

[NOT SCHEDULED FOR ORAL ARGUMENT]

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

UNITED STATES HOUSE OF
REPRESENTATIVES,

Plaintiff-Appellee,

v.

No. 16-5202

SYLVIA M. BURWELL, Secretary of Health &
Human Services; U.S. Department of Health &
Human Services; JACOB J. LEW, Secretary of
the Treasury; U.S. Department of the Treasury,

Defendants-Appellant.

**RESPONSE TO APPELLEE'S MOTION TO HOLD APPEAL IN
ABEYANCE OR FURTHER EXTEND THE BRIEFING SCHEDULE**

Appellee has moved to put this appeal into abeyance or, alternatively, further extend the briefing schedule beyond the deadlines that were set by agreement of the parties. For the following reasons, the motion should be denied.

1. This suit concerns the Executive Branch's administration of the insurance subsidy program established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA). The Act requires the Department of the Treasury to make payments to health insurers to subsidize health coverage for eligible low- and moderate-income Americans. These mandated payments have two components: premium tax credits, which subsidize insurance premiums for eligible

individuals, and cost-sharing reductions, which subsidize copayments and other types of out-of-pocket costs for certain individuals determined eligible to receive the tax credits. Since January 2014, Treasury has been making monthly payments for both components of the subsidy program from the permanent appropriation in 31 U.S.C. § 1324, which the ACA amended. Congress has taken no legislative action to restrict these ongoing payments.

Nonetheless, the House brought this suit asserting that the Section 1324 appropriation covers only the premium tax-credit component of the subsidy program, and that no appropriation is available to pay for the cost-sharing reduction component. After holding that the House has Article III standing and a cause of action, the district court adopted the House's view on the merits. The court enjoined the Executive Branch from making further cost-sharing reduction payments but issued a *sua sponte* stay pending appeal.

The Executive Branch filed its opening brief on October 24, 2016. On November 1, citing the need for "consultation with appropriate House officials" and "the important constitutional issues at stake," the House sought and obtained an agreed-to modification of the briefing schedule, with the House's brief due December 23, 2016, and the reply due January 19, 2017.

Our opening brief shows that this unprecedented suit and the district court's adjudication of the House's claims epitomize the "separation-of-powers problems inherent in legislative standing." *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000).

First, the case “meddl[es] in the internal affairs of the legislative branch” by allowing one House of Congress to circumvent the legislative process. *Id.* If the House wants to achieve the result it obtained in district court, the course prescribed by the Constitution is to enact legislation, which requires the House to obtain the agreement of the Senate and present the resulting measure to the President, thus accepting responsibility for the results. Second, this suit arrogates to the House a role in deciding how laws will be executed that the Constitution assigns to the Executive Branch. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976). “[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.” *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986). Third, this suit unmoors the Judiciary from “the traditional understanding of a case or controversy,” a doctrine developed “to ensure that federal courts do not exceed their authority as it has been traditionally understood.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)); *see Raines*, 521 U.S. at 828 (“Our regime contemplates a more restricted role for Article III courts.”).

The district court’s decision further compounded these errors by adopting a misguided interpretation of the ACA’s amendment of 31 U.S.C. § 1324 that would thwart the structure of the ACA’s carefully calibrated system of subsidies, severely disrupt the insurance markets, and—perversely—lead to substantially *greater* federal expenditures from the Section 1324 appropriation

2. These principles are unchanged by the recent election. The House does not suggest that the incoming Administration would welcome heretofore unprecedented suits by subcomponents of Congress that seek to alter the way the Executive Branch is administering federal law. That principle alone is reason not to halt briefing mid-course. And the statutory provisions that require subsidy payments to make health coverage affordable for millions of Americans and that reimburse insurers for these vast expenses remain the law of the land. The district court's decision thus threatens to "create untenable business uncertainty" for insurers and significant harm to consumers. *See Amicus Br. of America's Health Insurance Plans and Blue Cross Blue Shield Association* at 5.

More fundamentally, the House identifies no harm to completing the briefing schedule to which the parties agreed and the House asked this Court to enter on November 1, 2016.¹ The House's filing of its appellate brief would do nothing to constrain "the incoming President and his appointed officials" (Mot. 3), as the House asserts. Nothing in the statements on which the House relies (Mot 3 n.2) suggest otherwise. Denying the motion would simply allow this appeal to proceed in an orderly and timely fashion, without potential further delay to recommence briefing.

The cases on which the House relies (Mot. 2-3, 4-5) are inapposite because they

¹ The parties agreed to a comparable schedule in *Committee on Oversight and Gov't Reform, U.S. House of Representatives v. Lynch*, No. 16-5078 (D.C. Cir.), under which the Executive Branch's brief as appellee is due December 20, 2016, and the House's reply brief is due January 19, 2017.

involved abeyance motions filed by the Executive Branch itself. *See California et al. v. Emtl. Prot. Agency*, No. 08-1178 (D.C. Cir.) (motion by EPA filed on Feb. 6, 2009); *New Jersey v. Emtl. Prot. Agency*, No. 08-1065 (D.C. Cir.) (unopposed motion by EPA filed on March 24, 2008); *Mississippi v. Emtl. Prot. Agency*, No. 08-1200 (D.C. Cir.) (unopposed motion filed by EPA on March 10, 2009); *see also Emtl. Prot. Agency v. New Jersey*, Pet. Cert., No. 08-512 (S. Ct.) (applications filed by EPA to extend time to file a petition for a writ of certiorari). The House cites no case in which abeyance was granted over the Executive Branch's objection, at the request of the party that was suing the Executive Branch. In *Texas v. United States*, No. 14-cv-254 (S.D. Tex.) (discussed at Mot. 4-5), following remand from the Supreme Court, the district court ordered the parties to meet and confer about how to proceed with the next stage of litigation. The three parties jointly agreed that because the case was at a "unique juncture" and "[g]iven the change in Administration," a short stay was appropriate before deciding on the next steps. In this case, however, the next step is plain: to complete the already commenced briefing of this appeal.

3. If the House wishes to dismiss its complaint voluntarily, the Executive Branch has no objection to an order that dissolves the injunction and remands with instructions to dismiss the complaint and vacate the district court's decision. But if the House wishes to proceed with this unprecedented suit, it should file its brief on the due date that was set by agreement of the parties.

Respectfully submitted,

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s/ Alisa B. Klein

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2016, I electronically filed the foregoing opposition with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

Alisa B. Klein