No. 16-5202

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

UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

U.S. District Judge Rosemary M. Collyer
Case No. 1:14-cv-01967

MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION AND BACKGROUND

"The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Among those interlocking reforms, "the Act gives tax credits to certain people to make insurance more affordable." *Id.*

The Act provides two forms of subsidies that reduce the cost of obtaining health care for lower income individuals and their families. First, premium assistance tax credits under Section 1401 (26 U.S.C. § 36B), reduce the cost of monthly insurance premiums. Second, cost-sharing reductions under Section 1402 (42 U.S.C. § 18071), reduce the cost of obtaining covered medical services by lowering deductibles, copays, and annual maximum contributions by insureds. The individual's insurance company pays to the health care provider the amount of cost-sharing that otherwise would be owed by the individual, and the insurer is then reimbursed by the federal government. *See* 42 U.S.C. § 18071 (Section 1402); Appellants' Opening Br. 7.

This case involves the Executive Branch's administration of the Section 1402 cost-sharing reductions. Since January 2014, the Department of the Treasury has been making monthly payments reimbursing insurers

for the insurers' payment of these reductions from the permanent appropriation in 31 U.S.C. § 1324. Appellee U.S. House of Representatives ("House") filed this lawsuit against the Secretary of Health and Human Services and the Secretary of the Treasury claiming that the payments are not authorized by Section 1324. The District Court agreed and entered an injunction barring the payments, which it stayed pending appeal, and the Secretaries appealed.

On November 21, 2016, the House filed a motion to hold briefing in abeyance, stating that its "representatives and the President-Elect's transition team currently are discussing potential options for resolution of this matter, to take effect after the President-Elect's inauguration on January 20, 2017." Appellee's Mot. to Hold Briefing in Abeyance at 1. The House further stated that

> [t]he relatively short stay requested by [the House] would provide the incoming President and his appointed officials time to decide whether withdrawal or settlement of the appeal is warranted. In light of public statements by the President-Elect and his campaign, there is at least a significant possibility of a meaningful change in policy in the new Administration that could either obviate the need for resolution of this appeal or affect the nature and scope of the issues presented for review.

Id. at 3-4. This Court granted the motion on December 5, 2016. Per Curiam Order (Dec. 5, 2016).

An agreement between the new Administration and the House to allow the District Court's injunction to take effect—either by dismissing this appeal or by entering into a settlement providing that the injunction will take effect at some specified time in the future—will produce devastating consequences for the individuals who receive these reductions, as well as for the Nation's health insurance and health care systems generally.

Recipients of the cost-sharing reductions who purchased health care insurance policies for 2017 will likely face early termination of those policies, because the federal government permits insurers to leave the exchanges in the event cost-sharing reimbursement payments cease. (The laws of some States might prohibit insurers from leaving the exchanges or otherwise prohibit early termination of policies, but it is not at all clear how those laws would apply in a situation in which barring termination could risk insurer insolvency.) Even if the policies are not terminated, cost-sharing reduction recipients face significant injury, because insurers may not be able to afford to continue to pay health care providers in the absence of reimbursement by the federal government.

Whatever happens with respect to 2017 health insurance policies, elimination of the reimbursements means that insurers are highly likely to exit the market at the end of that year in order to avoid the obligation to

pay un-reimbursed cost-sharing reductions. That would mean higher cost or unavailability of health insurance for future years.[1]

Movants Gustavo Parker and La Trina Patton are two of the approximately 5.9 million people[2] who obtain their health insurance coverage through the Act's exchanges, and who are eligible to receive cost-sharing reductions under Section 1402.[3]

Movants will be injured substantially if the district court judgment is permitted to enter into effect. Until recently, Movants' interests were aligned with the interests of the Executive Branch, which has advocated for a construction of Section 1324 that permits the continued payment of the cost-sharing reimbursements to insurers. But the statements in the House's recent motion indicate that the Executive Branch could well

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[1] The general adverse consequences for the health insurance and health care systems are described in Appellants' opening brief (at 50-53) and in several of the amicus briefs filed in support of appellants. *See, e.g.*, Econ. & Health Policy Scholars Amicus Br. 7-22; Am. Hosp. Ass'n et al. Amicus Br. 5-18.

[2] Centers for Medicare & Medicaid Services, *First Half of 2016 Effectuated Enrollment Snapshot* (Oct. 19, 2016), *available at* https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-10-19.html.

[3] The declarations of each Movant, attached to this motion, demonstrate that each Movant has enrolled for health insurance coverage for 2017 and qualifies for cost-sharing in 2017 through health insurance purchased on an insurance exchange.

change position after January 20, 2017, and enter into an agreement to dismiss the appeal or otherwise agree that the District Court's injunction may take effect. Movants appear here to defend their interest in continued payment of the cost-sharing reimbursement and therefore respectfully request that this Court permit them to intervene.[4]

ARGUMENT

I. Movants Are Entitled to Intervention as of Right.

Intervention in the court of appeals "is governed by the same standards as in the district court." *Mass. Sch. of Law at Andover, Inc. v. United*

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[4] To be sure, the House and the new Administration may use other means to eliminate the cost-sharing payments reimbursing insurers:

- Congress could enact and the President could sign a law expressly precluding such expenditures. That would render this case moot and require this Court to vacate the decision below and remand the case to enable the district court to dismiss the action as moot.

- The President could direct the relevant agencies to interpret Section 1324 not to provide a permanent appropriation for the cost-sharing reimbursement payments. That too would render this case moot, although it might give rise to another lawsuit challenging the new interpretation of Section 1324.

But the House and the new Administration may not accomplish that goal by simply agreeing to allow the district court's injunction to take effect in the face of a motion to intervene by parties with standing to press the position currently advocated by the Executive Branch. That would allow the substantial interests of third parties to be affected adversely through judicial action as to which those third parties seek to be heard, rather than through the exercise by Congress and/or the Executive Branch of their own constitutional authority.

States, 118 F.3d 776, 779 (D.C. Cir. 1997) (emphasis omitted). This Court must permit intervention when a proposed intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A proposed intervenor must also demonstrate Article III standing. *See Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

This Court "ha[s] identified four prerequisites to intervene as of right" under Fed. R. Civ. P. 24(a)(2):

> (1) the application to intervene must be timely;
>
> (2) the applicant must demonstrate a legally protected interest in the action;
>
> (3) the action must threaten to impair that interest; and
>
> (4) no party to the action can be an adequate representative of the applicant's interests.

Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *S.E.C. v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Each of these requirements is satisfied here.

A. This Motion Is Timely

Filed thirty days after the House filed its motion to hold these proceedings in abeyance—and fifteen days after this Court granted that mo-

tion—this motion to intervene is timely. The timeliness of a motion to intervene "is to be judged in consideration of all the circumstances." *Amador Cty., Cal. v. U.S. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014) (quoting *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)). Relevant factors include the time elapsed since the inception of the suit, the purpose and necessity of intervention, and the risk of prejudice to the existing parties. *Id.*

With regard to the first factor, "courts measure elapsed time from when the 'potential inadequacy of representation [comes] into existence.'" *Id.* at 904 (quoting *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (alteration in original)). Thus, "courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court." *Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *see also Smoke*, 252 F.3d at 469-71 (holding that a post-judgment motion to intervene on the side of the government was timely because the government had "indicated it might not appeal" and the intervenors "moved to intervene in order to ensure that the appeal . . . took place.").

The potential inadequacy of the representation here arose at the earliest just thirty days ago, when the House filed its motion to hold the case

in abeyance pending the Presidential transition. Appellee's Mot. to Hold Briefing in Abeyance (Nov. 21, 2016). As the House pointed out in its motion for abeyance, this will allow it and the incoming Administration to—instead of litigating the merits—"otherwise resolve this appeal." Appellee's Mot. to Hold Briefing in Abeyance at 2. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (stating that the test for inadequacy is whether "the applicant [can] show[] that representation of his interest '*may be*' inadequate.") (emphasis added)). This prospect was confirmed only yesterday, when the Electoral College formally voted to elect Donald Trump as President.

Further, as explained in more detail below, Movants' purpose in intervening is critical and the necessity of intervention is manifest. If the Executive Branch dismisses this appeal, or the existing parties otherwise agree to a settlement that permits the District Court's injunction to take effect, Movants risk losing necessary health insurance coverage for themselves and their families. And if intervention is not allowed, they will not have a meaningful opportunity to challenge the District Court's erroneous ruling.

Finally, intervention will not prejudice either of the existing parties. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("[T]he require-

ment of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties."). It is hard to see how it would be unfairly prejudicial to prevent the House and the new Administration—who would no longer be truly adverse on the merits—from settling or dismissing this appeal to avoid appellate review of the district court's decision. Indeed, "[t]he only result achieved by denial of the motion to intervene in this case [would be] the effective insulation of the District Court's exercise of jurisdiction from all appellate review." *Acree*, 370 F.3d at 50 (reversing the district court's denial of intervention).

Moreover, Movants will rely on the opening brief filed by Appellants and are prepared to file a reply brief on any schedule adopted by the Court. Granting intervention therefore will not affect the timing of the Court's consideration of this case.

In sum, because the "potential inadequacy of representation came into existence only at the appellate stage," *Smoke*, 252 F.3d at 471, this is an "exceptional case" where "imperative reasons" compel a party to intervene in this Court without having attempted to intervene in the district court. *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552-53 (D.C. Cir. 1985). As this Court explained in *Donovan*, appellate-only in-

tervention is disfavored when "the positions of all interested parties have been fixed and fully addressed." *Id.* at 1553. But just the opposite is true here: the position of the Executive Branch is far from fixed, and—based on the House's representations—can be expected to change dramatically on January 20.

Because the risk that the Executive Branch will inadequately represent Movants' interests arose only on appeal, and because intervention will not "*unfairly* disadvantage[] the original parties," *Amador Cty.*, 772 F.3d at 905 (emphasis in original) (internal quotation marks omitted), this motion is timely.

B. Movants Have a Legally Protected Interest in the Action.

The requirement that an intervenor demonstrate a legally-protected interest "is primarily a practical guide to disposing of lawsuits by involving *as many apparently concerned persons as is compatible* with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (emphasis added). This Court has held that an intervenor's showing of Article III standing necessarily satisfies this factor. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("Our conclusion that the NRD has constitutional standing is alone sufficient to establish that the NRD has 'an interest relating to the property or transaction which is the subject of

the action,' Fed. R. Civ. P. 24(a)(2)."); *see also Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003) (same).

Moreover, in the case of an action challenging a statute, it is enough that, if the challenge succeeds, the intervenor will be harmed economically. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (holding that insurer had sufficient interest where—if plaintiffs' constitutional challenge to a statute succeeded—insurer would be required to cover additional accident damage that it could not recoup through increased premiums). Movants have both Article III standing and an economic interest in the ACA; they therefore have a more than sufficient interest to justify intervention.

"To establish standing under Article III, a prospective intervenor—like any party—must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals*, 322 F.3d at 732-33 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). When a litigant seeks to intervene to defend the propriety of agency action, this Court "ha[s] generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015).

Likewise, causation and redressability are satisfied if the loss to a proposed intervenor is "fairly traceable to the regulatory action . . . that the [plaintiff] seeks in the underlying lawsuit," and "it is likely that a decision favorable to [the intervenor] would prevent that loss from occurring." *Fund for Animals*, 322 F.3d at 733.

Movants are beneficiaries of the ACA marketplace exchanges and of the cost-sharing reductions provided pursuant to Section 1402. They sustained an injury-in-fact when the district court enjoined cost-sharing reduction reimbursements under Section 1402 because the injunction, if enforced, will increase Movants' financial burdens—as well as subject Movants to the likelihood that health insurance will not be available in future years as a result of the inevitable destabilization of the marketplace exchanges. As the health insurance industry explained in its amicus brief in this Court, the cessation of cost-sharing reimbursement threatens "potentially massive disruption to both issuers and enrollees." AHIP/BCBSA Amicus Br. 21.

That Movants will suffer cognizable harms is an incontestable economic fact. The only uncertainty is how they will be harmed—which depends in large part on when the cost-sharing reimbursements are terminated—but under any scenario, the harm will be severe.

If the cost-sharing reimbursements are enjoined immediately, insurers will face more than $7 billion of unfunded liability—the amount of cost-sharing reimbursements projected for 2017[5]—because of their obligation to advance the cost-sharing reductions (through payments to health care providers) and the absence of any reimbursement of that cost by the federal government.

Movants then could well have their 2017 health insurance policies terminated. The Center for Medicare and Medicaid Services, which requires exchange insurers to enter into an annual agreement, amended the 2017 agreement to acknowledge that insurers could seek to leave the exchange mid-year should the House of Representatives prevail in this lawsuit.[6] (Some States may bar early termination of exchange participation, but it is not clear how those laws would be applied in these unusual circumstances, particularly given the potential risk of insurer insolvency if

[5] The Congressional Budget Office estimates that cost-sharing will increase from $7 billion to $16 billion per year from 2016–2026, and total $130 billion from 2017-2026. *See* Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026*, at 8 tbl.2 (Mar. 2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-HealthInsuranceBaseline.pdf.

[6] *See* Qualified Health Plan Certification Agreement and Privacy and Security Agreement Between Qualified Health Plan Issuer and the Centers for Medicare & Medicaid Services 6 (Sept. 1, 2016), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Plan-Year-2017-QHP-Issuer-Agreement.pdf.

the subsidy reimbursement payments were terminated.) The American Academy of Actuaries recently explained in a letter to Members of the House of Representatives that if insurers are not reimbursed for cost-sharing reduction payments to health care providers,

> premiums will be too low to cover the costs of care. This creates the potential for insurer losses and solvency concerns. Due to contract provisions, insurers would be permitted to withdraw from the market if [cost-saving subsidy] reimbursements are not made. The prospect of losses and increased solvency risks could lead to insurers opting to withdraw, leading to severe market disruption and loss of coverage among individual market enrollees—both those receiving [cost-saving] and those not.

Letter from American Academy of Actuaries to Speaker Paul Ryan and Minority Leader Nancy Pelosi dated December 7, 2016, at 2, *available at* http://actuary.org/files/publications/HPC_letter_ACA_CSR_120716.pdf.

If Movants' insurers terminated their participation in the exchanges, they still would be obliged to provide non-exchange insurance coverage to Movants (because of federal and state guaranteed issue and renewal requirements, *see* 42 U.S.C. §§ 300gg-1 & 300gg-2). But Movants would no longer be able to afford to pay for that insurance coverage because the premium tax credits that subsidize Movants' insurance premiums are available only through the exchange. 26 U.S.C. § 36B(b)(2)(A). If insurers providing insurance through the exchanges terminated exchange participation, therefore, Movants would not be able to afford their premiums and

would cease paying the premiums in full. The insurers would then terminate their coverage for non-payment. *See* 42 U.S.C. § 300gg-2(b)(1).

Alternatively, even if Movants' coverage is not terminated, insurers likely would seek judicial relief from their obligation to continue advancing cost-sharing without reimbursement. The industry's amicus brief observes that requiring continued payments by insurers "would foist upon issuers an unfunded mandate that amounts to an unconstitutional taking." AHIP/BCBSA Amicus Br. 24; *see also* Linda J. Blumberg & Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in* House v. Burwell 8 (Urban Inst. Jan. 2016) ("*Implications*") (an immediate cessation of the reimbursement payments to insurers would cause them "to choose among incurring significant near-term financial losses, abruptly leaving the Marketplaces, filing their own legal actions against the federal government, potentially violating notice requirements for exiting the Marketplaces, and causing enormous disruption to their enrollees"), *available at* http://www.urban.org/research/publication/implications-finding-plaintiffs-house-v-burwell.

If an insurer did not terminate 2017 insurance policies, but was permitted to stop paying the cost-sharing reduction payments, Movants would suffer serious harm. A Commonwealth Fund study of marketplaces

in States with federally-administered exchanges found that cost-sharing reduced the average out-of-pocket limit from $6,224 to $2,047—over 67 percent—for individuals with incomes between 150 and 200 percent of the federal poverty level. The average combined medical and prescription drug deductible for the same group dropped from $3,063 to just $716—a nearly 77 percent reduction. *See* Jon Gabel, *et al.*, *The ACA's Cost-Sharing Reduction Plans: A Key to Affordable Health Coverage for Millions of U.S. Workers*, at 3, 6 (Oct. 2016), *available at* http://www.commonwealthfund.org/publications/issue-briefs/2016/oct/aca-cost-sharing-reduction-plans; *see also* Econ. and Health Policy Scholars Amicus Br. 10-11. Movants would lose these very significant economic benefits if the cost-sharing reimbursements were discontinued.

Even if an insurer were able to remain in the market until the end of the 2017 plan year and to continue to fund insureds' cost-sharing reductions, without receiving reimbursement from the United States, the insurer would surely exit the marketplace at the end of the plan year in order to shed any obligation to provide cost-sharing reductions. As the health insurance industry *amicus* brief explains:

> [C]ertain issuers may decline to take on the risk of participating in Exchanges in the absence of guaranteed reimbursement for cost-sharing reductions, among other factors. Such de-

> crease in Exchange participation would reduce competition and the availability not only of silver-plan variations offering cost-sharing reductions but of other plans that may be purchased using premium tax credits across the "metal tiers," thus constricting a key segment of the individual market.
>
> Even for those issuers that continue participating in Exchanges, state law requirements regarding the actuarial soundness of plans would potentially require setting premiums as if there is no federal cost-sharing reduction reimbursement.
>
> In either event, premiums would rise across the board and increase costs—including for those individuals who do not qualify for any subsidy, and for the federal government on account of increases in premium subsidies.
>
> In addition, rising premiums used to cover unreimbursed cost-sharing reduction subsidies will cause some of the healthiest individuals to decline more expensive insurance, spurred in part by the fact that the higher cost of coverage will trigger in more instances the 8% household-income threshold for avoiding the tax penalty for non-compliance with the individual mandate, That would ultimately lead to a deterioration of the risk pool and actuarially unstable health insurance coverage.

AHIP/BCBSA Amicus Br. 16-19 (citations omitted); see also *Implications* at 8; Families USA et al. Amicus Br. 18 ("The exodus prompted by defunding cost-sharing reductions could leave many communities with no insurers participating on the Exchange, denying residents there many key benefits of the ACA. Other Exchanges may have only one remaining insurer, offering a narrow network of providers that greatly restricts consumers' health care options, requiring them, for example, to travel across the state to find a doctor who accepts their coverage.").

As a consequence, Movants will either face higher premiums for insurance coverage and higher out-of-pocket copays and deductibles—which they cannot afford—or be unable to renew their policies at all.

In short, if the injunction is enforced and $7 billion is removed from the exchange marketplace, Movants will be injured. *See Friends of the Earth, Inc. v. Laidlaw Env. Svcs*, 528 U.S. 167, 180 (2000) (explaining that to establish the existence of an injury-in-fact, a party must show an invasion of a legally protected interest that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical."). These injuries are not "too speculative for Article III purposes"—they are indisputable economic facts. *See Lujan,* 504 U.S. at 564 n.2.

Causation and redressability are satisfied for similar reasons. First, the injury to Movants is "fairly traceable to the regulatory action . . . that the [plaintiff] seeks in the underlying lawsuit." *Fund for Animals*, 322 F.3d at 733. Again, should the injunction against cost-sharing reimbursement be enforced, insurance companies will be constrained by economic necessity to reduce or eliminate Movants' benefits. While the cost-sharing reimbursements are paid to insurers, they are provided to insurers to benefit Movants directly—by reducing Movants' cost-sharing obligations—and Movants will be injured directly if those payments cease.

Second, as required to establish redressability, "it is likely that a decision favorable to [Movants] would prevent that loss from occurring." *Id.* That is the case because, in short, Movants benefit from the government's reimbursement payments, this lawsuit challenges those payments, and an unfavorable decision would remove those benefits.

For all of these reasons, Movants have Article III standing. *See Crossroads Grassroots Policy Strategies*, 788 F.3d at 317. And Movants therefore have a more than sufficient interest to justify intervention.

C. This Action Threatens To Impair Movants' Interest.

Rule 24(a)(2) requires that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). This Court has construed this requirement "as looking to the practical consequences of denying intervention, even where the possibility of future challenge … remains available." *Fund for Animals*, 322 F.3d at 735. That is, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977).

It is not clear that Movants would have *any* future opportunity to contest the district court's interpretation of the statutory provisions at is-

sue here. It is possible that another court would refuse to entertain an action that would require entry of an injunction conflicting with the obligations imposed by the injunction entered by the court below.

But even if such an opportunity were available, it would certainly be "more burdensome." Certainly if this appeal is dismissed and the district court's decision is allowed to stand, that ruling would have persuasive weight with whatever court were to hear Movants' claims in the future. *See Crossroads Grassroots Policy Strategies*, 788 F.3d at 320 (creation of unfavorable precedent in the present action "make[s] the 'task of reestablishing the status quo . . . more difficult and burdensome,'" and thus impairs intervenor's ability to protect its interest) (quoting *Fund for Animals*, 322 F.3d at 735).

And requiring Movants to seek to intervene in the court below to seek vacation of the injunction would serve little purpose, as the District Court would be unlikely to change its view of the relevant legal issues. That would simply produce an appeal to this Court.

Perhaps more importantly, Movants will suffer significant negative consequences in the period between the injunction taking effect and the institution of some future action—a result that this Court has held constitutes impairment under Rule 24(a)(2). *See Fund for Animals*, 322 F.3d at

735 (finding impairment because "loss of revenues during any interim period would be substantial and likely irreparable"); *Costle*, 561 F.2d at 909 ("Aside from the time and expense of litigation as a recourse, it may be that review might be had only after final effectiveness, during a period when appellants may be subject to compliance and enforcement."). As explained above, the injunction creates a significant risk that Movants will lose their health insurance coverage entirely or impose upon them unaffordable cost-sharing obligations that would prevent them from using health insurance to obtain needed medical services; any subsequent medical problem would then surely be as "substantial and likely irreparable" as any "loss of revenues." *Fund for Animals*, 322 F.3d at 735.

This appeal accordingly may constitute Movants' *only* opportunity to litigate these issues; even if not, a contrary decision would impede their ability to protect their interests. The third prong of Rule 24(a)(2) is thus satisfied.

D. Movants' Interests Are Not Adequately Represented.

Movants' interests will not be represented adequately in this appeal after January 20, 2017. Up to this point, the interests of the Executive Branch have been aligned with those of Movants. But—based on the House's representations—the new Administration may well take a differ-

ent view. Moreover, the House has represented that it and the incoming Administration's officials are "discussing potential options for resolution" of this appeal, other than to "continue prosecuting" it. Appellee's Mot. to Hold Briefing in Abeyance at 1-2. But any disposition of this case—including settlement or dismissal by the new Administration—that leaves the district court's injunction intact will harm Movants; their interest therefore will not be represented after January 20, and certainly will not be represented adequately.

This is more than enough to satisfy the fourth prong of the Rule 24(a)(2) test for intervention as of right, which requires only that "the applicant show[] that representation of his interest 'may be' inadequate.'" *Trbovich*, 404 U.S. at 538 n.10. Moreover, "the burden of making that showing should be treated as minimal," *id.*, and this Court "ha[s] described this requirement as 'not onerous,'" *Fund for Animals*, 322 F.3d at 735 (quoting *Dimond*, 792 F.2d at 192).

Because Movants have a compelling interest in this action that is not adequately represented, and that would be impaired by disposition of this appeal without them, this timely motion entitles Movants to intervention.

II. In the Alternative, This Court Should Grant Movants Permissive Intervention.

For essentially the same reasons as those explained above, Movants satisfy the standard for permissive intervention under Fed. R. Civ. P. 24(b). Not only do they "ha[ve] a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), Movants here seek to defend the main action *itself*, on the same basis that the Executive Branch has done up to this point. And intervention would not "unduly delay or prejudice the adjudication of the original parties' rights," Fed R. Civ. P. 24(b)(3). Quite the contrary: Movants seek *to adjudicate* the rights of the original parties, in the face of the possible joint decision to dismiss this appeal and thus avoid appellate review of the district court's decision.

* * *

Whether as of right or permissively, Movants should be permitted to intervene to protect their interests and ensure the unprecedented and far-reaching decision below is subject to appellate review before the lower court's injunction may take effect.

CONCLUSION

The motion to intervene should be granted.

December 20, 2016

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), movants certify that:

Except for Gustavo Parker and La Trina Patton, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Defendants-Appellants and the Brief for *Amici Curiae* Economic and Health Policy Scholars.

December 20, 2016 /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for movants certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 4,970 words; and

(ii) complies with the typeface requirements of Rule 27(d)(1)(E) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

December 20, 2016 /s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that that on December 20, 2016, the foregoing was served electronically via the Court's CM/ECF system upon all counsel of record.

December 20, 2016

/s/ Andrew J. Pincus
Andrew J. Pincus