2017-2395

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff – Appellant,

v.

UNITED STATES,
Defendant – Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 16-967C, JUDGE ERIC G. BRUGGINK

REPLY BRIEF OF APPELLANT

December 20, 2017

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CERTIFICATE OF INTEREST

Counsel for Appellant Maine Community Health Options certifies the following:

1. Full name of every party represented by me:

   Maine Community Health Options

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   Maine Community Health Options

3. Parent corporations and publicly held companies that own 10% or more of stock in the party: Maine Community Health Options does not have any parent corporation, nor do any publicly held companies own 10 percent or more of Maine Community Health Options' stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   Daniel W. Wolff, Xavier Baker, and Skye Mathieson (Crowell & Moring LLP).

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

The following cases pending before the Court of Federal Claims are related cases within the meaning of Federal Circuit Rule 47.5:

Case	Docket No.	Judge
Alliant Health Plans, Inc. v. United States	No. 16-1491C	Judge Braden
Atkins v. United States	No. 17-906C	Judge Kaplan
BCBSM, Inc. v. United States	No. 16-1253C	Judge Coster Williams
Blue Cross and Blue Shield of Alabama v. United States	No. 17-95C	Judge Campbell-Smith
Blue Cross and Blue Shield of Kansas City v. United States	No. 17-95C	Judge Braden
Blue Cross and Blue Shield of Tennessee v. United States	No. 16-651C	Judge Horn
Blue Cross of Idaho Health Service, Inc. v. United States	No. 16-1384C	Judge Lettow
Common Ground Healthcare Cooperative v. United States	No. 17-877C	Judge Sweeney
EmblemHealth, Inc. v. United States	No. 17-703C	Judge Wheeler
Farmer v. United States	No. 17-363C	Judge Campbell-Smith
First Priority Life Ins. Co. v. United States	No. 16-587C	Judge Wolski
Glause v. United States	No. 17-1157C	Judge Braden
HealthNow New York Inc. v. United States	No. 17-1090C	Judge Hodges
Health Alliance Medical Plans, Inc. v. United States	No. 17-653C	Judge Campbell-Smith
Health Alliance Medical Plans, Inc., et	No. 17-1759C	Judge

al. v. United States		Campbell-Smith
Health Net, Inc. v. United States	No. 16-1722C	Judge Wolski
Health Republic Ins. Co. v. United States	No. 16-259C	Judge Sweeney
HPHC Insurance Co., Inc. v. United States	No. 17-87C	Judge Griggsby
Harvard Pilgrim Health Care, Inc. et al. v. United States	No. 17-1350C	Judge Griggsby
HealthyCT, Inc. v. United States	No. 17-1233C	Judge Firestone
Humana v. United States	No. 17-1664C	Judge Firestone
Local Initiative Health Auth. For Los Angeles Cty. v. United States	No. 17-1542C	Judge Wheeler
Maine Community Health Options v. United States	No. 17-1387C	Judge Bruggink
MDwise Marketplace v. United States	No. 17-1958C	Judge Coster Williams
Medica Health Plans v. United States	No. 17-94C	Judge Horn
Minuteman Health Inc. v. United States	No. 16-1418C	Judge Griggsby
Molina Healthcare v. United States	No. 17-97C	Judge Wheeler
Montana Health CO-OP v. United States	No. 16-1427C	Judge Wolski
Montana Health CO-OP v. United States	No. 17-1298C	Judge Wolski
Neighborhood Health Plan, Inc. v. United States	No. 16-1659C	Judge Smith
New Mexico Health Connections v. United States	No. 16-1199C	Judge Bruggink
Ommen v. United States	No. 17-712C	Judge Lettow
Premera Blue Cross v. United States	No. 17-1155C	Judge Griggsby
Sanford Health Plan v. United States	No. 17-357C	Judge Bruggink
Sanford Health Plan v. United States	No. 17-1432C	Judge Bruggink
QCC Ins. Co., et al. v. United States	No. 17-1312C	Judge Coster Williams
Vullo v. United States	No. 17-1185C	Judge Wolski
Wisconsin Physicians Service Ins. Corp. v. United States	No. 17-1070C	Judge Braden

The following cases pending before this Court are related cases within the meaning of Federal Circuit Rule 47.5:

Case	Docket Number	Circuit
Blue Cross and Blue Shield of North Carolina v. United States	No. 17-2154	Federal Circuit
Land of Lincoln Mutual Health Ins. Co. v. United States	No. 16-1224	Federal Circuit
Moda Health Plan, Inc. v. United States	No. 17-1994	Federal Circuit

December 20, 2017

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INTRODUCTION

The Government musters virtually no defense of the CFC's analytical framework for good reason: the CFC attempted to divine Congress's "implicit[]" intent to eliminate a specific obligation of the United States, via Spending Riders, without ever ascertaining the nature and extent of the underlying obligation. Appx10.

Pivoting from the CFC, the Government addresses the two key questions that other CFC judges and litigants have identified: (1) did the 2010 Congress create a statutory obligation, and (2) if so, did the text of the Spending Riders fully extinguish that obligation?

Regarding the first question, the Government argues that Section 1342 did not create an obligation because: (1) it lacked specific funding language, (2) other ACA sections and Medicare Part D, by contrast, contained funding language, and (3) Congress relied on CBO scoring when enacting the ACA. Govt. Br. at 16-20.

But Congress has the Constitutional power to obligate the Government to pay irrespective of any appropriations. Unlike an agency, Congress exercises its power of the purse by either (1) empowering agencies to spend money (*e.g.*, conferring budget

authority), or (2) exercising that power directly by obligating the federal fisc (*e.g.*, using mandatory language that the U.S. Government "shall pay"). Section 1342's "shall pay" language is an example of the second method. The Government, without citation, argues that the ***enacting*** Congress must appropriate funds before its "shall pay" obligation attaches. (The cases cited by the Government uniformly turn on whether Congress ***subsequently*** extinguished an obligation.) On the contrary, it is hornbook fiscal law that an undefinitized obligation is still an enforceable obligation, notwithstanding the need for future data to ascertain a precise sum certain. *See* Pl. Br. at 63. The Government ignores this fiscal law principle. This Court should not.

Section 1342 does not tether its "shall pay" mandate to "payments in" or contain any language evincing a budget-neutral intent. To adopt the Government's view, the Court must ***add*** language tethering the "shall pay" mandate to "payments in"; ***add*** budget neutrality language that the enacting Congress expressly omitted; and change the phrase "shall pay" to say "shall pay ***subject to appropriations***." On the other hand, MCHO's interpretation harmonizes the text of Section 1342 with

bedrock fiscal law *and* the ACA's overarching statutory scheme and purpose.

The Government's brief also raises, and then vanquishes, a straw man about "uncapped" liability—an argument not advanced by MCHO. Govt. Br. at 1, 17-19. MCHO asserted that the 2010 Congress ***expressly*** capped the Government's liability in accordance with a statutory formula. Pl. Br. at 31-32. As discussed below, this Court should not read-in a second, ***implicit*** cap limiting "payments out" to user fees.

Regarding the second question before this Court, the Government asserts that the Spending Riders "clearly" nullified whatever obligation existed under Section 1342 (other than user fees). Govt. Br. at 14, 21-23, 27, 30, 42. The Government's argument ignores the ***actual text*** of the Riders—which state that Congress blocked HHS from using certain funding accounts to pay Section 1342 liabilities in specific years. The Riders do not purport to amend Section 1342; they do not expressly "cap" "payments out" to "payments in"; and they do not overcome the controlling presumptions against repeals by implication and retroactivity. The obligations created by Section 1342 attached well before the Riders (albeit undefinitized), and the Government's

nonpayment of that liability is precisely the type of ***enforceable obligation*** on which this Court may pass judgment.

ARGUMENT

Judge Bruggink framed the Government's liability in terms of the following two questions:

1. Is the Government's money-mandating obligation to pay—which the statutory formula ***expressly*** capped to a percentage of insurers' excess costs—also ***implicitly*** capped to the extent of "payments-in" (*i.e.*, "budget neutral")?

   Or

2. Did the 2015 and 2016 Spending Riders fully repeal the Government's obligation?

Pl. Br. at 21; Appx12. In deciding the case, Judge Bruggink avoided the first question and skipped to the second, which was error. Pl. Br. at 22, 25. Under the proper analytical framework, this Court should address both the scope of the Government's obligations set forth in Section 1342 and the impact of the subsequent Spending Riders on that obligation. And it should reject the Government's arguments, which elevate the ***perceived*** intent of Congress above the ***actual text*** of the law.

I. SECTION 1342 CREATED AN OBLIGATION OF THE UNITED STATES TO MAKE FULL RCP PAYMENTS EXPRESSLY CAPPED BY THE STATUTORY FORMULA.

The Government appears to agree with MCHO that the nature and extent of Section 1342's obligation must first be determined before assessing the impact of the Spending Riders on that obligation. However, its contention that Section 1342 created ***no obligation whatsoever***, Govt. Br. at 16-20, disregards controlling principles of statutory interpretation. The Government's position deprives Section 1342 of all meaning based on both its text and its purpose.

A. The Text of Section 1342 Created an Obligation of the U.S. Government to Make Full and Annual Payments.

As set forth in MCHO's opening brief, Section 1342's statutory language creates a mandatory obligation that the Government "shall pay" in accordance with (and capped by) the statutory formula on an annual basis. Pl. Br. at 25-41. It is well settled that the Court's interpretation of Section 1342 "starts where all such inquiries must begin: with the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citation and quotations omitted). The Government's brief attempts to rewrite Section 1342.

First, the Government does not directly respond to MCHO's textual arguments, attempting instead to insert words that are not there. MCHO explained that "the language of the statute itself":

- uses "shall" rather than "may," creating a mandatory obligation to make payments in accordance with the statutory formula (Pl. Br. at 26-27);
- dictates that the RCP "shall be based on" Medicare Part D, which is not budget neutral and is presumed to have influenced Congress (Pl. Br. at 28-29); and
- omits any language whatsoever limiting RCP "payments out" to "payments in" or "the availability of appropriations," as exists elsewhere in the ACA (Pl. Br. at 30).

The Government first deletes the directive that the RCP "shall be based on the program for regional participating provider organizations under [the Medicare Part D risk mitigation program]." ACA § 1342(a). The Government argues that in order for this language to have any significance, Congress was required to copy-and-paste the exact language from the Medicare Part D statute into the ACA—including the magic words that HHS was granted "budget authority in advance of appropriations." Govt. Br. at 18-19. This is error. First, Congress is presumed to have legislated with awareness of how Medicare Part D operates and is funded. Pl. Br. at 28-29 (citing cases).

Second, the Government offers no alternative interpretation of how Section 1342 is "based on" Medicare Part D. In so doing, the Government improperly reduces Congress's "shall be based on" statutory direction to empty surplusage. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (referencing the "presumption that each word Congress uses is there for a reason" (citation omitted)). Congress frequently adopts concepts from existing programs into new legislation exactly as it has done here—especially when dealing with programs already familiar to the affected community. It is inconceivable that Congress created the risk corridors program in the ACA "based on" the risk corridors program in Medicare Part D, and yet made the ACA version budget neutral without saying so in the text of the law.

Moreover, Section 1342's "shall pay" mandate creates a more specific obligation than Medicare Part D. The Medicare Part D statute provides that HHS "shall establish a risk corridor." 42 U.S.C. § 1395w-115(e)(3). By contrast, Section 1342 also mandates that HHS "***shall pay.***"

The Government's statement that the Medicare Part D statute "expressly made risk-corridors payments an obligation of the government," Govt. Br. at 18, again strips Congress of its authority to directly exercise the power of the purse. As discussed above, Congress can require HHS to make certain payments and arm it with budget authority to do so (necessary under the Anti-Deficiency Act for an agency to spend federal funds). On the other hand, Congress may, as it did in Section 1342, exercise its power directly by mandating that the Government "shall pay." The Medicare Part D language cited by the Government grants HHS budget authority in advance of appropriations and "represents the obligation ***of the Secretary***" to make certain payments (emphasis added). This was simply Congress requiring HHS to make the requisite payments, consistent with the approach taken in Medicare Part D. By contrast, Section 1342's mandate that HHS "shall pay" directly obligates the federal Government, whether through HHS or otherwise, to make the requisite payments.

In addition to depriving Section 1342's "shall pay" mandate of any meaning, the Government's argument conflates budget authority (HHS's ability to pay) with liability (the United States' obligation to

pay). As discussed further *infra* Section I.D, the availability of an appropriation is important to the functioning of any federal program but it is not the catalyst of statutory liability.

The Government repeatedly states that Congress has "the power of the purse." MCHO agrees. It is because Congress has the power of the purse that it can mandate payment irrespective of whatever additional authority it vests in an agency to obligate the Government on its own. The "in advance of appropriations" language in Medicare Part D is certainly one way for Congress to accomplish its aims; Section 1342's "shall pay" mandate is another way.

The Government also seeks to insert language that Congress omitted when it passed Section 1342 and, in so doing, misapprehends MCHO's argument regarding the absence of limiting language. Govt. Br. at 26. MCHO does not argue that obligations can only be modified if the substantive legislation was "subject to the availability of appropriations." For the reasons discussed above and in MCHO's opening brief, Section 1342 created an obligation and that obligation was capped only by the statutory formula; ***there was no second, implicit cap limiting "payments out" to "payments in."*** Pl. Br. at 31-32. MCHO

recognizes that Congress ***can*** legislate such a cap through language other than "subject to availability of appropriations." The point, though, is that, in Section 1342, Congress did ***not*** legislate a second cap on "payments out" ***in any fashion***—by using "subject to the availability of appropriations," "subject to budget neutrality," "capped at user fees," or dictating that amounts "collected" under the program should be used "to make . . . payments" under the same program.

Significantly, Congress used such limiting language throughout the ACA, but it chose ***not*** to do so in Section 1342. *See, e.g.*, 42 U.S.C. § 280k (establishing a program "subject to the availability of appropriations");[1] 42 U.S.C. § 1395w-4(c) ("The payment modifier established under this subsection shall be implemented in a budget neutral manner."); 42 U.S.C. § 18061 (in the RCP's sister program, the reinsurance program, dictating that "the applicable reinsurance entity collects payments . . . and uses amounts so collected to make

[1] The Government's efforts to undermine the significance of this provision by asserting that an appropriation was made for this program in the ACA, Govt. Br. at 26 n.9, misses the point. The mechanism by which an obligation is ultimately funded, whether simultaneously or thereafter, is distinct from the nature and scope of the obligation. *See* Pl. Br. at 41-47. The point is that where Congress wished to limit an obligation to the amounts appropriated—either in the ACA itself or in subsequent legislation—it knew how to say so.

reinsurance payments"). This Court should reject the Government's efforts to add language to Section 1342 that Congress chose not to include.

B. The Government's Interpretation of Section 1342 Undermines Its Statutory Purpose.

The Government concedes that Section 1342 is a "premium stabilization" program (Govt. Br. at 1, 4, 15, 16) and simultaneously advances a reading of the statute that subverts that statutory purpose. As set forth in MCHO's opening brief, the ACA created a brand new and untested system of healthcare marketplaces with distinct requirements, for which no one—neither the Government nor insurers—had sufficient data with which to price premiums.[2] Pl. Br. at 2, 6-10. The RCP was

[2] For this reason, the Government's repeated reference to the "business judgment" of insurers (Govt. Br. at 17) is a red herring. Insurers lacked data on uninsured populations; the very purpose of the RCP was to incentivize insurers to enter the untested market without preemptively hiking premiums. The Society of Actuaries explained: "The goal of the [RCP] is to protect health insurance issuers against this pricing uncertainty of their plans, temporarily dampening gains and losses in a risk-sharing arrangement between issuers and the federal government. Since the protection is only available for QHPs, it also provides a strong incentive for issuers to participate in the health insurance exchanges set up by the ACA. ***Lastly, it provides an incentive for issuers to manage their administrative costs optimally.***" Doug Norris *et al.*, *Risk Corridors under the Affordable Care Act—A Bridge over Troubled Waters, but the Devil's in the Details*, Health Watch at 5 (Oct. 2013),

designed to share risk between insurers and the federal government in order to stabilize premiums. "The words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). The Government's position fails under this bedrock principle of statutory construction.

First, the Government repeatedly asserts that the RCP, along with the other two of the "Three Rs," was designed to "distribute risk among insurers." Govt. Br. at 5, 15. That is incorrect. The Three Rs are distinct programs designed to stabilize premiums in distinct ways. The risk adjustment program distributes risk among insurers. Pl. Br. at 29 (*see* 77 Fed. Reg. 17,220, 17,220 (Mar. 23, 2012); 76 Fed. Reg. 41,930, 41,930 (July 15, 2011), Appx114). The RCP, by contrast, "serves to protect against uncertainty in rate setting by qualified health plans ***sharing risk in losses and gains with the Federal government***," 77 Fed. Reg. at 17,220 (emphasis added). Although inconvenient for the

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available at https://www.soa.org/library/newsletters/ health-watchnewsletter/ 2013/october/hsn-2013-iss73-norris.aspx (emphasis added).

Department of Justice's argument, to date, HHS still agrees with MCHO on this critical point:

> Protecting health insurance issuers against uncertainty in setting premium rates: The temporary risk corridors program protects qualified health plans from uncertainty in rate setting from 2014 to 2016 ***by having the Federal government share risk in losses and gains.***[3]

The Government's argument in this case would convert the RCP into the risk adjustment program, which distributes payments among insurers. And the Government has not articulated how an RCP that merely distributes "payments in" from insurers pro rata as "payments out" would involve the Government sharing any risk.

Second, as set forth in MCHO's opening brief, a budget-neutral RCP ***would hedge no risk whatsoever*** and thereby ***fail to stabilize premiums*** because, in the event that all insurers experienced losses, insurers would be entitled to $0 and bear the full brunt of the risk everyone knew to exist at the outset of the program. This Court "cannot interpret federal statutes to negate their own stated purposes." *See*

[3] CMS, "Premium Stabilization," *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/index.html (last visited December 20, 2017) (emphasis added).

N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419-20 (1973). Accordingly, the Government's arguments must fail.

C. The Government's Authorities in Support of Its Interpretation That the RCP is Budget Neutral Actually Support MCHO.

1. HHS's Statements Support MCHO.

The Government takes MCHO's reliance on HHS's implementing regulations out of context to argue that agencies cannot exceed their statutory authorization. Govt. Br. at 30. This assertion misses the mark. MCHO relies on HHS's statements parroting Section 1342 not to suggest that HHS created a new obligation but rather to demonstrate that the agency's understanding of Section 1342 is consistent with MCHO's interpretation and the plain language of the statute. Pl. Br. at 14, 28 n.10. HHS's repeated commitments that unpaid risk corridors amounts remain "an obligation of the United States" and its actual payments (albeit partial payments) on an annual basis further support MCHO's reading of Section 1342. Pl. Br. at 16-17 n.7.

The only contrary statements the Government can reference reflect HHS's legal obligation, consistent with the Anti-Deficiency Act, to only spend funds appropriated to it by Congress. *See* Govt. Br. at 32. The HHS statement in May 2014 simply commits to making payments

"subject to the availability of appropriations," as HHS—being an agency—is required to do. But the Government ignores the HHS acknowledgement that "***the Affordable Care Act requires the Secretary to make full payments to issuers***," and "***HHS will use other sources of funding for the risk corridors payments***, subject to the availability of appropriations." 79 Fed. Reg. 30,240, 30,260 (May 27, 2014); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (emphases added). HHS, the agency charged with managing both the Medicare Part D and ACA RCPs, understood in 2010 and understands now that Section 1342 is not budget neutral. That HHS's activities are subject to the availability of appropriations has no bearing on obligations and debts of the United States.

2. CBO's Statements Support MCHO.

The Government cites to CBO's failure to score Section 1342 and attempts to convert CBO's silence into an affirmative statement that Section 1342 was understood to be budget neutral. Govt. Br. at 19-20. First, "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009). Second, CBO is in the business of

predicting the impact of a statute and any opinion that the RCP would be budget neutral at the outset of the program reflects just that: a prediction that the RCP, like the Medicare Part D RCP it was modeled on, would be approximately budget neutral. *See* CBO, "The Budget and Economic Outlook: 2014 to 2024" at 114-115 (Feb. 2014), *available at* https://www.cbo.gov/publication/45010. Third, when CBO did eventually opine on the RCP specifically, it agreed with MCHO that it is not budget neutral. Pl. Br. at 33.

3. GAO's Statements Support MCHO.

Similarly, GAO does not support the Government as it has never posited that "payments out" are subject to "payments in." It concluded, as the Government concedes, Govt. Br. at 9, that RCP payments could also be made from the CMS PM Appropriation. The Hon. Jeff Sessions the Hon. Fred Upton, B-325630, 2014 WL 4825237, at **2-3 (Sept. 30, 2014).

D. A Statutory Obligation to "Pay" May Exist Independent of an Appropriation.

There is no question Congress can obligate the United States through substantive legislation to pay money. *See United States v. Mitchell*, 463 U.S. 206, 218 (1983). That is precisely what Congress did

in Section 1342. The Government's argument that no statutory obligation can exist without an appropriation is legally unsupported.[4] *See, e.g.*, Govt. Br. at 6, 21, 25. As set forth in our opening brief, the Government's liability does not depend on their also being a dedicated source of funding for that liability. Pl. Br. at 41-47. The Government continues to conflate Congress's sovereign authority to obligate the United States in the first instance (*i.e.*, create a liability) with Congress's authority to appropriate funds to pay its obligations. Indeed, the Government's own treatment of Medicare Part D undermines its position—Medicare Part D no more has a permanent appropriation than Section 1342, yet the Government concedes it obligates the United States. Govt. Br. at 19.

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[4] It also defies common sense. The Government's position that Section 1342 created ***no obligation whatsoever*** unless and until further appropriations were made, Govt. Br. at 25, utterly undermines the entire purpose of Section 1342 for the reasons discussed *supra* Section I.B. It also undermines the Government's position that an appropriation is necessary for an obligation to arise in the first instance because the Government's logic compels the conclusion that, had Congress opted to appropriate no funds whatsoever, Section 1342 as written in 2010 was meaningless and 100% handicapped from having mitigated any risk whatsoever. This means that QHP issuers would have priced premiums, entered the market, and performed for the first benefit year ***before any obligation to pay a dime arose.*** "It is implausible that Congress meant the Act to operate in this manner." *Burwell*, 135 S. Ct. at 2484.

The Government's position also flies in the face of over a century of precedent. Pl. Br. at 42-47 (citing cases). As set forth in *Collins v. United States*,[5] "[t]hat ***such liabilities may be created where there is no appropriation of money to meet them*** is recognized in [the substantive legislation]." 15 Ct. Cl. 22, 35 (1879) (emphasis added).[6] The RCP created such a liability in Section 1342 for the reasons set forth *supra* Section I.A. There is no requirement for Congress to also create a specific appropriation. *See, e.g.*, *United States v. Langston*, 118 U.S.

[5] In attempting to escape the applicability of *Collins v. United States*, the Government misses MCHO's point. The court in *Collins* posits that legal obligations are distinct from the mechanism by which they are paid and the Court's role is to determine the former. Pl. Br. at 42-43. The Government's point—that the actual payment pursuant to any judgment entered by the Court requires an appropriation—is unremarkable. Such a judgment can be paid through an appropriation by Congress (as was done at the time that *Collins* was decided) or through the Judgment Fund, which was created to streamline that process. However, *Collins* reaffirms that the mechanics of paying a judgment relate to the role of the Treasury in fulfilling such a judgment, not this Court's role in assessing the scope of an obligation and entering judgment accordingly. *Collins*, 15 Ct. Cl. at 35 ("***The officers of the Treasury*** have no authority to pay such compensation until appropriations therefor are made . . .") (emphasis added). Once the courts resolve the question of whether the United States owes a debt, it is for the United States to determine how that judgment should be paid.

[6] *See also* Pl. Br. at 42 n.16 (citing cases).

389, 391-94 (1886) (Government liable for statutory promise to pay despite absence of a specific appropriation).

The Government's assertion that five cases "relied on appropriations legislation in determining that there was no substantive ground for liability" is incorrect. *See* Govt. Br. at 29. Each of those cases underscored CFC's error in this case in failing to first determine the nature and scope of an obligation before assessing the impact of the Spending Riders. Each of those cases first determined the scope of the obligation at issue ***and then analyzed the relevant appropriations language to determine whether the obligation was altered, not whether the obligation existed in the first instance:***

- *Compare United States v. Dickerson*, 310 U.S. 554, 555-56 (1940) ("It is conceded that Section 9, if not repealed or suspended at the date of his reenlistment, ***would entitle him to the sum of seventy-five dollars.***") (emphasis added), *with id.* (assessing whether subsequent appropriations suspended or repealed that obligation).

- *Compare United States v. Will*, 449 U.S. 200, 203-05 (1980) (detailing content of statutes that set the compensation for federal judges), *with id.* at 221-25 (assessing whether subsequent appropriations suspended or repealed that obligation).

- *Compare United States v. Mitchell*, 109 U.S. 146, 149 (1883) (finding that through the substantive statute, "the salaries of interpreters were fixed, some at $400 and some at $500 per annum . . ."), *with id.* (assessing whether subsequent appropriations suspended or repealed that obligation).

- *Compare Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1168 (Fed. Cir. 1995) (observing that "once the requirements of the statute have been met, the Secretary of DOE determines a school district's entitlement to funds under [the relevant statute]"), *with id.* at 1170-71 (determining whether funding was required to be "100% in accordance with [the substantive statute]" and assessing the impact of subsequent appropriations).[7]

- *Compare Prairie Cty., Mont. v. United States*, 782 F.3d 685, 686 (Fed. Cir. 2015) (summarizing the formulas set forth in the substantive statute defining the government's liability and indicating that "[t]he principal question in this appeal is ***whether the government's liability under [the substantive statute]*** is limited by the amount appropriated by Congress for fiscal years 2006 and 2007"), *with id.* at 690-91 (assessing whether subsequent appropriations suspended or repealed that obligation).[8]

As MCHO set forth in its opening brief, the mere failure to appropriate funds does not abolish a statutory obligation that the U.S. Government "shall pay" that obligation. Pl. Br. at 25-27. This Court should reject

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[7] As set forth *infra* Section II.B, *Highland Falls* is also inapposite because the substantive legislation was found to be discretionary, not mandatory. *Id.* at 1167.

[8] That the Court rested its ultimate conclusion on the presence of "subject to the availability of appropriations" in the substantive statute bolsters MCHO's point. *Id.* at 687-90. Such language is customarily how Congress conditions an obligation, which it did not do in Section 1342. The Court's analysis highlights the importance of determining the scope of an obligation (*e.g.*, unconditional, capped in some way, or subject to the availability of appropriations) before determining whether and how subsequent appropriations measures modified that obligation.

the Government's efforts to conflate two distinct aspects of the relevant statutory analysis.

II. LATER SPENDING RIDERS DID NOT MODIFY OR REPEAL THE GOVERNMENT'S OBLIGATION TO MAKE FULL, ANNUAL RCP PAYMENTS.

Having failed to support its unsubstantiated claim that Section 1342 did not make RCP payments "an obligation of the government," Govt. Br. at 18, the Government then argues that, in any case, later Spending Riders somehow "capped the Government's liability at amounts collected." Govt. Br. at 21. The Government's position is tainted by (1) its inability to address why Congress apparently accomplished in the Spending Riders what it declined to do through substantive legislation, (2) the absence of sufficiently clear statutory text to repeal or amend Section 1342, and (3) the presumption against retroactivity.

A. Congress Chose Not to Amend the RCP.

There is nothing in Section 1342 that speaks to budget neutrality or capping payments out at "payments in." The Government argues that, in 2014, Congress intended to achieve this result by blocking CMS program management funds that GAO identified. The Government's brief asserts, repeatedly, that this "clearly" shows Congress ***intended*** to

cap RCP payments at user fees and therefore ***implicitly*** did so via the Spending Riders. Govt. Br. at 21-25, 27, 30, 34, 39.

The Government's brief sidesteps the uncomfortable fact that Congress, in 2014, explicitly considered ***and declined*** to amend the RCP to make it budget neutral. Pl. Br. at 49-51. The Government's attempt in footnote 8 to evade this compelling fact is unavailing where, as here, the legislation that Congress declined to pass reflects precisely the interpretation of Section 1342 that the Government urges this Court to adopt. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) ("While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected.").

Among Congress's myriad efforts to repeal the ACA generally or Section 1342 specifically were multiple efforts to render Section 1342 budget neutral.[9] Congress declined to pass any one of those pieces of legislation. To graft upon Section 1342 a reading of budget neutrality

[9] *See, e.g.*, Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014) (seeking to "ensur[e] [Section 1342's] budget neutrality"); *see also* Appx151.

that Congress expressly considered and declined to adopt is tantamount to requesting that this Court facilitate an end-run around the Constitution's statutory amendment process.

B. Insufficient Appropriations Alone Do Not Abolish Statutory Obligations.

As set forth in our opening brief, the Government's contention that Congress "explicitly barred HHS from using the only other potential funding source that the GAO identified" and therefore supposedly made its "intent to cap the government's liability at the amounts collected abundantly clear," Govt. Br. at 25, again confuses Congress's ability to obligate payments and HHS's ability to discharge them. *See* Pl. Br. at 51-52. The Spending Riders restricted HHS's ability to make RCP payments from certain funds. It did not eliminate all sources of funding for RCP payments using Congress's standard language to do so. Restricting appropriations alone does not effect a repeal or amendment of a previously legislated obligation, particularly where Congress considered directly repealing or amending the RCP but declined to do so. *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."); *Greenlee Cty.,*

Ariz. v. United States, 487 F.3d 871, 877 (Fed. Cir. 2007) ("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." (citing *N.Y. Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)).

The Government's assertion that the Spending Riders were "abundantly clear" in imposing a cap on RCP payments to "payments in" runs afoul of two bedrock principles that control the question: (1) repeals or amendments by implication are not favored and (2) this general rule of statutory interpretation applies with especial force when the purported repealing measure is in an appropriations bill. Pl. Br. at 53. The Spending Riders are by no means "abundantly clear," particularly in light of the clarity elsewhere within the same Riders.

In an apparent effort to overcome these presumptions, the Government resorts to Congress's "intent" (Govt. Br. at 16) and "objective" (Govt. Br. at 23). But the Government is wrong in asserting that "[a]s long as Congress's intent is clear, it is dispositive." Govt. Br. at 27. The touchstone of the inquiry is "the intention of Congress ***as***

expressed in the statutes." *Mitchell*, 109 U.S. at 150 (emphasis added). The Government accuses that "[n]one of the cases cited by plaintiff gave courts license to disregard Congress's intent" but fails to cite a single case that gives this Court license to disregard the text of the Spending Riders. That text supports MCHO.

As set forth in MCHO's opening brief, Congress throughout the Spending Riders used its standard language to eliminate all funding sources by prohibiting the use of "funds made available by this Act or any other Act." Pl. Br. at 59-60. That language does not exist, however, in the text applicable to the RCP payments. Where Congress has indicated in other provisions of a particular statute that it knows how to effectuate a particular limitation, the Supreme Court "cautions against inferring a limitation" where that language is absent. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013) (reasoning that, where Congress used specific language of limitation in one statute that it omitted in another, "[t]hese statutes confirm that Congress knows how to limit a court's discretion . . . when it so desires." (citations and quotations omitted)).

For this reason, the Government's contention that its purported "cap" "could not have been more explicit," Govt. Br. at 22, is all the more incredible. ***Congress could have been more explicit***. It could have amended Section 1342 and used the word "cap," or "budget neutral," but it declined to do so. It could have prohibited the use of funds in "this Act or any other Act," but it declined to do so. Thus, all Congress expressed in the statutes is that HHS's ability to make RCP payments from specified sources should be limited for that year. It did not "cap" the Government's RCP obligations.

The Government's attempts to distinguish MCHO's principal cases reflect a departure from controlling principles and an apparent effort to shift the burden of proving a repeal by implication. The appropriation at issue in *Gibney* provided "that none of the funds appropriated for the [INS] shall be used to pay compensation for overtime services other than as provided in [two general laws]." *Gibney v. United States*, 114 Ct. Cl. 38, 48-49 (1949). The *Gibney* court held that this constituted "a mere limitation on the expenditure of a particular fund [that] had no other effect" on the statutory requirement (in that case, to pay overtime). *Id.* at 50. The *Gibney* appropriation

rider is nearly identical to the ones at issue here, which set forth that "[n]one of the funds made available by this Act from [specified sources] may be used for" RCP payments." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227 (2014). The Government cherry-picks one clause from the *Gibney* court's opinion to argue that these two nearly identical statutory provisions are in fact distinct in a material way, fixating instead on the language "as provided in [two general laws]" in the *Gibney* appropriation. While the plaintiff in *Gibney* certainly highlighted that language, the Court's reasoning was not premised on it. In concluding that the relevant language was "a mere limitation on the expenditure of a particular fund and had no other effect," the Court reiterated, as MCHO has advanced here, that:

> For more than half a century according to the rules and the practice prevailing in the Congress, a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation any more than the failure to pay a note in the year in which it was due would cancel the obligation stipulated in the note . . . ***The usual form of a simple limitation was that none of the funds provided should be used for a specific purpose-naming the purpose.*** I know of no departure from this rule in the enactment of legislation in the history of the Government.

Gibney, 114 Ct. Cl. at 50-51 (emphasis added). The Court's holding rested on the appropriation's consistency with the "usual form" of a limitation on the use of funds for a particular purpose, full stop. The Riders did just that. There is no additional requirement that Congress reference the laws that remain in effect notwithstanding its mere limitation. To credit the Government's position turns the presumption against repeals by implication, and its especial application to appropriations riders, on its head by imposing a textual burden on Congress that simply cannot be squared with *Gibney*.

The Government's efforts to evade *Langston* are equally unavailing. Employing circular logic, the Government simply reiterates that *Langston* is distinguishable because Congress in the Riders "affirmatively prohibited HHS from using funds other than collections for such payments" rather than "fail[ing] to appropriate sufficient funds." Govt. Br. at 28. The *Langston* Court held that "[r]epeals by implication are not favored" and required "words that expressly, or by clear implication, modified or repealed the previous law." 118 U.S. at 393-94. The Government fails to identify the clear language expressing an intent to repeal the *Langston* Court required. Rather, given that the

Riders merely blocked specified sources of funding and did not eliminate all sources of funding, *see supra* Section II.B, it is more akin to the *Langston* appropriation.

The Government's cases similarly support MCHO's position. The Government relies on *United States v. Vulte* to argue that if Congress "indicates in its appropriations acts 'a broader purpose' beyond 'something more than the mere omission to appropriate a sufficient sum,'" this Court should exalt Congress's intent. Govt. Br. at 36 (citing 233 U.S. 509, 515 (1914)). But even *Vulte* reiterates that appropriations riders do not modify substantive laws unless that intent is "expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." 233 U.S. at 515. The Government's cases underscore the precise language that is missing from the Spending Riders and the fatal flaw in the Government's analysis for the reasons set forth in MCHO's opening brief—language that evinces an intent to "cap" "payments out" to "payments in" that sufficiently overcomes the controlling presumptions.

Pl. Br. at 56-61. Absent such language, the statutory language controls.[10]

The Government's remaining precedents are inapplicable because the Government's analysis is tainted by its conflation, consistent with the CFC's error below, of the nature and scope of the obligation at issue on the one hand and the impact of the relevant appropriations riders on the other. In *Highland Falls-Fort Montgomery Central School District v. United States*, Govt. Br. at 37-38, contrary to the Government's assertion, the substantive statute was ***not mandatory***. *Compare* 48 F.3d at 1167 (affirming lower court finding that the Impact Aid Act

[10] Unsurprisingly, the Government pivots to its principal cases, *Dickerson* and *Will*, without addressing the fact that the appropriations there at issue prohibited the use of funds in "this Act or any other Act." The CFC below recognized this, Appx22, but improperly elevated perceived congressional intent over the actual text of the appropriations riders. *United States v. Mitchell* is similarly inapposite. *See* Govt. Br. at 24-25. The substantive statute set the salary of Indian interpreters "in full of all emoluments and allowances whatsoever." 109 U.S. at 149. Subsequent appropriations reduced the salary but created a bonus pool to be distributed at the Secretary's discretion. *Id.* The Supreme Court reasoned that this statutory language effectuated a complete change in compensation structure, which "distinctly reveals a change in the policy of Congress on this subject" that was "irreconcilable" with the original statute. *Id.* at 149-50. By contrast, MCHO's reading of the Spending Riders is perfectly reconcilable with Section 1342 and, indeed, is the only reasoning that can effectuate Section 1342's statutory purpose.

"was not mandatory . . . ."), *with* Govt. Br. at 40 (asserting that later riders imposed a cap "notwithstanding the mandatory language of the Impact Aid Act.").[11] The Secretary of Education had broad authority to determine eligibility for funds consistent with statutory criteria. By contrast, Section 1342's "shall pay" mandate is set by a statutory formula and unqualified; entities meeting the statutory criteria will receive payment.

Moreover, because the substantive statute in *Highland Falls* qualified its "shall" pay language with a detailed allocation scheme if appropriations were insufficient, the Court also determined that later appropriations that "earmarked" the *precise* amounts to be paid properly reduced the amounts due. 48 F.3d at 1168-69 (quoting 20 U.S.C. §§ 237(a), 240(c)). This case is inapposite here because (1) section 1342's mandate is unqualified beyond the specifically legislated

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[11] To be clear, MCHO does not assert that the Impact Aid Act was not money-mandating for the purposes of jurisdiction; merely that, on the merits, the Court determined that the language of the Impact Aid Act was not mandatory.

Furthermore, MCHO never asserted that a money-mandating statute for the purposes of jurisdiction automatically establishes liability on the merits. *See* Govt. Br. at 41-42. Rather, Section 1342 is money-mandating for the purposes of jurisdiction and ***also*** entitles MCHO to full payment without regard to appropriations.

cap and (2) there is nothing remotely similar to the earmarks present in *Highland Falls* in the Spending Riders.

C. The Government's Application of the Presumption Against Retroactivity Is Flawed.

First, the Government's contention that Section 1342 did not give rise to any obligation whatsoever, and therefore the Spending Riders had no retroactive effect, fails for the reasons described *supra* Section I.B because such a reading wholly fails to effectuate Section 1342's statutory purpose.

Second, the Government, contrary to controlling principles of fiscal law, continues to conflate when a legal obligation arises with the timing of payment for that obligation. The Government asserts that no legal obligation to make RCP payments could have attached before 2015, when insurers submitted their actual data for the 2014 benefit year. Govt. Br. at 29-30. It is bedrock fiscal law that an "obligation arises when the definite commitment is made, even though the actual payment may not take place until a future fiscal year. . . [T]he term 'obligation' includes both matured and unmatured commitments . . . An unmatured commitment is a liability which is not yet payable but for which a definite commitment nevertheless exists." II GAO, Principles

of Fed. Appropriations Law, at 7-4 - 7-5 (3d ed. 2004), *available at* http://www.gao.gov/legal/redbook/overview. The Government offers no explanation for why these two principles—(i) when an obligation arises (here, at least by late 2013, when insurers committed to participating on the exchanges); and (ii) when it is definitized (mid-2015, when the final amount is tabulated)—should be collapsed contrary to GAO's guidance.

That the Government's position requires insurers to complete performance for the 2014 benefit year (January-December) before ***any obligation to pay them arises*** merely serves to underscore that such a position "impair[s] rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006).

According to the Government, MCHO (1) had no rights at all under Section 1342 despite its statutory purpose of mitigating risk by promising payment to QHP issuers, (2) agreed to participate in the exchanges and offer QHPs consistent with the ACA's extensive and costly requirements despite facing a wholly untested market, and (3)

performed for the entire 2014 benefit year, and only ***after*** all of that, in the following year (2015), did any obligation to pay MCHO arise. "It is implausible that Congress meant the Act to operate in this manner." *Burwell*, 135 S. Ct. at 2484. And to say to MCHO "'[t]he joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 466 (2017) (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

CONCLUSION

For the reasons set forth above and in MCHO's opening brief, Health Options respectfully requests that the Court reverse the CFC's judgment and remand with instructions to enter judgment in favor of Health Options.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure ("Fed. R. App. Proc.") 32(a)(7)(B) and Federal Circuit Rule 32(a): it contains 6,999 words, excluding the portions exempted by Fed. R. App. Proc. 32(f) and Federal Circuit Rule 32(b).

This Brief complies with the typeface requirement of Fed. R. App. Proc. 32(a)(5) and the type style requirement of Fed. R. App. Proc. 32(a)(6): it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point size.

In preparing this certificate of compliance, I have relied upon the word count function of the word processing system that was used to prepare the brief.

December 20, 2017

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