No. 16-5202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of Health and Human Services; JACOB J. LEW, in his official capacity as Secretary of the Treasury,
Defendants – Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer, U.S. District Judge)

APPELLEE'S REPLY IN SUPPORT OF MOTION TO HOLD BRIEFING IN ABEYANCE OR, IN THE ALTERNATIVE, TO EXTEND THE BRIEFING SCHEDULE

Effectively conceding their inability to refute the House's showing that a short stay of the briefing schedule is warranted by considerations of judicial economy, litigation efficiency, and the strong public policy in favor of voluntary settlement of disputes, Appellants do not even address those compelling grounds for granting the relief sought by the House. Instead, Appellants focus their response on an inaccurate summary of the issues in the appeal, which are irrelevant to the relief sought in this motion. Appellants also fail to address the House's

alternative request for an extension of the briefing schedule. Appellants' objections are baseless, and the requested relief should be granted.

It is undisputed that relief of the type sought here is appropriate to achieve "economy of time and effort for [the court], for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). It is also undisputed that the incoming Administration has expressed its intention to repeal or modify the Affordable Care Act, and that the discussions between the President-Elect's transition team and the House could obviate the need for resolving this appeal or affect the nature and scope of the issues presented for review. Those undisputed facts alone provide compelling justification for granting the requested abeyance.

This Court has "long recognized the public interest in, and importance of, settlement of litigation." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 307 (D.C. Cir. 2015) (citation omitted). The relief sought by the House is plainly in furtherance of that important public policy, and should therefore be granted.

Appellants err in suggesting that no harm would result from adhering to the present briefing schedule. Requiring the parties to complete the briefing of this appeal on the current schedule creates the substantial likelihood that public resources will be wasted, since the potential for settlement with the new Administration means that the appeal may never need to be heard. Moreover, the present briefing schedule calls for the Executive Branch to file its reply brief on the

last day of the current Administration, meaning that briefing will be closed before the new Administration (which has expressed decidedly different views on the underlying legislation from those held by the current Administration) takes office. Even leaving aside the substantial possibility of a settlement that would render those additional briefs pointless wastes of public resources, the new Administration would likely feel compelled to request supplemental briefing to express its views, further consuming public resources and delaying any ultimate resolution. The orderly disposition of this appeal would clearly be furthered by granting the relief sought.

Appellants make no effort to claim that they would suffer any prejudice from the requested abeyance, and any such claim would be meritless in light of the stay entered by the district court. Appellants suggest that the district court decision has created "'business uncertainty'" for insurers (Resp. 4 (citation omitted)), but any such uncertainty will not be affected by holding the briefing of this appeal in abeyance, since the district court's stay will remain in place, thereby preserving the status quo. And adhering to the current briefing schedule would do nothing to alleviate any alleged uncertainty, whereas granting the requested relief would facilitate the parties' ability to achieve an orderly disposition.

Appellants concede that courts have frequently granted stays of the proceedings in comparable circumstances, including recently at the request of the

current Administration. They claim, however (Resp. 4-5), that courts should grant such relief only if and when the current Administration requests it. The power to hold judicial proceedings in abeyance does not belong to the Executive Branch; rather, it is a "power *inherent in every court* to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254 (emphasis added). The Executive Branch's unwillingness to consent to the abeyance is no basis for denying the common-sense relief sought, particularly where, as here, the only apparent basis for that unwillingness is the current Administration's desire to have the last say in the briefing process on the day before the new Administration takes office.

Appellants' attempt to argue the merits of the appeal (Resp. 2-3) has nothing to do with the present motion, and in any event presents a distorted view of the issues and of the law. In contrast to the question of individual legislators' standing which was at issue in the cases relied upon by Appellants, the Supreme Court has repeatedly and consistently recognized the Article III standing of legislative bodies, including the House, to seek judicial relief to protect their institutional powers. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 931 n.6 (1983) (holding that "a justiciable case or controversy under Art. III" was established regarding the constitutionality of the one-chamber legislative veto "because of the presence of the two Houses of Congress as adverse parties"); *Ariz. State Legislature v. Ariz.*

Ind. Redistricting Comm'n, 135 S. Ct. 2652, 2664 (2015) (upholding state legislature's standing as "an institutional plaintiff asserting an institutional injury"); *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (upholding legislative standing for group of legislators with sufficient votes to control legislative outcome because of their "plain, direct and adequate interest in maintaining the effectiveness of their votes").

Appellants also mischaracterize the Appropriations Clause question at issue here. The Clause provides in unambiguous terms that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Congress has never appropriated money to fund the expenditures at issue here, so the Constitution bars those expenditures absent further action by Congress. Appellants' only argument to the contrary is squarely foreclosed by the plain language of the very provision they rely on, which provides that "[d]isbursements may be made . . . *only* for" specified purposes that indisputably do *not* include the cost-sharing program at issue here. 31 U.S.C § 1324(b) (emphasis added).

Finally, the House notes that Appellants have not even responded to the House's alternative request for a 45-day extension of the briefing schedule. At the very least, therefore, that effectively unopposed request should be granted.

CONCLUSION

For the foregoing reasons, and those set forth in the House's motion, the Court should hold in abeyance all briefing in this appeal, and direct the parties to file by February 21, 2017, a joint status report indicating (a) whether the parties are considering settlement or voluntary dismissal of the appeal, and, if not, (b) proposing a schedule for the remainder of the briefing in this matter. In the alternative, the Court should grant Appellee's request for a 45-day extension of the briefing schedule.

Respectfully submitted,

/s/Thomas G. Hungar
THOMAS G. HUNGAR, D.C. Bar No. 447783
General Counsel
TODD B. TATELMAN, VA Bar No. 66008
Associate General Counsel
ELENI M. ROUMEL, NY Bar No. 3978863
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Appellee United States House of Representatives

November 28, 2016

CERTIFICATE OF SERVICE

I certify that on November 28, 2016, I filed the foregoing Appellee's Reply in Support of Motion to Hold Briefing in Abeyance or, in the Alternative, to Extend the Briefing Schedule via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/Eleni M. Roumel
Eleni M. Roumel