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' SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

The House's unprecedented claim to standing to challenge the Executive's implementation of federal law rests on a misunderstanding of the requirements for Article III standing, as well as mischaracterizations of the Affordable Care Act ("ACA") and the relevant appropriations legislation. The ACA establishes an integrated program of subsidies for the purchase of health insurance, including advance payments of premium tax credits and cost-sharing reductions. The ACA mandates the Executive Branch to make these payments, and the Act reflects Congress's understanding that the subsidies would not require an annual appropriation. The Executive has accordingly made advance payments of the subsidies from the permanent appropriation of 31 U.S.C. § 1324. Congress did not restrict these payments in fiscal years 2014 and 2015, but instead enacted appropriations legislation that acknowledge that the payments would be and were being made.

Nothing in the House's supplemental filing contradicts these facts, and the House is simply wrong in its assertion that it made "legislative decisions" not to fund the advance payment of cost-sharing reductions. The House's theory of standing is equally flawed. This case is based on the House's disagreement with the Executive's interpretation of the ACA and Section 1324, but such a disagreement does not confer Article III standing. Put simply, one House of Congress cannot resort to the federal courts to vindicate its reading of federal law, rather than proceeding legislatively.

1. The House's flawed claim to standing begins with a flawed understanding of the ACA's legislative plan. Indeed, the House errs at the outset by describing the ACA as merely "*authoriz[ing]* the Executive to make" advance payment of premium tax credits and cost-sharing reductions. Pl.'s Supp'l Mem. Concerning Defs.' Mot. to Dismiss at 3 (ECF 33) (emphasis in

original); *see also id.* at 2. The ACA does more than just authorize such payments. Instead, through its repeated use of the word "shall,"[1] the ACA *obligates* the Executive to make these advance payments, and eligible insureds (as well as insurers on behalf of these insureds) have a legal entitlement to them. "Congress' use of the term 'shall' indicates an intent to impose discretionless obligations." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (internal quotation marks omitted).

Congress's instruction that the Executive *must* make these payments is coupled with the conspicuous absence of any language "authorizing" future appropriations for them. This is additional, powerful evidence that Congress understood these payments to have already been fully appropriated. As the House itself has noted, Opp'n to Mot. to Dismiss at 8 (ECF 22), where Congress intends simply to empower itself in future years to appropriate funds for a particular purpose, it will enact an "authorization of appropriations" provision that does not, by itself, constitute an appropriation of funds. The ACA itself is replete with dozens of examples of such provisions. *See, e.g.*, Pub. L. No. 111-148, § 2705(f) (2010) ("There are authorized to be appropriated such sums as are necessary to carry out this section.").[2] But there is no similar

[1] *See King v. Burwell*, --- S. Ct. ---, 2015 WL 2473448, at *14 (June 25, 2015) (26 U.S.C. § 36B(a) provides that premium tax credit "shall be allowed" for an "applicable taxpayer"). *See also* 42 U.S.C. § 18071(a)(2) (directing that insurers "shall reduce the cost-sharing under the plan"); 42 U.S.C. § 18071(c)(3)(A) (directing that HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions"); 42 U.S.C. § 18082(c)(2)(A), (c)(3) (directing that Treasury "shall" make advance payments to insurers); 42 U.S.C. § 18082(a)(3) (same).

[2] *See also, e.g.*, *id.*, §§ 1002, 2706(e), 2952(c), 3013(c), 3015, 3501, 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5),

"authorization of appropriations" provision in the ACA for the Act's integrated system of subsidies for the purchase of insurance – including the advance payments of cost-sharing reductions at issue here. The fact that Congress mandated that these subsidies be paid, coupled with the absence of any provision authorizing the enactment of future annual appropriations for this purpose, is a strong indication that Congress understood that these payments have already been fully appropriated. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").[3]

2. The Court need not and should not resolve the House's and the Executive's competing interpretations of the ACA and of Section 1324 in order to address the threshold question whether the House has standing here. The question of standing "in no way depends on the merits" of a plaintiff's legal claim. *Warth v. Seldin*, 422 U.S. 490, 500 (1976).[4] To be sure, as the House notes, this Court must assume *arguendo* that the House would ultimately

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4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

[3] As the defendants have explained, Defs.' Supp'l Mem. at 2-8 (ECF 34), 31 U.S.C. § 1324 provides the appropriation for these mandatory payments. That statute provides a permanent appropriation for "refunds due from credit provisions of the Internal Revenue Code of 1986 … [including section] 36B …." 31 U.S.C. § 1324(b)(2). Advance payments of the cost-sharing reductions are an integral part of the insurance subsidy program created under Section 36B: among other things, eligibility for premium tax credits under Section 36B is a necessary precondition for an individual's eligibility for cost-sharing reductions, 42 U.S.C. §18071(f)(2), and the ACA's advance payment of the subsidies, 42 U.S.C. §18082(c)(2)(A), (c)(3).

[4] *See also In re Navy Chaplaincy*, 697 F.3d 1171, 1175 (D.C. Cir. 2012) ("in reviewing the standing question, [this Court] must be careful not to decide the questions on the merits *for or against the plaintiff*, and must therefore assume that on the merits the plaintiffs would be successful in their claims") (emphasis added; internal quotation omitted).

prevail on the merits of its statutory interpretation claim. Pl.'s Supp'l Mem. at 1, 9-10. But the question of standing "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Here, the nature and source of the claim asserted make clear that standing is lacking.

The House errs in contending that this Court cannot even consider that the nature of this inter-branch dispute is one of statutory interpretation. To the contrary, even while it reserves judgment on how this interpretive dispute would be resolved on the merits, this Court must recognize that the "nature and source" of this dispute, *Warth*, 422 U.S. at 500, involves one House of Congress's disagreement with the Executive Branch's reading of federal law. Such a dispute does not cause the House any legally cognizable injury that gives rise to legislative standing. *See, e.g.*, *Harrington v. Bush*, 553 F.2d 190, 213 (D.C. Cir. 1977) (agency's alleged misuse of appropriations "does not invade the lawmaking power of Congress or appellant"). This is particularly true here, where the relevant provisions of law, including the ACA itself as well as subsequent appropriations legislation, expressly condition, rather than restrict, the payment of the ACA's cost-sharing reductions.[5] And the Court must also consider that the full

[5] The House insists that its claim is not based on a disagreement over the interpretation of federal law, implying instead that the Executive has refused to comply with a clear appropriations restriction. Pl.'s Supp'l Mem. at 9-10. But that is simply wrong. As the defendants previously have explained, *see* Defs.' Supp'l Mem. at 2-5, for fiscal years 2014 and 2015, Congress enacted appropriations legislation that included dozens of explicit restrictions on particular uses of federal funds, but neither the House nor Congress as a whole sought to restrict the use of federal funds for the advance payment of the cost-sharing reductions. Rather than restricting these advance payments, Congress chose instead to adopt legislation that *conditioned* these payments on a certification by HHS that a program is in place to verify that applicants are eligible for the Affordable Care Act's subsidies. Consolidated Appropriations Act, 2014, Pub.

range of legislative remedies – including the enactment of new legislation – remains available to the House, and that those remedies have gone unused.[6]

The contrary approach that the House urges here would permit it to sue over *any* dispute of federal law that it may have with the Executive Branch – which is not the law and which would radically alter our constitutional order. In order to establish standing under its theory, the House would need only to advance some interpretation of federal law and allege that the Executive is not correctly implementing the House's understanding of what federal law requires. The House has not tried to limit its theory of legislative standing to appropriations statutes, nor could it logically do so. That is because the House could easily repackage any claim that the Executive is misreading federal law as one that the Executive is spending funds contrary to their appropriated purpose in implementing that purported misreading.

Well-established precedent rejects such boundless legislative standing. One House of Congress lacks standing to sue the Executive over the interpretation and implementation of federal law, even if that House's interpretation ultimately turns out to be correct. *Compare Clinton v. City of New York*, 524 U.S. 417, 438-39 (1998) (invalidating Line-Item Veto Act), *with Raines v. Byrd*, 521 U.S. 811, 824 (1997) (Members of Congress lacked standing to

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L. No. 113-76, Div. B, § 1001(a). That condition was promptly met, and advance payments of cost-sharing reductions have proceeded on the terms that the full Congress envisioned.

[6] *See Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (holding that legislators lacked standing to challenge Executive action, without reaching the merits of that challenge, because legislators "continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the 'war'"); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (dismissing legislators' challenge to Executive's alleged spending of unappropriated funds, without reaching the merits of that challenge, because "Congress could terminate the AHRI were a sufficient number in each House so inclined, [and] the parties' dispute is therefore fully susceptible to political resolution").

challenge the same statute). The House may seek to vindicate its views through the tools available to it in the legislative process; it may not instead bring suit in this Court.[7]

3. The House again relies on a "vote nullification rationale for conferring standing" in *Coleman v. Miller*, 307 U.S. 433 (1939), as well as the citation to that case in *Arizona State Legislature v. Arizona Independent Redistricting Commission* ("*AIRC*"), --- S. Ct. ---, 2015 WL 2473452 (June 29, 2015). Pl.'s Supp'l Mem. at 10-11. The House misreads *Coleman*. As the D.C. Circuit has explained, the *Coleman* plaintiffs had standing because they "may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated. In other words, they had no legislative remedy." *Campbell*, 203 F.3d at 23. *AIRC* had the same understanding of *Coleman*'s limited scope. Finding that the facts in that case "fit[] the same bill" as those in *Coleman*, the Court held that because the Arizona Legislature could not pursue any legislative remedy to supersede the AIRC's map, the state constitution "would completely nullify any vote by the Legislature, now or in the future, purporting to adopt a redistricting plan." 2015 WL 2473452, at *10 (internal quotation and alterations omitted).

The case law thus describes only a "very narrow" circumstance, *Campbell*, 203 F.3d at 23, in which a legislative plaintiff may suffer a legally cognizable injury that gives rise to standing – namely, where action of the legislature is foreclosed as a matter of legislative power, as was the case with the lieutenant governor's vote overriding the state senate's disapproval of the constitutional amendment in *Coleman* and the state constitution's elimination of the state

[7] Rather than engaging on these points in its supplemental memorandum, the House instead engages in an extended, and unwarranted, *ad hominem* attack on the defendants' counsel. Pl.'s Supp'l Mem. at 6-7 & n.5. The House's accusations are baseless.

legislature's ability to adopt a redistricting plan in *AIRC*. *See Kucinich v. Obama*, 821 F. Supp. 2d 110, 119 (D.D.C. 2011) ("in order for the 'very narrow' *Coleman* exception to apply and support a finding of legislative standing, plaintiff legislators must be without legislative recourse before they may turn to the courts to seek their desired remedy") (internal citation omitted). The House's claim here plainly does not fall within the very narrow circumstance where state legislative action is formally invalidated in such a manner. Unlike the plaintiffs in *Coleman* or *AIRC*, the House here was and remains fully free to legislate on this topic (with the concurrence of the Senate, as required by the fundamental bicameralism principle of the Constitution), or to apply any of its other numerous legislative tools, to advance its view that no federal funds should be available for the payments that the Executive is legally required to make.

4. The House also rests its claim to standing on *U.S. House of Representatives v. U.S. Department of Commerce* ("*Census Case*"), 11 F. Supp. 2d 76 (D.D.C. 1998), *appeal dismissed*, 525 U.S. 316 (1999).[8] Pl.'s Supp'l Mem. at 11-12. The House now contends that "there is no constitutionally coherent distinction between the unique interest asserted by the House in the Census case" and the interests that it asserts here. *Id.* at 12. The district court in the *Census Case* expressly recognized a critical distinction. It held that the House had standing because it was entitled to information that the Executive Branch had withheld, and because the House's particularized interest in its own lawful composition would be threatened if House seats were misallocated under the Census Bureau's plan for conducting the census. 11 F. Supp. 2d at

[8] The Supreme Court did not affirm the district court's standing ruling in that case, and that ruling is not binding here. But even the conclusion that the House had standing under the facts of the *Census Case* would not support the House's claim to standing here.

85-86, 90. The district court found that those specific interests presented the "extremely rare case" where the House's asserted injury was "distinct from the general public." *Id.* at 90. Significantly, the district court went out of its way to distinguish those facts from ones – like those at issue here – where the House's asserted standing to sue is "based upon claims that the Executive Branch is misinterpreting a statute or the Constitution." *Id.* at 89-90. Such a claim, the district court held, would *not* "injure[] that house in a matter that satisfies Article III's rigorous demands." *Id.* at 90.[9]

In the end, the House has not been able to identify a single court that has found standing on facts and allegations like those presented here. Under any standard of analysis – let alone the "especially rigorous" one mandated by the Supreme Court, *AIRC*, 2015 WL 2473452, at *10 n.12 (internal citation and quotation marks omitted) – this Court should not be the first.[10]

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[9] The House embraced this distinction in its briefing to the Supreme Court in the *Census Case*, arguing that "[t]he district court correctly found that … judicial resolution of this legal dispute would neither give rise to a doctrine of general legislative standing nor otherwise offend the separation of powers." Brief for U.S. House of Representatives at 12, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 767637, at *12; *see id.* at *17 (disclaiming the possibility that the House would ever attempt "to afford itself broad standing to challenge the lawfulness of Executive conduct"). That concession was correct: one House of Congress lacks standing to sue to challenge the Executive's interpretation and implementation of federal law.

[10] The complaint should be dismissed for the additional reasons that the House lacks a cause of action, and that this Court should exercise its equitable discretion to decline to adjudicate this political dispute. The House cannot point to any source of law, under either the Declaratory Judgment Act, the Administrative Procedure Act, or the Constitution itself, that provides it with a cause of action to sue the Executive over the implementation of federal law. See Defs.' Mem. in Supp. of Their Mot. to Dismiss at 23-26 (ECF 20-1); Defs.' Reply Mem. in Supp. of Their Mot. to Dismiss at 15-21 (ECF 26). And even if such a cause of action existed, this Court should nonetheless exercise its discretion to direct the House to seek a "political resolution" of its grievances with the Executive Branch. *Chenoweth*, 181 F.3d at 116.

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Respectfully submitted,

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