IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

PLAINTIFF COMMON GROUND HEALTHCARE COOPERATIVE'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiff Common Ground Healthcare Cooperative ("Common Ground" or "Plaintiff"), on behalf of itself and the CSR Class (the "Class"), respectfully requests summary judgment for the Class on its claims for unreimbursed cost-sharing reduction payments for the 2017 benefit year and first two financial quarters of the 2018 benefit year. Given that the CSR Class is currently in the middle of the class notice period, Common Ground requests that the Court defer ruling on this motion until the opt-in deadline has passed. Furthermore, because unreimbursed CSR payments continue to accrue on a monthly basis, Common Ground also requests the right to supplement this brief with the final amount of the award it requests on the Class's behalf, if the Court finds in the Class's favor on liability.

INTRODUCTION

"Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). Key to this goal were a variety of programs aimed at incentivizing health plan issuers to enter the fledgling ACA exchanges, and to make health care more affordable for low-income Americans. The Court is well-versed in the details of one such program—risk corridors—and has since been exposed in this case to another—cost-sharing reductions. In each of these programs (which are respectively established by Sections 1342 and 1402 of the ACA), the Government imposed on itself mandatory obligations to pay qualified health plan ("QHP") issuers certain pre-defined amounts. Nevertheless, it has since failed to abide by those payment obligations, prompting this class action (and many other lawsuits).

After years of litigation, the Federal Circuit has now finally weighed in on the risk corridors program. In its recent *Moda* opinion, the Circuit found that Section 1342 of the ACA

is "unambiguously" a money-mandating statute requiring full risk corridor payments on an annual basis.[1] With respect to the *CSR* Class, the *Moda* opinion compels judgment in the Common Ground's favor, because the Federal Circuit was clear that language virtually identical to Section 1402's payment language (the Government "shall make periodic and timely payments" to QHP issuers) is money-mandating, and because the Federal Circuit expressly recognized that Congress's "mere failure to appropriate" (as it did here by never even mentioning the CSR program in any appropriations bills) does not obviate any obligations to pay.

Further underscoring why the Court must find in Common Ground's favor is that, for years, HHS paid CSR amounts on a monthly basis. During the first lawsuit regarding the Affordable Care Act and CSR payments, the Government took the position that whether those payments were proper was simply a question of appropriations. When the current administration in October 2017 stopped HHS from continuing the CSR payments, it did so only by claiming that there were no appropriations available. The Government has never claimed that it lacked the obligation to satisfy its money-mandating statutory obligations to make cost-sharing reduction payments to QHP issuers. Rather, the original challenge to HHS's CSR payments was on the ground that they were impermissible because they used funds that had not been properly appropriated. This action is brought under the Tucker Act, and the Federal Circuit's binding *Moda* precedent (as well as decades of Supreme Court precedent) dictates that, under these facts

[1] The Federal Circuit panel deciding the case also found that certain riders Congress subsequently included in appropriations bills obviated the Government's obligation to pay risk corridor amounts to the QHP issuers it induced to enter the ACA exchanges. Although Common Ground strongly believes the *Moda* majority reached the wrong conclusion, that issue will be decided in the remaining phases of the *Moda* appeal, and Common Ground has therefore asked that the Risk Corridors Class portion of this case remain stayed.

and legislative history, the Government cannot avoid its payment obligation by failing to appropriate funds to satisfy a money mandating obligation; failure to appropriate is not a valid defense to Common Ground's (and the Class's) claims for CSR payments.

Common Ground respectfully requests the Court to enter judgment on its and the CSR Class's behalf for their cost-sharing reduction claims as they are based upon a money-mandating statutory obligation to pay and there have been no spending bills that would impact this payment obligation.

I. STATEMENT OF THE ISSUE PRESENTED

1. Is the Government liable for its failure to meet its statutory obligations to make "periodic and timely payments" to Common Ground and the CSR Class for the final quarter of the 2017 benefit and the first two financial quarters of the 2018 benefit year?

II. STATEMENT OF THE CASE AND OF UNDISPUTED MATERIAL FACTS

A. The Plain Language of Section 1342 of the ACA Required Full Risk Corridor Payments

As a threshold matter, Common Ground notes that the Federal Circuit's recent *Moda* opinion sets forth, at length, the legislative history and statutory framework for the risk corridors program. *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1314-1319 (Fed. Cir. 2018). That opinion concludes, as a factual and legal matter, that the Government obligated itself to pay full, annual risk corridor amounts to QHP issuers for each of the 2014, 2015, and 2016 benefit years, but later obviated that obligation through certain appropriation bill riders. *Id.* at 1330-31.[2] The *Moda* opinion explicitly rejected the Government's various arguments that, under the plain

[2] Common Ground expects that Moda and/or Land of Lincoln (whose parallel appeal of the dismissal of its risk corridors claims was affirmed based on the Circuit's reasoning in *Moda*) will take further steps to pursue their appellate rights.

language of the ACA itself, it did not have an obligation to pay QHP issuers full risk corridor amounts. The Federal Circuit held that because the statute's language was clear and the Government's arguments were attempts to write in limitations not present in Section 1342 or the ACA. *Id.* at 1320-22.

B. The ACA Established the Cost-Sharing Reduction Program to Help Make Healthcare Affordable for Those Who Most Need It

In addition to the risk corridors program (and the other "Three Rs," *see id.* at 1314), the ACA attempted to stabilize the health insurance market and decrease the cost of health insurance by helping offset certain costs consumers must pay: insurance premiums and out-of-pocket expenses. For low-income insureds, the ACA did so by, *inter alia*, establishing the cost-sharing reduction ("CSR") program.

1. QHP issuers must make CSR payments and the Government "shall make" reimbursements on a "periodic and timely" basis

Section 1401 of the ACA provides premium tax credits for individuals with household income between 100% and 400% of the federal poverty level who purchase health insurance through ACA exchanges and meet certain other requirements. ACA § 1401 [26 U.S.C. § 36B]. Section 1402 of the ACA requires QHP issuers to reduce out-of-pocket costs for eligible insureds (those who are eligible to receive tax credits under Section 1401 and whose household income is below 250% of the poverty level) by making cost-sharing reduction ("CSR") payments. Section 1402 then requires the Government to reimburse QHP issuers for the costs of those reductions.

In relevant part, Section 1402 of the ACA provides:

> In the case of an eligible insured enrolled in a qualified health plan – (1) the Secretary shall notify the issuer of the plan of such eligibility; and (2) the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c).

ACA § 1402(a) [42 U.S.C. § 18071]. "Cost-sharing" is defined to include "deductibles, coinsurance, copayments, or similar charges." ACA § 1302(c)(3)(A)(i) [42 U.S.C. § 18022]. QHP issuers must reduce cost sharing for eligible insureds who enroll in "silver plans" through the exchanges, ACA § 1402(c)(2), and QHP issuers must offer at least one "silver" plan in order to participate in the exchanges, ACA § 1301(a)(1)(C)(ii) [42 U.S.C. § 18021].

Section 1402 of the ACA further requires the Secretaries of HHS and the Treasury to reimburse QHP issuers for these cost-sharing reductions:

> An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary ***shall make periodic and timely payments to the issuer equal to the value of the reductions***.

ACA § 1402(c)(3)(A) [42 U.S.C. § 18071] (emphasis added).

Neither these statutory provisions nor the subsequent implementing regulations permit the government to make no payments or to make partial payments or reimbursements. Instead, they are clear that HHS shall make full payments—and, in the implementing regulations' case, "advance" payments—for the cost-sharing reductions QHP issuers must by law provide. *See generally* 42 U.S.C. § 18071; 45 C.F.R. § 156.430(b), (d), & (e).

Further, there are no cost-sharing reduction exceptions for QHP issuers. HHS has been consistent from the ACA's inception through today that an issuer ***must*** make cost-sharing reduction payments if they wish to participate in the ACA exchanges. *See, e.g.*, 45 C.F.R. § 156.410(a) ("A QHP issuer must ensure that an individual eligible for cost-sharing reductions, as demonstrated by assignment to a particular plan variation, pays only the cost sharing required of an eligible individual for the applicable covered service under the plan variation. The cost-sharing reduction for which an individual is eligible must be applied when the cost sharing is collected.").

2. Consistent with its obligations to make "periodic and timely" reimbursements, the Government established a monthly advance payment and annual reconciliation process for CSR payments

Section 1412 of the ACA established a program for making "advance payments" to QHP issuers for both the premium tax credits established by Section 1401 of the ACA and the CSR reimbursements provided by Section 1402. ACA § 1412 [42 U.S.C. § 18082]. With respect to the cost sharing reduction reimbursements, Section 1412 provides that the "Secretary of the Treasury ***shall make such advance payment*** at such time and in such amount" as specified by HHS. *Id.* at § 1412(c)(3) (emphasis added). The details of this program are set out in implementing regulations. *See e.g.*, 45 C.F.R. § 156.430(b)(1) ("QHP issuer ***will receive*** periodic advance payments") (emphasis added).

Following the ACA's implementation, the Government established a CSR reimbursement schedule under which the Government would provide periodic advance payments to QHP issuers, which are then periodically reconciled to the actual amount of cost-sharing reductions provided to enrollees and providers. *See* ACA § 1412 [42 U.S.C. § 18082]; 45 C.F.R. § 156.430(b)-(d). Specifically, CMS established "a payment approach under which HHS would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts."[3] "After the close of the benefit year, QHP issuers must submit to HHS information on the actual value of the cost-sharing reductions provided" and HHS "would

[3] HHS Notice of Benefit and Payment Parameters for 2014, CMS (March 11, 2013), at 7, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-technical-summary-3-11-2013.pdf.

then reconcile the advance payments and the actual cost-sharing reduction amounts."[4] Finally, the Government would reimburse the QHP issuer "any amounts necessary to reflect the CSR provided or, as appropriate, the issuer [would] be charged for excess amounts paid to it."[5]

3. One CSR program purpose is to reduce overall federal expenditures by making health insurance available to more American citizens

As HHS observed during the notice and comment rulemaking process, the cost-sharing reduction program was meant "help eligible low- and moderate-income qualified individuals and families afford the out-of-pocket spending associated with health care services provided through Exchange based QHP coverage." 78 Fed. Reg. 15541, at 15542 (Mar. 11, 2013). It is undisputed the CSR program had this effect for the years in which the Government actually made periodic and timely payments (although the separate harm the Government caused by reneging on other payment obligations—*e.g.*, risk corridor payments—caused many QHP issuers to go out of business or leave the ACA exchanges entirely).

Further, the House of Representatives specifically recognized the importance of making full, annual cost-sharing payments to insurers under the ACA's provisions. In litigation over the CSR program, *see* Section II.D, *infra*, the House of Representatives noted that a failure to make payments in a way that provided certainty about the "existence and amount of payments" would be "inefficient and destabilizing," and "would also inevitably lead to increased premiums—and correspondingly greater federal expenditures," even if Congress ultimately appropriated funds

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[4] *Id.*

[5] Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 28, *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf; *see also* 45 C.F.R. 156.430(e).

for the payments. Br. for Defs. at 23, *United States House of Representatives v. Burwell*, 2015 WL 9316243 (D.D.C. Dec. 2, 2015) (No. 1:14-cv-01967), ECF No. 55-1.[6]

C. Following the ACA's Implementation, the Government Began Making CSR Reimbursements Without Any Line Item Appropriation for the Program

As discussed above, Section 1401 of the ACA added a new section to the Internal Revenue Code providing eligible insureds with premium tax credits to cover their health insurance premiums. ACA § 1401 [26 U.S.C. § 36B]. The ACA also amended the pre-existing, permanent appropriation embodied in 31 U.S.C. § 1324. Section 1324 establishes a permanent appropriation of "[n]ecessary amounts…for refunding internal revenue collections as provided by law," including "refunds due from" specified provisions of the tax code. 31 U.S.C. § 1324. Section 1401 of the ACA amended the list in Section 1324 to include "refunds due from" Section 36B. ACA § 1401.

In April 2013, the Office of Management and Budget ("OMB") submitted a budget request to Congress for fiscal year 2014 that included a request for a line item appropriation designating funds for the payment of cost-sharing reductions. *See* Fiscal Year 2014 Budget of

[6] The House of Representatives has also taken the position that portions of the ACA are "interdependent" and failing to implement some could lead to "skyrocketing premiums" or even "death spirals." *See* Br. for Resp't at 14-15, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 349885, at *14-15 (Jan. 21, 2015) ("the individual-coverage provision could not perform its market-stabilizing function in the absence of subsidies making coverage broadly affordable" and "[t]he denial of tax credits and the resulting loss of customers would thus have disastrous consequences for the insurance markets in the affected States"); Br. for Resp't at 26, *Nat. Fed'n of Indep. Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 273133, at *26 (Jan. 27, 2012) ("without a minimum coverage provision, the guaranteed-issue and community-rating provisions would drive up costs and reduce coverage, the opposite of Congress's goals"). The above arguments admittedly address different provisions of the ACA, but demonstrate that the Act is an interlocking statute designed to improve, not destroy, health insurance markets, and that full, annual payment regimes are critical to this functioning.

the United States Government, Appendix at 448 (Apr. 10, 2013). The same day, HHS separately submitted its justification to Congressional appropriations committees, stating that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014." *See* HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees at 184 (Apr. 10, 2013) *available at* https://www.cms.gov/about-cms/agency-information/performancebudget/downloads/fy2014-cj-final.pdf.

Congress did not provide the line item appropriation requested by HHS. *See* S. Rep. No. 113-71, 113th Cong. at 123 (July 11, 2013) (stating that "[t]he Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA") *available at* https://www.congress.gov/113/crpt/srpt71/CRPT-113srpt71.pdf. No subsequent Congressional action has explicitly appropriated money for Section 1402 CSR reimbursements. However, Congress never repealed or amended the CSR provision, and the October 2013 legislation references the existence of CSR reimbursements. *See* Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013) (requiring HHS to certify that a program was in place to verify that applicants were eligible for "premium tax credits . . . and reductions in cost-sharing" before "making such credits and reductions available"). Indeed, Congress has never included any language in appropriations or other bills preventing HHS, CMS, or the Treasury from accessing certain funds or accounts to make CSR payments; Congress simply has not made an explicit appropriation.

In January 2014, the Obama administration began making monthly advance payments to

reimburse QHP issuers for cost sharing reductions pursuant to Sections 1401 and 1402.[7] The Obama administration cited Section 1324 as the appropriation for these payments.[8]

D. The House of Representatives, Led by a New Majority, Challenged the Government's CSR Reimbursements for Lack of Adequate Appropriations

On November 21, 2014, the United States House of Representatives filed a complaint against HHS and the Treasury seeking an injunction preventing the executive branch from "making any further Section 1402 Offset Program payments to Insurers unless and until a law appropriating funds for such payments is enacted." *See* Complaint, at 27, *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 1 (D.D.C. filed 11/21/2014). According to the House of Representatives' Complaint, "Congress has not, and never has, appropriated any funds (whether through temporary appropriations or permanent appropriations) to make any Section 1402 Offset Program payments to Insurers." *Id.* at ¶ 28. However, the Complaint did not allege that Congress amended or repealed the CSR reimbursements. *See generally id.*

The Obama administration moved for summary judgment, asserting that 31 U.S.C. § 1324 provided a permanent appropriation for both Section 1401 premium tax credits and Section 1402 CSR reimbursements. *See* Br. For Defs. at 11, *House v. Burwell*, 2015 WL 9316243, ECF No. 55-1. The Obama administration argued that CSR reimbursements and premium tax credits

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[7] *See* Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 27 ("Payments to issuers of estimated monthly amounts began in January 2014."), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf.

[8] *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014), ("cost-sharing subsidy payments are being made through the advance payments program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid"), *available at* http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf.

"are legally intertwined," and both "are made by the same payer (the Department of the Treasury), to the same recipient (the insurer), on behalf of the same person (the eligible insured), and for the same statutory purpose—'to reduce the premiums payable by individuals eligible for such credit.' 42 U.S.C. § 18082(a)." *Id.* at 2.

The district court ruled in favor of the House of Representatives, finding that 31 U.S.C. § 1324 did not constitute a permanent appropriation for Section 1402 CSR reimbursements: "The Affordable Care Act unambiguously appropriates money for Section 1401 premium tax credits but not for Section 1402 reimbursements to insurers." *House v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016). Further, the district court found no other source of appropriation for Section 1402 payments: "Congress authorized reduced cost sharing but did not appropriate monies for it, in the FY 2014 budget or since." *Id.* at 174-75. The District Court entered an injunction preventing any further reimbursements under Section 1402, but, recognizing the importance of CSR reimbursements, stayed the injunction pending resolution of any appeal. *Id.* at 189.

The Obama administration appealed the ruling to the D.C. Circuit, and filed its opening brief in October 2016. However, in November 2016, Republican Donald Trump was elected President and the Republican-controlled House of Representatives filed a request that the appeal be "temporarily [held] in abeyance" to "provide the President-Elect and his future Administration time to consider whether to continue prosecuting or to otherwise resolve this appeal." Appellee's Mot. to Hold Briefing in Abeyance, *House v. Burwell*, Case No. 16-5202, Dkt. #1647228 (D.C. Cir. Nov. 21, 2016) at 1-2. The D.C. Circuit granted the request and the appeal has since been dismissed by agreement between the parties. Order, *House v. Azar*, Case No. 16-5202, Dkt. #1731071 (D.C. Cir. May 16, 2018).

E. The Current Administration Now Refuses to Pay Cost-Sharing Reduction Reimbursements

Until October 2017, the current administration continued its predecessor's practice of paying CSR reimbursements. However, on October 11, 2017, Attorney General Sessions submitted a letter to the Department of Treasury and HHS advising that 31 U.S.C. § 1324 could not be used to fund CSR reimbursements. (Ex. 1, Oct. 11, 2017 Ltr. from Sessions to Secretary of Treasury and Acting Secretary of HHS.) Attorney General Sessions concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursements were two distinct programs, and the permanent appropriation in Section 1324 only provided funding for the Section 1401 premium tax credits. (*Id.* at 1-2.)

The next day, on October 12, 2017, HHS announced that it would stop making CSR reimbursements: "In light of [Attorney General Session's] opinion—and the absence of any other appropriation that could be used to fund CSR payments—CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." (Ex. 2, Oct., 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs).) The Executive Branch submitted a Notice in the *House v. Burwell* appeal referencing the October 12 HHS Memorandum and noting that "[t]he upcoming October 18 [CSR reimbursement] payment thus will not occur." Notice, *House v. Burwell*, Case No. 16-5202, Dkt. #1698827 (D.C. Cir. Oct. 13, 2017) at 1.

As of the date of this motion, Common Ground and the other members of the CSR Class have not been reimbursed for any CSR payments they made from October 2017 through the present.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the

moving party is entitled to a judgment as a matter of law. RCFC 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if it "may reasonably be resolved in favor of either party." *Id.* at 250. The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The nonmoving party then bears the burden of showing that there are genuine issues of material fact for trial. *Id.* at 324.

IV. ARGUMENT

A. The Government Owes the CSR Class Full Reimbursements for Their Post-September 2017 CSR Payments

1. Principles Of Statutory Construction

When interpreting a statute, a Court must first look to the statute's plain language in order to "inquire whether Congress has clearly spoken on the subject" in dispute. *Bath Iron Works Corp. v. United States*, 27 Fed. Cl. 114, 125 (1992) (citing *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991)). If the statute is plain on its face, that is the end of the inquiry. *Id.* Assuming there is an ambiguity in the statute's plain meaning, however, the next step is to look at "other extrinsic aids, such as legislative history." *Id.* (citing *Richards Medical Co. v. United States*, 910 F.2d 828, 830 (Fed. Cir. 1990)).

"Where a statute's text and legislative history are silent on an issue of statutory construction, the overriding purpose of the provision is highly relevant in resolving the ambiguity." *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334, 1342 n.4 (Fed. Cir. 2005). To this point, "the court will not look merely to a particular clause . . . , but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give it such a construction as will carry into

execution the will of the Legislature." *Warner–Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1355 (Fed. Cir. 2003) (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)); *see also King*, 135 S. Ct. at 2490 (refusing to read portion of the ACA "out of context" with the broader Act, because it would render other provisions in the Act senseless or contradictory).

2. Section 1402 Requires Monthly Reimbursements With an Annual Reconciliation

The ACA is plain on its face that the Government "***shall make*** periodic and timely payments to the [QHP] issuer equal to the value of the [CSR] reductions." 42 U.S.C. 18071(c)(3)(A). The ACA did not define "periodic and timely payments," so HHS subsequently used its discretion to define that term as monthly reimbursements with an annual reconciliation against the CSR payments a QHP issuer actually made. 45 C.F.R. § 156.430(b), (d), & (e).

Because the ACA states that the Government "shall make" CSR reimbursements, the plain text is the full extent of the inquiry regarding the Government's payment obligations. *See Moda*, 892 F.3d at 1320-22 (language that the Government "shall pay" certain amounts is "unambiguously mandatory," and Section 1342 created an obligation to pay full, annual risk corridor amounts); *LCM Energy Sols. v. United States*, 107 Fed. Cl. 770, 774 (2012) (noting that a money mandating statute with "a clear standard for the payment of money and states a precise amount of money to be paid" could only be "fairly interpreted" as mandating "the exact amount of the full grant" to which a plaintiff was entitled); *Sharp v. United States*, 80 Fed. Cl. 422, 427 (2008) ("In the absence of any effective required offset under section 1450(c)(1), these surviving spouses are statutorily mandated to receive their full SBP payments, because 10 U.S.C. § 1450(a)(1) requires the payment of SBP annuities to surviving spouses.").

In practice, the Government confirmed this plain-language conclusion by making monthly reimbursements to QHP issuers, starting at the ACA exchanges' inception and

continuing until October 2017. When the current administration ceased making CSR reimbursements, it simply cited a lack of appropriations. *See generally* Ex. 1. It did not argue the Government had no obligation to pay. *Id.*

HHS has similarly admitted, in writing and through past practice, that the statute requires periodic and timely reimbursements. Once the ACA exchanges opened and QHP issuers began providing cost-sharing reduction payments, HHS employed its limited discretion to make "periodic and timely" payments by doing so every month with an annual reconciliation. 45 C.F.R. § 156.430(b)-(e).[9] To this day, HHS still defines "periodic and timely" the same way for the CSR program; it simply has not made any CSR reimbursements since October 2017 because of the lack of appropriations from Congress. *Compare* 45 C.F.R. § 156.430(b), (d), & (e) (requiring HHS to make reimbursements to QHP issuers); *with* Ex. 2 (noting that the only reason HHS ceased CSR payments is because of new guidance that it had no appropriation to continue making the payments).

These are not innocuous statements and actions; they are straightforward admissions that HHS reads Section 1402 exactly as the Class does here. The situation in which the parties thus find themselves is that HHS concedes it must make periodic and timely CSR reimbursements by statute, but has withheld those reimbursements because it claims it does not have adequate appropriations for the payments.

[9] Had HHS created some other reimbursement framework, the "timeliness" of payments under that system would be analyzed pursuant to HHS's limited discretion to implement the law. *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 776-778 (2017). In this lawsuit, Common Ground does not claim that monthly payments were not "timely" enough. Quite the opposite. HHS and the Government should be held to the payment framework HHS established to satisfy its "periodic and timely" reimbursement requirements.

Nowhere—not in this case or any other—has the Government ever offered an interpretation of Section 1402 in which its has no obligation to reimburse QHP issuers for their CSR payments. One can only surmise as to the political motivations for failing to appropriate funds for the CSR program in the new ACA health exchanges, but such political gamesmanship has no effect on a statutory obligation to pay, particularly when citizens' lives are at stake. HHS must comply with its own interpretation of the statute: one where it makes "periodic and ***timely***" (*i.e.*, monthly) CSR reimbursements.

3. It Is Legally Irrelevant Whether Congress Appropriated Funds To Pay HHS's Monetary Obligations

As it did in the risk corridors cases, the Government may argue in opposition to this motion that Congressional failure to appropriate funds for CSR reimbursements should somehow inform this Court's interpretation of Section 1402. There is no merit to such an argument, and it would be frivolous in light of the Federal Circuit's recent *Moda* opinion, which acknowledges that a "mere failure to appropriate" legally has no effect on the Government's obligation to pay. *Moda*, 892 F.3d at 1321.

Here, the CSR provisions of the ACA plainly state that the Government "shall make" certain, defined reimbursements in certain, defined situations. 42 U.S.C. § 18071(c)(3)(A). This language is unambiguously money-mandating, meaning it is irrelevant whether Congress ever made a specific appropriation to satisfy that payment obligation. *See, e.g., United States v. Langston*, 118 U.S. 389 (1886) (holding that Congress owed Haitian ambassador $2,500 where statute mandated that he be paid $7,500 annually and Congress only appropriated $5,000 for that purpose); *Moda*, 892 F.3d at 1320-22 (rejecting Government's argument "that a statutory obligation cannot exist absent budget authority"); *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (*en banc*) (failure to appropriate funds did not absolve the Government of its

obligation to pay amounts owed); *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (Congress's failure to appropriate funds does not "defeat a Government obligation created by statute"); *District of Columbia v. United States*, 67 Fed. Cl. 292, 340 (2005) (holding that government had a statutory obligation to pay the plaintiff; statute did not expressly specify that payments made pursuant to it were an "obligation" of the Government); *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949) (requiring payment of overtime wages to government workers where such overtime was mandated by statute, but Congress forbade the employing agency from using appropriated funds for that purpose).

There is "a very strong presumption" that appropriation acts do not substantively change existing law. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). Here, where Congress never even *mentioned* the CSR program in its appropriations bills, that presumption is dispositive. The Government thus cannot rely on any later appropriations bills to argue they somehow obviated its obligation to make CSR reimbursements.

B. The Mandate to Make "Periodic and Timely" Reimbursements Requires Payments Now Rather Than at Some Unspecified Future Date

Another way the Government might defend this motion is to argue that the Government has discretion to change the CSR reimbursement schedule at its whim. Such an argument, however, fails as a matter of law and fact, largely due to a doctrine—*Chevron* deference—the Government originally invoked in the risk corridors cases.

1. HHS Has Acknowledged It Has No Discretion to Avoid Making CSR Reimbursements

As an initial matter, *Chevron* deference is inappropriate where the intention of a statute is clear. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

agency, must give effect to the unambiguously expressed intent of Congress."). This is the so-called "step one" of any *Chevron* analysis.

HHS has admitted since the ACA's inception that it has no discretion whether or not to make CSR reimbursements. Indeed, HHS's payment history from 2014 until October 2017 clearly demonstrates acknowledgement that the ACA requires it to make such reimbursements. By HHS's own admission, the only reason it ceased reimbursing QHP issuers for CSR payments is because Attorney General Sessions changed the current administration's position with respect to its contentions about the funding sources for those payments. As a consequence, HHS then deemed itself constrained from making payments for which it did not have appropriated funds. Ex. 2. HHS did not contend it had discretion to withhold the reimbursements. *Id.*

2. *Chevron* Deference Applies to the Reimbursement Schedule HHS Established for CSR Payments

The one area the ACA *did* provide HHS discretion was with respect to the schedule for "periodic and timely" CSR reimbursements. As previously noted, the ACA did not define what that term meant, so, utilizing its limited discretion, HHS implemented a "periodic and timely" schedule in which it provided monthly reimbursements to QHP issuers with an annual reconciliation. Given that this schedule was established through the notice and comment process, it is presumed valid unless and until HHS changes its approach with a reasoned explanation. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," which includes "at least display[ing] awareness that it is changing position and show[ing] that there are good reasons for the new policy") (citations and internal quotations omitted).

HHS has never purported to change its CSR reimbursement schedule; it has only informed QHP issuers that it will not make further payments until and if Congress appropriates it the proper funds. Ex. 2. Accordingly, *Chevron* deference applies and every month that goes by without a CSR reimbursement accrues additional owed money to the CSR Class members. *See Health Republic*, 129 Fed. Cl. at 776-778 (collecting law on *Chevron* deference and noting that HHS's interpretation that it must make annual risk corridor payments had "controlling weight" for future lawsuits over nonpayment of those amounts).

C. The Amount Of The Class's Damages Is Uncontested

Before every benefit year, QHP issuers must estimate the amount of CSR payments they expect to pay to their plan members. *See* 45 C.F.R. § 155.1030; 45 C.F.R. § 156.430(b). Working off those estimates, HHS makes monthly payments to the QHP issuers and then reconciles any outstanding amounts at the end of the year. *See* 45 C.F.R. § 156.430(c); Cost-Sharing Reductions Reconciliation, HHS, March 2013, at 4 ("HHS will pay a per member per month CSR advance payment amount for each plan variation (issuers will receive the same amount for all enrollees with a plan variation, each month)."); *id.* at 5 ("After the close of the benefit year, QHP issuers will be required to provide CMS with data on the value of the cost-sharing reductions provided to enrollees (and reimbursed to providers). [CMS] will calculate CSR reconciliation payments based on the difference between issuer's CSR advanced payments and the value of cost-sharing reductions provided.") All of this information is already within the Government's own files and uncontested. There are only two damages questions remaining as of the date of this motion. First, determination of which QHP issuers will opt-in to the Class. Second, the amount of time that will pass between filing this motion and judgment in the case. Because CSR reimbursement damages accrue on a continuing and monthly basis, Common

Ground cannot calculate the final amount until the parties complete their briefing on this motion and the Court is prepared to enter judgment on the CSR Class's behalf.

Once the opt-in deadline passes and the Court issues its order on this motion, Class Counsel will be able to determine the full scope of the Class and its damages. Common Ground therefore requests the right to supplement this motion at that time with the full amount of damages for which it seeks summary judgment.

D. The ACA Provides No Authority to Offset CSR Reimbursements Due to Any Subsequent Premium Increases

In opposition to Common Ground's motion for class certification, the Government argued that many CSR Class members have not suffered any harm because their states permitted them to raise premiums on silver plans, thereby shifting cost increases from the Government's failure to pay CSR reimbursements back to the federal government via the ACA's tax subsidy program. Dkt. 26, at 12. As the Court noted in rejecting that position, the Government did "not identify any statutory provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligations (even if insurers intentionally increased premiums to obtain larger premium tax credit payments to make up for lost cost-sharing reduction payments)." Dkt. 30 at 10. Common Ground respectfully submits that there is no such provision in the federal statutory scheme.

The reality is that, absent a specific statutory provision, the Government's obligation to make payments according to a money-mandating statute is absolute. The Government imposed this obligation on itself when it passed the Tucker Act and waived sovereign immunity with respect to such claims. Here, some states have identified temporary workarounds meant to prevent massive premium increases—which have largely failed, again as a direct result of the

Government failing to satisfy its obligations under the ACA.[10] However, those state-level accommodations neither alter nor obviate the Government's obligation to pay.[11]

CONCLUSION

For the foregoing reasons, Common Ground respectfully requests that the Court grant summary judgment in the CSR Class's favor.

[10] John Holahan, Linda J. Blumberg, and Erik Wengle, "Changes in Marketplace Premiums, 2017 to 2018," Robert Wood Johnson Foundation & Urban Institute (March 2018) at 4-6, *available at* https://www.urban.org/sites/default/files/publication/97371/changes_in_marketplace_premiums_2017_to_2018_0.pdf (charting average monthly premium increases by state, and noting that the vast bulk of premiums throughout the U.S. increased, often by substantial amounts, from 2017 to 2018)

[11] Even if the Government claimed some QHP issuers owed it some amounts as the result of their higher premiums, a set-off defense is unavailable as a matter of law. *See Local Oklahoma Bank, N.A. v. U.S.*, 59 Fed. Cl. 713, 721 (2004), *aff'd*, 452 F.3d 1371 (Fed. Cir. 2006).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2018, a copy of the attached Plaintiff Common Ground Healthcare Cooperative's Motion for Summary Judgment and Memorandum of Law in Support was served via the Court's CM/ECF system on Defendant's counsel Marcus S. Sacks.

/s/ Stephen Swedlow
Stephen Swedlow