339 U.S. 33 (1950) 5, 6

STATUTES

*26 U.S.C. § 36B 2
31 U.S.C. § 1301 14
*31 U.S.C. § 1324 ..... *passim*
*42 U.S.C. § 18071 ..... 2, 9, 11
42 U.S.C. § 18081 ..... 8, 9
*42 U.S.C. § 18082 ..... *passim*
42 U.S.C. § 18091 9
*Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 12
Consolidated and Further Continuing Appropriations Act, 2015,
Pub. L. No. 113-235, 128 Stat. 2130 (2014) 19
Continuing Appropriations Act of 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013) 15
Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015) 20

RULES & REGULATIONS

45 C.F.R. 155.320 16
45 C.F.R. 156.430 16
78 Fed. Reg. 15,410 (Mar. 11, 2013) 16
78 Fed. Reg. 42,160 (July 15, 2013) 16

LEGISLATIVE HISTORY

159 Cong. Rec. H5517 (Sept. 12, 2013) 16
159 Cong. Rec. H5525 (Sept. 12, 2013) 17
160 Cong. Rec. S475 (Jan. 27, 2014) 17
160 Cong. Rec. H2814 (Apr. 2, 2014) 17
160 Cong. Rec. S3440 (June 5, 2014) 17
H.R. Res. 676, 113th Cong. (2014) 17
H.R. Rep. No. 113-17 (2013) 18
H.R. Rep. No. 113-403 (2014) 18
H.R. Rep. No. 114-47 (2015) 18
H.R. 3762, 114th Cong. (2016) 20
H.R. Rep. No. 114-96 (2015) (Conf. Rep.) 18
Seeking PPACA Answers: Hearing Before the House Energy & Commerce Comm., Subcomm. on Oversights and Investigations, 113th Cong. 2d Sess. (2014) 17

PRELIMINARY STATEMENT

The text, structure, design, and history of the Affordable Care Act demonstrate that the Act permanently funded both interrelated components of its insurance subsidy program—premium tax credits and cost-sharing reductions. The House's alternative construction disregards the cardinal principle, recently reiterated by the Supreme Court in interpreting one of the same ACA provisions at issue here, that courts must read statutory terms "in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation omitted). The House fails to cite *King* in its opening brief, let alone explain how its interpretation of the ACA's amendment to 31 U.S.C. § 1324 is compatible with the ACA's statutory scheme. No such explanation is possible.

The House devotes much of its briefing to facts that cannot resolve the question before this Court. Ignoring contrary evidence from both Congress and the Executive Branch, the House places great weight on the Executive's fiscal year 2014 budget request, which sought a line-item appropriation for the Department of Health and Human Services (HHS) to make cost-sharing reduction payments. That budget request, however, did not fully account for the text, structure, design, and history of the ACA—a complex statute that the Supreme Court recently described as containing "more than a few examples of inartful drafting." *King*, 135 S. Ct. at 2492. In any event, the Supreme Court has long refused to draw an inference about the meaning of a statute from an agency's post-enactment proposals, or from congressional silence in the face of such proposals. Under long-standing precedent, then, the fiscal year 2014 budget request cannot answer the question here, namely, the meaning of the ACA and its amendment to Section 1324.

When the House does address that statutory question, it offers a superficial interpretation of the ACA based only on the purported "plain language" of the ACA's amendment to one particular provision, 31 U.S.C. § 1324(b). Mem. in Supp. of Pl.'s Mot. for S.J. ("Pl.'s Mem.") at 3, 20 (ECF No. 53). But even as to that provision, the House's reading is far from "plain," and—as the Supreme Court recently emphasized in *King*—courts must "construe statutes, not isolated provisions." 135 S. Ct. at 2489 (internal quotation omitted).

The House's construction cannot be squared with the statute as a whole. It rests on the mistaken premise that the ACA "created two programs," what the House calls the "Section 1401 Refundable Tax Credit Program" and the "Section 1402 Offset Program." Pl.'s Mem. at 1-2. Based on this premise, the House concludes that, by cross-referencing Section 36B in the permanent appropriation found at 31 U.S.C. § 1324, the ACA funded the "Section 1401" program in its entirety—including the premium tax credit portion of the advance payments made under Section 1412 of the ACA (42 U.S.C. § 18082(c)), not Section 1401 (26 U.S.C. § 36B)—but did not fund the "Section 1402" program at all. But the ACA makes clear that cost-sharing reductions and premium tax credits are components of a single program in which eligibility for one is predicated on eligibility for the other, and advance payments attributable to both subsidies are made by the same agency to the same entities for the same purpose. *See* 42 U.S.C. § 18071(f)(2); 18082(a), (a)(3). Within this integrated program, both portions of the advance payments, including the advance cost-sharing reduction payments at issue here, are "refunds due from" Section 36B within the meaning of 31 U.S.C. § 1324(b) because both are compensatory payments made available through the application of Section 36B, which sets forth conditions necessary to qualify for cost-sharing reductions as well as premium tax credits.

The House's attempt to artificially divide the ACA's subsidies into two separate programs disregards not only the ACA's text but also how portions of the Act "work when combined." *King*, 135 S. Ct. at 2494. As the defendants and their *amici* have explained, both components of the insurance subsidy program are economically and legally intertwined. The House acknowledges (Pl.'s Mem. at 6) that the ACA requires insurers to provide reduced cost-sharing to eligible insureds. If Treasury could not comply with the ACA's mandatory directive to compensate insurers for these cost-sharing reductions, 42 U.S.C. § 18082(c), insurers would increase premiums to cover these unreimbursed costs. Those increased premiums would translate into higher premium tax credits, resulting in the indirect payment of cost-sharing reductions from the same permanent appropriation that the House insists is off-limits here, as well as greater overall federal spending. Congress could not have intended this "paradoxical result." Amicus Br. of Economic and Health Policy Scholars at 14 (ECF No. 64).

The House also does not address several other features of the ACA that confirm that Section 1324 permanently funds both components of the insurance subsidy program. For example, the House ignores the ACA provision barring insurance issuers from using cost-sharing reduction payments to pay for elective abortions. This restriction was enacted precisely because a similar restriction in the yearly Hyde Amendment applies only to annual appropriations and would thus be inapplicable to cost-sharing reductions, which are permanently appropriated. Likewise, the House does not account for the ACA's omission of the type of "authorization of appropriations" language that Congress routinely uses when annual appropriations are required (including in the ACA itself), or the fact that Congress relied on the Congressional Budget Office's (CBO) scoring of the cost-sharing reduction payments as mandatory payments when it enacted the ACA. Given all of this statutory evidence, it is unsurprising that Congress appears for years to

have understood, correctly, that cost sharing reductions do not require an annual appropriation because the ACA had fully funded its insurance subsidy program. Indeed, the only post-ACA legislation addressing cost-sharing reductions, which conditioned the payments on verification of insureds' eligibility, correctly presumed that an appropriation existed and the payments would begin once the condition was met.

In sum, because the ACA as a whole is best read to provide permanent funding for all of the components of its integrated system of insurance subsidies, the House's motion for summary judgment should be denied.

ARGUMENT

I. The House Errs in Relying on the Administration's Fiscal Year 2014 Budget Request and Congress's Failure to Grant that Request

In urging that the Department of the Treasury is precluded from making advance cost-sharing reduction payments, the House focuses extensively on the Executive Branch's fiscal year 2014 budget request, which sought a line-item appropriation for HHS for such payments, and on the Office of Management and Budget's fiscal year 2014 Sequestration Report. The House does not directly explain the legal significance of these selected fiscal year 2014 documents. It appears to be suggesting, however, that the initial indication by the Executive Branch that an annual appropriation would be required should prevent the Executive from revisiting the question, and should constrain this Court in concluding otherwise now, after careful application of the traditional tools of statutory analysis.

Any such suggestion is misplaced. The contents of the FY 2014 budget request and sequestration report (which tracked the budget request) are not in dispute. But those documents did not fully account for the text, structure, design, and history of the ACA (or, as explained below,

infra, at 15-18, reflect the full course of dealing by and between the Executive and Legislative Branches during that budget cycle).

In any event, it is well established that prior Executive Branch statements have no bearing on questions of statutory interpretation like the one now before this Court. For example, in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), Congress did not enact a proposal by the Department of Justice for legislation exempting the Immigration Service from the Administrative Procedure Act. The unanimous Court refused to "draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress." *Id*. at 47. The Court explained that it would draw "no inference in favor of either construction of the Act—from the Department's request for legislative clarification, from the congressional committees' willingness to consider it, or from Congress' failure to enact it." *Id*. at 47-48. Similarly, in *FTC v. Dean Foods Co.*, 384 U.S. 597, 608-09 (1966), two Federal Trade Commission chairmen had appeared before Congress to urge the need for legislation to allow the FTC to seek preliminary injunctions in court. The Supreme Court nevertheless held that the FTC had had such power all along under the All Writs Act, emphasizing that "[t]his Court has consistently refused to construe such requests by government agencies and the resulting nonaction of the Congress as affirmative evidence of no authority." *Id*. at 610. *See* Defs.' Mem. at 30 (listing Comptroller General and Office of Legal Counsel opinions applying the same principle for appropriations statutes).[1]

[1] *See also, e.g.*, *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348-49 (1963) ("Of course, our construction of the amended [Section 7 of the Clayton Act] is not foreclosed because, after the passage of the amendment, some members of Congress, *and for a time the Justice Department*, voiced the view that bank mergers were still beyond the reach of the section." (emphasis added)); *United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586, 590 (1957) (drawing no inference

As this longstanding precedent recognizes, an agency's request to Congress may simply reflect a desire to "terminate or avoid adverse contentions and litigations." *Wong Yang Sung*, 339 U.S. at 47; *N.J. Chapter Inc. of Am. Physical Therapy Ass'n v. Prudential Life Ins. Co. of Am.*, 502 F.2d 500, 505 n.1 (D.C. Cir. 1974) (same); *see also United States v. Sw. Cable Co.*, 392 U.S. 157, 170-71 (1968) (drawing no inference from the FCC's unsuccessful efforts to obtain legislation authorizing the regulation of CATV systems because an agency may have an "understandable preference for more detailed policy guidance than" a statute provides). And, of course, an agency may later conclude that its earlier position was unnecessary upon more carefully reexamining the statutory question. *See, e.g.*, *FCC v. Fox Television Stations*, 556 U.S. 502, 514 (2009). This principle applies with particular force to the Affordable Care Act, which the Supreme Court emphasized in *King* is "far from a *chef d'oeuvre* of legislative draftsmanship." 135 S. Ct. at 2493 n.3.

Congress's failure to enact the Executive Branch's 2014 budget request thus sheds no light on the statutory interpretation question before the Court. *See* Defs.' Mem. at 29-33. Congress's silence is wholly consistent with the conclusion that it understood that the ACA provides a permanent appropriation for cost-sharing reductions in Section 1324. *See Burns v. United States*, 501 U.S. 129, 136 (1991) ("In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective."); *Sw. Cable*

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from the fact that the Federal Trade Commission previously stated that Section 7 of the Clayton Act "did not apply to vertical acquisitions" when construing Section 7 to apply to vertical acquisitions); *id*. at 615 (Burton, J., dissenting) (unsuccessfully urging that "forty years" of Federal Trade Commission and Department of Justice interpretations should be deemed "persuasive evidence of the proper scope of" Section 7).

Co., 392 U.S. at 170 ("Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV.").[2] In any event, as discussed in the defendants' opening brief (at 15-16) and below (*infra*, at 15-18), one does not have to guess what Congress understood during the 2014 budget cycle. The best evidence of Congress's understanding at that time is found in its only post-ACA legislation addressing the cost-sharing reductions: the October 2013 eligibility-verification provision that presumed an appropriation existed.

In the end, the question whether the ACA permanently appropriated funds for cost-sharing reduction payments (as well as premium tax credits) must be determined not by past Executive Branch statements and requests for legislation, but by a comprehensive analysis of the ACA itself.

II. A Careful Analysis of the ACA Demonstrates that Congress Permanently Appropriated Funds for All Components of the Act's Integrated Subsidy Program

The House's reading of the statute rests on its mistaken premise that the Affordable Care Act creates "two programs"—one for premium tax credits and one for cost-sharing reductions—and that Congress intended these programs to function and be funded separately. *See, e.g.*, Pl.'s Mem. at 1-2. The ACA, however, did not establish a distinct "Section 1401 Refundable Tax Credit Program" and "Section 1402 Offset Program." That nomenclature appears only in the House's Complaint and briefing[3]—not in the ACA itself. Instead, the ACA's text, structure, and design combine both subsidies—legally and economically—into a single,

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[2] *See also* Amicus Br. of Members of Congress at 23 n.4 (ECF No. 63) ("*amici* do know why Congress did not make an annual appropriation: none was necessary"); *id.* ("As everyone understood at the time the law was enacted and as the law itself makes clear, [cost-sharing reduction] payments were funded out of the permanent appropriation provided in 31 U.S.C. § 1324.").

[3] *See, e.g.*, Compl. ¶¶ 27, 29; Pl.'s Mem. at 1-2.

unified advance payment program. When this program is properly understood as the integrated whole that Congress created, it is clear that the ACA amended 31 U.S.C. § 1324 to provide a permanent appropriation for *both* the premium tax credit and cost-sharing reduction portions of that program.

The text of Section 1411 and Section 1412 of the ACA specifies that advance payments of both premium tax credits and cost-sharing reductions are part of a *single program* of insurance subsidies. Section 1411 directs the Secretary of HHS to "establish *a* program" for the advance determination of individuals' eligibility for both types of subsidies. 42 U.S.C. § 18081(a) (emphasis added). Section 1412 similarly directs the Secretary of HHS, in consultation with the Secretary of the Treasury, to "establish *a* program" for Treasury to make the advance payment of both premium tax credits and cost-sharing reductions. 42 U.S.C. § 18082(a) (emphasis added).

The Act, moreover, integrates the *payment* of both forms of the subsidy within this program. It requires that advance payments of both premium tax credits and cost-sharing reductions be made to the same recipient on behalf of the same eligible individuals, for the same purpose: to "reduce the premiums payable by individuals eligible for such credit." 42 U.S.C. § 18082(a)(3). Accordingly, Section 1412 expressly directs the same payer—the Secretary of the Treasury—to make advance payment of the cost-sharing reduction component, as well as the premium tax-credit component, of this subsidy program. *See* 42 U.S.C. § 18082(c)(3). The text of the ACA therefore belies the House's division of the Act's subsidies into "separate and distinct" programs. Pl.'s Mem. at 29 n.16.

As the defendants have explained, both components of this single program are within the scope of the ACA's amendment to Section 1324 because both are "refunds due from" Section 36B, which sets forth conditions necessary to qualify for cost-sharing reductions as well as premium tax

credits. *See* Defs.' Mem. at 12-13. The ACA tethers the two together, incorporating Section 36B's definitions and eligibility criteria into both payments. Specifically, the ACA provides that Section 36B's definitions govern cost-sharing payments, 42 U.S.C. § 18071(f)(1), and that "[n]o cost-sharing reduction shall be allowed … with respect to coverage for any month unless the month is a coverage month with respect to which a credit is allowed to the insured (or an applicable taxpayer on behalf of the insured) under section 36B of such title." 42 U.S.C. § 18071(f)(2). *See also* 42 U.S.C. § 18081(b)(4) (singular requirements for both types of subsidy based on Section 36B's rules); 42 U.S.C. § 18082(a)(2)(B)(ii) (similar).

Just as the text of the ACA intertwines its insurance subsidies, so does its economic operation. As the House recognizes, the ACA requires insurers to reduce cost-sharing for eligible individuals enrolled in silver-level insurance plans, whether or not they are compensated for doing so. Pl.'s Mem. at 6. In other words, the amount of cost-sharing reductions for eligible insureds does not depend on cost-sharing reduction payments to insurers. But insurance premiums do depend on these payments—and, thus, so do premium tax credits. If insurers were not compensated for the cost-sharing reductions they are required to provide to insureds, they would raise premiums for silver plans to account for the additional expense of providing those reductions. *See* Dep't of Health & Human Servs., Office of the Ass't Sec'y for Planning and Evaluation, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* at 1 (Dec. 1, 2015) (ECF No. 55-6). Such premium increases would undermine the Act's expressly stated purpose of reducing insurance premiums, *see* 42 U.S.C. § 18091(2)(J); *King*, 135 S. Ct. at 2493 ("We cannot interpret federal statutes to negate their own stated purposes.") (internal quotation omitted).

As the defendants' opening brief explains, moreover, the premium increases would cause a corresponding increase in premium tax credits. *See* Def.'s Mem. at 16-20. Because the ACA pegs the size of the premium tax credits for all eligible individuals in a particular area to the price of premiums for the second lowest-cost silver plan offered in that area, an increase in silver-plan premiums would trigger a dollar-for-dollar increase in the amount of the premium tax credits available to all subsidized enrollees. *See id.*; *see also* Amicus Br. of Economic and Health Policy Scholars at 13. The payment of these increased tax credits would come from *the same permanent appropriation* that the House insists does not fund the advance payment of cost-sharing reductions themselves. There is no reason why Congress would have intended to leave open the possibility that cost-sharing reductions would be subsidized by the federal government in such a roundabout way, rather than in the more straightforward way that the ACA in fact contemplates: mandatory advance payments to insurers.

The disruptive consequences of the House's reading would not stop there. Many insureds would respond to the spike in silver plan premiums by purchasing a gold plan that provides more comprehensive coverage than—but also, for many, now would be cheaper than—a silver plan. Thus, refusing to reimburse insurers for providing cost-sharing reductions would drive silver plan premiums up further still, because only those eligible for the most generous cost-sharing reductions would enroll in those silver plans. The increase in silver plan premiums, in turn, would result in even greater premium tax credit expenditures. *See* Defs.' Mem. at 19; *ASPE Issue Brief* at 4. And because many more people are eligible for premium tax credits than for cost-sharing reductions, HHS estimates that total federal costs would increase substantially—by billions of dollars annually. *ASPE Issue Brief* at 1, 4. The failure to provide annual appropriations would thus cause Treasury to pay for *more* comprehensive coverage for *more*

people—indirectly through increased premium tax credits rather than directly through cost-sharing reduction payments—thereby thwarting the ACA's effort to target federally-funded cost-sharing assistance to the lowest-income individuals, whom Congress deemed most in need of relief from out-of-pocket health care expenses. *See* 42 U.S.C. § 18071(c)(2). Put simply, "Congress could not have intended this result." Amicus Br. of Economic and Health Policy Scholars at 14. The House cannot explain why, given these bizarre consequences, Congress would have provided a permanent appropriation for only one portion of the Act's unified advance-payment program.

The House's interpretation is also impossible to square with several other ACA provisions. As the defendants' opening brief explained, *see* Defs.' Mem. at 13-14, during the debates over the ACA, some Members of Congress expressed concern that the Act's 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. To address that concern, Congress included in the ACA a provision explicitly prohibiting the use of funding attributable to either premium tax credits or any "cost-sharing reduction" to pay for the abortion services subject to the Hyde Amendment. 42 U.S.C. § 18023(b)(2)(A)(ii). This ACA provision was thus premised on the explicit understanding that the Act's entire program of subsidies—including cost-sharing reduction payments—is covered by a permanent appropriation. *See also* Amicus Br. of Members of Congress at 22. Were the cost-sharing reduction payments subject to annual appropriations, they would be covered by the annual Hyde Amendment, and it would have been unnecessary to include them in the scope of the special restriction directed at permanently funded expenditures. The House's opening brief does not address this provision of the ACA, even though the defendants have discussed it in prior briefing. *See* Defs.' Supp'l Mem. in Supp. of Their Mot. to Dismiss at 4, 11 n.8 (ECF No. 34).

The House also fails to address Congress's awareness that the Congressional Budget Office had scored the ACA's entire insurance subsidy program—including both cost-sharing reduction payments and premium tax credits—as mandatory rather than discretionary spending. *See* Defs.' Mem. at 23-25. The CBO, which "is strictly nonpartisan," conducts "objective, impartial analysis" to produce "independent analyses of budgetary and economic issues to support the Congressional budget process." *See* Overview, Congressional Budget Office, *available at* https://www.cbo.gov/about/overview (last visited Jan. 14, 2016). Congress expressly relied on the CBO's scoring in the ACA itself. *See* Pub. L. No. 111-148, § 1563(a), 124 Stat. 119, 270-71 (2010).

Similarly, the House does not address the fact that Congress omitted from the ACA's cost-sharing reduction provisions the type of language that Congress uses when annual appropriations are required. As explained by the House leaders who were actively involved in the ACA's enactment, "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." Amicus Br. of Members of Congress at 21. If Congress so intends, it signals that intent by enacting "authorization of appropriations" language, which does not itself provide an appropriation, but provides a statutory basis for Congress to appropriate such funds in the future. Congress included such language in many other ACA provisions. *See id*. That Congress did not use such language with respect to cost-sharing reduction payments "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." *Id*. Indeed, had Congress not permanently funded the cost-sharing reductions, it would have exposed the government to

litigation by insurers, who could bring damages actions under the Tucker Act premised on the government's failure to make the mandatory cost-sharing reduction payments that the Act requires. The House has not explained why Congress would have invited such suits, which, if successful, would end up creating a cumbersome and potentially more expensive payment regime than simply appropriating the funds in the first place. *See* Defs.' Mem. at 20-21.

Rather than engaging with this interpretive evidence, the House argues that the "plain language" of Section 1324 precludes the defendants' reading because the advance cost-sharing reduction payments are not tax "refunds." Pl.'s Mem. at 30. But the House itself concedes that Section 1324's permanent appropriation funds the portion of the advance payments made under 42 U.S.C. § 18082 (Section 1412 of the ACA) that is attributable to premium tax credits, even though such payments are not themselves refunds of an individual's tax payments. Pl.'s Mem. at 26. And as the defendants previously explained, other provisions listed in Section 1324 have not been strictly limited to payments under the listed tax refund provisions themselves. *See* Defs.' Mem. at 26-29. Thus, whether a compensatory payment is expressly denominated a tax "refund" is not dispositive of the scope of Section 1324, even under the House's understanding of the statute.

On the House's view, advance payments of premium tax credits are within the scope of Section 1324 because they are part of what it calls "the Section 1401 Refundable Tax Credit Program," Pl.'s Mem. at 26 & n.14, and advance cost-sharing reduction payments are not within the scope of Section 1324 because they are part of what it describes as a "separate and distinct" statutory program, *id.* at 29 n.16. The House is correct to recognize that Section 1324 encompasses payments that are integral to the tax programs listed in that statute, *see* Defs.' Mem. at 27, but it errs in failing to recognize that the ACA creates a single such "program," 42 U.S.C. § 18082(a), encompassing both forms of the insurance subsidies. *See* Defs.' Mem. at 12-26;

supra, at 7-12. When read in light of the ACA as a whole, as it must be, Section 1324 makes clear that it appropriates funds for both components of the advance payments required by Section 1412 (42 U.S.C. § 18082).

Finally, the House correctly observes that "[a] law may be construed to make an appropriation … only if the law specifically states that an appropriation is made …." Pl.'s Mem. at 16 (citing 31 U.S.C. § 1301(d)). But here, there is no need to infer or imply an appropriation. There is no dispute that Section 1324 provides a permanent appropriation; the only question in this case is whether that law, as amended by the ACA, funds both the premium tax credit and cost-sharing reduction portions of the advance payments mandated by the Act. That question is decided by ordinary principles of statutory interpretation, including the principle that statutes must be read as a whole. *See* 1 U.S. Government Accountability Office, *Principles of Federal Appropriations Law* at 2-85 (3d ed. 2004) (Exh. 14). A careful, comprehensive reading of the ACA demonstrates that the Act creates "a program"—in the singular—that requires advance payments of both subsidies, from a single source, with eligibility for cost-sharing reductions dependent on eligibility for premium tax credits. The ACA's amendment to Section 1324 accordingly covers both.

III. Post-ACA Legislative Developments Confirm That Cost-Sharing Reduction Payments Are Permanently Appropriated

The House recites a series of appropriations enactments, from fiscal year 2014 to the present, and notes that none of these statutes contains an annual appropriation for cost-sharing reduction payments. Pl.'s Mem. at 9-11. From this recitation, the House draws the inference that no appropriation is available for these payments under the ACA's amendment to Section 1324. But, as shown above, *supra*, at 5-7, Congress's later silence is inherently unreliable

evidence of the meaning of existing statutes. Congress speaks through the legislation that it enacts.

And Congress has enacted actual legislation presuming that a permanent appropriation exists for cost-sharing reduction payments. Indeed, since the ACA's passage, Congress has enacted only one appropriations provision that addresses those payments: the October 2013 Continuing Appropriations Act, which conditioned cost-sharing reduction payments on a certification from HHS that it would verify insureds' eligibility for both premium tax credits and cost-sharing reductions.[4] Pub. L. No. 113-46, Div. B, § 1001(a) (Oct. 17, 2013). The necessary premise of that legislation was that once the certification condition had been satisfied—as it promptly was—the Executive would begin making the mandatory payments in January 2014. The House dismisses this provision by noting that it was an anti-fraud provision placed in a part of the Act separate from the appropriation. Pl.'s Mem. at 32. But that observation is beside the point: Congress would have had no reason to enact this provision if it did not anticipate that cost-sharing reduction payments would be made.

The House also incorrectly suggests, Pl.'s Mem. at 32-33, that Congress had no reason to believe when it enacted this verification provision in October 2013 that cost-sharing reduction payments were imminent. But HHS officials had repeatedly announced that such payments would be made, without any caveat as to annual appropriations. For example, HHS made public announcements throughout 2013 that cost-sharing reduction payments would be made, including

[4] As described below (*see infra*, at 20), just one week ago, Congress passed another bill (since vetoed) that addressed the cost-sharing reduction payments. Like the October 2013 Continuing Appropriations Act, that legislation presumed that cost-sharing reduction payments were fully funded.

that qualified health plans on the Exchanges "*will* receive periodic advance payments";[5] that Exchanges must "[e]nsure that advance payments of the premium tax credit and cost-sharing reductions are provided";[6] and that "advance payments of the premium tax credit and cost-sharing reductions" would be paid beginning in 2014.[7]

The congressional debates over the verification provision reflected Members' understanding that cost-sharing reduction payments would soon begin and were not awaiting further appropriations. Representative Ellmers, for example, criticized a July 2013 cost-sharing reimbursements rule, *see* note 6, *supra*,—but only because she believed the rule would result in payments on behalf of ineligible individuals, not because the rule provided for payments of cost-sharing reductions at all. 159 Cong. Rec. H5517 (Sept. 12, 2013) (Rep. Ellmers). Likewise, she criticized CMS's publication of its fact sheet, *see* note 7, *supra*, but again, only based on the belief that payments would be made on behalf of potentially ineligible individuals, not because the payments were to be made in the first place. 159 Cong. Rec. H5523 (Sept. 12, 2013) (Rep. Ellmers); *see also id*. at H5517 (advocating legislation that would "protect taxpayer dollars" by requiring verification "before any premiums *and cost-sharing credits* are paid out"

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[5] HHS announced on March 11, 2013, that "[a] QHP issuer [*i.e.*, an issuer of a qualified health plan on the Exchanges] *will* receive periodic advance payments," 78 Fed. Reg. 15,410, 15,537 (Mar. 11, 2013) (finalizing 45 C.F.R. § 156.430(b)) (emphasis added); *see also id.* at 15,413 (reciting that advance payments of cost-sharing reductions will begin in 2014).

[6] HHS further announced on July 15, 2013 a regulatory requirement that all of the new Exchanges must "[e]nsure that advance payments of the premium tax credit and cost-sharing reductions are provided" for insureds who certify their eligibility for the payments, 78 Fed. Reg. 42,160, 42,318 (July 15, 2013) (finalizing 45 C.F.R. § 155.320(d)(3)(iii)(C)).

[7] CMS published a fact sheet on August 5, 2013, making clear that "advance payments of the premium tax credit and cost-sharing reductions" would be made beginning in 2014, CMS, Frequently Asked Questions on Health Insurance Marketplaces and Income Verification (Aug. 5, 2013) (Exh. 15).

(emphasis added)). In addition, Representative McDermott submitted into the record the Executive Branch's Statement of Administration Policy opposing the proposed legislation as it then existed on the ground that it would "delay[] tax credits and cost-sharing reductions that will otherwise be provided to millions of Americans." 159 Cong. Rec. H5525 (Sept. 12, 2013) (Rep. McDermott); *see also id.* at H5526 (submitting HHS letter to Members of Congress noting that cost-sharing reduction payments will be made).

As this evidence demonstrates, when Congress enacted its verification provision in October 2013, it did so with full knowledge that the Executive Branch would be making cost-sharing reduction payments in the coming year. And it remained clear to Congress throughout 2014 that these payments had begun.[8] Indeed, until the House filed this lawsuit, Congress, like the Executive, acted on the understanding that an appropriation was firmly in place for the advance payment of cost-sharing reductions.[9]

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[8] On January 16, 2014, an HHS official testified to a House committee that "the payments of tax credits and cost-sharing reductions to those insurance companies will be flowing next week. They will begin next week. That is going to happen." *Seeking PPACA Answers: Hearing Before the House Energy and Commerce Comm., Subcomm. on Oversights and Investigations*, 113th Cong., 2d Sess. at 26 (Jan. 16, 2014) (Gary Cohen, Dir., Center for Consumer Information and Insurance Oversight, CMS) (Exh. 16). In January, 2014, Senator Grassley stated his understanding that the payment of "cost-sharing subsidies" was underway. 160 Cong. Rec. S475 (Jan. 27, 2014) (Sen. Grassley). In April of the same year, Representative Burgess noted that the Affordable Care Act would result in the payment of "$1 trillion in premium cost-sharing subsidies." 160 Cong. Rec. H2814 (Apr. 2, 2014) (Rep. Burgess). And in June 2014, Senator Portman criticized the verification process for "applicants for advance payments of the premium tax credit and cost-sharing reductions," which in his view had already resulted in "improper payments" and ineligible people "getting these payments." 160 Cong. Rec. S3440 (June 5, 2014) (Sen. Portman).

[9] The House's Complaint was filed under the purported authority of H.R. Res. 676, 113th Cong. (2014). That resolution does not mention cost-sharing reductions, but instead authorizes that suit be brought on behalf of the House with respect to any alleged deficiency in the Executive's administration of the ACA. *Id.*, § 1. Cost-sharing reduction payments were not mentioned in any of the legislative debates concerning H.R. Res. No. 676.

In addition to this eligibility-verification legislation, from 2010 forward—including during the pendency of this litigation—the nonpartisan CBO has continued to score cost-sharing reduction payments as mandatory payments that do not depend on annual appropriations.[10] In reliance on CBO scoring, congressional committees, including the House Budget Committee, have consistently treated cost-sharing reduction payments as mandatory payments that do not depend on annual appropriations and that would thus require legislation to repeal. *See* H.R. Rep. No. 113-17, at 80-82 (Mar. 15, 2013) (House Budget Committee FY2014 budget report) (listing "policy option" for "mandatory spending" to include repeal of ACA "exchange subsidies," resulting in savings in direct spending estimated by the CBO to be $1.2 trillion).[11]

Finally, although the House attempts to analogize Congress's treatment of cost-sharing reduction payments with its treatment of risk-corridor payments, *see* Pl.'s Mem. at 21-22, the contrast could not be more stark. Throughout 2014, congressional oversight of risk-corridor

[10] *See* CBO, *The Budget and Economic Outlook: Fiscal Years 2013 to 2023* at 24 & n.17 (Feb. 2013) (Exh. 17) (noting that cost-sharing reduction payments are mandatory); CBO, *Estimate of the Budgetary Effects of the Insurance Coverage Provisions Contained in the Affordable Care Act* at 2-3 (Feb. 2013) (Exh. 18) (including cost-sharing reduction payments within estimate of direct spending for insurance subsidies of $1.2 trillion over ten years); CBO, *The Budget and Economic Outlook: Fiscal Years 2014 to 2024* at 58-59 (Feb. 2014) (Exh. 19) (noting that "subsidies to reduce cost-sharing amounts" are mandatory); CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act* at 10 tbl. 3 (Apr. 2014) (Exh. 20) (listing "cost-sharing subsidies" as mandatory); CBO, *The Budget and Economic Outlook: Fiscal Years 2015 to 2025* at 14, 122 (Jan. 2015) (Exh. 21) (treating cost-sharing reduction payments as mandatory); CBO, *Estimate of Direct Spending and Revenue Effects of H.R. 3762, the Americans' Healthcare Freedom Reconciliation Act, as Passed by the Senate on December 3, 2015, and Following Enactment of the Consolidated Appropriations Act, 2016* at 1 (Jan. 4, 2016) (Exh. 22) (scoring proposed repeal of cost-sharing reduction payments as change to direct spending).

[11] H.R. Rep. No. 113-403, at 76 (Apr. 4, 2014) (House Budget Committee FY2015 budget report) (same); H.R. Rep. No. 114-47, at 107 (Mar. 20, 2015) (House Budget Committee FY2016 budget report) (same); H.R. Conf. Rep. No. 114-96, at 200 tbl. 11, 201 tbl. 12 (Apr. 29, 2015) (conference committee report on FY2016 budget) (including cost-sharing reduction payments as direct spending).

payments proceeded in tandem with congressional oversight of cost-sharing reduction payments. Members of Congress sent inquiries to the Executive Branch questioning the existence of an appropriation in both contexts,[12] and the Executive Branch advised Congress that it believed an appropriation was available for both types of payments.[13] The Executive Branch specifically advised Congress that the cost-sharing component of the advance payments was being paid from the same account used to pay the premium tax credit component of the advance payments.[14]

At the end of 2014, Congress imposed explicit restrictions on the use of certain appropriated funds for risk corridor payments.[15] *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227 (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 . . . may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)"). Just weeks ago Congress imposed an identical restriction in the FY 2016 Consolidated Appropriations

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[12] *Compare* Letter from Rep. Fred Upton to the Hon. Sylvia M. Burwell (June 10, 2014) (Exh. 23) (risk corridor payments) *with* Letter from Sen. Ted Cruz and Sen. Michael S. Lee to the Hon. Sylvia M. Burwell (May 16, 2014) (ECF No. 53-13) (cost-sharing reduction payments).

[13] *Compare* Letter from the Hon. Sylvia M. Burwell to Rep. Fred Upton (June 18, 2014) (Exh. 24) (risk-corridor payments) *with* Letter from the Hon. Sylvia M. Burwell to Sen. Ted Cruz and Sen. Michael S. Lee (May 21, 2014) (ECF No. 53-15) (cost-sharing reductions).

[14] *See* Letter from the Hon. Sylvia M. Burwell to Sen. Ted Cruz and Sen. Michael S. Lee (May 21, 2014).

[15] The House refers to a GAO opinion, issued before the enactment of this funding restriction, that addressed the availability of an appropriation for risk corridors. Pl.'s Mem. at 21-22. The House also attaches the first three pages of that opinion as an exhibit. Pl.'s Exh. I (ECF No. 53-9) (incomplete excerpt of GAO opinion). The House does not mention that the seven-page opinion concluded, notwithstanding the contrary view expressed by some Members, that appropriated funds would be available for risk corridor payments. *See* GAO, B-325630, HHS—Risk Corridors Program (Sept. 30, 2014). (The complete opinion is attached hereto as Defendants' Exhibit 25).

Act. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225 (Dec. 18, 2015) (same). By contrast, Congress did not impose any such restriction on the use of funds for cost-sharing reduction payments, which Congress knew were being paid from the Section 1324 permanent appropriation.

To the contrary, in its FY2014 appropriations legislation, Congress imposed an eligibility-verification requirement that was premised on the understanding that the payments would be made. The House and Senate, moreover, recently reiterated that understanding in another piece of legislation (since vetoed). Both Houses passed a bill that would have repealed provisions of the ACA, but would have preserved the payment of cost-sharing reductions through the end of 2017. H.R. 3762, 114th Cong. § 202(e)(2) (Jan. 8, 2016). Congress would have had no reason to ratify cost-sharing reduction payments for the next two years in this manner if it had believed that no funding was available for these payments. Consistent with these expressions of Congressional understanding, Treasury has continued to make advance payments of cost-sharing reductions, as required and funded by the ACA.[16]

[16] The House's constitutional claim under the Administrative Procedure Act (Pl.'s Mem. at 34-35) fails for the same reason that its primary claim fails; cost-sharing reduction payments are fully funded under the ACA. And, at all events, summary judgment should be awarded to the defendants on the two remaining counts because the House lacks standing to raise them; at this stage of the litigation, it is clear that the dispute between the House and the Executive Branch is solely over the meaning of federal statutes. Under the reasoning of this Court's prior opinion in this case, the House lacks standing to pursue such a claim. *See* Defs.' Mem. at 33-34.

CONCLUSION

For the foregoing reasons, the House's motion for summary judgment should be denied, and summary judgment should be awarded to the defendants.

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Respectfully submitted,

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