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

REPLY BRIEF FOR LAND OF LINCOLN

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Section 1342 of the Patient Protection and Affordable Care Act (ACA) provides in mandatory, unconditional terms that the Department of Health and Human Services (HHS) "shall pay" an "amount" fixed by statutory formula to "participating [health insurance] plans." 42 U.S.C. § 18062(b)(1). The Government defends the Federal Circuit's reasoning only half-heartedly and instead advances an argument the Court of Appeals rejected: that the plain language of Section 1342 does not mean what it says.

In the Government's view, the "shall pay" language of Section 1342 means two different things: in Section 1342(b)(2), "shall pay" means insurers are required to make "payments in" according to the statutory formula, but in Section 1342(b)(1), "shall pay" means "shall *not* pay unless and until Congress appropriates funds." Nothing in the statute supports that one-sided interpretation. The plain text contains no contingencies, such as the conditional language Congress used in at least four other sections of the ACA: "shall pay, subject to the availability of appropriations." Section 1342 omits that caveat.

No court has ever held that Congress must include an appropriation in order to make a money-mandating statute effective. Indeed, this Court rejected such an approach in *United States v. Langston*, 118 U.S. 389 (1886), followed by 150 years of precedent. Here, the Federal Circuit correctly recognized that Section 1342's "shall pay" language is "unambiguously mandatory" even without an appropriation, as "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt." Pet.App. 16, 18. Below, the Government recited the principle that "the mere failure of Congress to appropriate funds . . . does not in and of itself defeat a Government obligation created by statute." Fed. Cir. No. 2017-1224 Appellees' Br.27 (citation omitted). Similarly, in litigation involving cost-sharing subsidies under the ACA (where Congress did not specifically appropriate funds), the Government acknowledged the absence of an appropriation would not preclude an insurer from "receiv[ing] the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund."[1]

The Government's new-found attempt to render congressional mandates meaningless absent an appropriation is precisely backwards. Those mandates govern, despite funding limitations in appropriations laws, unless the appropriations measures expressly or by clear implication repeal the money-mandating obligations. The after-the-fact appropriations riders here fall far short of the high standard for implied repeal.

In the Government's view, no statutory mandate is binding unless accompanied by an appropriation and, even then, no promise is ever genuinely binding, because appropriations can always be altered or revoked in the future. That view would frustrate Congress's authority to create statutory

[1] *House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Defendants' Memorandum in Support of Their Motion for Summary Judgment, Dkt. 55-1, at 20 (D.D.C. Dec. 2, 2015).

commitments and to enlist private parties in policy implementation. Private parties "would bargain warily – if at all." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 192 (2012). That result would "increase the cost to the Government of purchasing goods and services." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 644 (2005).

The Government asserts it was "objectively unreasonable" (Govt.Br.40) for insurers to take Congress at its word regarding the mandatory "shall pay" language. But an interpretation under which reliance was inherently unreasonable cannot possibly be right, as the very purpose of Section 1342 was to induce such reliance – to encourage insurer participation on ACA exchanges and to lower insurer rates in the face of an uncertain risk pool. Section 1342 could hardly achieve that purpose if the statute had no effect at all unless and until a future Congress decided to make risk-corridors payments.

The Government insists HHS committed no wrong "by faithfully adhering to Congress's funding limitations." Govt.Br.4. But this case is not an Administrative Procedure Act (APA) action to force HHS to pay money it does not have. Rather, it is a Tucker Act suit for damages against the United States, which has created a permanent, standing appropriation in the Judgment Fund, 31 U.S.C. § 1304, to pay such damages. If the Tucker Act applied only where an agency unlawfully withholds available appropriated funds, it would be largely superfluous. A claimant facing an obdurate agency could simply seek declaratory and injunctive relief to release the funds, with no need for damages. The Government would reduce the Tucker Act to a hollow shell rather than a "great act of justice."

United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915) (Holmes, J.).

This case does not seek to impose "liability for Congress's own funding determinations," Govt.Br.4, any more than *Langston* did, or any more than *United States v. Winstar*, 518 U.S. 839 (1996), imposed liability for Congress's regulatory decisions. This case merely enforces the plain language of Congress's own handiwork in the Tucker Act for breaches of Congress's money-mandating commitments in Section 1342.

A. Section 1342 Creates A Money-Mandating Obligation Regardless Of Appropriations.

1. The Government Ignores The Plain Text Of The Statute.

The question of whether Congress created a money-mandating obligation in advance of appropriations is one of statutory interpretation. Yet the Government ignores the operative statutory language. The argument section of its brief quotes only the portion of Section 1342 instructing the Secretary to "create and administer a risk corridor program" (Govt.Br.20), while disregarding the mandatory payment language: "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, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount." 42 U.S.C. § 18062(b)(1). The combination of (1) the "shall pay" language, (2) a statutory formula that leaves no uncertainty or discretion regarding the "amount" that must be paid, and (3) the identity of the recipient – *i.e.*, "the participating [insurer] plan" – renders Section 1342 a clear and binding financial obligation. This obligation, in turn, gives insurers an enforceable right to payment.[2]

This Court has previously recognized the mandatory nature of "shall pay." *Ramah Navajo*, 567 U.S. at 185. Moreover, Section 1342 contrasts with other ACA programs that Congress expressly made subject to the availability of appropriations. *See, e.g.*, 42 U.S.C. § 280k(a) ("subject to the availability of appropriations"); *id.* § 300hh-31(a) (same); *id.* § 293k-2(e) (same); *id.* § 1397m-1(b)(2)(A) (same).

The absence of conditional language in Section 1342 is instructive. As one of the Government's own authorities describes, "the language 'subject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." *Greenlee County v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1142 (2008). Congress took a different approach in the mandatory, unconditional language of Section 1342.

Section 1342(a) provides that the risk-corridors program is "based on" Medicare Part D, 42 U.S.C. § 18062(a), which creates a federal obligation and is not budget-neutral. Under the Government's view, Section 1342 would not be "based on" Medicare Part D at all. Instead, Section 1342 would operate in the *opposite* manner.

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[2] Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) ("duty" implies a "right" as correlative).

The Government notes that Part D, in contrast to Section 1342, provides "budget authority in advance of appropriations." 42 U.S.C. § 1395w-115(a)(2). But Part D omits the unambiguous "shall pay" command of Section 1342. Instead, it states that the Secretary "shall provide for payment," suggesting creation of a mechanism for payment rather than directly commanding payment, *id.* § 1395w-115(a); provides for "[i]ncrease in payment" if costs exceed thresholds, which authorizes adjustments to payments, *id.* § 1395w-115(e)(2)(B); and states it "represents the obligation of the Secretary to provide for the payment of amounts provided under this section," which is less direct language than the imperative command of Section 1342. *Id.* § 1395w-115(a)(2). Part D also differs from Section 1342 in identifying a single funding source: the Medicare Prescription Drug Account. *Id.* § 1395w–115(d)(3). Given that single source, providing budget authority in advance of appropriations in Part D made sense. In contrast, Section 1342 did not specify a single source of funding; it could have (but did not) make "payments in" the sole source of "payments out." The Court of Appeals correctly rejected the Government's attempt to use Part D's language to rewrite Section 1342. Pet.App. 20 n.3.

The Government cites specific appropriations for ACA programs commencing soon after enactment, such as assistance to States in creating exchanges (42 U.S.C. § 18031(a)(1)). Govt.Br.7. The risk-corridors program was different, because the exchanges did not open until January 2014, and as the Government admits, "[r]isk-corridors collections and payments could not begin until 2015."

Govt.Br.8. Annual appropriations are a typical practice, and it was reasonable for Congress to wait until insurers began offering plans on the exchanges.

2. The Statutory Context Reinforces The Plain Meaning.

The Federal Circuit found, and the Government has never disputed, that the risk-corridors program was enacted to induce insurers to provide coverage on ACA exchanges and to "discourage insurers from setting higher premiums to offset" the risk posed by the "expanded pool of individuals seeking coverage," for whom risk data was largely unavailable. Pet.App. 2. It would make no sense for Congress to attempt to induce insurer participation by making an illusory, non-binding offer on which it was "objectively unreasonable" for insurers to rely. Govt.Br.40.

The risk-corridors program does not merely share risk "among insurers," as the Government erroneously states. Govt.Br.3. Rather, in promulgating its final rule, HHS explained that "risk corridors create a mechanism for *sharing* risk . . . *between the Federal government and [Qualified Health Plan] issuers*." 77 Fed. Reg. 17,236 (Mar. 23, 2012) (emphases added); *see also* 78 Fed. Reg. 15,412 (Mar. 11, 2013) (Government and insurers "share in profits or losses").

The Government would rewrite Section 1342 to transform risk-corridors from a program under which insurers and the Government *share* risks, to a program in which insurers shoulder them alone. Under the Government's interpretation, risk-corridors would *amplify* risks to insurers, by requiring them to make "payments in" if their plans are profitable, but denying them any assurance of statutorily promised "payments out." Indeed, under the Government's position, not even "payments in" would be an available payment source, absent an appropriation. The Government's view is antithetical to the very nature of risk-corridors programs, with which Congress presumably was familiar from other contexts. *See* 42 C.F.R. § 422.458 (Medicare Advantage risk-corridors program for 2006 and 2007); 67 Fed. Reg. 41,070 (June 14, 2002) (Medicaid Managed Care State risk-corridors program).

The Government warns of "uncapped liability to insurers" if its position is not accepted. Govt.Br.3. But Section 1342(b)(1) explicitly limits the Treasury's liability. Insurers bear all the losses when costs are 3% over the target, and they bear half of the losses up to 8%. The Government disregards the cap enacted by Congress and asks this Court to write a new one.

If there were any doubt about the meaning of Section 1342, and there is not, HHS's notice-and-comment rulemaking interpretation would be entitled to *Chevron* deference. Open.Br.27. The Government points to HHS statements (made *after* the exchanges opened and *after* Land of Lincoln had already committed to provide coverage through 2016) that HHS's ability to make risk-corridors payments was subject to availability of appropriations. Govt.Br.41. But even as it acknowledged practical limits on its own ability to make payments, HHS reaffirmed that Section 1342 created money-mandating obligations. Thus, the Government cites a May 2014 HHS response to public comments (Govt.Br.41-42) without including key language: "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 79 Fed. Reg. 30,260 (May 27, 2014). In 2015 and 2016 – even after Congress began enacting appropriations riders – HHS repeated that risk-corridors liabilities are "obligation[s] of the United States Government for which full payment is required." Open.Br.13-14.

3. An Appropriation Is Not Necessary To Make A Money-Mandating Statute Effective.

The Government's argument that Congress must supply an appropriation to make a money-mandating obligation effective would impose an impermissible judge-made limitation on Congress's Article I powers. Congress is free to create an obligation without an appropriation; its Article I power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (Marshall, C.J.).

The Government's position would disrupt appropriations practices. "Congress may expressly state that an agency may obligate in excess of the amounts appropriated, or it may implicitly authorize an agency to do so by virtue of a law that necessarily requires such obligations." GAO, *Principles of Federal Appropriations Law* 6-91 (3d ed. 2006) (GAO Redbook).[3] For instance, the Federal Water

[3] This Court has often relied on the GAO Redbook. *E.g.*, *Ramah Navajo*, 567 U.S. at 190; *Cherokee Nation*, 543 U.S. at 643.

Pollution Control Act Amendments of 1972 authorized obligations in advance of appropriations. *Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975). GAO cites many other examples, Redbook at 6-92, including obligations for medical services under the Defense Health Program:

> We have previously identified situations where Congress has expressly mandated an agency to incur obligations without regard to the availability of budgetary resources to cover the obligations. For example, . . . the Veterans Administration (VA) becomes legally liable for compensation and pension benefit payments to a veteran on the date it administratively adjudicates a veteran's claim as due and payable. Since no further congressional action is needed to establish a right to payment, the obligation for these benefits occurs by operation of law. . . .[4]

See also 2 U.S.C. § 622(9) (recognizing "the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts," where "the United States is obligated to make such payments"); GAO, *A Glossary of Terms Used in the Federal Budget Process* 13 (5th ed. 2005) ("[B]ecause the entitlement is created by operation of law, if Congress does not appropriate the money necessary to fund the payments, eligible recipients may have legal recourse").

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[4] GAO Opinion B-287619, at 9 (July 5, 2001) (cited in Redbook at 6-92).

No case, from any court, has ever adopted the Government's position. Nor can the Government distinguish *Langston*. Govt.Br.30-31. If the Government's position were correct, *Langston* would have concluded that the statute setting a $7,500 salary was purely hortatory absent an appropriation, and there would have been no obligation to pay. Yet *Langston* affirmed a $7,666.66 judgment in the ambassador's favor. Petitioners here, like the plaintiff in *Langston,* ask a court to enter judgment against the United States for amounts owed by statute. Any insufficiency of HHS's appropriations is beside the point.

For decades following *Langston*, courts adjudicated Tucker Act claims without appropriations to pay judgments. For example, in *New York Central R.R. v. United States*, this Court affirmed the Court of Claims' determination that "lack of appropriation . . . furnishes no reason why this court may not render its judgment for the amount due." 65 Ct.Cl. 115, 128 (1928), *aff'd*, 279 U.S. 73 (1929); *see also Lovett v. United States*, 104 Ct.Cl. 557, 582-83 (1945) ("In a long line of cases it has been held that lapse of appropriation, failure of appropriation, exhaustion of appropriation, do not of themselves preclude recovery for compensation otherwise due.") (citing 23 decisions).

This Court held such claims permissible in *Glidden Co. v. Zdanok,* 370 U.S. 530, 570-71 (1962), notwithstanding absence of appropriations. Under the Government's theory, *Glidden* should have held that, without an appropriation, there was no claim or judicial jurisdiction to begin with.

The Government suggests *Langston* would somehow justify *entering* a judgment in Petitioners' favor but not *paying* that judgment. Govt.Br.30. But how to satisfy a judgment is not the question at hand. Moreover, the Judgment Fund makes this an easier case than *Langston*, not a harder one. Congress's creation of a permanent and indefinite appropriation in the Judgment Fund to satisfy the judgments of the Court of Federal Claims represents Congress's considered decision to forgo the cumbersome process of exercising appropriations control over the payment of individual claims. In *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80 (1992), this Court held that the Judgment Fund provided the requisite appropriation permitting payment of funds from the Treasury to a bank claiming a statutory obligation. *Id.* at 94-95 (Rehnquist, C.J., for the Court).

The Government's argument is also foreclosed by *Ramah Navajo*, which opined 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." 567 U.S. at 197 (quoting *Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892)). This Court relied on decisions pre-dating the Judgment Fund without suggesting any reason to question their applicability. 567 U.S. at 190-91, 195, 197 (citing *Dougherty v. United States*, 18 Ct.Cl. 496 (1883), as well as *Ferris* (1892)). *Ramah Navajo* explained that "the Appropriations Clause is no bar to recovery in a case like this one, in which 'the express terms of a specific statute' establish 'a substantive right to compensation' from the Judgment Fund." *Id.* at 198 n.9 (quoting *Office of Personnel Management v. Richmond*, 496 U.S. 414, 432 (1990)).[5]

Similarly, in *Cherokee Nation*, this Court held the Government's substantive obligations were not limited by an appropriations restriction and favorably cited (543 U.S. at 642-43) the decision in *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct.Cl. 1966) (*per curiam*) ("The failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights [remain] enforceable in the Court of Claims").

The Government cites the Federal Circuit's decisions in *Greenlee County* and *Prairie County*. Govt.Br.28, 33, 37. But both cases reaffirmed: "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Greenlee County*, 487 F.3d at 877 (quoting *N.Y. Airways*); *Prairie County v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015) (same).

The Government spills much ink on *Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d 1166 (Fed. Cir.), *cert. denied*, 516 U.S. 820 (1995), which did not involve a money-mandating statute at all. *Id.* at 1167 (trial court found "entitlement to funds under the Act was not

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[5] The Government cites *Richmond.* Govt.Br.15, 20, 41. But *Richmond* expressly distinguished Tucker Act claims based on statutes, 496 U.S. at 431-32, like the claims here.

mandatory and that appellants therefore did not have a monetary claim against the government. We affirm."). In contrast, Section 1342 provides for mandatory payments. Nor did *Highland Falls* involve an implied repeal. Instead, the Federal Circuit harmonized the prioritization provision with a subsequent appropriations earmark, as the Government told this Court in opposing certiorari. 1995 WL 17108180, at *7.

4. The Government's Reliance On The Anti-Deficiency Act Lacks Merit.

By its terms, the Anti-Deficiency Act applies to federal "officer[s] and employee[s]," 31 U.S.C. § 1341(a)(1), *not* to Congress. The legislature is free to enact money-mandating statutes like Section 1342 without accompanying appropriations. *See* Part A-3, *supra.* Moreover, the Act exempts obligations "authorized by law," 31 U.S.C. § 1341(a)(1)(B), and here Section 1342 provides the authorization.

This Court rejected similar Anti-Deficiency Act objections in *Ramah Navajo*, 567 U.S. at 197-98, and *Cherokee Nation*, 543 U.S. at 642-43, explaining the Act restricts the authority of federal employees, not the rights of claimants against the Government.

The Government contends Section 1342 and the Anti-Deficiency Act "conflict" and must be "harmonized." Govt.Br.26. But there is no conflict, and, even if there were, the more specific, later-enacted statute (Section 1342) would govern, as the Government's own authority recognizes. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

The Government's argument is belied by its actual practice. The Government's position effectively means HHS repeatedly violated the Anti-Deficiency Act by recording risk-corridors liabilities as "obligations," Open.Br.12-14, yet the sanctions the Government cites (Govt.Br.32) have never been imposed.

5. The Government's Comparison To Government Contracts Undermines Its Position.

The Government concedes its arguments have little force under *Ramah Navajo* and *Cherokee Nation*, Govt.Br.37-38, which upheld governmental contractual liability even where agency-created obligations exceeded appropriations under the governing statute (the Indian Self-Determination and Education Assistance Act (ISDA)). If anything, the instant case is more straightforward, because Section 1342 does not contain the caveat, "subject to the availability of appropriations," in the ISDA. 567 U.S. at 186; 543 U.S. at 640-41. Even if the Government's argument were correct (and it is not), it would mean merely that Section 1342 has the same "subject to availability" caveat as the ISDA. And Petitioners would still prevail.

The Government fails to distinguish *Ramah Navajo* and *Cherokee Nation*.

First, the Government's suggestion that individual contracting officers in *Ramah Navajo* and *Cherokee Nation* held greater authority under the Appropriations Clause than Congress itself, is plainly backwards. Surely Congress's express command that the Government "shall pay," codified in Section 1342, carries more weight than a contracting officer's promise to pay under a form contract.

Second, the reasoning in *Ramah Navajo* and *Cherokee Nation* cannot be limited to the government contracts context. The contracts in those cases had a statutory foundation (the ISDA), and in entering contracts, HHS and the Interior Department were exercising statutory responsibilities.

Thus, *Cherokee Nation,* 543 U.S. at 642-43, cited *N.Y. Airways*, which involved a statutorily created obligation and denied the distinction between statutory and contractual obligations proposed by the Government here: "the failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation," "[w]hether the obligation . . . is derived from express contract with the Government, or by statute." 369 F.2d at 752 (citation omitted). *See* GAO Redbook at 6-91 ("The 'authorized by law' exception in 31 U.S.C. § 1341(a) applies to noncontractual obligations as well as to contracts. The basic approach is the same.").

The Government contends that the ISDA program was "individualized," while the risk-corridors program was "general." Govt.Br.39-40. That distinction fails. The ISDA program was "general" in the sense that the statute directed agencies to enter contracts with multiple willing tribes, creating a situation where no individual tribe could "know how much of th[e] appropriation remains available for it at any given time." *Ramah Navajo*, 567 U.S. at 191 (internal quotation marks and citation omitted).

The risk-corridors program was similar. It was "individualized" in the sense that HHS signed separate, bilateral agreements with insurers to provide qualified plans on exchanges. Pet.App. in No. 18-1038 at 87a-88a. It was "general" in that individual insurers were in the same boat as the tribes in *Ramah Navajo* and *Cherokee Nation*. "Payments in" and "payments out" depended on a host of factors outside an individual insurer's knowledge, and indeed were not calculated by HHS until long after the close of the plan year. And Land of Lincoln had already committed to provide coverage for plan years 2014, 2015, and 2016 before HHS announced its 2014 calculations (in summer 2015) – before HHS adopted its "transitional policy" and before Congress began enacting appropriations riders in December 2014. In addition, insurers' understandings were affected by HHS's repeated reassurances that it "anticipate[d] that risk corridors collections will be sufficient to pay for all risk corridors payments," Pet.App. 10, and, even if not, risk-corridors liabilities remained governmental obligations. Open.Br.12-14.

The Government fails to distinguish *Ramah Navajo* and *Cherokee Nation*.

B. Section 1342 Is Enforceable Through Damages Actions Under The Tucker Act.

1. The Government's New Tucker Act Argument Was Not Presented Below.

For the first time in this case, the Government contends a damages remedy is unavailable here under the Tucker Act. Govt.Br.29-34. The Government did not raise this argument in the Federal Circuit (where it conceded Court of Federal

Claims jurisdiction, Pet.App. 15 n.2), and the argument should not be considered. *See Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

2. The Government's New Tucker Act Argument Lacks Merit.

The Government implausibly argues that, in enacting Section 1342, Congress meant to undertake the empty gesture of creating a specific money-mandating right without any enforceable remedy. *But see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Government fails to inform this Court that its consistent position in related ACA litigation (involving the risk-adjustment and reinsurance programs) is the opposite: that Tucker Act claims for damages, not APA suits for declaratory or injunctive relief, are the proper remedies for HHS's failure to make statutorily required payments.[6] There, the Government maintains "the Court of Federal Claims has authority to provide an adequate remedy" under the Tucker Act.[7] The courts have consistently

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[6] *See Fry v. Centers for Medicare and Medicaid Services*, 2019 WL 3801822 (N.D. Ill. Aug. 13, 2019); *Farmer v. United States*, 2018 WL 1365797 (D.S.C. Mar. 16, 2018); *Richardson v. United States Dep't of Health & Human Servs.*, 2018 WL 1569772 (D. Nev. Mar. 30, 2018); *Gerhart v. United States Dep't of Health & Human Servs.*, 242 F. Supp. 3d 806 (S.D. Iowa 2017).

[7] *Fry v. Centers for Medicare and Medicaid Services*, No. 1:19-cv-01320, U.S. Reply Memorandum in Support of Motion to Dismiss, Dkt. 24, at 6 (N.D. Ill. June 21, 2019) (Govt. *Fry* Reply); *see also Community Health Choice, Inc. v. United States*, 141 Fed.Cl. 744, 764 n.20 (2019) (quoting further

accepted the Government's jurisdictional argument, opining that the reinsurance program (for example) "can fairly be interpreted as mandating compensation." *Conway v. United States*, 2019 WL 4877280, *4 (Fed.Cl. Oct. 3, 2019).

The Government's switch in position lacks merit. The plain text of Section 1342, essentially ignored by the Government, is again dispositive: HHS "shall pay" specific sums to identified recipients pursuant to a statutory formula under which it is possible to calculate amounts owed to the last dollar. The traditional remedy for breach of duty to pay a specific sum to a specific person is a damages claim, just as breach of a trust duty has traditionally led to a claim for damages. *See United States v. Mitchell*, 463 U.S. 206, 226 (1983). Thus, the mandatory language in Section 1342 "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties." *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009) (internal quotation marks omitted).

In addition, this Court has recognized that a statute mandates compensation where "a damages remedy" "furthers the purposes of the statutes and regulations." *Mitchell*, 463 U.S. at 226. Here, permitting insurers to sue to collect amounts that Congress mandated they receive would serve Congress's purpose in enacting the risk-corridors program.

Government concessions), appeal pending, No. 19-1633 (Fed. Cir.).

The Government notes the absence of a specific damages remedy in Section 1342, but a statute "need not explicitly provide that the right or duty it creates is enforceable through a suit for damages" in order to create Tucker Act liability. *Navajo Nation*, 556 U.S. at 290; *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) (rejecting need for "explicit provision for money damages"). The Court of Federal Claims routinely entertains Tucker Act claims under statutes lacking express damages remedies. *E.g.*, 5 U.S.C. § 5942; 37 U.S.C. § 204.

The Government speculates Congress did not foresee damages claims in enacting Section 1342. Govt.Br.29. But longstanding Tucker Act precedent indicated damages would be available for breaches of money-mandating obligations. In 2010, Congress likely expected to appropriate in accord with its money-mandating statute. *Train*, 420 U.S. at 39 n.2 ("expectation is that appropriations will be automatically forthcoming"). Regardless, asking whether Congress specifically "anticipated" damages suits in enacting Section 1342 is not the proper approach to statutory interpretation. *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998) (citation omitted).

The Government cannot cite any case in which a plaintiff seeking damages against the Government was required to sue under the APA rather than the Tucker Act. *Bowen v. Massachusetts*, 487 U.S. 879 (1988), did not hold a Tucker Act claim unavailable. To the contrary, it acknowledged "the purely monetary aspects of the case *could* have been decided in the Claims Court," but nonetheless allowed Massachusetts to proceed in district court under the APA, as it requested. *Id.* at 910 n.48 (emphasis added).

In contrast to this case, *Bowen* involved a situation where the Tucker Act could not provide complete relief. The remedy sought in *Bowen* included "declaratory or injunctive relief that require[d] the Secretary to modify future practices," better suited to adjudication in district court. *Id.* at 905, 907-08. The relief was not an "order that [the] amount . . . be paid," but rather a decision finding unlawful an agency reimbursement decision. *Id.* at 909. "[E]ven the monetary aspects of the relief that the State sought [we]re not 'money damages.'" *Id.* at 893.

This case is different. Here, Petitioners seek damages for the Government's failure to honor its past obligations under an expired program inducing insurance coverage on the exchanges. *Bowen* indicated such claims fall within the Tucker Act: they seek "to compensate a particular class of persons for past . . . labors," "as compensation for a past wrong," rather than "to subsidize future state expenditures." *Id.* at 906 n.42.

The Government has successfully argued that *Bowen* is inapplicable to claims for past-due amounts under the risk-adjustment and reinsurance programs, because they lack a "complex [and] ongoing relationship" between the insurer and HHS.[8] That reasoning is applicable to the expired risk-corridors program as well.

[8] Govt. *Fry* Reply at 5 (quoting *Bowen*, 487 U.S. at 905 (brackets in original)).

C. The Appropriations Riders Did Not Extinguish The Government's Obligation.

The Government ignores the riders' text: "[n]one of the funds made available *by this Act*" from specified sources could be used for risk-corridors payments. 128 Stat. 2491 (emphasis added). Tellingly, other provisions in the 2014, 2015, and 2016 appropriations laws barred funds under "this Act or any other Act" – but the risk-corridors riders did not. Open.Br.24-25.

The Government insists the riders "ensured that no taxpayer funds could be used for risk corridor payments." Govt.Br.46. But if that is what the riders meant, Congress could have written them to say exactly that. Congress did not. Nor did the riders use the language previously employed by Congress to foreclose payment, as in *United States v. Dickerson*, 310 U.S. 554, 555-56 (1940) (no funds under "this or any other Act"), or *United States v. Will*, 449 U.S. 200, 205-07 (1980) (no funds under "this Act or any other Act").

Rather than ruling out every possible funding source for risk-corridors, Congress appropriated $484 million in "payments in" (Govt.Br.11; Open.Br.24), plus funds from the sale of data (*id.*), and potentially additional sums from FY2015 continuing resolutions enacted before the first rider (December 16, 2014).[9] And Congress did not

[9] Judge Wheeler found FY2015 continuing resolutions made available an additional $750 million in risk-corridors appropriations, Pet.App. 129 n.13, under the principle "the need arose . . . that year . . . even though the funds are not to be disbursed and the exact amount owed by the government

foreclose supplemental or future-year appropriations.

The Government asks, "What else could Congress have intended?" (Govt.Br.46 (citation omitted)), as though Congress had a monolithic intent. But Members of Congress held divergent views. Some sought to repeal the risk-corridors program, some to make it budget-neutral, others to fund it fully. The riders' text is the result of compromise: a majority proved willing to enact appropriations measures temporarily foreclosing certain funding sources, but nothing more. Bypassing the riders' text in search of a supposedly unitary legislative intent ignores the reality of "legislative compromises essential to a law's passage," and improperly awards one side more than it achieved in the legislative process. *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 543 (2019) (citation omitted).

After the riders were enacted, Congress continued to consider bills to repeal the risk-corridors program or make it budget-neutral. Open.Br.11-12. And Congress continued to enact appropriations riders even after the risk-corridors program ended. Govt.Br.46. This legislative activity made sense only if risk-corridors obligations remained.

HHS understood the riders did not eliminate risk-corridors liabilities. It interpreted the riders to preclude agency payments from the specified

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cannot be determined until the subsequent fiscal year." GAO Redbook at 5-14 (3d. ed. 2004).

funding sources during the period covered by the riders, but it continued to record sums due as governmental obligations. Open.Br.14-16.

The White House included risk-corridors payments in its FY2019 budget, Open.Br.14 – further confirmation the riders did not permanently extinguish the obligation. *See United States v. Vulte*, 233 U.S. 509, 514-15 (1914) (appropriation ban for 1906 and 1907 did not constitute permanent prohibition and did not apply to officer's 1908 pay).

The Government's question, "What else could Congress have intended?" could have been posed in virtually every case holding insufficient appropriations inadequate to repeal an obligation. The appropriations limits in *Langston*, *N.Y. Airways*, and similar cases were finely "calibrated" (Govt.Br.50) to precise dollar amounts, and there were no other funding sources available. In *Langston*, Congress appropriated exactly $5,000 for the ambassador, who was specifically identified by title, and who did not identify any other appropriation available to pay him. 118 U.S. at 391.

In *Ramah Navajo*, the statute capped program funds, and there was no other appropriation available besides the Judgment Fund. Yet this Court opined that allowing Tucker Act damages nonetheless gave effect to the appropriations restriction: the "'not to exceed' language in the appropriation still has "legal effect"; "it prevents the Secretary from reprogramming other funds to pay contract support costs." 567 U.S. at 195. The same is true here. *Ramah Navajo* also pointed to *Ferris*, where the plaintiff won a judgment even though Congress specified a precise appropriations amount for Delaware River improvements, and the claimant could not identify any other available funds. *Id.* at 194.

This Court has never approved retroactive repeal of a statutory obligation after private parties relied on Congress's inducement and fulfilled their end of the bargain. Petitioners' rights vested at the time they accepted Congress's offer and committed to provide insurance on the exchanges (Open.Br.43-44), as made clear in *In re Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 186 (1873), and *United States v. Larionoff*, 431 U.S. 864, 878-79 (1977) – not when the Government subsequently computed "payments out" according to the statutory formula. *Contra* Govt.Br.52. Otherwise, protections against retroactive laws could be evaded by the simple expedient of postponing ministerial calculations.

D. Land of Lincoln Properly Stated Contract And Takings Claims.

The Government is wrong in arguing Land of Lincoln waived its contract claim. The claim is fairly encompassed within Lincoln's Question Presented, which referred to the "Government's payment obligations" to "parties that have already performed their part of the bargain." Pet. i. The Petition discussed "the terms of the deal," cited *Winstar* (a contract case), and spent three pages addressing the implications of the case "for the Government and those who do business with it." Pet. 28, 33, 34-36. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379, 380 n.1 (1995) (issues preserved where petition addressed "the facts that would support both," even though argument was "couched in terms of a different but closely related theory"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992).

Moreover, the contract and takings claims are part-and-parcel of Lincoln's retroactivity argument. The Petition contended that, if the riders were interpreted as eliminating the Government's obligation after-the-fact, they "would 'impair rights a party possessed when he acted.'" Pet. 29 (citation omitted). *See United States v. Northern Pacific Railway Co.*, 256 U.S. 51, 64 (1921) (congressional grant of land to railroad "was converted into a contract" once railroad performed).

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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