Nos. 18-1023, 18-1028, 18-1038

IN THE

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS, *Petitioner,*

v.

UNITED STATES, *Respondent.*

MODA HEALTH PLAN, INC., ET AL., *Petitioners,*

v.

UNITED STATES, *Respondent.*

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, AN ILLINOIS NONPROFIT MUTUAL INSURANCE CORPORATION, *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER LAND OF LINCOLN

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QUESTION PRESENTED

This case involves the "risk-corridors" program established by the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062, which mandates that for the first three years of the ACA, the Government "shall pay" mathematically determined amounts to health insurers based on a statutory formula in order to induce them to participate in health insurance exchanges and to reduce the premiums they would otherwise charge.

In this case, the Federal Circuit held on the basis of legislative history that the Government's obligation to make risk-corridor payments was extinguished by appropriations riders temporarily foreclosing certain sources of funds for the risk-corridors program. The riders were included in spending bills enacted several years after the ACA was adopted — and after Petitioner had already performed its part of the bargain under the risk-corridors program.

The Question Presented is: Whether a temporary cap on appropriations availability from certain specified funding sources may be construed, based on its legislative history, to abrogate retroactively the Government's payment obligations under a money-mandating statute, for parties that have already performed their part of the bargain under the statute.

PARTIES TO THE PROCEEDING

The captions in Nos. 18-1023 and 18-1038 contain the names of all parties. In No. 18-1028, the Petitioners are Moda Health Plan, Inc. and Blue Cross and Blue Shield of North Carolina. The Respondent is the United States.

RULE 29.6 STATEMENT

Petitioner Land of Lincoln Mutual Health Insurance Company is an Illinois non-profit mutual insurance corporation currently in liquidation in Illinois state court under the supervision of the Director of the Illinois Department of Insurance, who acts as the statutory and court-affirmed liquidator. *See In the Matter of the Liquidation of Land of Lincoln Mutual Health Insurance Co.*, No. 2016 CH 9210 (Cook County). No publicly traded company owns more than 10% of its stock.

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BRIEF FOR PETITIONER LAND OF LINCOLN

Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln"), which is under the supervision of the Director of the Illinois Department of Insurance acting as the statutory and court-affirmed liquidator, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the Federal Circuit (Pet. App. 1-60; Pet. App. in No. 18-1038, at 1a-6a)[1] are published at 892 F.3d 1311 (Fed. Cir. 2018) and 892 F.3d 1184 (Fed. Cir. 2018). The order denying rehearing and accompanying dissenting opinions (Pet. App. 63-84) are published at 908 F.3d 738 (Fed. Cir. 2018). The decision of the United States Court of Federal Claims in Land of Lincoln's case (Pet. App. in No. 18-1038, at 70a-140a) is published at 129 Fed. Cl. 81 (2016).

JURISDICTION

The United States Court of Federal Claims had jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) and the Affordable Care Act, 42 U.S.C. § 18062. The Federal Circuit had jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). The judgment of the Court of Appeals was entered on June 14, 2018, Pet. App. 1, and Petitioner's timely petition for rehearing *en banc* was denied on November 6, 2018. *Id.* at 63. This Court granted Petitioner's timely

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 18-1028.

petition for writ of certiorari on June 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at Pet. App. 207-210.

STATEMENT

Congress enacted the "risk-corridors" program in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062. The statute unequivocally mandates that for the first three years of the ACA's operation, the Government "shall pay" mathematically determined amounts to health insurers of Qualified Health Plans ("QHPs") based on the insurance risk they face. Specifically, to induce insurers to set reasonably-priced premiums for newly insured customers (many of whom lacked insurance histories), Congress promised in Section 1342 to bear a statutorily defined portion (but not all) of the losses that a QHP might incur if premiums proved too low to cover costs.

The Federal Circuit correctly recognized that Section 1342 is a money-mandating statute. It could hardly have found otherwise given Congress' "shall pay" directive. But a divided Court of Appeals relied on legislative history to hold that later-enacted appropriations riders, which temporarily foreclosed certain sources of funds for the risk-corridors program, extinguished the Government's obligation to make the statutorily required payments.

The Federal Circuit so ruled even though it conceded that the riders (1) did not repeal or amend Section 1342's substantive formula for calculating the

mandated payments, and (2) were enacted *after* Land of Lincoln had performed its part of the bargain by providing insurance coverage throughout the year 2014, signing up policyholders at already-fixed premiums for the 2015 plan year, and committing to the Federal Government to renew customers and remain on the Illinois insurance exchange through the end of 2016.

The divided Federal Circuit panel created a novel "repeal-by-implication" doctrine that circumvents the bicameralism and presentment requirements of Article I by allowing individual Members of Congress (and their staffs) to manipulate legislative history in the appropriations process surreptitiously to renege on prior binding commitments of Congress as a whole. Nothing in the text of the appropriations riders could be read to repeal Section 1342. Yet the Federal Circuit construed two threads of "legislative history" manufactured by three Members of Congress to undo legislation enacted by the entire Congress and signed by the President. The Court of Appeals ignored that, both before and after the enactment of the appropriations riders, Congress as a whole considered and rejected proposals that would have achieved expressly what the Court of Appeals claimed the riders had accomplished implicitly through these snippets of legislative history. The Court of Appeals likewise ignored that, both before and after the enactment of the appropriations riders, the Department of Health and Human Services ("HHS"), which was charged with implementation of Section 1342, had repeatedly reassured insurers and Congress (including after notice-and-comment rulemaking) that risk-corridor payments remained a binding obligation of the United States.

The Federal Circuit's decision is also at odds with the presumption against retroactivity. By permitting three members of Congress to repeal congressionally created rights after Congress had already induced private performance, the decision upsets the settled expectations of commercial actors and undermines the Government's reliability as a business partner.

Land of Lincoln's own experience illustrates the risk to private companies of doing business with the Government under the Federal Circuit's approach. After the Government refused to honor its risk-corridor commitments, Land of Lincoln was forced to enter liquidation on October 1, 2016, three months prior to the end of the policy year, and nearly 50,000 policyholders in Illinois lost their health insurance as a result.

The decision signals to all those doing business with the Government — including those outside the healthcare industry — that it cannot be trusted to meet its obligations. Accordingly, the decision will discourage private parties from partnering with the Government, interfere with the implementation of public programs, and ultimately raise costs to the Treasury. The judgment below should be reversed.

A. Background.

1. The "Risk-Corridors" Program.

Congress included in the ACA three "premium stabilization programs" designed to mitigate insurers' risks in the early years of the exchanges: reinsurance, risk corridors, and risk adjustment. 42 U.S.C. §§ 18061-18063. Reinsurance spreads the cost of large insurance claims across all insurers; risk

adjustment transfers funds from insurers with healthier enrollees to those with sicker enrollees.

This case involves the risk-corridors program, enacted in Section 1342(a) of the ACA, which creates a statutory formula under which HHS "shall" make risk-corridor payments according to insurers' cost-to-premium ratios. *See* 42 U.S.C. § 18062(b)(1) (HHS "*shall* provide under the program" certain payments to QHPs) (emphasis added). The statute gives HHS no discretion to increase or reduce the pertinent amounts. Rather, the statute provides that if "a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, [HHS] *shall* pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount." *Id.* at § 18062(b)(1)(A) (emphasis added). If a QHP's costs are more than 108 percent of the target amount, HHS "*shall* pay" "2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount." *Id.* at § 18062(b)(1)(B) (emphasis added). Conversely, if a QHP's allowable costs are less than its target amounts, then Section 1342 provides that the plan "shall pay" the Government a portion of the difference ("payments in"). *Id.* at § 18062(b)(2).

According to HHS, the risk-corridors program played a "critical role in ensuring the success of the Exchanges."[2] The Federal Circuit explained that,

[2] HHS, "Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans (CMS-9989-P) and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (CMS-9975-P), Preliminary Regulatory

"[b]ecause insurers lacked reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage via the new [ACA] exchanges, insurers faced significant risk if they elected to offer plans in these exchanges." Pet. App. 2. The risk-corridors program was "designed to mitigate that risk and discourage insurers from setting higher premiums to offset that risk." *Id.* As a result of reduced premiums, the Government saved substantial amounts in subsidies otherwise owed under the ACA.

Section 1342 nowhere provides that the risk-corridors program would be budget-neutral or that "payments out" would be limited to "payments in" from profitable insurers. Nor is the program structured in such a manner. Each QHP's profit and loss data are not calibrated to a statewide or market-wide average or other factors that would allow the payments in and out of the program to net to zero across all issuers. Rather, payments owed to (or by) each QHP issuer are calculated according to its own profits or losses.

Section 1342 does not use the language Congress employed in other ACA provisions, which variously provide that they "shall be implemented in a budget neutral manner[,]" 42 U.S.C. § 1395w-4(p)(4)(C), or that payments to insurers are "subject to the availability of appropriations." *See, e.g.*, 42 U.S.C. § 280k(a); 42 U.S.C. § 300hh-31(a); 42 U.S.C. § 293k-2(d); 42 U.S.C. § 1397m-1(b)(2)(A).

Impact Analysis" at 11 (July 2011) ("HHS Preliminary Regulatory Impact Analysis").

Instead, Section 1342(a) provides that the risk-corridors program is "based on" Medicare Part D, the prescription drug program, which is not budget-neutral and requires federal payments pursuant to a similar statutory formula. *See* 42 U.S.C. § 1395w-115(e)(3)(A).[3] In contrast, both reinsurance and risk adjustment are budget-neutral.[4]

In light of the mandatory risk-corridor language, from the beginning HHS took the view that Section 1342 was money-mandating. The final rule promulgated by HHS on March 23, 2012 to implement the risk-corridors program provided that QHPs "*will receive* payment from HHS" according to the statutory formulas.[5]

In March 2013, HHS explained that "[t]he risk corridors program is *not statutorily required to be budget neutral*. *Regardless* of the balance of payments and receipts, HHS *will remit payments* as required under section 1342."[6] "This constituted the final word from HHS on the risk-corridors program

[3] The Medicare Part D program alternated between net revenue positive and negative between 2007 and 2010. *See* CBO, The Budget and Economic Outlook 2014 to 2024, at 50, Table 3-1 (2014), available at https://www.cbo.gov/publication/45010.

[4] *See* 42 U.S.C. § 18061(b)(1)(B) (reinsurance program refers to "amounts so collected"); *id.* at § 18061(b)(4) (payment methodology); 78 Fed. Reg. 15,441 (Mar. 11, 2013) ("The Affordable Care Act risk adjustment program is designed to be a budget-neutral revenue redistribution among issuers.").

[5] Risk Corridor Establishment and Payment Methodology, 77 Fed. Reg. 17,251 (Mar. 23, 2012) (codified at 45 C.F.R. § 153.510) (emphasis added).

[6] Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013) (emphasis added).

before the exchanges opened and the program began." Pet. App. 7.

2. Health Insurers Provide Coverage In Reliance On The Government's Commitments.

Prior to its liquidation, Land of Lincoln was an Illinois non-profit mutual insurance company specifically created to provide coverage on the Illinois exchange under the ACA. It provided affordable health insurance to almost 50,000 Illinois policyholders, many of whom had previously lacked access to government-provided or employer-provided health insurance. Pet. App. in No. 18-1038, at 72a. In 2013, Land of Lincoln was approved by the Centers for Medicare & Medicaid Services ("CMS"), a unit of HHS, as a Consumer Operated and Oriented Plan (a "CO-OP"). *Id.* at 72a n.2. Land of Lincoln entered into a loan agreement with HHS requiring it to continue offering coverage on the Illinois healthcare exchange through 2016. (Fed. Cir. Dkt. 136, at 26).

Relying on the Government's assurances, Land of Lincoln and many other health insurers agreed to participate in the ACA exchanges, signed QHP contracts, priced their plans affordably despite the uncertain risk of participating in the new insurance exchanges, and sold health insurance plans to many who were previously uninsured.

3. HHS's "Transitional Policy" Increases Insurers' Risk, After They Have Already Committed To Provide Ongoing Coverage.

In November 2013, after Land of Lincoln and other insurers had already set premiums for the exchanges

for 2014, HHS announced a "transitional policy," allowing consumers to retain existing insurance plans that did not comply with ACA standards. Pet. App. 7-8. As the Court of Appeals recognized, "[t]his dampened ACA enrollment in states implementing the policy, especially by healthier individuals who elected to maintain their lower level of coverage, leaving insurers participating in the exchanges to bear greater risk than they accounted for in setting premiums." *Id.* at 8; *see also id.* at 96.

HHS acknowledged that "this transitional policy was not anticipated by health insurance issuers when setting rates for 2014" but promised "the risk corridor program should help ameliorate unanticipated changes in premium revenue." *Id.* at 9. HHS informed insurers that it would adjust the operation of the risk-corridors program for 2014 to "offset losses that might occur under the transitional policy." *Id.* While HHS expressed an intent to administer the risk-corridors program in a budget-neutral manner, it considered a shortfall in "payments in" unlikely and further recognized that any shortfall in "payments in" would not vitiate its statutory duty to make full "payments out." Pet. App. 101-102.[7]

When the ACA was enacted in 2010, the Congressional Budget Office ("CBO") did not "score" (*i.e.*, calculate the budgetary impact of) the risk-

[7] 79 Fed. Reg. 30,260 (May 27, 2014) ("In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations.").

corridors program. *See* HHS Preliminary Regulatory Impact Analysis 9-10. When CBO ultimately scored the risk-corridors program in February 2014, it concluded that "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit."[8] CBO noted that, in contrast to the risk adjustment and reinsurance programs, "payments and collections under the risk corridor program will not necessarily equal one another."[9]

4. Congress Enacts Appropriations Riders After Insurers Have Already Provided Coverage And Committed To Provide Ongoing Coverage.

Because exchanges did not begin operation until 2014, Congress did not include a specific appropriation for risk-corridor payments during the passage of the ACA in 2010 for that future expense.

After Land of Lincoln and other insurers had been providing coverage throughout 2014, and after 2015 plans had been priced and marketed, Congress passed a fiscal year 2015 appropriations bill for HHS on December 16, 2014 providing a lump sum for CMS's Program Management account. Pet. App. 12. However, the lump-sum appropriation included a rider providing:

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[8] CBO, The Budget and Economic Outlook: 2014 to 2024, at 59 (Feb. 2014), available at https://www.cbo.gov/Publications/45010.

[9] *Id.* at 110.

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services — Program Management' account, may be used for payments under Section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. Congress included the same language in appropriations riders for fiscal years 2016 and 2017. Pet. App. 13.

Notably, Congress did not repeal or amend Section 1342 itself or alter the statutory formula under which HHS was required to make risk-corridor payments. In fact, the same Congress (the 113th) that enacted the first appropriations rider considered and rejected numerous bills to repeal the risk-corridors program or make it budget-neutral by capping "payments out" at "payments in."[10] Even after the appropriations riders began to be enacted, Congress repeatedly considered proposals to repeal the risk-corridors program[11] or to

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[10] See S. 1726, 113th Cong. (2013) (would eliminate § 1342); H.R. 3541, 113th Cong. (2013) (same); H.R. 3812, 113th Cong. (2014) (same); H.R. 3851, 113th Cong. (2014) (same); H.R. 5175, 113th Cong. (2014) (same); H.R. 3985, 113th Cong. (2014) (would eliminate § 1342 after 2014); S. 2214, 113th Cong. (2014) (would amend § 1342 to "ensur[e] budget neutrality"); H.R. 4354, 113th Cong. (2014) (same); H.R. 4406, 113th Cong. (2014) (would limit payments out to payments in).

[11] *See* S. 123, 114th Cong. (2015); H.R. 221, 114th Cong. (2015); 161 Cong. Rec. S8420 (daily ed. Dec. 3, 2015) (consideration and rejection of amendment providing that

make it budget-neutral[12] and did not enact any of them.

President Obama signed the riders into law without any acknowledgement he was eviscerating an essential ACA program – one whose importance he had specifically noted. *See* Barack Obama, *United States Health Care Reform Progress to Date & Next Steps*, 316 J. AM. MED. ASSOC. 525, 530 (Aug. 2, 2016) (citing importance of "a fully funded risk-corridor program").

Even after the enactment of the appropriations riders, HHS and CMS continued to recognize risk-corridor payments as federal obligations. In a February 2015 final rule, CMS assured insurers that "the Affordable Care Act requires the Secretary to make full payments to issuers."[13] On November 2, 2015, HHS expressly "reiterat[ed] that risk corridor payments are an obligation of the U.S. Government."[14] It repeated that assurance in a November 19, 2015 notice to insurers: "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year

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"Secretary shall not collect fees and shall not make payments under" risk-corridors program).

[12] *See* S. 147 § 2, 115th Cong. (2017); S. 359, 114th Cong. (2015); H.R. 724, 114th Cong. (2015).

[13] HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015).

[14] Appx. in No. 17-1224 (Fed. Cir.) 306.

2015 obligation[s] of the United States Government for which full payment is required."[15]

In the summer of 2015, HHS instructed state insurance commissioners who were reviewing issuers' proposed 2016 benefit-year rates to assume that issuers would receive full risk-corridor payments – thereby hindering issuers' ability to raise premiums to compensate for the possibility that the Government would renege on its obligation.[16]

In September 2016, HHS reassured insurers: "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required."[17]

In September 2016 testimony before Congress that had been approved by the Department of Justice, the Acting Administrator of CMS repeated that

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[15] Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.

[16] Letter from Kevin Counihan to State Insurance Commissioners (July 21, 2015) ("CMS . . . recognizes that the [ACA] requires the Secretary to make full [risk-corridors] payments to issuers . . . [W]e ask that you consider these findings as you work to finalize rates for the 2016 plan year [BY]."), available at https://www.cms.gov/CCIIO/Resources/Letters/Downloads/DOI-Commissioner-Letter-7-20-15.pdf.

[17] CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF.

assurance.[18] The Administrator was asked whether CMS took the position that "insurance plans are entitled to be made whole on risk corridor payments even though there is no appropriation." He responded: "Yes. It is an obligation of the federal government."[19]

Even the initial version of the HHS FY 2019 Budget in Brief (published online in February 2018) recognized risk-corridor payments as obligations of the Government. Pet. App. 33. The budget proposal included more than $11.5 billion of funding, allocated to FY 2018, with the explanation: "This proposal provides a mandatory appropriation to fully fund the Risk Corridors Program." (Fed. Cir. No. 17-1224 Dkt. 164, at 62). The same provision was contained in the President's official budget proposal sent to Congress on February 12, 2019. (Fed. Cir. No. 17-1994 Dkt. 85.)

B. Procedural History Of This Case.

Land of Lincoln offered policies to consumers on the Illinois Health Insurance Marketplace in 2014, 2015, and 2016, until its liquidation effective October 1, 2016. Pet. App. in No. 18-1038 at 105-106a. For 2014, Land of Lincoln was entitled to $4,492,244 under the risk-corridors program but received only $550,782, or 12.6% of the amount owed. *Id.* at 72a. For 2015 and 2016, Land of Lincoln was entitled to

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[18] House of Representatives, Subcommittee on Health, Committee on Energy and Commerce, *The Affordable Care Act on Shaky Ground: Outlook and Oversight*, Preliminary Transcript at 85, 87-88 (Sept. 14, 2016), available at https://docs.house.gov/meetings/IF/IF02/20160914/105306/HHRG-114-IF02-Transcript-20160914.pdf.

[19] *Id.* at 85.

risk-corridor payments of $68,917,591 and $52,747,976 respectively, but received nothing. (Fed. Cir. No. 17-1224 Dkt. 160).

Accordingly, in June 2016, Land of Lincoln brought this action against the Government in the Court of Federal Claims under the Tucker Act, seeking to recover the balance due under the risk-corridors program. Pet. App. in No. 18-1038 at 106a. Land of Lincoln asserted five claims, including a statutory claim under Section 1342; breach-of-contract claims (both express and implied-in-fact); and a claim that HHS unlawfully took Land of Lincoln's property without just compensation in violation of the Fifth Amendment's Takings Clause. *Id.* at 73a.

In November 2016, the Court of Federal Claims granted judgment to the Government. *Id.* at 117a, 123a-140a.

C. The Decision Under Review.

A divided Federal Circuit affirmed, over a dissenting opinion by Judge Newman, for the reasons stated in the Court of Appeals' decision in the companion *Moda* case. Pet. App. in No. 18-1038, at 3a.

In *Moda*, the Federal Circuit acknowledged that Section 1342 "created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk-corridors program." Pet. App. 20. The Federal Circuit recognized that Section 1342 was "unambiguously mandatory" even though "it provided no budgetary authority to the Secretary of HHS and identified no source of funds for any

payment obligations beyond payments in." *Id.* at 16, 18. The majority explained that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt," and "the government's statutory obligation to pay persist[s] independent of the appropriation of funds to satisfy that obligation." *Id.* at 18, 19. The majority acknowledged that insufficiency of appropriations "does not . . . cancel [the Government's] obligations, nor defeat the rights of other parties." *Id.* at 19 (internal quotation marks and citation omitted).

Nevertheless, the majority held the Government's obligation to pay was extinguished by the appropriations riders. *Id.* at 21. The Court of Appeals pointed to legislative history – in particular, a February 2014 request by two Members of Congress to the Government Accountability Office ("GAO") regarding sources of funds that could be used to make payments in execution of the risk-corridors program, *id.* at 26,[20] as well as a statement by House

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[20] In September 2014, GAO responded to the request by identifying two potential sources of funding. First, it found that HHS, and more specifically CMS, was permitted to draw from its general lump-sum fiscal year 2014 program-management appropriation of $3.6 billion to make payments under the risk-corridors program. Pet. App. 11. Second, GAO concluded that "payments in" under the risk-corridors program (*i.e.*, payments from QHPs to CMS) constituted "user fees," and so "any amounts collected in FY 2014 pursuant to section 1342(b)(2) would have been available . . . for making the payments pursuant to section 1342(b)(2)." *Id.* GAO added that appropriations acts "are considered nonpermanent legislation," so the language it analyzed regarding the lump-sum appropriation and user fees "would need to be included in the CMS PM appropriation for FY 2015" in order to be available to make any risk-corridor payments in fiscal year 2015. *Id.* at 12.

Appropriations Chair Harold Rogers in connection with the first rider asserting that "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral." *Id.* at 12-13.

The Court of Appeals described the appropriations riders as "temporary measures capping risk corridor payments out at the amount of payments in." *Id.* at 30. Yet the Federal Circuit gave these temporary caps regarding the source of payments the same impact as a substantive repeal of the Government's obligation to pay.

Judge Newman, in dissent, explained that, under longstanding precedent, the appropriations riders did not "erase the obligation" to pay. *Id.* at 44. She warned the majority was "discarding" "[t]he classic case" of *United States v. Langston*, 118 U.S. 389 (1886), which "has stood the test of a century and a half of logic, citation, and compliance," and establishes that any intent to repeal or modify legislation must be "clearly stated." Pet. App. 47. "The standard is high for intent to cancel or amend a statute. The standard is not met by the words of the riders." *Id.* at 50.

In addition, Judge Newman criticized the unfairly retroactive nature of the majority's interpretation. The first rider was not enacted until December 16, 2014. By then, Land of Lincoln had nearly completed the 2014 insurance plan year, had already issued policies for the 2015 plan year (which contained guaranteed renewal rights for consumers for the 2016 plan year), and had already committed by contract with HHS to provide insurance on the Illinois Exchange in 2016: "The appropriations rider cannot

have retroactive effect on obligations already incurred and performance already achieved." *Id.* at 58.

Judge Newman warned that "[b]y holding that the government can avoid its obligations after they have been incurred, . . . this court undermines the reliability of dealings with the government." *Id.* at 60.

D. Proceedings On Rehearing *En Banc.*

On November 6, 2018, the Federal Circuit denied rehearing and rehearing *en banc*, with Judges Newman and Wallach dissenting. Pet. App. 63-65.

Judge Newman warned that the Government's breach of its obligations "has caused significant harm to insurers who participated in the Affordable Care Act program" and would "undermine[]" "[t]he government's access to private sector products and services." *Id.* at 68.

Judge Wallach, in a separate dissent joined by Judge Newman, explained that "the majority's holding regarding an implied repeal of the Government's obligation cannot be squared with Supreme Court precedent." *Id.* at 70. He cautioned that "[t]o hold that the Government can abrogate its obligation to pay through appropriations riders, after it has induced reliance on its promise to pay, severely undermines the Government's credibility as a reliable business partner" "in all sectors." *Id.* at 82, 83.

SUMMARY OF ARGUMENT

The ACA presented Land of Lincoln and other health insurers with a straightforward offer: if they would agree to provide "Qualified Health Plans" through the ACA exchanges, the Government under Section 1342 "shall pay" risk-corridor payments

covering statutorily specified portions of insurer losses during the first three years of operation. Land of Lincoln accepted the offer, provided health insurance at affordable rates to nearly 50,000 policyholders on the Illinois exchange, and incurred substantial losses, due in significant part to the increased risks caused by HHS's "transitional policy" (adopted by HHS after Land of Lincoln had already committed to provide coverage for the years 2014, 2015, and 2016).

Yet the Government reneged, paying Land of Lincoln only 12.6% of the money owed for 2014 and nothing for 2015 and 2016. Land of Lincoln was driven into insolvency by the Government's bait-and-switch and is now under the control of the Illinois Director of Insurance as court-appointed liquidator. It is entitled to the balance due.

The appropriations riders did not extinguish the Government's legal obligation to make risk-corridor payments. The riders merely restricted the availability of certain specified funding sources: "[n]one of the funds made available by *this Act*" from two Medicare trust funds and the CMS Program Management account could be used for risk-corridor payments. Pet. App. 12 (emphasis added). Such language does not constitute the kind of clear statement necessary to effect an implied repeal or amendment of the Government's substantive obligation. Tellingly, at the time the riders were enacted, Congress, the President, and HHS all understood them as *not* extinguishing the obligation to pay – making it impossible to find a "clear statement" otherwise. If there were any doubt, HHS's authoritative view that the risk-corridor payments remained a governmental obligation (even after the

initial appropriations riders were enacted) would be entitled to deference.

This Court has held that Congress may extinguish a money-mandating statutory obligation only through express language or by clear implication and only by prospectively amending the statutory formula or prospectively revoking the substantive right. But the Federal Circuit, despite conceding that the appropriations riders neither amended the statutory formula in Section 1342 nor revoked the statutory right, nonetheless read them as retroactively eliminating the Government's payment obligation through what it dubbed a "temporary cap" on payments. That holding cannot be squared with *Langston*, 118 U.S. at 389, which held that a mere cap on appropriations *cannot* relieve the Government of its payment obligations.

The Federal Circuit rested its decision on legislative history rather than text. But permitting legislative history accompanying appropriations riders to override the language of prior congressional enactments allows individual members of Congress to manipulate legislative history to thwart the will of Congress as a whole, undermining democratic accountability. Moreover, the materials cited by the Federal Circuit were woefully insufficient: a back-and-forth between two congressional offices and the GAO, as well as a passing remark in a 677-page explanatory statement inserted into the Congressional Record by Representative Rogers accompanying one (and only one) of the three appropriations riders. The Federal Circuit relied on flimsy evidence involving *three* Members of Congress. In contrast, Congress as a whole repeatedly considered and rejected bills to repeal the risk-

corridors program or to make it budget-neutral (the very thing the Federal Circuit insisted the riders had accomplished), and it continued to entertain such proposals even after it began to enact the riders.

The decision below accorded the appropriations riders an impermissibly retroactive effect. If permitted to stand, it would be the first instance ever where a court has construed an appropriations measure to repeal a statutory obligation after Congress induced private-party performance, and after private parties relied on Congress' promises to their detriment and fulfilled their end of the bargain.

Even if the Federal Circuit's interpretation of the riders were correct – and it is not – the judgment should still be reversed. The Court of Appeals' construction of the riders as a "temporary" suspension of the risk-corridor payments does not justify a *permanent* extinguishment of the obligation to pay. And even if the riders eliminated the Government's obligation after the fact, Land of Lincoln properly stated breach-of-contract and takings claims.

ARGUMENT

I. THE APPROPRIATIONS RIDERS DID NOT EXTINGUISH THE GOVERNMENT'S OBLIGATION TO MAKE RISK-CORRIDOR PAYMENTS.

This "Court has had frequent occasion to note that . . . indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787-88 (1981). Rather, "absent a clearly expressed congressional intention, an implied repeal will only be

found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (internal quotation marks, citations, and alterations omitted); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (repeal-by-implication argument "faces a stout uphill climb" and raises "separation of powers" issues). The rule is longstanding. *Harford v. United States*, 12 U.S. (8 Cranch) 109, 109-10 (1814) (Story, J.) (later statute cannot be construed to repeal or suspend earlier one unless such construction is "necessary and unavoidable").[21]

Further, "[t]he doctrine disfavoring repeals by implication . . . applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). That added force reflects House and Senate rules providing that no change in substantive law may be reported or received in a general appropriations bill. *See* House Rule XXI 2(a)(2)(b); Senate Rule XVI(4). It also reflects the realities of the legislative process. As Judge Newman observed, "burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might

[21] *See also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) (finding of repeal by implication is a "rarity") (internal quotation marks and citation omitted); *Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part) ("We have not found any implied repeal of a statute since 1975. And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917.") (citations omitted).

precipitate." Pet. App. 47. *See also Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992) ("repeals by implication are especially disfavored in the appropriations context") (citing *Hill*, 437 U.S. at 190); *Andrus v. Sierra Club*, 442 U.S. 347, 359-60 (1979) ("The rules of both Houses prohibit 'legislation' from being added to an appropriation bill.") (internal quotation marks and citation omitted).

A. The Riders Did Not Amount To The Requisite "Clear Statement" Necessary To Extinguish The Obligation To Pay.

The high standard for finding an implied repeal or amendment cannot be met here. The plain text of the appropriations riders did not modify or extinguish the obligation to pay. Each rider provided merely that "[n]one of the funds made available by *this Act"* from three specified funding sources — two Medicare trust funds (the Federal Hospital Insurance Trust Fund and the Federal Supplemental Medical Insurance Trust Fund) and funds transferred into the CMS Program Management account — could be used for risk-corridor payments. Pet. App. 12 (emphasis added). The riders only imposed temporary (one-year) restrictions on certain specified sources of funds for risk-corridor payments, without addressing other sources. As Judge Wallach noted, the riders "do not address whether the obligation remains payable," but "at most, only address from whence the funds to pay the obligation may come." Pet. App. 76.

The riders did not purport to alter a single word of the ACA or change the payment formula in Section 1342. They did not repeal Section 1342, or amend the "shall pay" language of Section 1342, and the Federal Circuit did not suggest otherwise. The riders did not

cap risk-corridor payments at the amount of risk-corridor receipts (or "payments in") or expressly extinguish the Government's obligation to pay.

Nor did the riders cut off all funds to the risk-corridors program. In fact, they affirmatively appropriated "such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2020."[22] HHS also used "payments in" from profitable insurers (which ultimately totaled some $484 million) to fund the risk-corridors program.[23]

Notably, other provisions of the same appropriations acts used markedly different language from the riders. For example, Section 753 of the 2015 Appropriations Act provided: "None of the funds made available by this Act *or any other Act* may be used to exclude or restrict, or to pay the salaries and expenses of personnel" in a certain program. Pet. App. 139 (emphasis added). Congress repeated nearly identical language ("this or any other Act") in other

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[22] Consolidated and Further Continuing Appropriations Act, 2015, Div. G., Title II, 128 Stat. 2130, 2477.

[23] Government Accountability Office, Department of Health & Human Servs. - Risk Corridors Program, B-325630, at 3-6 (Sept. 30, 2014), http://www.gao.gov/assets/670/666299.pdf.

sections.[24] Another provision set an express cap.[25] The appropriation laws also contained language that, unlike the risk-corridor riders, expressly repealed or amended existing statutory provisions.[26] In sum, Congress knew how to make substantive changes to Section 1342 if it wished to do so.

The importance of the risk-corridors program makes it highly doubtful that Congress would have altered a key feature of that program without a clear statement. Congress does not "alter the fundamental

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[24] *See* Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113-235) ("2015 Appropriations Act"), § 716 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay ...."), § 717 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay ...."), § 718 ("None of the funds appropriated by this or any other Act shall be used to pay ...."); § 731 ("None of the funds made available by this or any other Act may be used to write, prepare, or publish ...."); Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113), § 714 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay ...."), § 715 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay ...."), § 716 ("None of the funds appropriated by this or any other Act shall be used to pay ...."), § 733 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used ....").

[25] *See* 2015 Appropriations Act § 735 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay the salaries and expenses of personnel . . . in excess of $4,000,000.").

[26] *See, e.g.*, 2015 Appropriations Act at 128 Stat. 2492, ("Section 414 of the Social Security Act (42 U.S.C. 614) is repealed."); 128 Stat. 2525 ("Sections 65, 66, 67, and 68 of the Revised Statutes (2 U.S.C. 6569, 6570, 6571) are repealed."); 128 Stat. 2774 ("Subtitle C of title II of the Pension Protection Act of 2006 (26 U.S.C. 412 note) is repealed.").

details of a regulatory scheme in vague terms or ancillary provisions." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); *see also Epic Sys. Corp.*, 138 S. Ct. at 1626-27 (same).

Any suggestion that the appropriations riders represented a "clear statement" to amend or repeal the risk-corridors program would be untenable in light of the contemporaneous understandings of Congress, the President, and the agency charged with implementing the statute. After enacting the appropriations riders, Congress as a whole repeatedly considered, and failed to approve, bills that would have expressly limited risk-corridor "payments out" to "payments in" — i.e., the very thing the Federal Circuit insisted the riders had already accomplished. *See* pp. 11-12, *supra*. President Obama signed the bills containing the riders without any objection or signing statement, and without any other indication that he understood that by doing so, he was eviscerating a program essential to the continued viability of the ACA. *See* p. 12, *supra*.

Even after the riders were enacted, HHS continued to reassure health insurers that "the ACA requires the Secretary to make full payments to issuers," and "HHS will record risk corridor payments due as an obligation of the United States Government for which full payment is required." *See* pp. 12-13, *supra*. This reassurance was codified in regulations adopted after notice and comment (*id.*) and repeated in September 2016 congressional testimony, which DOJ approved. *See* pp. 13-14, *supra*.

If there were any ambiguity about the meaning of the appropriations riders (and there is not), HHS's

authoritative view that the risk-corridor payments remained a governmental obligation would be entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Whether or not HHS would ordinarily be entitled to deference in construing an appropriations measure, the Federal Circuit treated the riders as though they made substantive modifications to Section 1342, a statutory provision that HHS *was* charged with implementing and interpreting. The Federal Circuit erred in crediting the *post hoc* revisionism of the Government's litigators rather than the carefully considered, consistently held, and authoritative HHS construction of the law it was charged with administering. *See United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001); *Christensen v. Harris County,* 529 U.S. 576, 587 (2000).

B. Interpreting the Appropriations Riders As Abrogating The Government's Obligation To Pay Would Be Unprecedented Under This Court's Decisions.

This Court has never held that appropriations measures like the riders in this case could extinguish a substantive mandate. Rather, this Court has explained that an appropriations restriction "merely imposes limitations upon the Government's own agents," but does not "pay the Government's debts, nor cancel its obligations." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)). Thus, in *Ramah Navajo*, private contractors prevailed in their Tucker Act claim for compensation despite

appropriations laws imposing statutory caps on the Government's obligations. The contractors recovered their full damages (in excess of the statutory caps), even though Congress "appropriated 'not to exceed' a given amount . . ., thereby imposing an express cap on the total funds available." *Id.* at 194.

Similarly, in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), this Court held that the Government's substantive obligations were not limited by an appropriations measure restricting agency expenditures to a sum certain ($1,713,052,000). *Id.* at 637. This Court favorably cited (*see* 543 U.S. at 642-43) the decision in *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) (*per curiam*), which held that an appropriations measure capping payments precisely at "$3,358,000" did not extinguish the Government's obligation to pay a greater sum. *Id.* at 749. The *New York Airways* court commented: "We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation." *Id.* at 750 (internal quotation marks and citation omitted).

This principle is longstanding. In *Langston*, 118 U.S. at 389, this Court held that a money-mandating statute was not "deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount . . . and which contained no words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394.

In *Langston*, an ambassador held a position under a statute providing that such a minister "shall be entitled to a salary of $7,500 a year." 118 U.S. at 390 (internal quotation marks and citation omitted).

Although in some years Congress appropriated the full $7,500, the legislature appropriated only $5,000 for that particular position in appropriations acts for fiscal years 1883 and 1884. *Id.* at 391. This Court held the claimant was still due $7,500 for 1883 and 1884 because the salary "was originally fixed at the sum of $7,500," and "[n]either of the acts appropriating $5,000 . . . contains any language to the effect that such sum shall be 'in full compensation' for those years," nor did either contain "an appropriation of money 'for additional pay,' from which it might be inferred that [C]ongress intended to repeal the act fixing his annual salary at $7,500." *Id.* at 393. This Court opined that "according to the settled rules of interpretation," "subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years" did not "abrogate[] or suspend[]" the Government's pre-existing legal obligation. *Id.* at 394.

The situation here is comparable to *Langston* in relevant respects. The appropriations riders did not amend or repeal the substantive provisions of Section 1342. Rather, they simply temporarily limited appropriations availability from certain specified funding sources, while leaving other potential sources intact — just as the appropriations measure in *Langston* appropriated only $5,000 for the ambassador's position for fiscal years 1883 and 1884, without cutting off all sources of funding for the position, without prohibiting payments above $5,000, and without stating that $5,000 served as full satisfaction of the Government's obligation.

Under the Federal Circuit's approach, *Langston* would have been decided differently. According to the Court's reasoning, Congress' decision to appropriate

only $5,000 for the ambassador's position in 1883 and 1884 — in contrast to its decision to appropriate the full $7,500 in other years — could have been said to evidence "Congress's intent to temporarily cap" the salary for the years in question. Pet. App. 29. Just as the Federal Circuit opined in this case that "Congress enacted temporary measures capping risk corridor payments out" at a certain amount, *id.* at 30, this Court could have held in *Langston* that Congress enacted temporary measures capping the ambassador's salary at the amount of $5,000. Under the Federal Circuit's approach, the ambassador in *Langston* should have lost. Instead, he prevailed.

This Court should not disturb the bedrock principle of *Langston* nor muddy the interpretative waters which have long governed appropriations law. "Congress will be presumed to have legislated against the background of our traditional legal concepts." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). For over a century, Congress has been on notice that appropriations measures capping agency expenditures, providing limited funds, or restricting specified funding sources do not extinguish a substantive mandate. *See In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.) ("As the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated.") (citing *Langston*, 118 U.S. at 394); GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-63 (4th ed. 2016) ("The mere failure to appropriate sufficient funds is not enough"; it may "prevent administrative agencies from making payment, but, as in *Langston* and

[*United States v. Vulte*, 233 U.S. 509 (1914)], is unlikely to prevent recovery by way of a lawsuit.").

The Federal Circuit's approach not only is prohibited by *Langston* and its progeny, but also makes little practical or legal sense. The Court of Appeals acknowledged that Land of Lincoln would have prevailed if Congress had remained *silent* and never appropriated any funds for the risk-corridors program. Pet. App. 18-20. The Court of Appeals could offer no reason why Congress' decision to appropriate program management funds to HHS, and then enact riders suspending the use of those particular funds for the risk-corridors program, should lead to the opposite outcome.

This Court has identified only two situations in which appropriations measures may extinguish or alter the Government's obligations to pay under prior statutes: (i) by completely revoking the entitlement to payment (as in *United States v. Dickerson*, 310 U.S. 554 (1940), and *United States v. Will*, 449 U.S. 200 (1980)), or (ii) by amending an entitlement created by a prior appropriation law via express reformation of the statutory formulas governing the entitlement (as in *United States v. Mitchell*, 109 U.S. 146 (1883), and *Vulte*, 233 U.S. at 509 (1914)). The second of these paths — using an appropriations law to amend the formula governing a recipient's entitlement — has occurred only where the original formula was itself contained in an appropriations law, rather than a substantive statute like Section 1342.

The risk-corridor riders did not accomplish either (i) or (ii). As the Federal Circuit conceded, the riders neither revoked nor amended the entitlement to payment contained in Section 1342. Moreover, Land

of Lincoln's original entitlement was created in a substantive statute, rather than an appropriations law as in *Mitchell* and *Vulte*. Thus, the Federal Circuit's decision was flatly inconsistent with this Court's precedent for assessing the impact of appropriations measures on pre-existing substantive mandates and is at odds with the framework created by this Court in *Dickerson, Will, Mitchell*, and *Vulte*.

In *Dickerson*, Congress repealed a substantive provision granting a reenlistment bonus for military personnel. Appropriations bills from 1934 through 1937 provided that the bonus statute was "*hereby suspended* as to reenlistments made during the fiscal year" and also made clear that no money was to be paid "*notwithstanding* the applicable provisions of" the statute creating that bonus. 310 U.S. at 555 (emphasis added). This Court read a subsequent 1938 version — providing that "no part of *any* appropriation contained in *this or any other Act* shall be available" for reenlistment bonuses, "*notwithstanding* the applicable provisions of" the bonus statute — as a continuation of this express suspension. *Id*. at 556-61 (emphasis added). Thus, in *Dickerson,* Congress revoked the substantive entitlement to the bonus. Here, by contrast, the Federal Circuit did not suggest that Congress had repealed Section 1342 or revoked substantive rights to risk-corridor payments under the formula set forth in the statute. Nor could the Court of Appeals have reached that conclusion. The appropriations riders here did not suspend the underlying statutory obligation, prohibit the use of funding from "any other Act," or indicate that a new substantive rule would apply "notwithstanding" the substantive risk-corridor obligation.

In *Will*, 449 U.S. at 200, Congress enacted appropriations legislation providing that a previously applicable discretionary cost-of-living adjustment for government officials "*shall not take effect*" in a subsequent year. 449 U.S. at 222 (emphasis added). For two additional years thereafter, appropriations acts barred the use of funds appropriated "*by this Act or any other Act*," as in *Dickerson*. *See Will*, 449 U.S. at 205-07 (emphasis added). The fourth year's appropriation stated that "funds available for payment[s] . . . shall not be used." *Id.* at 208. This Court found that Congress had in each of the relevant years prospectively effected a "change [in] the application of existing law" to "rescind" the underlying, non-mandatory obligation "entirely." *Id.* at 223-24 (internal quotation marks and citation omitted).

Thus, in *Will*, the appropriations language in question eliminated the substantive entitlement altogether and foreclosed payment of the entitlement from "this or any other" source of funds – precisely what the Federal Circuit found the risk-corridor appropriations riders did *not* do. Notably, Congress used the locution *"this Act or any other Act"* in *Will* and in other provisions in the 2014, 2015, and 2016 appropriations acts – but *not* in the risk-corridor riders. *See* pp. 24-25, *supra.*

In *Mitchell* and *Vulte*, Congress changed the substantive formulas in earlier enacted compensation schemes established by earlier *appropriations* measures. In contrast, Land of Lincoln's entitlement was defined by Section 1342, rather than an appropriations law. In *Mitchell*, Congress enacted an appropriations law setting the pay of certain interpreters at a specified sum. A subsequent

appropriations act then changed the compensation system for interpreters from a higher base salary to a lower base salary with a discretionary bonus pool. *See* 109 U.S. at 148. This Court set a high bar for implied repeal even of an earlier appropriations law and specifically found the subsequent appropriations law "irreconcilable" with the prior one. *Id.* at 150.

In *Vulte*, 1906 and 1907 appropriations legislation altered previous appropriations laws by eliminating a 10% bonus in the salary formula for military officers in Puerto Rico and Hawaii. *See* 233 U.S. at 513. In *Vulte*, as in *Mitchell*, a subsequent appropriations law altered a prior appropriations measure — not a substantive statute. Here, as the Federal Circuit acknowledged, Congress made no such substantive amendment to the statutory formula for calculating risk-corridor amounts owed. The riders did not change Section 1342's formula for calculating "payments out" — *i.e.*, 50% of allowable costs in excess of 103% of revenues. Land of Lincoln remains entitled to precisely the same sum, pursuant to a statutory formula in Section 1342 that Congress did not touch.

In contrast to *Dickerson* and *Will*, where Congress repealed statutory entitlements, and *Mitchell* and *Vulte*, where the legislature changed appropriations law formulas governing entitlements for the years in question, the appropriations riders at issue here did nothing to revoke or amend the statutory rights and obligations created by Section 1342.

This Court's precedent has emphasized that an appropriation measure cannot alter a substantive mandate "unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." *Vulte*, 233 U.S. at

515; *see also Will*, 449 U.S. at 224 ("clear intent" required); *Dickerson*, 310 U.S. at 562 ("ambiguous" evidence insufficient). That high standard is not met here.

C. The Riders' Legislative History Is Not A Proper Basis For Extinguishing The Obligation To Pay.

This Court should not adopt the Federal Circuit's new approach to congressional repeals-by-implication, allowing legislative history accompanying appropriations measures to modify the substantive obligations of money-mandating statutes. Even if *some* forms of legislative history were permissible bases of statutory interpretation, the Federal Circuit's approach stretches the use of legislative history to the breaking point. It would empower individual members of Congress to smuggle snippets of legislative history into the appropriations context surreptitiously to repeal clear statutory obligations contrary to longstanding House and Senate procedural rules. Further, the judgment below would empower the Government to do so after private actors have accepted Congress' invitation and performed their end of the bargain in reliance on clear statutory language.

"[L]egislative history is not the law." *Epic Sys. Corp.*, 138 S. Ct. at 1631. Reliance on legislative history may vest "committee members — or, worse yet, unelected staffers and lobbyists — [with] both the power and the incentive to . . . manipulat[e] . . . legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). That is precisely the risk raised by this case,

and the risk this Court has sought to mitigate by adopting the presumption against implied repeals through appropriations laws. *See Cherokee*, 543 U.S. at 646 (rejecting reliance on legislative history in appropriations context).

In *Hill*, 437 U.S. at 153, this Court rejected reliance on legislative history accompanying appropriations measures as a basis for overriding a prior statutory mandate (there, the obligation for agency review under the Endangered Species Act). This Court explained that courts should not "assume that Congress meant to repeal [a substantive law] by means of procedure expressly prohibited under the rules of Congress." 437 U.S. at 191. Otherwise, "every appropriations measure would be pregnant with prospects of altering substantive legislation," "lead[ing] to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation." *Id.* at 190.

The Federal Circuit's novel approach would take this "absurd result" to another level — requiring private parties to review every conceivable scrap of legislative history that might be assembled, after the fact, to concoct a revisionist history that could deny them, retroactively, the benefit of the bargain promised by Congress. By requiring Congress to speak clearly when modifying prior legislative action, this Court's jurisprudence not only ensures that the private sector has notice of the applicable law but also

protects the constitutional interest in legislative accountability.[27]

Moreover, in considering legislative history, the Federal Circuit brushed aside much more telling evidence of congressional intent: even after enacting the appropriations riders, Congress continued to consider proposals to repeal the risk-corridors program or expressly to cap "payments in" at "payments out." *See* pp. 11-12, *supra.* Such legislative activity would have made little sense if Congress had shared the Federal Circuit's understanding that the appropriations riders had already eliminated the Government's obligation to pay under Section 1342. The record shows Congress was willing to enact appropriations riders temporarily foreclosing certain specified funding sources, but not to repeal Section 1342 or make it budget-neutral. "If courts felt free to pave over bumpy statutory texts . . ., [they] would risk failing to 'tak[e] . . . account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of congressional intent.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (citations omitted).

Assuming, *arguendo*, that it is *ever* possible for legislative history accompanying an appropriations measure to repeal clear statutory obligations by mere implication, the legislative history in this case falls far short of what is necessary. The Federal Circuit

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[27] Legislative history played only a supporting role in *Will* and *Dickerson*, as the appropriations measures in those cases expressly prohibited the use of any funds to pay the obligations at issue. *See Will*, 449 U.S. at 205-06 (restricting funds "in this or any other Act"); *Dickerson*, 310 U.S. at 556-57 (same).

cited a back-and-forth between two congressional offices and the GAO. Pet. App. 26. But this report does not even rise to the level of "legislative history," as nothing in it references the riders – the first of which was not even proposed until three months later. The Federal Circuit speculated that the riders were enacted in response to the GAO report. But there is no evidence of this, and statutory interpretation proceeds "by examining the text, not by 'psychoanalyzing those who enacted it.'" *Carter v. United States*, 530 U.S. 255, 271 (2000) (citation omitted).

Nor was the Federal Circuit's description of the GAO report accurate. The GAO did not identify CMS program management appropriations as the only potential source of funds to make payments out (besides "payments in" collected from profitable insurers). In fact, GAO found that "user fees" were also available. *See* p. 16 n.20, *supra*. In addition, Congress appropriated fees from the sale of data. *See* p. 24, *supra*. Moreover, GAO did not state that its analysis of the funding sources was exhaustive. GAO simply addressed the questions posed by the Members who requested the report. When Judge Wheeler of the Court of Federal Claims examined the issue after GAO's response, he found continuing resolutions during the first two-and-a-half months of fiscal year 2015 likely provided an additional $750 million in risk-corridor appropriations available before enactment of the December 16, 2014 rider. Pet. App. 129 n.13. The Federal Circuit did not disagree with Judge Wheeler on this point.

Next, the Federal Circuit also erroneously relied on a floor statement by Representative Rogers that "[i]n 2014, HHS issued a regulation stating that the

risk corridor program will be budget neutral." Pet. App. 12-13. "[F]loor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). Here, there is particular reason for caution. The relevant statement was a *two-sentence* snippet within an explanatory statement spanning some *677 pages* inserted into the Congressional Record. 160 Cong. Rec. H9307-9984 (Dec. 11, 2014). The statement covered *eleven* appropriations bills for fiscal year 2015, plus continuing appropriations for the Department of Homeland Security.

As Judge Wallach noted, "Chairman Rogers did not say that the 2015 *appropriations rider* sought to make the risk-corridors program budget neutral; instead, he said that such was the goal of an *HHS regulation* and that the 2015 appropriations rider sought to designate from which funds the payments out may not be made. Chairman Rogers said nothing about the 2015 appropriations rider's effect on the Government's *obligation* to make payments out." Pet. App. 79-80 (emphases in original).

In addition, Representative Rogers was in error; there was no 2014 regulation "stating that the risk corridor program will be budget neutral." 160 Cong. Rec. at H9838. To be sure, HHS issued a March 2014 regulation, but that rule did not require that the risk-corridors program be budget-neutral. Rather, it adopted a series of benefit and payment parameters, such as amendments to the definitions of "adjustment percentage," risk-corridor "profits," and "allowable administrative costs," 79 Fed. Reg. at 13,787 (Mar. 11, 2014), none of which automatically provided that the program would be budget-neutral. In accompanying commentary, HHS explained that over the three

years of its operation "[w]e intend to implement this program in a budget neutral manner." *Id.* But its intention was not a legal requirement and was not the product of notice-and-comment rulemaking; HHS never adopted any rule requiring that the risk-corridors program be budget-neutral. Further, the commentary reassured insurers that HHS would "help to further mitigate any unexpected losses for issuers of plans subject to risk corridors attributable to the effects of the transitional policy," *id*. at 13,786, and recognized that, under the program, the "Federal government and certain participating health plans" would "*shar[e]* in gains or losses" caused by "inaccurate rate setting from 2014 through 2016." *Id.* at 13,746 (emphasis added). The March 2014 commentary was thus consistent with HHS's longstanding view that risk-corridor payments were obligations of the United States and that the risk-corridors program was not statutorily required to be budget-neutral. *See* pp. 9, 12-14, *supra.*

In sum, the Federal Circuit relied on dubious "legislative history" involving only *three* Members of Congress — far too thin a reed to support the Court of Appeals' momentous decision overturning a substantive statute enacted by both Houses of Congress, signed by the President, and relied upon by participating health insurers to their detriment.

II. THE PRESUMPTION AGAINST RETROACTIVITY PRECLUDES INTERPRETING THE APPROPRIATIONS RIDERS AS EXTINGUISHING THE GOVERNMENT'S OBLIGATION TO PAY.

The usual "clear statement" rule for implied repeals is fortified in this case by the settled expectations of insurers like Land of Lincoln, which had already performed their part of the bargain with the Government when the appropriations riders were enacted. By the time the first rider was enacted (December 16, 2014), Land of Lincoln had nearly completed the 2014 insurance plan year, had already fixed premiums and issued policies for the 2015 plan year (which contained guaranteed renewal rights for consumers for the 2016 plan year), and had already committed to HHS to provide insurance on the Illinois Exchange in 2016. By virtue of its status as a CO-OP under the ACA and its loan agreement with the Government, Land of Lincoln was required to participate as a QHP for 2014, 2015, and 2016, and to afford consumers the right to automatic renewals of their policies. Accordingly, Land of Lincoln had no ability to withdraw from the Illinois insurance market, even after the appropriations riders were enacted.

The retroactive impact of the riders was therefore severe. Land of Lincoln had already incurred substantial costs in reliance on the Government's promise and had honored its part of the bargain in service of the ACA's policies. It relied on the promise of risk-corridor protections both in agreeing to offer policies on the exchanges and in pricing those policies. This is not to say that Land of Lincoln or other insurers relied on the Government to cover *all* of their

losses if they mispriced policies. Far from it. The government covered no part of excess costs from 100% to 103% of revenues and only half of excess costs from 103%-108% of revenues. But Land of Lincoln and other insurers agreed to participate in the exchanges and charge reasonable premiums to newly insured customers because the Government promised at least to share *some portion* of the risk with them.

The success of the exchanges depended on insurers' participation in the risk-corridors program, and the Government benefited directly from the lower premiums charged by insurers because it paid less in tax subsidies as a result of these reduced premiums. *See* p. 6, *supra*. Moreover, after insurers agreed to participate and 2014 rates were already set, HHS unilaterally increased insurer costs through the November 2013 "transitional policy" (*see* pp. 8-9, *supra*), thus making the risk-corridors program even more important to insurers' financial health. And in the summer of 2015, HHS instructed state insurance commissioners that, in reviewing the reasonableness of issuers' proposed 2016 benefit-year rates, they should assume that insurers would receive full risk-corridor payments (thereby constraining insurers' rates even more). *See* p. 13, *supra*.

Accordingly, the Government's retroactive denial of risk-corridor payments had a draconian impact. It drove Land of Lincoln into insolvency, and the company entered liquidation on October 1, 2016, three months prior to the end of the policy year. Overnight, nearly 50,000 policyholders in Illinois lost their health insurance. As a federal district court found, policyholders were required "to find coverage for the remainder of that year," and "[s]ome policyholders were placed in the unenviable position

of finding short-term health coverage and restarting their co-payment and deductible amounts from zero." *Dowling v. U.S. Dep't of Health and Human Servs.*, 325 F. Supp. 3d 884, 898 (N.D. Ill.), *vacated on jurisdictional grounds*, 905 F.3d 517 (7th Cir. 2018).

This Court has warned against statutory interpretations that would "impair rights a party possessed when he acted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (Title VII amendment did not apply to pre-enactment conduct). "The presumption against retroactive legislation . . . 'embodies a legal doctrine centuries older than our Republic.'" *Vartelas v. Holder*, 566 U.S. 257, 265 (2012) (immigration statute did not apply retroactively) (citation omitted). "[L]egislation is rarely afforded retroactive effect. . . . Indeed, the presumption is sometimes said to inhere in the very meaning of the 'legislative Powers' the framers assigned to Congress in Article I of our Constitution." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169-70 (10th Cir. 2015) (Gorsuch, J.); *see also Claridge Apartments Co. v. Comm'r of Internal Revenue*, 323 U.S. 141, 164 (1944) ("clearest mandate" required to apply statute retroactively); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (statute does not apply retroactively absent "manifest intention of the legislature"); *Metroil, Inc. v. ExxonMobil Oil Corp.*, 672 F.3d 1108, 1113 (D.C. Cir. 2012) (Kavanaugh, J.) ("bedrock rule of law values . . . counsel against retroactive application of new laws").

The presumption is particularly important where, as here, retroactive application would eliminate an entitlement promised by the Government to induce action by private parties. Instructive here is *In re Twenty Per Cent. Cases*, 87 U.S. 179 (1873), where

this Court declined to apply an appropriations law retroactively because it would upset settled expectations of those who had performed services for the Government. The case involved a joint resolution granting extra compensation for one year to certain federal civil service employees. Three years later, Congress enacted an appropriations law repealing all acts or joint resolutions granting extra compensation. The Court held that the repealing act did not retroactively eliminate the employees' right to extra compensation, because that right "became fixed and vested when the year's services were faithfully performed," even though the funds had not yet been paid to the claimants before the Court. *Id.* at 186. Precisely the same reasoning is applicable here. *See also United States v. Larionoff*, 431 U.S. 864, 878-79 (1977) (refusing to interpret statutory amendment as withdrawing Navy reenlistment bonus, even with respect to sailor who had agreed to extend enlistment period but had not begun to serve it; relevant time was "[w]hen [sailor] made that commitment, by entering an agreement to extend his enlistment"); *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (opinion of Paterson, J.) (interpreting federal statute reducing commissions of customs collectors as not applying to collections commenced before statute's enactment).

In the rare instances where this Court has found that appropriations riders either revoked or amended a substantive entitlement, it has never interpreted appropriations language as such if enacted *after* private-party performance. For example, *Dickerson* involved a suspension of reenlistment bonuses enacted in June 1938 for reenlistments during the next fiscal year, when Dickerson reenlisted. *See* 310

U.S. at 554-55. *Will* concerned discretionary cost-of-living adjustments for existing federal employees; cost-of-living adjustments, by definition, are prospective because they are triggered only as living costs increase over time. *See* 449 U.S. at 202-03, 217-21. *Mitchell* involved a prospective change in interpreters' pay. *See* Pet. App. 53. Similarly, in *Vulte*, as Judge Newman recognized, Congress "did not retroactively strip the officers of pay for duties they had performed while subject to the higher pay." Pet. App. 52. Denying a future bonus or cost-of-living adjustment while continuing to pay the base salary is qualitatively different from retroactively extinguishing an existing government obligation when private parties have already performed their part of the bargain and have suffered enormous losses as a result.

This Court has instructed that the presumption against implied repeals "carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Martin Evangelical Lutheran Church*, 451 U.S. at 788 (citation omitted); *see also United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982) (applying bankruptcy provision prospectively in order to avoid Fifth Amendment question). For the Government to retroactively extinguish obligations already incurred under Section 1342 would raise serious questions under the Due Process Clause, the Takings Clause, or both. *See, e.g., Larionoff*, 431 U.S. at 879 (opining that any attempt "to deprive a service member of pay due for services already performed, but still owing" would present "serious constitutional questions"). At the very least, the appropriations riders should not be read as repealing the Government's payment obligation in

the absence of any clear textual evidence that they accomplished such a far-reaching and potentially constitutionally problematic result.

III. PERMITTING ABROGATION OF THE GOVERNMENT'S OBLIGATIONS IN THIS CASE WOULD HAVE DELETERIOUS PRACTICAL CONSEQUENCES.

Interpreting ambiguous language in appropriations riders to repeal statutory rights and upend settled expectations would wreak havoc on public-private partnerships critical to the proper function of government programs. *See Ramah Navajo*, 567 U.S. at 191-92 (rejecting notion that private parties with government contracts are responsible for "track[ing] . . . agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its . . . promises" even when appropriations run short).

This case is a perfect illustration of the dangers caused by the Federal Circuit's rule. The Government's breach of its obligations drove Land of Lincoln into liquidation in October 2016, leaving nearly 50,000 Illinois policyholders without health insurance with three months remaining in the coverage year.

Land of Lincoln's demise was not an isolated incident. The Government's refusal to make the promised risk-corridor payments "caused significant harm to insurers who participated in the Affordable Care Act program." Pet. App. 68. Instead of a program under which insurers and the Government would "*share* in profits or losses resulting from inaccurate rate setting from 2014 through 2016," 78

Fed. Reg. at 15,413 (emphasis added), the Federal Circuit turned the risk-corridors program into a scheme of "heads-the-Government-wins, tails-the-insurer-loses." Insurers were required to share profits while being left holding the bag for nearly all their losses. Not surprisingly, by the end of 2016, only six of the 24 health insurance CO-OPs remained in business. Pet. App. 68. The Government's bait-and-switch had "transformed the Exchanges from promising to punitive for the insurance industry." *Id.* The negative impact of that transformation fell not just on the insurance industry, but also, as Judge Wallach noted, on the millions of Americans who faced restricted choice and higher prices when shopping for plans on the exchanges. Pet. App. 84 (noting that several health insurance companies withdrew entirely from the exchanges and others raised prices). The trend has continued. Two August 2019 CMS reports found that average monthly enrollment across the entire individual market fell 7% between 2017 and 2018. From 2016 to 2018, enrollment among those not qualifying for subsidies dropped by 2.5 million people — a 40% decline nationally.[28]

In short, the Federal Circuit construed the appropriations riders in a way that destabilized insurance markets, when the very purpose of the ACA

[28] *See* CMS, Early 2019 Effectuated Enrollment Snapshot (Aug. 12, 2019), available at https://www.cms.gov/newsroom/fact-sheets/early-2019-effectuated-enrollment-snapshot; CMS, Trends in Subsidized and Unsubsidized Enrollment (Aug. 12, 2019), available at https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Trends-Subsidized-Unsubsidized-Enrollment-BY17-18.pdf.

was to do the opposite. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.").

But the negative consequences of the Federal Circuit's decision are even broader. As Judge Newman explained, "[o]ur system of public-private partnership depends on trust in the government as a fair partner." Pet. App. 67. The Federal Circuit's decision undermines that trust. That, in turn, will lead to fewer — and less successful — public-private partnerships, which are integral to many complex statutory and regulatory schemes. The federal government spent $507 billion or 13% of the 2017 budget on contracts with the private sector for goods, services, and research and development.[29] "To hold that the Government can abrogate its obligation to pay through appropriations riders, after it has induced reliance on its promise to pay, severely undermines the Government's credibility as a reliable business partner." Pet. App. 83. As this Court has warned in a related context, "[i]f the Government could be trusted to fulfill its promise to pay only when more pressing fiscal needs did not arise, would-be contractors would bargain warily — if at all — and only at a premium large enough to account for the risk of nonpayment." *Ramah Navajo*, 567 U.S. at 191-92. "If a contractor's right to payment varied based on a future court's uncertain interpretation of legislative history, it would increase the Government's cost of contracting." *Id.* at 200. After all, "[a] promise to pay,

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[29] *See* Moshe Schwartz et al., Congressional Research Service, Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars, R44010, at 2 (July 2, 2018).

with a reserved right to deny or change the effect of the promise, is an absurdity." *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) (citation omitted).

The Federal Circuit's decision threatens enormously destabilizing effects on the government contracting community. This Court should adhere to the principle that "[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *Winstar*, 518 U.S. at 886 n.31 (plurality opinion) (internal quotation marks and citation omitted).

IV. THE JUDGMENT BELOW SHOULD BE REVERSED, EVEN IF THE FEDERAL CIRCUIT'S INTERPRETATION OF THE APPROPRIATIONS RIDERS WERE CORRECT.

A. Even If The Appropriations Riders Worked A "Temporary Suspension" Of The Government's Obligation To Pay, They Did Not Permanently Extinguish That Obligation.

Even if the Federal Circuit's interpretation of the riders were correct – and it is not – the judgment should nonetheless be reversed because the Court of Appeals' reasoning does not support the permanent extinguishment of the Government's obligation to pay. The Court of Appeals described the riders (which governed appropriations only during the fiscal years 2015, 2016, and 2017) as merely "temporary" suspensions of the obligation to pay and expressly did

not hold that they effected any permanent amendment. *See* Pet. App. 30 ("we only hold that Congress enacted temporary measures capping risk corridor payments out at the amount of payments in"); *id.* at 31 ("we do not hold that the appropriations riders effected any permanent amendment"); *see also id.* at 27 n.6.

The Federal Circuit never explained how a *temporary* cap on funding – one that limited use of certain appropriations during three fiscal years – could *permanently* extinguish the risk-corridor obligations that accrued under Section 1342. Even after the initial appropriations riders were enacted, HHS repeatedly announced the risk-corridor obligations would continue to be "recorded" and treated "as an obligation of the United States Government for which full payment is required." *See* pp. 12-14, *supra.* In other words, HHS did not treat the riders as permanently extinguishing the obligation. Rather, it took them to mean merely that risk-corridor payments would not be made during the period of the appropriations riders. In 2018, both the HHS FY 2019 Budget in Brief (published online in February 2018) and the official FY 2019 White House budget recognized risk-corridor payments as obligations of the Government – despite the expiration of the risk-corridors program in 2016 – and included more than $11.5 billion of funding as a "mandatory appropriation." *See* p. 14, *supra.*

Accordingly, the Federal Circuit's premise that the riders effected a *temporary* suspension of the obligation did not justify its conclusion that they created a *permanent* extinguishment.

B. Land Of Lincoln Properly Stated Contract And Takings Claims.

The Federal Circuit also erred in upholding the dismissal of Land of Lincoln's implied-in-fact contract and takings claims. The Government induced Land of Lincoln to provide affordable health insurance (and to keep its rates low) by promising to make risk-corridor payments according to the formula set forth in Section 1342. The "unambiguously mandatory" language of Section 1342, Pet. App. 16, together with HHS's accompanying regulatory commitments, constituted an "offer" and provided the necessary "clear indication that the legislature intend[ed] to bind itself contractually." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). Moreover, in order to participate on the exchange, insurers were required to submit an application for each plan, undergo a certification process, agree to participate in the risk-corridors program, and sign agreements with HHS pledging compliance with these terms. Pet. App. 111-12, 147-49.

In *United States v. Northern Pacific Railway Co.*, 256 U.S. 51 (1921), this Court held that a law granting land to a railroad company to construct a railway from Lake Superior to Puget Sound and Portland "embodied a proposal to the company to the effect that if it would undertake and perform that vast work it should receive in return the lands comprehended in the grant." *Id.* at 63-64. "Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the government." *Id.* So too here. *See also New York Airways*, 369 F.2d at 751 (agency rate order was offer to pay stipulated price for service,

which plaintiffs accepted by performance); GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-6, 10-12 (3d ed. 2006) ("The courts view the acceptance of a grant of federal funds subject to conditions that must be met by the grantee as creating a 'contract' between the United States and the grantee." . . . Thus, if a grantee does what it has committed itself to do and incurs allowable costs, the government is obligated to pay.").

Even if the appropriations riders could be interpreted as extinguishing the Government's payment obligation retroactively, they would represent a breach of contract for which the Government is liable. *See Mobil Oil Expl. & Producing Serv., Inc. v. United States*, 530 U.S. 604, 618-19 (2000) (Government liable when subsequently enacted statute breached contract); *Winstar*, 518 U.S. at 839 (compliance with earlier statutory reserve requirements created contract right that overrode later statutory change and justified damages award).

Land of Lincoln also stated a takings claim, because "[v]alid contracts are property," and "[r]ights against the United States arising out of a contract with [the United States] are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Even under the Federal Circuit's interpretation of the appropriations riders, Land of Lincoln stated valid contract and takings claims.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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