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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF ILLINOIS; THE STATE OF IOWA; THE COMMONWEALTH OF KENTUCKY; THE STATE OF MARYLAND; THE COMMONWEALTH OF MASSACHUSETTS; THE STATE OF MINNESOTA; THE STATE OF NEW MEXICO; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF OREGON; THE COMMONWEALTH OF PENNSYLVANIA; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; and THE STATE OF WASHINGTON, Plaintiffs, v. DONALD J. TRUMP, President of the United States; ERIC D. HARGAN, Acting Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; and DOES 1-20, Defendants.	Civil Action No. 3:17-cv-05895-VC **BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF**

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INTEREST OF *AMICI CURIAE*[1]

Amici are Democratic leaders in the House of Representatives who were actively involved in the enactment of the Patient Protection and Affordable Care Act ("ACA") and are thus particularly well-suited to provide the Court with background on the text, structure, and history of the law. In particular, *amici* can provide insight into how the law was designed to achieve its goal of expanding access to affordable health insurance through the reform of state individual health insurance markets. *Amici* are also familiar with the ways in which Congress provides funding for provisions of law, including the provision at issue in this case. *Amici* thus have unique knowledge about, and a strong interest in, the question whether the current Administration's decision to stop making monthly cost-sharing reduction (CSR) payments is lawful. As *amici* well know, it is not: those CSR payments are critical to the effective operation of the ACA, and Congress provided funding for them in the same permanent appropriation that funds the law's premium tax credits.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "the Act"), a landmark law dedicated to achieving widespread, affordable health care. To help achieve the statute's goal of "near-universal coverage," 42 U.S.C. § 18091(2)(D), without regard to preexisting health conditions or health status, the Act provides that individuals not covered by group health plans can purchase competitively-priced individual health insurance policies on American Health Benefit Exchanges ("Exchanges").

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

For moderate and low-income individuals, the Act ensures the affordability of such individual policies through an interlocking program of premium tax credits and cost-sharing reductions. The tax credits help individuals purchase health insurance on the Exchanges. The cost-sharing reductions in turn require insurers to help individuals defray the costs of health care purchased with that insurance by lowering co-payments, deductibles, and other out-of-pocket expenses. 42 U.S.C. § 18071(a)(2); 45 C.F.R. § 155.305(g). Critically, Congress gave insurers a legal right to payment from the federal government for the amount of those mandatory cost-sharing reductions, providing that "the Secretary *shall* make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added). Further, because the availability of tax credits and cost-sharing reductions is critical to the ACA's effective operation, the ACA provides common funding for them in a permanent appropriation, 31 U.S.C. § 1324, thereby ensuring that access to the necessary funds would not be subject to the vicissitudes of the annual budget process.

Despite the mandatory requirement that the federal government reimburse insurers for cost-sharing reductions, the Trump Administration has chosen to stop paying such reimbursements on the theory that Congress neglected to appropriate funds for these critical payments. The Administration is wrong. *Amici* members of Congress all served while the ACA was being passed and are thus familiar with the law, as well as with Congress's plan for its effective operation. They know, as the Supreme Court recently held, that the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market," *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Two key parts of those "interlocking reforms" are the premium tax credits and cost-sharing reductions that allow individuals to afford health insurance on the Exchanges. So fundamental are these features to the law's operation that the plain text of the Act *requires* the

Secretary of the Treasury to fund tax credits and cost-sharing reductions. 42 U.S.C. § 18082(a)(3). The law also directs the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury, to establish a program for the advance determination of the "income eligibility" of insured individuals for these benefits and for their unified payment. *Id.* § 18082(a)(1).

Moreover, to allow the Secretary to fulfill his obligation to pay for premium tax credits and cost-sharing reductions, Congress structured these complementary measures as a package and provided that they would both be funded out of the same permanent appropriation, 31 U.S.C. § 1324. Tellingly, analyses conducted by the Congressional Budget Office (CBO), the nonpartisan office responsible for analyzing budgetary and economic issues relevant to the congressional budget process, repeatedly reflected the widely-held understanding that the cost-sharing reductions, just like the premium tax credits, would be covered by a permanent appropriation. The law therefore reflects what everyone understood at the time: funding of both the premium tax credits and cost-sharing reductions are integrally connected and critical to the law's effective operation, and thus are funded permanently.

Subsequent actions by Congress confirm what everyone understood at the time the law was enacted. In 2014, for example, Congress passed H.R. 2775, which conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by the Department of Health and Human Services ("HHS") that the Exchanges verify that applicants meet the eligibility requirements for such subsidies, Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, Div. B, § 1001(a) (2013), a certification requirement with which HHS subsequently complied, Letter from Kathleen Sebelius to Hon. Joseph R. Biden, Jr. (Jan. 1, 2014), https://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf. Because there was no yearly appropriation for the payments, it would have made no sense for

Congress to enact such a law if, as the government now argues, Congress believed that there was no permanent appropriation available to fund the payments. Moreover, although the executive branch has been using this permanent appropriation to reimburse insurers for these cost-sharing reductions since January 2014, the House has at no point considered, and Congress has never passed, a law specifically prohibiting the executive branch from making these payments. As *amici* are well aware, in the years since the ACA was enacted, Congress has passed numerous provisions otherwise restricting the executive branch's use of funds related to the ACA. *See* C. Stephen Redhead & Ada S. Cornell, Cong. Research Serv., *Use of the Annual Appropriations Process To Block Implementation of the Affordable Care Act (FY2011-FY2017)* 6 (Jan. 13, 2017), https://www.fas.org/sgp/crs/misc/R44100.pdf. Indeed, those sorts of restrictions are among the tools that Congress routinely uses to advance its view as to the proper implementation of governing law.

As the Supreme Court has insisted, "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," and this Court "must interpret the Act in a way that is consistent with the former, and avoids the latter." *King*, 135 S. Ct. at 2496. Cost-sharing reductions—like the premium tax credits that are plainly funded by Section 1324—are an essential feature of the Act's operation that allow individuals to afford their health care expenses. This Court should conclude that Congress provided a permanent appropriation for those payments, and the Trump Administration therefore may not refuse to follow the Act's mandatory requirement that it reimburse insurers for them.

ARGUMENT

As the ACA's text makes clear, its goal was to achieve "near-universal coverage" and to ensure that that "near-universal coverage" would be affordable for all Americans. 42 U.S.C.

§ 18091(2)(D); *King*, 135 S. Ct. at 2485 (ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (ACA adopted "to increase the number of Americans covered by health insurance and decrease the cost of health care").

A critical part of Congress's plan to ensure affordable, "near-universal coverage" was to enact an interlocking system of premium tax credits and cost-sharing reduction payments to reduce the costs of both health insurance and health care purchased with that insurance. 26 U.S.C. § 36B; 42 U.S.C. §§ 18071, 18082. Under the terms of the ACA, the premium tax credits "shall be allowed" for individuals with household incomes from 100% to 400% of the federal poverty line to help them purchase insurance, 26 U.S.C. § 36B(a), (c)(1)(a), and insurance issuers "shall reduce the cost-sharing under the plan" for individuals with household incomes from 100% to 250% of the federal poverty line to help them defray the costs of health care purchased with that insurance (*i.e.*, out-of-pocket expenses such as co-payments and deductibles), 42 U.S.C. § 18071(a)(2); 45 C.F.R. § 155.305(g). Congress also gave the insurance issuer a legal right to payment from the federal government for the amount of those mandatory cost-sharing reductions, providing that "the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A); *id.* § 18082(c)(3) (advance payments "shall" be made).

Until last week, the Executive Branch has made these payments, recognizing that the permanent appropriation at 31 U.S.C. § 1324 includes funds for both the premium tax credits and the cost-sharing reductions necessary for the Act's effective operation. The Trump Administration, however, has chosen to reverse course and now argues that there is no appropriation for the cost-sharing reductions, even though, as it concedes, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. This assertion is at odds with the ACA's plan for reforming and

restructuring individual insurance markets, as well as with the mechanisms Congress adopted to effectuate that plan. Likewise, the Administration's interpretation conflicts with subsequent congressional action that confirms what everyone understood at the time: the ACA provides that the premium tax credits and cost-sharing reductions are commonly funded by the permanent appropriation in Section 1324. For that reason, the Trump Administration's refusal to pay the cost-sharing reductions that form a critical part of the Act's broader scheme is unlawful and cannot stand.

I. AT THE TIME THE ACA WAS ENACTED, EVERYONE IN CONGRESS UNDERSTOOD THAT TAX CREDITS AND COST-SHARING REDUCTIONS WOULD BOTH BE FUNDED OUT OF THE SAME PERMANENT APPROPRIATION.

Amici members of Congress served in Congress while the ACA was drafted and enacted, and they were actively involved in the debates concerning the ACA. They know from this experience that the tax credits and the cost-sharing reductions have always been viewed as integrally connected, and that both are indispensable to the restructuring of individual insurance markets that the statute prescribes to make affordable health insurance and health care available for all Americans. Given the identical goals served by these complementary subsidies and their centrality to the ACA's legislative plan, the law makes funding available for both subsidies from the same permanent appropriation, 31 U.S.C. § 1324, obviating the need to seek an annual appropriation. The government's new position to the contrary is wrong, and it is inconsistent with the way everyone in Congress understood the law to operate at the time it was enacted.

To start, there can be no doubt that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to the effective operation of the ACA. Indeed, it is precisely because both are so critical to the effective operation of the ACA that Congress established a unified payment system and funded both out of the same permanent appropriation, thereby

ensuring that payment would not be subject to the vicissitudes of the annual appropriation process. In concluding otherwise, the Trump Administration fundamentally misunderstands the ACA and, contrary to the Supreme Court's decision in *King v. Burwell*, seeks to disrupt Congress's legislative plan in enacting it, 135 S. Ct. at 2496.

As the Supreme Court explained in *King*, the ACA "adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." *Id.* at 2485. It "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." *Id.* These three reforms, the Court explained, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third. *Id.* at 2487.

As *amici* know from their involvement in deliberations about the ACA, the cost-sharing reductions complement the premium tax credits that *King* held were indispensable to the ACA's legislative plan, and these cost-sharing reductions are no less critical to that plan. Both the premium tax credits and the cost-sharing reductions work in tandem to ensure stable individual insurance markets open to all individuals, regardless of pre-existing conditions or health status generally, and accessible to moderate and lower-income individuals who, prior to the ACA, went uninsured. Whereas the premium tax credits make it more affordable for an individual to purchase health *insurance*, the cost-sharing reductions make health *care* more affordable by reducing the costs, such as co-payments and deductibles, that even those with health insurance must pay to obtain health care. This is no small thing: studies have shown that if cost-sharing is too high, many individuals will simply choose not to purchase insurance at all, thus undercutting the entire purpose

of the premium tax credits. *See* Jon R. Gabel et al., *The ACA's Cost-Sharing Reduction Plans: A Key to Affordable Health Coverage for Millions of U.S. Workers*, The Commonwealth Fund (Oct. 2016), http://www.commonwealthfund.org/publications/issue-briefs/2016/oct/aca-cost-sharing-reduction-plans ("Without the [CSRs] . . . health plans sold in the marketplaces may be unafford-able for many low-income people."); S.R. Collins et al., *To Enroll or Not To Enroll? Why Many Americans Have Gained Insurance Under the Affordable Care Act While Others Have Not*, The Commonwealth Fund (Sept. 2015), http://www.commonwealthfund.org/publications/issue-briefs/2015/sep/to-enroll-or-not-to-enroll ("Affordability was a key reason people did not enroll in plans."); *cf.* Gabel et al., *supra* ("57 percent of enrollees in plans sold in federally facilitated state marketplaces received cost-sharing reductions.").

The text and structure of the ACA make clear that the cost-sharing reductions and the pre-mium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law, which directs the government to "establish a program" for the unified admin-istration of advance payments of both forms of the subsidy. 42 U.S.C. § 18082; *see* Pls.' Mem. of Points and Auths. In Supp. of Ex Parte Mot. For TRO and Order to Show Cause Why a Prelim. Inj. Should Not Issue at 11 [hereinafter "Pls.' Mem."] ("All told, no fewer than 45 provisions in the ACA link premium tax credits and cost-sharing reductions."). Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing reductions "in order to reduce the premiums payable by individuals eligible for such credit." 42 U.S.C. § 18082(a)(3); Pls.' Mem. at 11 ("Congress created an integrated scheme to pay insurers at the same time and in the same manner for both types of subsidies . . . ."). Signifi-cantly, and contrary to Attorney General Sessions' claim that the ACA merely "*authorizes* the

federal government to make payments directly to insurers to offset the lost revenue these reductions cause," Letter from Jefferson B. Sessions III, Attorney Gen., to the Hon. Steven Mnuchin, Sec'y of the Treasury, and Don Wright, M.D., M.P.H., Acting Sec'y, U.S. Dep't of Health & Human Servs. 2 (October 11, 2017) (emphasis added) [hereinafter "Sessions Letter"], the ACA instead mandates that the federal government make those payments, repeatedly using the obligatory word "shall," *see, e.g.*, 26 U.S.C. § 36B(a); 42 U.S.C. § 18071(a)(2), (c)(3)(A); *id.* § 18082(c)(2)(A), (c)(3); *see also, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (contrasting "Congress' use of the permissive 'may' in [one section] . . . with the legislators' use of a mandatory 'shall' in the very same section" and noting that "[e]lsewhere in [a specified section], Congress used 'shall' to impose discretionless obligations").

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation. 31 U.S.C. § 1324; *see generally* Pls.' Mem. at 10–12 ("The text, structure, and design of the ACA also demonstrate that Congress permanently appropriated funds for cost-sharing reduction payments."); *id.* at 12 (explaining that if "CSR reimbursement payments are terminated, the resulting increase in premium tax credit expenditures will cost the federal government billions of dollars *more* than paying CSR reimbursements").[2] Although Section 1324 only expressly mentions the

[2] In *House v. Burwell*, the District Court for the District of Columbia dismissed the significance of these results, noting that they "flow not from the ACA, but from Congress' subsequent refusal to appropriate money." *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016); *see* Sessions Letter 3 ("practical difficulties result, if at all, from Congress's post-ACA decision to not appropriate money for CSR payments"). But this misses the point: again, it is precisely because Congress wanted to avoid the undesirable results that would follow if Congress refused to appropriate money that it did not make the advance payments subject to the annual appropriations process.

provision governing premium tax credits, it was well understood, as *amici* know from their experience in Congress at the time and as other provisions of the statute make clear, that the cost-sharing reductions and the premium tax credits were to be funded out of the same source. As just noted, the government was required to establish a "program" for the unified administration of both forms of the subsidy. 42 U.S.C. § 18082(a) ("[t]he Secretary . . . shall establish a program under which . . . advance determinations are made . . . with respect to the income eligibility of individuals enrolling in a qualified health plan in the individual market through the Exchange for the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title"); *id.* § 18082(a)(3) ("the Secretary of the Treasury makes advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit"); *see id.* § 18083(e) ("the term 'applicable State health subsidy program' means—(1) the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402"). Thus, read consistently with the ACA as a whole (and, in particular, Section 18082), Section 1324 provides a permanent appropriation for reimbursement of insurers' mandated payments for both the premium tax credits and the complementary cost-sharing reductions that are part of the same unified program and equally indispensable to the effective operation of the statute. *See King*, 135 S. Ct. at 2496 ("A fair reading of legislation demands a fair understanding of the legislative plan."); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").[3]

[3] The District Court for the District of Columbia rejected this argument, concluding that "premium tax credits are payable under Section 36B of the Internal Revenue Code, and cost sharing reductions are payable under Section 1402 of the ACA." *Burwell*, 185 F. Supp. 3d at 178. But

Significantly, analyses conducted by the CBO, the nonpartisan office responsible for analyzing budgetary and economic issues relevant to the congressional budget process, have repeatedly reflected the widely-held understanding that the cost-sharing reductions, just like the premium tax credits, are covered by a permanent appropriation. *See, e.g.*, CBO, *The Budget and Economic Outlook: 2015-2025*, at 122 tbl.B-3 (2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49892-Outlook2015.pdf (identifying both "[o]utlays for premium credits" and "[c]ost-sharing subsidies" as "[c]hanges in [m]andatory [s]pending"); *see also* CBO, *Frequently Asked Questions About CBO Cost Estimates* (last visited Oct. 19, 2017), https://www.cbo.gov/about/products/ce-faq (contrasting "[m]andatory" spending, i.e., "spending controlled by laws other than appropriation acts," with "[d]iscretionary spending," i.e., "spending stemming from authority provided in annual appropriation acts"); *see generally* Brief for Appellants, *U.S. House of Representatives v. Burwell*, 2016 WL 6216355, at *49 (noting that "during deliberations on the ACA, the [CBO] advised Congress that cost-sharing reductions were 'direct spending' rather than potential expenditures that 'would be subject to future appropriation action'").

It also bears emphasis that 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. In such circumstances, Congress will often enact an "authorization of appropriations," language which does not itself appropriate funds, but empowers Congress to appropriate funds in the future. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) ("There are authorized to be appropriated such sums as may be necessary to carry out this subchapter."). Congress included

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this misunderstands the structure of the statute: Sections 36B and 1402 establish the relevant programs, but neither of those provisions provides the appropriation to fund them. The appropriation for both is provided by Section 1324.

such language elsewhere in the ACA, *see, e.g.*, Pub. L. No. 111-148, § 1323(h) (2010), but tellingly did not include it with respect to the cost-sharing reductions. That Congress did not do so only underscores that everyone involved in the law's drafting understood that future appropriations would be unnecessary because those payments would be made out of the permanent appropriation provided in Section 1324.

Finally, another ACA provision also confirms what everyone at the time understood. When Congress was debating the ACA, some members expressed concern that these 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. *See, e.g.*, 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) ("this bill is not subject to appropriations"). To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law; in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations. *See* 42 U.S.C. § 18023(b)(2)(A) ("If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 . . . (ii) Any cost-sharing reduction under section 18071 of this title . . . .").

In short, the text of the ACA confirms what everyone in Congress understood at the time: the cost-sharing subsidies, like the premium tax credits, were an integral part of the ACA, which is why Congress mandated their payment and provided a permanent appropriation to ensure that the Secretary could comply with that legislative mandate.

II. SUBSEQUENT CONGRESSIONAL ACTION CONFIRMS THAT COST-SHARING REDUCTIONS WOULD BE FUNDED OUT OF THE SAME PERMANENT APPROPRIATION AS THE TAX CREDITS.

In the years since the ACA's enactment, congressional action has confirmed that Section 1324 provides a permanent appropriation for the advance payments that the ACA mandates that the Secretary make to insurers for the cost-sharing subsidies.

For example, for FY2014, there was no annual appropriation for these payments, but the House and Senate nonetheless both assumed that an appropriation was available, together passing a bill premised on that assumption. That bill conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the Exchanges verify that applicants meet the eligibility requirements for such subsidies. Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558, Div. B, § 1001(a) (2013). To comply with this provision, HHS subsequently certified that the Exchanges "verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions." Letter from Kathleen Sebelius to Hon. Joseph R. Biden, *supra*. Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if Congress believed that there was no permanent appropriation available to fund the payments.[4]

[4] Attorney General Sessions makes much of the Obama Administration's request for a line item designating funds for the payment of cost-sharing reductions. *See* Sessions Letter at 3. *Amici* take no position on why the prior administration made that request, but *amici* do know why Congress did not make an annual appropriation in response: none was necessary. As everyone understood at the time the law was enacted and as the law itself makes clear, those payments were funded out of the Section 1324 permanent appropriation. Tellingly, immediately after the Administration went forward and made the required payments, Congress did not dispute the Administration's action, or its funding both subsidy provisions from the same source, namely 31 U.S.C. § 1324.

Moreover, that certification surely gave Congress additional notice that the executive branch intended to make advance payments of cost-sharing reductions, and Congress never indicated that it viewed those payments as unlawful. In fact, two weeks after that certification, Congress enacted the Consolidated Appropriations Act, 2014, which imposed numerous explicit restrictions on particular uses of appropriated funds, *see, e.g.*, Pub. L. No. 113-76, 128 Stat. 5, Div. H, tit. V, §§ 502-520 (2014), but imposed no limits on the use of federal funds for the advance payment of ACA cost-sharing reductions. As *amici* know from their experience in Congress, members of Congress frequently use restrictions on appropriations to limit executive branch action and to make clear when they disagree with an executive branch interpretation of the law. That Congress did not do so with respect to these payments underscores that members on both sides of the aisle understood those payments to be lawful in light of the Section 1324 permanent appropriation.

Indeed, Congress's appropriations for subsequent years support the same point. In March 2014, OMB submitted a FY2015 budget request to Congress. OMB, Fiscal Year 2015 Budget of the United States Government, https://www.gpo.gov/fdsys/pkg/BUDGET-2015-BUD/pdf/BUDGET-2015-BUD.pdf. Given the Section 1324 permanent appropriation, this budget proposal did not seek an appropriation for the payment of the cost-sharing reductions, and in May 2014, then-OMB Director Sylvia Burwell informed members of Congress that all forms of the ACA's advance payments were being paid from the same source. Complaint, *U.S. House of Representatives v. Burwell*, 2014 WL 6492097, at ¶¶ 37-39. When Congress subsequently enacted the Consolidated and Further Continuing Appropriations Act, 2015, it once again did not in any way limit the use of federal funds for the advance payment of cost-sharing reductions under the ACA, even

though it did once again impose numerous other explicit restrictions on specific uses of appropriated funds, *see, e.g.*, Pub. L. No. 113-235, 128 Stat. 2130, Div. G, tit. V, §§ 502-519 (2014). Similarly, the Consolidated Appropriations Act, 2016, continued to impose numerous restrictions on some uses of appropriated funds, Pub. L. No. 114-113, 129 Stat. 2242, Div. B, tit. V, §§ 502-20 (2015), while imposing no limit on the use of federal funds for the advance payment of ACA cost-sharing reductions.

* * *

In sum, the text and structure of the ACA confirm what everyone in Congress understood at the time the law was enacted: the cost-sharing reductions, like the premium tax credits, are critical to the law's effective operation, and both were to be paid out of the same permanent appropriation, 31 U.S.C. § 1324. The existence of that permanent appropriation means the Trump Administration's decision to stop making CSR payments is at odds with its obligation under the statute and is unlawful.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for injunctive relief should be granted.

Respectfully submitted,

/s/ Elizabeth B. Wydra
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Dated: October 20, 2017

APPENDIX:

LIST OF *AMICI*

Rep. Nancy Pelosi
Democratic Leader

Rep. Steny H. Hoyer
Democratic Whip

Rep. James E. Clyburn
Assistant Democratic Leader

Rep. Joseph Crowley
Democratic Caucus Chair

Rep. Linda T. Sánchez
Democratic Caucus Vice-Chair

Rep. Nita Lowey
Ranking Member, Committee on Appropriations

Rep. Robert C. "Bobby" Scott
Ranking Member, Committee on Education and the Workforce

Rep. Frank Pallone
Ranking Member, Committee on Energy and Commerce

Rep. John Conyers, Jr.
Ranking Member, Judiciary Committee

Rep. Louise Slaughter
Ranking Member, Committee on Rules

Rep. Richard E. Neal
Ranking Member, Committee on Ways and Means

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, 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: October 20, 2017

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra