IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION OF THE UNITED STATES HOUSE OF REPRESENTATIVES TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

This suit concerns the continued viability of the separation of powers doctrine – the core principle upon which "the whole American fabric has been erected," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) – as a limit on Executive authority. The case is the result of an historic vote by plaintiff United States House of Representatives ("House") to enlist the aid of the federal judiciary in restraining an unprecedented assault by the Executive Branch on Congress's exclusive legislative powers. The Executive's brazen defiance of Article I has caused, and continues to cause, grave harm to the House as an institution, and a refusal by this Court to address the merits – as the Executive now urges – necessarily would dangerously expand the power of the Executive at the expense of the Legislative Branch. Thus, it is entirely appropriate for this Court to render a final judgment on the merits.

The current Administration has made no secret of its willingness, notwithstanding Article I, to act unilaterally when Congress declines to act as the Administration desires.[1] This suit addresses two of the most egregious examples of the Administration using Executive action as a substitute for legislation, both of which concern the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"). *See* Compl. ¶¶ 51-90 (Nov. 21, 2014)

[1] *See, e.g.*, President Barack Obama, Remarks on No Child Left Behind Flexibility in the East Room (Sept. 23, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/23/remarks-president-no-child-left-behind-flexibility ("Congress hasn't been able to do it. So I will. . . . [G]iven that Congress cannot act, I am acting."); President Barack Obama, Remarks on the Economy & Housing in Las Vegas, NV (Oct. 24, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing ("Where they [Congress] won't act, I will."); President Barack Obama, Remarks on Border Security & Immigration Reform in the Rose Garden (June 30, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform ("I take executive action . . . [where] Congress chooses to do nothing."); President Barack Obama, State of the Union Address (Jan. 28, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address ("[Y]ou don't have to wait for Congress to act. . . . [A]s a chief executive, I intend to lead by example.").

(ECF No. 1) (Counts I-V: the "Non-Appropriation Counts"); *id.* ¶¶ 91-108 (Counts VI-VIII: the "Nullification Counts").

The Non-Appropriation Counts. Defendants – Sylvia Mathews Burwell, Secretary of the Department of Health and Human Services ("HHS"); Jacob J. Lew, Secretary of the Department of the Treasury ("Treasury"); and the respective departments Burwell and Lew head – are paying public funds to certain insurance companies under a program authorized by the ACA, but for which *no funds* have been appropriated. This action directly impinges on Congress's power of the purse, *see* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."), art. I, § 1, art I, §7, cl. 2, a power regarded by the Framers and the courts as the *defining power* of the Legislative Branch. *See infra* Constitutional & Statutory Context, Part I. These unconstitutional and illegal payments – wholly without precedent we believe – are estimated to have exceeded $3 billion in Fiscal Year 2014, and to total approximately $175 billion over the ten succeeding Fiscal Years.[2]

With respect to the Non-Appropriation Counts, the House seeks (i) a declaration that defendants' payments violate Article I of the Constitution, as well as various federal statutes, and (ii) an order enjoining defendants Lew and Treasury from making any further such payments unless and until a law appropriating funds for such payments is enacted in accordance with Article I of the Constitution. *See* Compl., Prayer for Relief, ¶¶ A(i)-(v), B(i).

The Nullification Counts. Separately, defendants Lew and Treasury effectively have amended certain ACA provisions – provisions that place mandates on many employers and establish a deadline by which such employers must comply with those mandates – through a

[2] *See* Compl. ¶ 30 (citing Congressional Budget Office ("CBO"), Insurance Coverage Provisions of the Affordable Care Act – CBO's April 2014 Baseline at Table 3 (Apr. 14, 2014)).

Treasury regulation. The effective rewrite of those express statutory provisions constitutes a legislative decision, by defendants Lew and Treasury, that violates Article I. *See* U.S. Const. art. I, § 1; *id.* § 7, cl. 2. Their unconstitutional and illegal actions are estimated to cost federal taxpayers at least $12 billion.[3] With respect to the Nullification Counts, the House seeks a declaration that the Treasury regulation violates Article I of the Constitution. *See* Compl., Prayer for Relief, ¶¶ A(vi)-(viii).

Not surprisingly, defendants would prefer that the Court not reach the merits, and so they have moved to dismiss on three grounds: (i) the House lacks standing; (ii) the House has no cause of action; and (iii) the Court, as a matter of discretion, should decline to reach the merits. *See* Defs.' Mem. in Supp. of Their Mot. to Dismiss the Compl. at 6-26 (Jan. 26, 2015) (ECF No. 20-1) ("Defendants' Memorandum"). Defendants thereby seek to eliminate *any meaningful check* on their unconstitutional and unlawful actions, particularly as to the Non-Appropriation Counts, as to which they still cannot identify a constitutionally-required "Appropriation[] made by Law" that covers the billions they are passing out to insurance companies.[4] This is so because there is no reason to believe anyone would be injured for Article III purposes by defendants' giveaways of public funds, *other than the legislative institutions responsible for enacting the appropriations legislation that is a constitutional precondition for such spending*.

As Supreme Court Justice Joseph Story recognized long ago, Congress's power of the purse is the ultimate check on the "unbounded power" of the Executive. "[If not for the Appropriations Clause,] the executive would possess an unbounded power over the public purse

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[3] *See* Compl. ¶ 49 (citing Letter from Douglas W. Elmendorf, Dir., CBO, to Hon. Paul Ryan at 3 & attached tbl. (July 30, 2013)).

[4] *See* Philip Klein, *Treasury Won't Explain Decision To Make $3 Billion In Obamacare Payments*, Wash. Exam'r, Feb. 26, 2015, http://www.washingtonexaminer.com/treasury-wont-explain-decision-to-make-3-billion-in-obamacare-payments/article/2560739.

of the nation; and might apply all its monied resources at his pleasure." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-14 (Hilliard, Gray & Co. 1833) ("3 Story"). However, the Legislative Branch's power of the purse is effective as a limitation on the "unbounded power" of the Executive only if that legislative power is enforceable through the courts. Accordingly, the House urges this Court to refuse to be pushed aside, to deny defendants' Motion to Dismiss, and to set a briefing schedule for prompt resolution of the merits.

* * *

In responding to defendants' Motion to Dismiss, we describe the constitutional and statutory context of this case, *infra* pp. 4-10; set forth the relevant factual background, *infra* pp. 11-19; articulate the applicable legal standards, *infra* pp. 20-21; and then explain as a legal matter why the House has standing and a cause of action, and why the Court should reach the merits, *infra* pp. 21-45.

CONSTITUTIONAL AND STATUTORY CONTEXT

I. The Constitution Vests Congress with the Exclusive Authority to Legislate, and Expressly Bars the Executive from Spending Public Funds, Absent a Legislatively Enacted Appropriation.

The Framers carefully delineated the respective powers of the three branches in the first three Articles of the Constitution. While some powers are shared, others are exclusive. These exclusive powers primarily structure our system of separation of powers.

Under Article I, one exclusive power that defines the Legislative Branch is the power to legislate. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). This power may be exercised only through the "single, finely wrought, and exhaustively

considered, procedure," *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), that requires different constituencies and interests to interact to secure the passage of identical bills by the House and Senate (bicameralism), followed by delivery to the President for his signature or veto (presentment). *See* U.S. Const. art. I, § 7, cl. 2. Beyond the President's role in the presentment process, the Constitution does not permit the Executive to enact, amend, or repeal laws, either directly or indirectly. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) ("The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *Am Fed'n of Gov't Emps., AFL-CIO v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982) (per curiam) ("Legislative power may be exercised only as provided in article I, section 7 of the Constitution.").

A second, and related, power that defines the Legislative Branch is the power of the purse. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). The Framers emphasized the defining nature, for the Legislative Branch, of this power of the purse. *See, e.g.*, The Federalist No. 58, at 394 (James Madison) (Jacob E. Cooke ed. 1961) ("The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government.").[5]

[5] *See also* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . ."); *id.* art. I, § 8, cl. 2 ("The Congress shall have power . . . To borrow Money on the credit of the United States"); *id.* art. I, § 8, cl. 5 ("The Congress shall have power . . . To coin Money [and] regulate the Value thereof"); *id.* amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . ."). By way of these provisions, the Framers affirmatively vested Congress – the branch of the federal government most closely connected with, and most directly accountable to, the people – with direct responsibility for the Nation's finances. *See, e.g.*, The Federalist No. 58, at 394 (The power of the purse was vested in Congress "as the most complete and

(*Continued* . . .)

The Appropriations Clause not only vests Congress with a particularized and exclusive legislative authority, it also affirmatively limits the power of the Executive (and the Judiciary) by expressly barring the expenditure of *any* public funds absent enactment of a law appropriating such funds, as the Supreme Court and the lower courts repeatedly have emphasized:

> No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. . . . The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. *See* Constitution, art. 1, § 9 (1 Stat. at Large, 15). However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

Reeside v. Walker, 52 U.S. 272, 291 (1850); *see also OPM v. Richmond*, 496 U.S. 414, 424 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937))); *U.S. v. MacCollom*, 426 U.S. 317, 321 (1976) ("[T]he expenditure of public funds is proper *only when authorized by Congress* . . . ." (emphasis added)); *Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("Congress's control over federal expenditures is 'absolute.'" (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992))); *Rochester*, 960 F.2d at 185 (Congress has "exclusive power over the federal purse"); *Hart's Adm'r v. U.S.*, 16 Ct. Cl. 459, 484 (1880) ("[A]bsolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."), *aff'd sub nom. Hart v. U.S.*, 118 U.S. 62 (1886).

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effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.").

Courts particularly have emphasized the importance of the Appropriations Clause as a check on the Executive. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Richmond*, 496 U.S. at 425; *see also Cincinnati Soap*, 301 U.S. at 321 ("The [Appropriations Clause] was intended as a restriction upon the disbursing authority of the Executive department. . . ."); *Dep't of the Navy*, 665 F.3d at 1347 ("The Appropriations Clause is thus a bulwark of the Constitution's separation of powers [because it operates] as a restraint on Executive Branch officers [who may seek] 'unbounded power over the public purse.'" (quoting 3 Story § 1342, at 213-14)); *Dep't of the Air Force v. FLRA*, 648 F.3d 841, 845 (D.C. Cir. 2011) (same).[6] As a result, permitting the Executive, "on its own, [to] carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 414 (3d Cir. 2004).

Finally, vesting Congress with the exclusive power to appropriate public funds was central to the Framers' intent that political compromises between and among competing and otherwise antagonistic groups would be thrashed out primarily in the crucible of the legislative

[6] *Accord* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988) ("Stith") (congressional control of purse is "structural imperative" in our constitutional system); Joseph & Ann Cooper, *The Legislative Veto & the Constitution*, 30 Geo. Wash. L. Rev. 467, 491 (1961) ("Congress constantly uses the appropriation bills to control and supervise executive decision-making with regard to both policy and operations."); Edward S. Corwin, *The War & the Constitution: President & Congress*, 37 Am. Pol. Sci. Rev. 18, 24 (1943) ("[I]n its control of the purse-strings Congress possesses its most effective check on Presidential Power."); Ronald D. Rotunda, *The House of Representatives' Lawsuit Against the Executive Branch*, Verdict (Feb. 2, 2015) ("Rotunda Article") ("The power of Congress to control the purse strings is an essential element of checks and balances. . . . The framers, in an effort to create institutional checks to the abuse of power, provided that the President, a civilian, would be the commander-in-chief of the military. To check the President's power of the sword, the framers gave to Congress the power of the purse."), *available at* https://verdict.justia.com/2015/02/02/house-representatives-lawsuit-executive-branch.

process. As a result, the Appropriations Clause plays a critical role in the fashioning of majoritarian compromises in our society. If the Executive could simply spend freely, without appropriations from Congress – as defendants purport to be able to do here – Congress would be reduced to an advisory role, and its function as the epicenter of political debate, negotiation, and compromise in our constitutional system would disappear, along with Congress's ability to function as an effective check on the Executive.

II. Congress Exercises Its Article I Appropriations Clause Authority by Legislatively Enacting Appropriations, Which May Be Permanent or Non-Permanent, and by Declining to Enact Appropriations Legislation.

Congress implements its Article I appropriations authority through a series of legislative procedures commonly referred to as the "appropriations process."

"Authorizing" legislation establishes, continues, or modifies an agency, program, or government function. Authorizing legislation alone, however, does not provide the legal authority required by Article I, section 9, clause 7 of the Constitution to expend public funds to effectuate the agency, program, or function. Only an "appropriations" law can do that. *See* U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, vol. I at 2-41 (3d ed. 2004) ("GAO Red Book") ("An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act.").

"Appropriations" legislation, which *does* implement the authority vested in Congress by the Appropriations Clause, is legislation that designates an amount and source of public funds to pay for a program that Congress has authorized, and permits expenditure of such funds in support of such program. *See, e.g.*, *Nevada v. Dep't of Energy*, 400 F.3d 9, 13-14 (D.C. Cir. 2005) (appropriation requires specific direction to pay *and* designation of funds to be used); *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the

appropriations were made except as otherwise provided by law."); *id.* § 1301(d) ("A law may be construed to make an appropriation . . . only if the law specifically states that an appropriation is made . . . ."). Importantly here, it is well understood that "[a] direction to pay without a designation of the source of funds is not an appropriation." GAO Red Book, vol. I at 2-17 (private relief act that contained authorization and direction to pay, but no designation of funds, not an appropriation).

While Congress may combine an authorization and an appropriation in a single bill, it most often enacts them separately. Moreover, Congress may choose not to appropriate funds for an authorized program; or it may choose to appropriate amounts different from the amount (if any) provided for in an authorization; or it may limit the purposes for which appropriated funds may be used. Regardless of the choices made, appropriations legislation, "like any other statute, [must be] passed by both Houses of Congress and either signed by the President or enacted over a presidential veto." *Id.* at 2-45 (citing *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973); *Envirocare of Utah Inc. v. U.S.*, 44 Fed. Cl. 474, 482 (1999)).

The most common form of appropriation is a non-permanent (usually annual) appropriation for a particular agency, program, or function. The least common is a permanent appropriation which (i) remains in effect until Congress repeals or modifies it, and (ii) permits a federal agency to expend public funds without the need for passage of a non-permanent appropriations bill in the current Congress. For an appropriation to be considered permanent, the law must clearly and expressly so provide. *See* GAO Red Book, vol. I at 2-14.[7] The distinction

[7] Examples of permanent appropriations laws are: 31 U.S.C. § 1304(a) (payment of certain judgments: "Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs . . . when [certain specified conditions are met]."); 31 U.S.C. § 1305(2) (payment of interest on national debt: "Necessary amounts are appropriated . . . to pay interest on the public debt under laws authorizing payment."); 31 U.S.C. § 1324 (payments for refunds due under Internal Revenue

(*Continued* . . .)

between permanent and non-permanent appropriations is well established and well understood by the Executive which knows very well how to craft suitable, specific appropriations language when it wants Congress to provide it with funds. *See infra* Factual Background, Part I.B.[8]

By enacting non-permanent appropriations legislation, Congress carries out its oversight responsibilities and compels accountability on the part of the Executive Branch – the branch that spends well in excess of 99% of all federal dollars expended by the federal government[9] – by forcing the Executive repeatedly to justify authorized programs, its operations of those programs, and the amounts needed to operate those programs effectively and efficiently.[10]

Code: "Necessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law . . . ."); 42 U.S.C. § 401(a) (payments to Social Security recipients: "There is hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund for the fiscal year ending June 30, 1941, and for each fiscal year thereafter, [certain specified tax revenues]."); and 42 U.S.C. § 1395i(a) (payments for Medicare benefits: "There are hereby appropriated to the [Federal Hospital Insurance] Trust Fund for the fiscal year ending June 30, 1966, and for each fiscal year thereafter, [certain specified tax revenues].").

[8] *See also, e.g.*, Office of Mgmt. & Budget ("OMB"), Fiscal Year 2016 Budget of the U.S. Government, App. at 4 (Feb. 2, 2015) ("2016 Budget") ("The language proposed for inclusion in the 2016 appropriations acts appears following the account title, and the amounts are stated in dollars. . . . NATIONAL EYE INSTITUTE. *For carrying out section 301 and title IV of the PHS Act with respect to eye diseases and visual disorders, . . . $695,154,000*." (emphasis added)), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/appendix.pdf.

[9] *See* National Priorities Project, *President's Proposed Total Spending (Fiscal Year 2015)*, https://static.nationalpriorities.org/images/fb101/2014/presidents-proposed-total-spending.png.

[10] On Capitol Hill, the appropriations process involves consideration of 12 annual appropriations bills that fund a broad range of government activities. In the House, jurisdiction over "Appropriation of the revenue for the support of the Government" is delegated, in the first instance, to the Committee on Appropriations. *See* Rule X.1(b)(1), Rules of the House of Representatives, 114th Cong. (2015), *available at* http://rules.house.gov/sites/republicans.rules.house.gov/files/114/PDF/House-Rules-114.pdf. The House Appropriations Committee normally begins reporting bills in May or June, with the aim of completing committee and floor consideration of all 12 bills prior to Congress's annual August recess. *See* Jessica Tollestrup, Cong. Research Serv., R42388, *The Congressional Appropriations Process: An Introduction* at 5 (2014), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%2BP%3C%3B3%0A.

Typically, the House and Senate Appropriations Committees resolve through negotiations differences between appropriations bills passed by their respective chambers. *See id.* If agreement is reached and both chambers approve, the resulting legislation – sometimes in the form of individual bills, sometimes in the form of omnibus legislation (combining several regular bills into one larger bill) – is sent to the

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FACTUAL BACKGROUND

I. Background Pertinent to the Non-Appropriation Counts of the Complaint.

A. Congress Enacts the ACA with No Appropriation for the Section 1402 Offset Program.

On December 24, 2009, H.R. 3590, 111th Cong. (2009), as amended and retitled "Patient Protection and Affordable Care Act," passed the Senate by a vote of 60-39; on March 21, 2010, the House agreed to the Senate amendments by a vote of 219-212; and, on March 23, 2010, President Obama signed into law H.R. 3590, as agreed to by both the House and Senate. *See* Compl. ¶¶ 22-24.

Section 1402(a)(2) of the ACA (codified at 42 U.S.C. § 18071(a)(2)) requires all health insurance issuers offering a qualified health plan through the ACA ("Insurers") to provide reduced deductibles, co-pays, and co-insurance levels to qualified policyholders enrolled in such plans ("Beneficiaries"). These reductions are referred to in the ACA as "Cost-Sharing Reductions." ACA Cost-Sharing Reductions are required by law and are not contingent upon the receipt by Insurers of any offsetting payments from the government. Rather, Insurers – who benefit by participating in an ACA health insurance marketplace exchange – are statutorily required to provide Cost-Sharing Reductions to Beneficiaries as a condition of being permitted to offer insurance policies through an ACA exchange. *See* Compl. ¶¶ 25-26.

The ACA also establishes a program by which the federal government is authorized to make direct payments to Insurers to offset costs that Insurers incur in providing Cost-Sharing Reductions to Beneficiaries ("Section 1402 Offset Program"). However, *nowhere in the ACA* –

President for his signature or veto. If agreement cannot be reached prior to the beginning of the fiscal year (October 1), Congress may enact one or more continuing resolutions to fund government operations pending final disposition of the 12 regular appropriations bills, one or more omnibus appropriations bills, or some combination thereof. *See id.*

or anywhere else – did Congress appropriate any funds for the Section 1402 Offset Program. *See* Compl. ¶¶ 27-28; *see also* Mem. from Cong. Research Serv. to Senator Tom Coburn, at 9-10 (July 29, 2013) ("2013 CRS Mem.") (annual appropriation from Congress necessary to fund Section 1402 Offset Program), attached as Ex. A.[11]

In enacting the ACA, Congress knew how to appropriate funds when it so intended. For example, in the provision immediately preceding Section 1402, the ACA authorized refundable tax credits to be paid to qualified individuals to reduce the cost of their health insurance premiums ("Section 1401 Refundable Tax Credit Program"). *See* Compl. ¶ 29. In stark contrast to the Section 1402 Offset Program, the Section 1401 Refundable Tax Credit Program *is funded*, specifically through 31 U.S.C. § 1324, the permanent appropriation for refunds and credits due under the Internal Revenue Code ("IRC"). *See* Compl. ¶ 29; *compare* ACA §§ 1401(a), 1401(d)(1), 1412(c)(2) (codified at 26 U.S.C. § 36B(a), (d)(1); 42 U.S.C. § 18082(c)(2)) (payment under Section 1401 Refundable Tax Credit Program to be made through IRC), *with* ACA §§ 1402, 1412(c)(3) (codified at 42 U.S.C. §§ 18071, 18082(c)(3)) (no authority for Section 1402 Offset Program payments to be paid through IRC, or anywhere else).[12]

[11] Section 1412(c)(3) of the ACA (codified at 42 U.S.C. § 18082(c)(3)) establishes the mechanism by which Section 1402 Offset Program payments would be made, were funds to be appropriated for the program.

[12] Throughout the ACA, Section 1401 is referred to as a "premium *tax credit*" under "section 36B of the Internal Revenue Code," while the Section 1402 cost-sharing reduction program is referred to as "reduced cost-sharing" or simply "section 1402," *not* by any reference to the IRC. *See, e.g.*, ACA §§ 1411(a)(2), (b)(3), 1412(a), (c)(2), (c)(3) (codified at 42 U.S.C. §§ 18081(a)(2), (b)(3), 18082(a), (c)(2), (c)(3)).

The ACA is replete with examples of specific appropriations, leaving no doubt that Congress knew how to appropriate money when it so intended. *See, e.g.*, ACA § 3021(f) (codified at 42 U.S.C. § 1315a(f)) (appropriating $5,000,000 in FY 2010 and $10,000,000 in FY 2011-19 for design, implementation, and evaluation of payment and service delivery models).

B. Congress Again Declines to Appropriate Funds for the Section 1402 Offset Program.

The absence of an appropriation for the Section 1402 Offset Program is obvious on the face of the ACA. Consequently, in March 2013, the Administration sought a non-permanent, annual appropriation to fund that program for Fiscal Year 2014. In particular, in the section of its Fiscal Year 2014 budget dealing with the Centers for Medicare and Medicaid Services ("CMS") – an agency within defendant HHS – the Administration specifically requested, "'[f]or carrying out . . . sections 1402 and 1412 of the [ACA], such sums as necessary,' and, '[f]or carrying out . . . such sections in the first quarter of fiscal year 2015[,] . . . $1,420,000,000.'" Compl. ¶ 31 (quoting OMB, Fiscal Year 2014 Budget of the U.S. Government, App. at 448 (Apr. 10, 2013)). In its underlying budget justification, defendant HHS:

- expressly recognized that it required an annual (non-permanent) appropriation for CMS' "five annually-appropriated accounts," including, in particular, a new, "annually-appropriated" account for Section 1402 Offset Program payments to begin in Fiscal Year 2014, the "Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans (Cost Sharing Reductions)" account;
- said CMS needed an "annual" appropriation for Section 1402 Offset Program payments in the amount of "$4.0 billion in the first year of [ACA Exchange] operations . . . [and] a $1.4 billion advance appropriation for the first quarter of Fiscal Year 2015 . . . to permit CMS to reimburse [certain insurance] issuers;" and
- explained that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014."

Compl. ¶ 32 (quoting HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees, at 2, 4, 7, 183-84).

In other words, when it submitted its Fiscal Year 2014 budget to Congress, in March 2013, the Administration correctly recognized that it could not make Section 1402 Offset Program payments to Insurers *unless and until* Congress specifically appropriated funds for that purpose. Compl. ¶ 33.

In July 2013, the Senate Appropriations Committee declined to approve the Administration's request. *See* S. Rep. No. 113-71, at 123 (2013) (recommending that request for annual appropriation to fund Section 1402 Offset Program payments for Fiscal Year 2014 not be adopted). In fact, neither the House nor the Senate ever adopted a bill approving the Administration's request, and no bill containing an appropriation to fund the Section 1402 Offset Program was presented to the President for his signature or veto. *See* Compl. ¶ 34; 2013 CRS Mem. at 9-10 (confirming that no funds appropriated for Section 1402 Offset Program payments, and that annual appropriation would be necessary to fund program).

Congress also did not appropriate funds for the Section 1402 Offset Program for Fiscal Year 2015 (the current fiscal year). *See* Compl. ¶ 34.

C. Defendants Pay to Insurers, under the Section 1402 Offset Program, Billions of Dollars in Public Funds That Congress Has Not Appropriated.

Notwithstanding the lack of any appropriation for the Section 1402 Offset Program – either in the ACA or in any Fiscal Year 2014 appropriations bill – defendants unilaterally began making such payments to Insurers in January 2014, and continued making them thereafter. *See* Compl. ¶ 35 (citing CMS, March Marketplace Payment Processing Cycle: Enrollment & Payment Data Reporting & Restatement at 9 (Feb. 12, 2014); CMS, Marketplace Payment Processing: Restatement & Payment Reporting at 7, 11 (Jan. 13, 2014)). OMB estimated that Section 1402 Offset Program payments to Insurers for Fiscal Year 2014 would total $3.978 billion. *See id.* (citing OMB, OMB Sequestration Preview Report to the President and Congress

for Fiscal Year 2014, and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version, p. 23 (May 20, 2013)).

In its Fiscal Year 2015 budget, submitted to Congress in March 2014 – by which time defendants already had begun making Section 1402 Offset Program payments to Insurers – the Administration conspicuously began thrashing about for a rationale to justify its disregard of the Appropriations Clause. In particular, its request for a non-permanent appropriation to enable CMS to make Section 1402 Offset Program payments had disappeared, and was replaced with a single line item in the Internal Revenue Service ("IRS") section of the budget, lumping together the Section 1401 Refundable Tax Credit Program – funding for which is permanently appropriated through the IRC, *see supra* Factual Background, Part I.A – with the Section 1402 Offset Program which *is not* funded through the IRC. *See* Compl. ¶ 36 (citing OMB, Fiscal Year 2015 Budget of the U.S. Government, App. at 1087 (Mar. 4, 2014)).

The only explanation the Administration offered for this about-face came from defendant Burwell, then Director of OMB, during her confirmation hearings to be HHS Secretary. *See id.* ¶ 37. Responding to questions from two Senators, Burwell stated that no payments would be made from a Treasury account (no. 009-38-0126) established to make Section 1402 Offset Program payments (presumably because the account was empty since Congress had appropriated no funds for such payments). *See id.* ¶ 38. Instead, she said, "Section 1402 Offset Program payments would be made from the same account [no. 015-45-0949] from which the [Section 1401 Refundable Tax Credit Program payments] are paid," an explanation she justified only on

grounds of "efficiency." *Id.* (quoting Letter from Sylvia M. Burwell, Dir., OMB to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014)).[13]

This explanation means that defendants are using the permanent appropriation for tax refunds and credits (31 U.S.C. § 1324) not only properly to make Section 1401 Refundable Tax Credit Program payments, but also – wholly improperly – to make Section 1402 Offset Program payments. These Section 1402 Offset Program payments are improper because (i) the ACA does not permit 31 U.S.C. § 1324 to be used to fund Section 1402 Offset Program payments, and (ii) 31 U.S.C. § 1324, on its face, states that "[d]isbursements may be made from the appropriation made by this section only for (1) refunds to the limit of liability of an individual tax account, and (2) refunds due from credit provisions of the [IRC]," 31 U.S.C. § 1324(b); Compl. ¶¶ 39, 65-69. Defendants' Section 1402 Offset Program payments to Insurers are neither. *See* Compl. ¶ 39; *see also* 2013 CRS Mem. at 9-10 (noting that, unlike Section 1401 Refundable Tax Credit Program, Section 1402 Offset Program payments are *not* funded through any permanent appropriation).

Defendants now say, in support of their Motion to Dismiss, that "[t]he cost sharing reduction payments are being made as part of a mandatory payment program that Congress has fully appropriated. *See* 42 U.S.C. § 18082 [i.e., ACA § 1412]." Defs.' Mem. at 6. But saying

[13] The Burwell letter had responded to a letter from the Senators inquiring why the Administration had flip-flopped on the question of whether Section 1402 Offset Program payments would be subject to mandatory sequestration rules. *See* Compl. ¶ 38 n.13 (citing Letter from Senators Ted Cruz and Michael S. Lee, to Sylvia M. Burwell, Dir. OMB, at 2 (May 16, 2014)). The Senators' May 16, 2014 letter, in turn, resulted from a significant discrepancy between OMB's sequestration reports to Congress for Fiscal Years 2014 and 2015. OMB reported for Fiscal Year 2014 that Section 1402 Offset Program payments to Insurers for that fiscal year were predicted to be $3.978 billion, and that such payments *were* subject to mandatory sequestration in the amount of $286 million. *See id.* (citing OMB Report FY 2014 at App., p. 23 (referencing Treasury account no. 009-38-0126 under "Centers for Medicare and Medicaid Services")). Ten months later, Treasury account no. 009-38-0126 disappeared from the OMB report, with no explanation provided. *See id.* (citing OMB, OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2015, at App., p. 6 (Mar. 10, 2014)).

an apple is an orange does not make it so. Moreover, as we already have explained, ACA § 1412 only *authorizes* Section 1402 Offset Program payments; it self-evidently does *not* appropriate any funds for such payments. *See supra* Factual Background, Part I.A; *see also* 2013 CRS Mem. at 9-10 (Congress did not appropriate funds for Section 1402 Offset Payments to Insurers; program requires annual appropriation); GAO Red Book, vol. I at 2-17 (direction to pay without designation of source of funds is not an appropriation); Compl. ¶¶ 25-41, 51-90.

II. Background Pertinent to the Nullification Counts of the Complaint.

A. Congress Enacts the ACA with Employer Mandates and a Deadline for Compliance with Those Mandates.

Congress, in the ACA, also imposed mandates on some employers, along with a system of financial penalties tied to the IRC for enforcement, and specific dates on which the mandates were to take effect. In particular, in ACA § 1513 (codified at 26 U.S.C. § 4980H), Congress amended the IRC by adding to Chapter 43 of the IRC a new section 4980H. New section 4980H imposes on "applicable large employer[s]" who fail to offer all of their "full-time employees" (and their dependents) affordable health insurance coverage, as defined in the statute, one or both of two tax penalties set forth in section 4980H(a)-(b). The tax penalties sometimes are referred to as "employer shared responsibility payments." *See* Compl. ¶ 42. Section 1513(d) of the ACA states expressly that "'[t]he amendments made by this section *shall apply* to months beginning after December 31, 2013.'" Compl. ¶ 43 (quoting ACA § 1513(d) (emphasis added)).

B. Defendants Lew and Treasury Nullify the Employer Mandate Provisions of the ACA.

Given its importance to the budgetary impact of the ACA, as well as the balance of burdens between the private sector and the government, the selection of the December 31, 2013 date, after which the Employer Mandate provisions of the ACA would become effective, was a

matter of intense debate in Congress during its consideration of the bills that became the ACA. *See id.* ¶ 44. However, notwithstanding that date's centrality to the ACA, defendant Treasury, on July 2, 2013, announced that it would not adhere to the statute. It did so via a blog post entitled – ironically – "Continuing to Implement the ACA in a Careful, Thoughtful Manner," which stated: "'shared responsibility payments [imposed on employers by IRC § 4980H] . . . . will not apply for 2014. Any employer shared responsibility payments will not apply until 2015.'" *Id.* ¶ 45(i) (quoting Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, Treasury Notes (July 2, 2013)). One week later, the IRS, a bureau of defendant Treasury, reiterated that "'no employer shared responsibility payments will be assessed for 2014.'" *Id.* ¶ 45(ii) (quoting IRS Notice 2013-45, 2013-31 I.R.B. 116, at 3 (July 9, 2013)).

In February 2014, defendant Treasury promulgated a final rule, the Preamble to which delayed still further, through calendar year 2015, the ACA-imposed January 1, 2014 Employer Mandate deadline for employers who employ on average at least 50 but fewer than 100 full-time employees on business days during 2014. *See id.* ¶ 45(iii) (citing Treasury Rule, pmbl. § XV.D.6.a(1), 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014)).

The same regulation effectively altered the ACA provision which mandates that applicable large employers offer affordable coverage to *all* their full-time employees to avoid the tax penalty imposed by section 4980H(a). With respect to 2015, the regulation did so by stating, in its Preamble that, "'for each calendar month during 2015, . . . an applicable large employer member that offers coverage to at least 70 percent . . . of its full-time employees . . . will not be subject to an assessable payment under section 4980H(a).'" *Id.* ¶ 46(i) (quoting Treasury Rule, pmbl. § XV.D.7.a, 79 Fed. Reg. at 8575). And with respect to 2016 and beyond, the regulation provided that applicable large employers need only offer affordable coverage to 95% of their

full-time employees to avoid the tax penalties imposed by section 4980H(a)-(b). *See id.* ¶ 46(ii) (citing Treasury Rule, pt. 54, §§ 54.4980H-4(a), 54.4980H-5(a), 79 Fed. Reg. at 8597-99).[14]

These actions of defendants Lew and Treasury – which amount to little more than "'tailor[ing]' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms," *Utility Air*, 134 S. Ct. at 2445 (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)) – cost the federal government an estimated $12 billion in annual revenue, *see* Compl. ¶ 49 (citing Letter from Douglas W. Elmendorf, Dir., CBO, to Hon. Paul Ryan at 3 & attached tbl. (July 30, 2013)).

III. The House of Representatives Formally Authorizes This Litigation.

On July 30, 2014, the House formally authorized the Speaker, on behalf of the House, to initiate this litigation. *See* H. Res. 676, 113th Cong. (2014) (enacted); 160 Cong. Rec. H7087-H7099 (daily ed. July 30, 2014) (recording vote on H. Res. 676: 225-201); *see also* H. Res. 5, § 3(f)(2)(A), 114th Cong. (2015) (enacted) ("The House of Representatives of the One Hundred Fourteenth Congress is authorized to act as the successor in interest to the House of Representatives of the One Hundred Thirteenth Congress with respect to the civil action United States House of Representatives v. Sylvia Mathews Burwell[] . . . filed by the House of Representatives in the One Hundred Thirteenth Congress pursuant to House Resolution 676.").

[14] *See also* U.S. Treasury Dep't, Fact Sheet: Final Regulations Implementing Employer Shared Responsibility Under the [ACA] for 2015 at 1 (2014) ("To avoid a payment for failing to offer health coverage, employers need to offer coverage to 70 percent of their full-time employees in 2015 and 95 percent in 2016 and beyond[] . . . ."), *available at* http://www.treasury.gov/press-center/press-releases/Documents/Fact Sheet 021014.pdf.

APPLICABLE LEGAL STANDARDS

The Motion to Dismiss rests on both Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *See* Defs.' Mem. at 6-23 (asserting that House lacks standing); *id.* at 23-24 (asserting that House lacks cause of action under Declaratory Judgment Act).

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) ("If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiffs factual allegations as true . . . ."). The same thing is true of the 12(b)(6) aspect of defendants' motion: The Court must accept the facts alleged in the Complaint as true, and consider them in the light most favorable to the House, *see Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), and it must construe the Complaint "liberally and giv[e] the [House] the 'benefit of all inferences that can be derived from the facts alleged,'" *id.* at 240 (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)); *see also RSM Prod. Corp. v. Freshfield Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012); *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012).

In ruling on defendants' motion, this Court may consider all documents attached to, cited to, or referenced in, the Complaint, as well as matters of which the Court may take judicial notice. *See EEOC v. St. Xavier Parochial Sch.*, 117 F.3d 621, 624 & n.3 (D.C. Cir. 1997).

Finally, in resolving the standing aspect of defendants' motion, the Court must assume the House has stated viable claims on the merits. *See, e.g.*, *Vietnam Veterans of Am. v. Shinseki*,

599 F.3d 654, 658 (D.C. Cir. 2010) ("Whether or not plaintiffs stated a claim – whether they had a cause of action – goes to the merits of the case and, as we have held, the merits must be assumed when considering standing." (citing *City of Waukesha v. EPA.*, 320 F.3d 228, 235 (D.C. Cir. 2003) (per curiam))); *Pierce*, 697 F.2d at 305 ("For purposes of the standing issue, we accept as valid [plaintiff's] pleaded legal theory."). Thus, in determining whether the House has standing to assert the Non-Appropriation Counts of the Complaint, the Court must assume Congress has *not* appropriated any funds for the Section 1402 Offset Program, as the House (correctly) has alleged. *See* Compl. ¶¶ 28, 34-35, 40, 53, 59, 76, 78. The Court may *not* assume that "Congress has fully appropriated" funds for that program, as defendants incorrectly – and without identifying any actual appropriation – suggest it should. Defs.' Mem. at 6

Applying these standards, the Motion to Dismiss must be denied, as we now explain.

ARGUMENT

Defendants say the House lacks standing; that it lacks a cause of action under the Declaratory Judgment Act; and that the Court should, in its discretion, decline to reach the merits. *See* Defs.' Mem. Argument, Parts I, II.A, II.B. In so moving, defendants seek to eliminate any role for the Article III branch in resolving this dispute between the other two branches regarding Congress's core functions – one of the judiciary's most essential roles in our constitutional system. *See, e.g., U.S. v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("*AT&T I*") ("[T]he mere fact that there is a conflict between the legislative and executive branches . . . does not preclude judicial resolution of the conflict."); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) ("The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable; Supreme Court precedent establishes that this branch has an equally fundamental role to play, and that judges not only

may, but sometimes must, exercise their responsibility to interpret the Constitution and determine whether another branch has exceeded its power."); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) ("[T]he Supreme Court has confirmed the fundamental role of the federal courts to resolve the most sensitive issues of separation of powers.").

Defendants' extreme position, if accepted, would neuter Congress, enlarge the power of the Executive to dangerous levels, and seriously distort the balance of powers between the political branches. Such a concentration of unchecked power in one branch is precisely what the Framers sought to avoid in designing our tripartite system, and for this reason, as well as those that follow, the House urges the Court to deny defendants' motion.

I. The House Has Article III Standing.

The standing doctrine is based on Article III's commitment to the federal courts of "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The familiar three elements of Article III standing, which the House easily satisfies here, are:

> (1) . . . an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (same).

While the Supreme Court has inquired in past cases whether a "dispute is traditionally thought to be capable of resolution through the judicial process," *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (quotation omitted), it also has stressed that "[p]roper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch [not] shrink from a confrontation with [its] coequal branches," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). Defendants' conduct here, which

presents a direct threat to the continued viability of the separation of powers doctrine, is just such a case. The standing doctrine never was intended as an escape hatch for federal courts at moments when their independence and judgment is most needed by our system.[15]

No court ever has held that the House or Senate, as institutions, lacked standing to sue to redress an institutional injury. Indeed, courts in this Circuit repeatedly have held to the contrary. *See, e.g., AT&T I*, 551 F.2d at 390-91 ("[T]he House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."); *Miers*, 558 F. Supp. 2d at 69 (same); *Holder*, 979 F. Supp. 2d at 3 (holding that House committee had standing to enforce subpoena issued to Attorney General); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) ("*Census Case*") (holding that House had standing to challenge Executive's use of statistical sampling to conduct decennial census).

The premise of defendants' standing arguments is that all constitutional disputes between the political branches must be resolved, if at all, only through the fortunes of politics. Under this approach, all such constitutional disputes would be consigned to linger for years, and a salutary constitutional doctrine designed to prevent judicial excess would be converted into a rule that reduces federal courts to non-entities whenever the political branches are on opposite sides of a case. That is wrong. While the House does not contend that every constitutional dispute that arises between the political branches must be considered by the courts, it does contend that

[15] Indeed, policing the efforts of one branch to aggrandize its powers at the expense of other branches is one of the judiciary's primary functions. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (U.S. 2014); *Mistretta v. U.S.*, 488 U.S. 361 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown*, 343 U.S. at 587; *Myers v. U.S.*, 272 U.S. 52 (1926); *see also, e.g.*, *Pierce*, 697 F.2d at 306 ("[s]eparation of powers principles are offended" when one branch attempts to enlarge its power at the expense of another branch).

(i) Article III must not render the courts automatically unavailable when such disputes do arise, and (ii) the House certainly has standing to bring its claims before the Court in this case.

It bears repeating that the House did not undertake this action lightly. Rather, it debated on the floor of the House, and then adopted by a vote of the full Membership, a formal resolution authorizing the House to seek judicial redress, a fact that is significant for purposes of this Court's standing analysis. *See, e.g.*, *Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees [individual Members of Congress] have not been authorized to represent their respective Houses of Congress in this action[] . . . ."); *AT&T I*, 551 F.2d at 391 ("[T]he House . . . passed H. Res. 1420, authorizing Chairman Moss's intervention on behalf of the Committee and the House . . . ."); *Miers*, 558 F. Supp. 2d at 71 ("[T]he fact that the House has . . . explicitly authorized this suit . . . . is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury . . . to the permissible category of an institutional plaintiff asserting an institutional injury . . . .").[16]

A. Defendants' Section 1402 Offset Program Payments, for Which There Is No Congressional Appropriation, Injure the House.

Defendants' Section 1402 Offset Program payments injure the House as an institution in four distinct ways: (i) they cut the House out of its most defining constitutional functions; (ii) they nullify the House's prior legislative judgments to not appropriate funds for the Section 1402 Offset Program; (iii) they negate the House's ability to use the power of the purse to check

[16] *Cf. Walker v. Cheney*, 230 F. Supp. 2d. 51, 68 (D.D.C. 2002) (noting that "the Comptroller General here has not been expressly authorized by Congress to represent its interests in this lawsuit," and that he "has not identified any Member of Congress (other than [one Senator]) who has explicitly endorsed his recourse to the Judicial Branch."); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 11 (D.D.C. 2002) (noting that individual Members "have not been authorized, implicitly or explicitly, to bring this lawsuit on behalf of the House, a committee of the House, or Congress as a whole").

the Executive; and (iv) they eliminate the House's ability to use the power of the purse to further its oversight and investigative responsibilities.

1. Defendants Have Injured the House by Divesting It of Core Article I Functions.

The Constitution guarantees to the House a necessary role – indeed, *the defining role* – in *any* expenditure of public funds by virtue of the fact that the House and the Senate *first* must pass identical appropriations bills – and such bills then must become law – *before* any public funds may be expended. *See* U.S. Const. art. I, § 1; §7 cl. 2; §9, cl. 7. Put another way, the House's affirmative vote is a necessary precondition of any expenditure by the Executive of public funds.

When the Executive expends public funds in the *absence* of any congressional enactment appropriating funds for such expenditures, as defendants have done here, the House is directly injured by being divested utterly and completely of its most defining constitutional function and power. This injury, which essentially reduces the House to the role of bystander, is not only concrete and particularized, it is so enormously damaging to the House as an institution that it is impossible to overstate. Indeed, if stripping the House of its constitutional function of voting affirmatively to appropriate public funds *before* defendants hand out $175 billion in Section 1402 Offset Program payments does not constitute an injury to the House – as defendants contend – then the concept of Article III institutional injury would have no meaning.

Defendants' actions also impair other core Article I powers that the Constitution has entrusted to the House. *See, e.g.*, U.S. Const. art. I, § 1, and § 7, cl. 2. In particular, if the Executive is free to spend public funds at will, it also can create programs and agencies at will, gutting the House's constitutional role in creating and funding, through legislation, such programs and agencies. *See, e.g.*, Stith, 97 Yale L.J. at 1356 ("If the Executive could avoid limitations imposed by Congress in appropriations language . . . this would vitiate the

foundational constitutional decision to empower Congress to determine what actions [i.e., programs and functions] shall be undertaken in the name of the [U.S.]."). Similarly, the Executive could effectively force Congress to adopt legislation raising taxes and borrowing money. "[T]he constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught [if the Executive could spend without appropriations] because the Executive could effectively compel such legislation by spending at will." *Id.* at 1349.

In short, if defendants are free to pass out public funds in the absence of any constitutionally-enacted appropriation, the House's core Article I functions just simply wither away. That is an Article III injury, indisputably caused by defendants, and remediable by a favorable judicial ruling. Accordingly, the House has Article III standing.

2. Defendants Have Injured the House by Nullifying Its Prior Legislative Decisions to Withhold Funding for the Section 1402 Offset Program.

As we explained earlier, the House elected to not appropriate funds for the Section 1402 Offset Program when (i) Congress enacted the ACA, *see supra* Factual Background, Part I.A.; (ii) the Administration expressly requested such an appropriation for Fiscal Year 2014, *see supra* Factual Background, Part I.B.; and (iii) Congress declined to appropriate funds for Fiscal Year 2015, *see id*. Defendants' payments to Insurers, in the face of these repeated congressional decisions to not appropriate funds, injure the House by nullifying its prior legislative decisions.

The Supreme Court long has recognized that legislators have standing to defend the effect of their legislative decisions. For example, in *Coleman v. Miller*, 307 U.S. 433 (1939), 20 members of the Kansas Senate voted for ratification of a proposed amendment to the U.S. Constitution, and 20 members voted against ratification. The Lieutenant Governor, in his role as presiding officer of the Senate, cast the tie-breaking vote in favor of ratification, and a majority of the Kansas House of Representatives also voted for ratification. *Id.* at 436. A group of state

legislators, including all 20 state senators who voted against ratification, then sued, alleging that the Lieutenant Governor did not have the right to cast a vote. *Id*. After they lost in the Kansas Supreme Court, the U.S. Supreme Court took the legislators' case and concluded that, if they were correct on the merits, their votes against ratification had been "overridden and held virtually for naught," and that such vote nullification gave them an "adequate interest to invoke [the Court's] jurisdiction." *Id.* at 438. As the Court explained later, "*Coleman* stands for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823.

This case presents the same type of nullification injury the Supreme Court recognized in *Coleman* (and reaffirmed in *Raines*). The House has decided, on multiple occasions, that it would *not* adopt legislation appropriating funds for the Section 1402 Offset Program; that is, it institutionally determined – by not voting to enact such appropriations legislation – that defendants would be denied the funds to make any Section 1402 Offset Program payments. By ignoring those repeated congressional judgments and passing out billions to Insurers, defendants have injured the House by nullifying its prior legislative decisions.

Because defendants indisputably are the cause of the House's injury, and the injury is remediable by a favorable judicial ruling, the House has Article III standing.

3. Defendants Have Injured the House by Negating Its Ability to Use the Power of the Purse to Check the Executive.

We explained earlier that Congress's power of the purse is crucial to its ability to fulfill its constitutional role as a check on the other branches, particularly the Executive, in our separated powers system of government. *See supra* Constitutional & Statutory Context, Part I. The Executive itself frequently has acknowledged the importance and availability of that

checking function. "Congress, of course, has a variety of means by which it can exert pressure on the Executive Branch, such as . . . reducing Executive Branch appropriations[] . . . ." Mem. in Supp. of [White House Counsel's & White House Chief of Staff's] Mot. to Dismiss and in Opp'n to [House]'s Mot. for Partial Summ. J. . . . . at 9, *Miers*, No. 1:08-cv-00409 (D.D.C. May 9, 2008) (ECF No. 16-1) ("White House *Miers* Memorandum"); *see also* Mem. in Supp. of [Attorney Gen.'s] Mot. to Dismiss at 29, *Holder*, No. 1:12-cv-01332 (D.D.C. Oct. 15, 2012) (ECF No. 13-1) ("DOJ *Holder* Memorandum") ("[The House] can legislate change within the Department of Justice, or slash the budget in the area of concern." (citations omitted)). Indeed, judges sometimes have cited Congress's ability to check the Executive through its use of the power of the purse in declining to intervene in some conflicts between the branches. *See, e.g.*, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (citing *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)).

But when defendants pay billions to Insurers *in the absence of legislation* appropriating funds for those payments – as defendants are doing here and as they will continue to do unless the Court steps in and stops the Executive from brazenly aggrandizing its power at the expense of the Legislative Branch – that checking power just disappears. The House cannot use its power of the purse to check the Executive if the Executive is free to dole out public funds without any congressional appropriation. That is an institutional injury to the House of the most profound nature and proportion because if the Executive can spend without appropriations, "congressional action in the area of spending – traditionally perhaps its single most important responsibility – [would be rendered] merely advisory or prohibitory." Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505, 1514 (1973). Under such circumstances:

> [T]he American people will sense the futility of appealing to their elected representatives. They will conclude that the executive branch is the only

> significant arena for policymaking. This undermining of confidence in the ability of Congress to act with authority on appropriations will eventually destroy public reliance on that representative body and thereby increase the power and authority of the executive to the detriment of our tradition of separate institutions acting as checks and balances on one another.

Frank Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Executive Discretion*, 22 Stan. L. Rev. 1240, 1250 (1970); *see also* Rotunda Article ("If the Executive Branch can get away with [spending money Congress has not appropriated], we will find that Congress's power of the purse is about as effective a restraint on Executive Power as handcuffs made of paper.").

Because defendants indisputably are the cause of the House's injury, and the injury is remediable by a favorable judicial ruling, the House has Article III standing.

4. Defendants Have Injured the House by Impairing Its Investigative and Oversight Functions.

The House's authority to investigate and oversee the Executive flows directly from its Article I legislative function. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("[T]he scope of [Congress's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry . . . is an essential and appropriate auxiliary to the legislative function.").[17] That investigative and oversight authority is extremely broad. *See, e.g.*, *Barenblatt v. U.S.*, 360 U.S. 109, 111 (1959) ("The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate[]

[17] *See also* Woodrow Wilson, *Congressional Government* 195, 198 (Dover Publ'ns 2006) (1885) ("Quite as important as legislation is vigilant oversight of administration . . . . It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it seeks. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.").

. . . ."); *Watkins v. U.S.*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.").

One tool the House possesses to pressure the Executive to provide information in furtherance of the House's oversight and investigative role – albeit a blunt and not always wholly effective tool – is the power of the purse, as the Executive itself repeatedly has argued. *See, e.g.*, DOJ *Holder* Mem. at 29 (arguing court should find House committee lacked standing to enforce committee subpoena to Attorney General because House can pressure Executive for information by "slash[ing its] budget"); White House *Miers* Mem. at 9 (same). This tool has taken on greater importance in recent years as the Executive's willingness to thumb its nose at congressional subpoenas – coupled with its refusal to prosecute Executive officials held in contempt of Congress for refusing to comply with congressional subpoenas – has increased dramatically.[18]

"[I]t [is] well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *Census Case*, 11 F. Supp. 2d at 86; *see also AT&T I*, 551 F.2d at 391 ("[T]he House as a whole has standing to assert its investigatory power[] . . . ."); *Holder*, 979 F. Supp. 2d at 20 (same); *Miers*, 558 F. Supp. 2d at 71 (recognizing that "loss of information to which [a House

[18] For example, in 2007, former White House Counsel Harriet Miers and then-White House Chief of Staff Joshua Bolten both refused to comply with subpoenas issued by the House Committee on the Judiciary. The House held both in contempt, the U.S. Attorney refused to present the matter to a grand jury (notwithstanding his obligation to do so, *see* 2 U.S.C. § 194), and the Committee was forced to sue civilly to enforce its subpoena. *See Miers*, 558 F. Supp. 2d at 57-64. Similarly, in 2012, the Attorney General refused to comply with a subpoena issued by the House Committee on Oversight and Government Reform. The House held him in contempt, the U.S. Attorney refused to present the matter to a grand jury (again, notwithstanding his statutory obligation to do so), and the Committee was forced to sue civilly to enforce its subpoena. *See Holder*, 979 F. Supp. 2d at 5-7.

committee] is entitled and the institutional diminution of its subpoena power" are cognizable injuries for purposes of Article III). It follows that eliminating the tool that is, the House's ability to use its power of the purse to help secure the Executive's compliance with demands for information the House needs to discharge its oversight and investigative duties – as defendants have done here – plainly constitutes an institutional injury for purposes of Article III.

Because defendants indisputably are the cause of the House's injury, and the injury is remediable by a favorable judicial ruling, the House has Article III standing.

B. Defendants Lew and Treasury Have Injured the House by Nullifying the Employer Mandate Provisions of the ACA.

Defendants Lew's and Treasury's unilateral rewrite of section 1513(d) of the ACA and section 4980H of the IRC, *see* Factual Background, Part II.B, also causes Article III institutional injury to the House because, as in *Coleman*, their actions effectively nullified the House's vote on certain key provisions of the ACA.

Raines makes clear that *Coleman* provides a basis for congressional plaintiff standing when congressional plaintiffs suffer an institutional injury which is not "abstract and widely dispersed," including an institutional injury amounting to vote nullification. *Raines*, 521 U.S. at 825-26, 829 (citing *Coleman*, 307 U.S. 433); *see also Census Case*, 11 F. Supp. 2d at 89 ("[L]egislative standing survives in cases in which the injury to a legislator (or legislative entity) is personal, or where the institutional injury alleged is not 'wholly abstract and widely dispersed.'" (quoting *Raines*, 521 U.S. at 829)). In *Raines* itself, the Court was persuaded that vote nullification did not occur because the individual legislators there "simply lost th[e] vote" over the legislation they attacked. 521 U.S. at 824. Here, the situation is just the opposite: The vote was won, not lost, and the House seeks to prevent that vote from being nullified.

In addition, there is a fundamental difference between individual legislators asking the judiciary to invalidate a law passed by a majority of their colleagues, and the institution of the House seeking to ensure that the Executive does not cavalierly rewrite laws Congress has passed in order to satisfy some particular political expediency of the moment. *Cf. INS v. Chadha*, 462 U.S. 919, 1000 (1983) ("[T]he Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written."). Indeed, the House's case for standing here is, if anything, *stronger* than the state legislators' case for standing in *Coleman* inasmuch as the House is suing as an institution, while the state legislators in *Coleman* were not.

Defendants try to distinguish *Coleman* on the ground that that case was not originally brought in federal court, and did not raise separation of powers concerns. *See* Defs.' Mem. at 20-23. The first point is true, the second is not (the case involved separation of powers issues on the state level), but, in any event, neither is relevant. The material fact is that *Coleman* concerned the standing of legislators whose votes – if they were correct on the merits – had been nullified by Executive action. So too here.[19]

What is most troubling about defendants' position is that it contains no limiting principle. Under their logic, for example, the Executive could waive enforcement of the tax laws on a wholesale basis – "in the interest of economic relief to the American people, the Treasury Department will institute no tax collection proceedings of any kind until further notice" – and the House could not enter the courthouse to seek judicial relief. If the Executive can simply excise or change express conditions as a matter of discretion, then Article I itself becomes discretionary

[19] *Raines* rejected arguments advanced by the Solicitor General in that case similar to those defendants advance here. Instead, the Court recognized the "importance" of the fact that the individual Member plaintiffs brought suit in *Raines* without authorization from their respective houses (unlike here), 521 U.S. at 829, a fact that would have no "importance" to the *Raines* Court if *Coleman* always were inapplicable to suits brought by federal legislators, as defendants suggest.

for any president who disagrees with the results of the legislative process. In this case, defendants' unilateral rewrite of section 1513(d) of the ACA and section 4980H of the IRC was not simply a postponement of a rollout date, it was a wholesale waiver of compliance with the ACA for a substantial percentage of the Nation's employers. That is vote nullification writ large.

In short, the rewriting of section 1513(d) of the ACA and section 4980H of the IRC by defendants Lew and Treasury injures the House by nullifying its vote on the ACA. That injury indisputably is caused by defendants Lew and Treasury and is remediable by a favorable judicial ruling. Accordingly, the House also has standing on the Nullification Counts of its Complaint.

C. Defendants' Standing Arguments Are Unsupported by Either Law or Logic.

Defendants advance a series of flawed arguments in support of their contention that the House lacks standing. We address and refute each in turn.

1. Defendants Mischaracterize the Nature of This Suit.

Initially, defendants mischaracterize this suit as a dispute concerning whether "the Executive Branch is implementing statutory provisions[] . . . in a manner different from what the current House would prefer." Defs.' Mem. at 2; *see also id.* at 1 (dispute concerns allegations that "Executive Branch has misapplied federal law"); *id.* at 2 (case is "generalized institutional dispute between the Executive Branch and one chamber of the Legislative Branch concerning the proper interpretation of federal law"); *id.* at 12 (dispute concerns "implementation of federal law"); *id.* at 13 (dispute concerns "execution of federal law"); *id.* at 16-17 ("The House[']s suit is] . . . premised on its disagreement with the Executive Branch's implementation of that law.").

The inaccuracy of these characterizations is apparent from the face of the Complaint. With respect to the Non-Appropriation Counts in particular, *the House alleges that defendants are acting in the absence of any federal law*, i.e., in the absence of any appropriations legislation that is a constitutional precondition for the Section 1402 Offset Program payments defendants

have made and are continuing to make, and that these actions are causing grave institutional injury to the House. *See* Compl. ¶¶ 25-41, 51-90; *see also supra* Argument, Part I.A. That is anything but a garden variety dispute between the political branches over the "implementation" or "proper interpretation" of federal laws.

Similarly, the Nullification Counts allege that defendants Lew and Treasury have violated the Constitution by effectively rewriting, through the regulatory process, certain ACA Employer Mandate provisions. *See* Compl. ¶¶ 42-50, 91-108. While those counts do concern statutory provisions that have been enacted, the dispute self-evidently is not about "implementation" or "interpretation." It is about encroachment and aggrandizement, the very dangers the separation of powers principle and an independent judiciary were created to address. *See supra* Constitutional & Statutory Context, Part I & note 15.

As we explained above, in resolving defendants' standing arguments, the Court must assume the House has stated viable claims. *See supra* Applicable Legal Standards. Defendants may not assume away the merits of those claims – whether by mischaracterizing them or otherwise – to defeat the House's standing.

2. Defendants' Alternative Remedies Argument Is Wrong.

Defendants next argue, incorrectly, that the Court should hold that the House does not have standing because alternative non-judicial remedies are available to it. *See* Defs.' Mem. at 19-20.

As an initial matter, the non-judicial remedies defendants identify are difficult to take seriously. For example, they suggest the House could "refus[e] to confirm Presidential appointees." Defs.' Mem. at 19 (quoting *U.S. v. Windsor*, 133 S. Ct. 2675, 2704-05 (U.S. 2013) (Scalia, J., dissenting)). However, the confirmation power belongs to the Senate alone. *See* U.S.

Const. art. II, § 2, cl. 2. Defendants also say – apparently oblivious to the irony – that the House "could repeal or amend the terms of the . . . appropriations authority that it has vested in the Executive Branch," or "eliminat[e] . . . funding." Defs.' Mem. at 19-20. The whole point of the Non-Appropriation Counts, of course, is that *Congress has not vested defendants with any appropriations authority* with respect to the Section 1402 Offset Program in the first place. Accordingly, there is nothing to "repeal or amend" or "eliminate." Furthermore, the implication of this suggestion – that defendants may spend what they want on the Section 1402 Offset Program *unless and until* Congress enacts a law prohibiting such spending (presumably over a Presidential veto) – turns the Constitution inside out. The Appropriations Clause, by its plain terms, already bars defendants from expending any public funds "but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Congress is not required to pass a law to prevent defendants from doing what the Constitution already expressly forbids.[20]

More importantly, defendants' alternative remedies argument is beside the point, both because it has no bearing on whether the House has suffered an institutional injury and therefore has Article III standing (it has and does), and because it is not a reason for this Court to abstain from discharging its constitutionally-mandated function.

> Where the dispute consists of a clash of authority between the two branches[] . . . judicial abstention does not lead to orderly resolution of the dispute. . . . If negotiation fails as in a case where one party, because of chance circumstance,

[20] The same thing is true of defendants' suggestion that Congress "repeal or amend the terms of the regulatory . . . authority that it has vested in the Executive Branch," Defs.' Mem. at 19, to stop defendants from rewriting statutes Congress has enacted. Congress need not pass laws to prevent the Executive from doing something – legislating – the Constitution already prohibits it from doing. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *see also Chadha*, 462 U.S. at 1000 ("[T]he Article II mandate for the President to execute the law is a directive to enforce the law which Congress has written."); *Youngstown*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

> has no need to compromise a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government.

U.S. v. AT&T, 567 F.2d 121, 126 (D.C. Cir. 1977). Access to the courts is simply not dependent on the availability of other options, and we are aware of no decision that says litigation must be the only available option.

3. The Special Anti-Standing Rules Defendants Propose for This Particular Case Must Be Rejected.

Defendants next propose a series of special rules designed to ensure that the House not have standing in this particular case. For example, they say the House lacks standing because it is attempting to defend the "Article I Legislative Power," a power that "is not one that the House may exercise on its own." Defs.' Mem. at 15. That is wrong. The House is an independent, constitutionally necessary actor in the legislative process, *see* U.S. Const. art. I, § 7, cl. 2, and it need not be joined by the Senate to litigate, *see, e.g.*, *Windsor*, 133 S. Ct. 2675 (House intervened to defend Defense of Marriage Act; Senate did not); *Adolph Coors Co. v. Brady*, 944 F.2d 1543 (10th Cir. 1991) (House intervened to defend Federal Alcohol Administration Act; Senate did not); *Census Case*, 11 F. Supp. 2d 76 (House challenged Executive's use of statistical sampling to conduct decennial census; Senate did not); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) ("A group of [state] senators . . . had the right to intervene. The concurrence of the [state] house was not necessary as it would have been to enact legislation."); *see also* Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 983 n.43 (1983) ("Defense of a statute by one house of Congress (as opposed to a defense undertaken by Congress as a whole) is consistent with the constitutionally independent roles of each house with respect to the other."). Defendants have not cited any authority for the proposition that the two houses of Congress must litigate together, and we are not aware of any.

Defendants also posit that the House lacks standing because the injury alleged in the Complaint is an injury to the House of the 111th Congress (Jan. 2009-Jan. 2011), when the ACA was adopted by Congress. *See* Defs.' Mem. at 15 n.5. This suggestion is bizarre. *First*, the House is not a continuing body and, therefore, the House of the 111th Congress, which no longer exists, can neither suffer injury nor be a party to litigation. *See, e.g.*, *Eastland*, 421 U.S. at 512 ("[T]he House, unlike the Senate, is not a continuing body . . . ."); *AT&T I*, 551 F.2d at 390 ("Unlike the Senate which is a continuing body, . . . th[e] House ends with its adjournment . . . ."); *Miers*, 558 F. Supp. 2d at 97 ("Unlike the Senate, the House is not a continuing body."). *Second*, the institutional injuries which undergird the House's standing in this case, *see supra* Argument, Part I.A-B, do not turn on when the ACA was enacted or which Members voted for or against the legislation. Those injuries are being experienced by the institution as it now is constituted and, accordingly, the House as it now is constituted has standing to sue. *Cf. Census Case*, 11 F. Supp. 2d at 88 (rejecting Executive Branch argument that injury caused by statistical sampling would be experienced only by future, not yet extant, Houses, and would not be experienced by current House: "[T]he [current] House of Representatives is a proper plaintiff.").

Finally, defendants say that a claim of "abstract dilution of institutional legislative power" is insufficient to establish Article III standing. Defs.' Mem. at 9 (citing *Raines*, 521 U.S. at 826). This is a straw man, because the House does not rest its assertions of Article III injury on an "abstract dilution of institutional legislative power." *See supra* Argument, Parts I.A-B. Indeed, there is nothing "abstract" about (i) the House's being cut out of its Appropriations Clause function, and thereby deprived on one of its most significant constitutional powers; (ii) the nullification of the House's prior legislative judgments to not appropriate funds for the Section 1402 Offset Program; (iii) the negating of the House's ability to use the power of the

purse to check the Executive; (iv) the elimination of the tool that is the House's ability to use the power of the purse to help secure compliance from the Executive with demands for information; or (v) the nullification of the House's vote on the Employer Mandate provisions of the ACA.[21]

II. The House Has a Cause of Action.

Defendants also argue, half-heartedly, that the House lacks a cause of action. *See* Defs.' Mem. at 23-24. That is incorrect. The House has causes of action under (i) the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 ("DJA"); (ii) the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* ("APA"); and (iii) the Constitution.

A. The House Has a Cause of Action under the Declaratory Judgment Act.

Defendants devote all of one paragraph to their "no DJA-cause-of-action" argument. *See* Defs.' Mem. at 23. This is not surprising; the Executive has advanced the same argument in past legal disputes with the Legislative Branch, and always has lost. *See, e.g.*, *Holder*, 979 F. Supp. 2d at 22-24; *Miers*, 558 F. Supp. 2d at 84-88. The DJA's plain language and purpose, as well as the Supreme Court's unwavering application of the DJA (even where no other cause of action exists), all support the same result here.

Plain Language. The plain language of the DJA – which must "be liberally construed to achieve the objectives of the declaratory remedy," *Miers*, 558 F. Supp. 2d at 82 (quoting

[21] Defendants' reliance on *Raines* is misplaced because that case concerned only *individual* legislators' standing, not the standing of a house of Congress as an institution. Indeed, all the D.C. Circuit cases defendants cite involved individual legislators, rather than institutional plaintiffs. *See* Defs.' Mem. at 14-15, 19-22, 26 (citing *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977)). Furthermore, as we already have explained, *Raines* supports, rather than undercuts, the House's standing in this case. *See supra* Argument, Part I.B. In particular, the Supreme Court there concluded that the individual legislators lacked standing because – unlike here – the injury they asserted was not to "themselves as individuals," but rather was an injury suffered by the *institution*. 521 U.S. at 829. And the Court emphasized that the individual legislators "ha[d] not been authorized to represent their respective Houses of Congress in th[e] action." *Id*. Here, of course, quite the opposite is true. *See supra* Factual Background, Part III.

McDougald v. Jenson, 786 F.2d 1465, 1481 (11th Cir. 1986)) – makes clear that, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought, 28 U.S.C. § 2201(a); *see also* Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment . . . .").

Thus, to be entitled to bring suit under the DJA, the House need only demonstrate (1) "a case of actual controversy," i.e., that it has standing, which it does, *see supra* Argument, Part I; (2) that this Court has jurisdiction, which it does, *see* Compl. ¶ 6, a point defendants do not contest; and (3) that the Committee filed "an appropriate pleading," which clearly it did, *see* Compl. Having established those three elements, the House is entitled, "whether or not further relief is or could be sought," to have its "rights and other legal relations" declared, 28 U.S.C. § 2201(a); specifically, the "rights and other legal relations" that stem from the authority granted to the House under Article I, as well as the limits placed on defendants' expenditure of public funds by Article I, 31 U.S.C. § 1324, and ACA § 1402.

Supreme Court Precedent. The Supreme Court has proceeded for more than 60 years under the premise that the DJA creates a cause of action, and it has articulated only two limitations to the application of that statute. First, the Court has held that the DJA does not provide federal courts with an independent source of *jurisdiction*. *See, e.g.*, *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)). Second, the Court has said there must be an "actual case or controversy" before the judiciary may review a party's action under the DJA. *See, e.g.*, *Coffman v. Breeze Corps.*, 323

U.S. 316, 324 (1945); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272 (1941); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-41 (1937).

The Court never has expressed doubt that a party that meets the statutory elements, as the House does here, has a *cause of action* for declaratory and other ancillary relief. Indeed, the Court has entertained many suits where no traditional cause of action had accrued. For example, *Haworth* concerned an action brought by an insurer for a declaration that several policies held by the defendant had lapsed and that the insurer only was responsible for a minimum payment upon the defendant's death (which had not yet occurred). *See Haworth*, 300 U.S. at 237-38. The Court held that the DJA provided the insurer with a right to seek declaratory relief. *Id.* at 242 ("[This case] calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts."). With each prerequisite met, the Court held that "the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the [DJA]." *Id.* at 244.

So too here. The House asserts that defendants have overstepped their constitutional and statutory authority in ways that cause institutional injury to the House. *See* 28 U.S.C. § 2201(a). Defendants appear to deny those allegations, and the Complaint is the "appropriate pleading" that brings the dispute before this Court. *Id*. The House has standing, *see supra* Argument, Part I, and, under the terms of the DJA, *nothing more is necessary*. This case is "manifestly susceptible of judicial determination. It calls[] . . . for an adjudication of present right upon established facts." *Haworth*, 300 U.S. at 242. The DJA itself makes clear that no other cause of action need exist: "[C]ourt[s] . . . may declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

Purpose. The DJA was enacted primarily to create a cause of action in cases where there may be "no existing cause of action upon which a hearing could be had at the time; but there is a substantial controversy as to the [legal rights involved]." 69 Cong. Rec. 1683 (1928).[22] Defendants cite two cases, but those cases actually highlight the distinctions between this case and those where resort to the DJA is not allowed: *C&E Servs. Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201-02 (D.C. Cir. 2002) (when Congress expressly precludes a judicial remedy, DJA cannot provide one); *Gem Cnty. Mosquito Abatement Dist. v. EPA*, 398 F. Supp. 2d 1, 12 (D.D.C. 2005) (DJA does not create jurisdiction). Here, no statute precludes a judicial remedy for the House, and defendants do not dispute that this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1345. *See* Compl. ¶ 6. Accordingly, the House has a cause of action under the DJA. *Accord Miers*, 558 F. Supp. 2d at 85 (noting that DJA supplied cause of action in case where *Executive* sought to block congressional action: "The difference between that case and this one is that the parties are reversed; here, the House stands in the position of the plaintiff and the Executive is the defendant. This Court fails to see why that fact should alter the DJA analysis in any material respect.") (*citing U.S. v. House of Representatives*, 556 F. Supp. 150, 151-53 (D.D.C. 1983))).

B. The House Has a Cause of Action under the Administrative Procedure Act.

The House also a cause of action under the APA with respect to Count V of the Complaint which alleges defendants' Section 1402 Offset Program payments to Insurers are: (i) "not in accordance with law" within the meaning of APA § 706(2)(A); (ii) "contrary to

[22] *See also* Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action & Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. Rev. 529, 582-83 (1989) (DJA provides cause of action where none existed before); *Developments in the Law: Declaratory Judgments – 1941-1949*, 62 Harv. L. Rev. 787, 808 (1949) (DJA "sanctions the trial of controversies before a conventional cause of action has accrued and another remedy has become available" (emphasis added)).

constitutional right, power, privilege, or immunity" within the meaning of APA § 706(2)(B); and (iii) "in excess of statutory jurisdiction, authority, or limitation, or short of statutory right" within the meaning of APA § 706(2)(C). Compl. ¶¶ 84-86; *see also id.* Count V.

The APA plainly creates a cause of action for all parties – including the House – aggrieved by agency conduct encompassed by APA § 706(2). *See* 5 U.S.C. §§ 702, 704, 706(2) (empowering courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," and to "hold unlawful and set aside agency action[s]"). Defendants do not, because they cannot, suggest otherwise. *See* Defs.' Mem. (no mention of APA).

C. The House Has an Implied Cause of Action under the Constitution.

Finally, the House has an implied cause of action directly under the Constitution. As the Court is aware, the judiciary is more willing to imply causes of action under the Constitution than it is to imply causes of action under federal statutes:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions or other public causes of actions. In each case, however, the question is the nature of the legislative intent informing a specific statute[] . . . .
>
> The Constitution, on the other hand, does not "partake of the prolixity of a legal code." *McCulloch v. Maryland*, [17 U.S. (4 Wheat.) 316, 407 (1819)]. It speaks instead with a majestic simplicity. One of "its important objects," is the designation of rights. And in "its great outlines," *the judiciary is clearly discernible as the primary means through which these rights may be enforced.*

Davis v. Passman, 442 U.S. 228, 241 (1979) (emphasis added); *see also Miers*, 558 F. Supp. 2d at 88 ("[t]he inquiry involved in implying a cause of action from the Constitution itself[] . . . is much different" than inquiry involved in implying cause of action under a statute).

In *Marshall v. Gordon*, 243 U.S. 521 (1917), the Supreme Court established a framework for implying remedies pursuant to Congress's Article I powers:

> [T]he implied power . . . rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed.

Id. at 542. This case concerns just such a right of self-preservation. Defendants have acted without Congress – by expending billions of dollars in public funds absent any appropriation to make those payments, and by effectively rewriting statutory provisions not to their liking – notwithstanding Article I of the Constitution. Those actions strike at the very heart of the House's *express* Article I legislative and "guardian of the purse" powers. Under these circumstances, the Court may and should imply – under the very same Constitution that vested those powers in Congress in the first place – a cause of action for the House to vindicate its authorities and its role in our constitutional form of government. *See Holder*, 979 F. Supp. 2d at 17 (implying, under Constitution, cause of action for congressional committee to vindicate Congress's power to investigate, which power is implied from Congress's general legislative authority); *Miers*, 558 F. Supp. 2d at 89-91 (same).

III. The Court Should Reach the Merits of the House's Claims.

Defendants' final argument is an appeal to the Court's discretion. They say the Court, even if it concludes that the House has standing and a cause of action, nevertheless should exercise its discretion – whether under the DJA or a doctrine known as "equitable discretion" – to decline to hear this case. *See* Defs.' Mem. at 24-26. The Court should reject this argument, which largely recycles the same abstract arguments defendants have raised elsewhere in their quest to escape judicial review. *See supra* Argument, Part I.C.

> Resolution of the discretion issue under the DJA turns on
>
> whether [declaratory relief] would finally settle the controversy between the parties; whether other remedies are available or other proceedings pending; the convenience of the parties; the equity of the conduct of the declaratory judgment plaintiff; prevention of "procedural fencing"; the state of the record; the degree of adverseness between the parties; and the public importance of the question to be decided.

Mittleman v. U.S. Dep't of the Treasury, 919 F. Supp. 461, 470 (D.D.C. 1995) (quotation omitted); *see also Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 670 F. Supp. 424, 431 (D.D.C. 1987) ("Two criteria are ordinarily relied upon to determine whether a court should, in its discretion, render a declaratory judgment: (1) whether the judgment will 'serve a useful purpose in clarifying the legal relations in issue' or (2) whether the judgment will 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" (quoting *President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980))).[23] Here, these factors weigh heavily in favor of the Court exercising its discretion to reach the merits, just as they did in other cases involving congressional plaintiffs. *See, e.g.*, *Holder*, 979 F. Supp. 2d at 24-26; *Miers*, 558 F. Supp. 2d. at 94-99.

The issues the House raises here unquestionably are of enormous public importance, and the Court's rendering a declaratory judgment here will "serve a useful purpose in clarifying the legal relations in issue." *Nat'l R.R.*, 670 F. Supp. at 431 (quoting *Vance*, 627 F.2d at 364 n.76). This dispute concerns the limits on Executive Branch intrusion into Congress's legislative domain. By determining whether (i) defendants are precluded from spending public funds absent an appropriation, *see* Compl. ¶¶ 51-90 (Non-Appropriation Counts), and (ii) defendants Lew and Treasury are precluded from rewriting federal legislation by way of the regulatory process, *see*

[23] *See also* Fed. R. Civ. P. 57 advisory committee's note ("A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise on undisputed or relatively undisputed facts[] . . . .").

id. ¶¶ 91-108 (the Nullification Counts), a declaratory judgment will resolve the legal controversy between the parties. For the same reasons, a declaratory judgment here will terminate the "uncertainty, insecurity, and controversy giving rise to the proceeding." *Nat'l R.R.*, 670 F. Supp. at 431 (quoting *Vance*, 627 F.2d at 364 n.76).

Defendants' second "discretion" argument is that this Court should stand aside because this is a "political dispute." Defs.' Mem. at 25. This is a recycled version of the self-serving arguments we already have addressed. *See supra* Argument, Part I.C. It also is the same argument the Executive always trots out when it does not wish to answer Legislative Branch charges that the Executive has run roughshod over the Constitution. *See, e.g.*, *Holder*, 979 F. Supp. 2d at 25-26 (rejecting argument); *Miers*, 558 F. Supp. 2d at 95-97 (same).

In any event, (i) the "equitable discretion" doctrine only ever applied to suits brought by individual legislators, *see, e.g.*, *Dornan v. U.S. Sec'y of Def.*, 851 F.2d 450 (D.C. Cir. 1988) (per curiam); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983), as opposed to suits authorized and filed by an institution of Congress, like this suit; and (ii) the doctrine has no vitality after *Raines* because individual legislators no longer have standing to assert institutional injuries in the first instance, *see, e.g.*, *Campbell*, 203 F.3d 19; *Chenoweth*, 181 F.3d 112; *Kucinich*, 236 F. Supp. 2d 1.

CONCLUSION

For all of the foregoing reasons, defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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February 27, 2015

CERTIFICATE OF SERVICE

I certify that on February 27, 2015, I served one copy of the foregoing Opposition of the United States House of Representatives to Defendants' Motion to Dismiss the Complaint via CM/ECF on all registered parties.

/s/ Jonathan Turley
Jonathan Turley