IN THE UNITED STATES COURT OF FEDERAL CLAIMS

18-143C
(Judge Kaplan)

MONTANA HEALTH CO-OP,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MOTION TO DISMISS

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June 1, 2018

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MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint of plaintiff, Montana Health CO-OP. Plaintiff's complaint fails to state a claim upon which relief can be granted.

INTRODUCTION

The Constitution is clear: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This basic rule ensures that the peoples' elected representatives in Congress have exclusive power to authorize the expenditure of public funds. Without a congressional appropriation—an "Appropriation made by law"—public money cannot be spent. When Congress refuses to appropriate money for a particular purpose or program, the other branches have no authority to override that decision.

Plaintiff disagrees and asks this Court to order payment from the Judgment Fund for a program that Congress has declined to fund directly. This Court should reject that request. The Judgment Fund is not an omnibus source of backup funding for Federal programs. Resort to the Judgment Fund presupposes liability, and there is no basis to hold the Government liable here.

The program at issue is part of the Affordable Care Act (ACA). Pursuant to the ACA, individuals meeting certain income requirements are eligible to receive refundable premium tax credits that apply towards the cost of purchasing health insurance offered on ACA Exchanges. In addition, insurance issuers that provide health insurance on the ACA Exchanges are required to reduce cost sharing (such as deductibles and co-payments) for individuals who are receiving premium tax credits and meet additional eligibility requirements. These cost-sharing reductions (CSRs) reduce the expense that those individuals incur for out-of-pocket costs.

Provisions in the ACA authorized the Government to make advance payments to issuers for these premium tax credits. Separately, other ACA provisions authorized the Government to reimburse issuers for providing CSRs. But when it passed the ACA, Congress chose to permanently appropriate funds for the premium tax credits, while opting not to permanently appropriate funds to reimburse issuers for CSRs. Instead, Congress left CSR payments to the annual appropriations process, just like most Federal programs. Only if Congress appropriates funding may such payments lawfully be made. And since the passage of the ACA in 2010, Congress has never done so.

In 2014 the prior Administration began using the permanent appropriation for tax refunds—the same provision that funds the ACA's premium tax credits—to reimburse issuers for the CSRs those issuers provided to their insureds. A district court enjoined those payments as unlawful but stayed the injunction pending appeal. The current Administration subsequently concluded that the permanent appropriation for tax refunds was not legally available to make

CSR payments. As a result, the Government stopped making CSR payments to issuers in October 2017.[1]

Plaintiff has brought suit to recover CSR payments it claims the Government was obligated to make in order to defray the cost of CSRs it provided to its insureds from October to December 2017. It claims a statutory right to these payments, and further alleges that it entered into a binding implied-in-fact contract with the United States pursuant to which it is entitled to be reimbursed for its CSR reductions. But plaintiff tacitly acknowledges that Congress never appropriated funds for the payments plaintiff demands. Indeed, the central premise of plaintiff's complaint is that the *absence* of an appropriation by Congress—that is, Congress's decision to not fund the CSR program—is *no obstacle* to collecting payments as though the program were fully funded. As plaintiff sees it, Congress's decision whether to fund CSR payments is beside the point because the Judgment Fund provides catch-all funding when, as here, Congress has declined to provide it. This Court should reject that remarkable claim. Nothing in the ACA or elsewhere suggests that Congress silently surrendered its power of the purse to the Judgment Fund, such that its decision whether to appropriate funding for CSR payments is irrelevant.

The complaint should be dismissed for failure to state a claim upon which relief may be granted. Contrary to plaintiff's suggestion, the ACA never guaranteed that issuers would be reimbursed for CSRs. *See* Complaint, ¶ 12. The ACA provisions plaintiff invokes state that the Department of Health & Human Services (HHS) and the Department of the Treasury shall make CSR payments under specified circumstances, but those provisions nowhere appropriate funds for such payments. Absent an appropriation for CSR payments by Congress, the Executive

[1] As explained below, the district court has since vacated its injunction pursuant to a settlement agreement.

Branch is constitutionally barred from making CSR payments, and plaintiff is not entitled to receive them. Contrary to plaintiff's allegation, Congress did not make CSR payments an "obligation" of the Government without regard to appropriations.

Nor does plaintiff state a viable claim for damages pursuant to an implied-in-fact contract theory. The Executive Branch has not entered into any "implied-in-fact contract" to make CSR payments to plaintiff. And even if it had, the Executive Branch does not have the power to circumvent Congress's refusal to fund a particular program by entering into "contracts" with the program's participants and then making payments pursuant to those "contracts" of the very amounts Congress has withheld. Moreover, controlling Supreme Court precedent provides that Federal statutes are presumed not to create private contractual rights, unless Congress manifests a clear intent to be contractually bound. Here, Congress gave no indication that it intended to bind the United States in contract to make CSR payments; indeed, it indicated the opposite by declining to permanently fund CSR payments in the ACA itself and by then repeatedly declining to appropriate money to fund them.

Plaintiff's statutory and contract claims fail as a matter of law, and the complaint must be dismissed.

QUESTIONS PRESENTED

1. Whether plaintiff's statutory claim fails as a matter of law because plaintiff has no entitlement to CSR payments absent an appropriation from Congress.

2. Whether plaintiff's implied-in-fact contract claim fails as a matter of law because Congress did not create private contractual rights to CSR payments or authorize HHS to do so.

STATEMENT OF THE CASE

I. The Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the ACA), which enabled individuals and small businesses to purchase health insurance through marketplaces called Exchanges. Exchanges are organized and operated at a state-level.

The ACA classifies plans offered on the Exchanges into four "metal" levels based on how much of the expected cost of medical care the issuer will bear. 42 U.S.C. § 18022(d). A "silver" plan is structured so that the issuer pays at least 70 percent of the average enrollee's health care expenses, leaving the enrollee responsible for the other 30 percent through cost-sharing charges such as co-payments, coinsurance, and deductibles. *Id*. In a "gold" or "platinum" plan, the issuer will bear a greater portion of health care expenses, while the issuer will be responsible for a lower portion of the enrollee's expenses in a "bronze" plan. *Id*.

The ACA established two programs to lower the cost to insureds of qualified health plans (QHPs) offered through the Exchanges. The first is a premium tax credit. In section 1401 of the ACA, Congress added a new provision to the Internal Revenue Code authorizing a refundable tax credit to subsidize health insurance premiums for taxpayers with household incomes between 100 and 400 percent of the Federal poverty level. *See* 26 U.S.C. § 36B. The amount of the tax credit is based on the price of the second-lowest-cost silver plan available on the Exchange in the local area, as well as on the household income of the person seeking insurance. *See id*. Thus, if premiums for the second-lowest-cost silver plans increase, the tax credits increase by a corresponding amount. And in the ACA, Congress also amended the permanent appropriation

for tax refunds to extend to § 36B's premium tax credit, thus ensuring this program would always be funded. *See* 31 U.S.C. § 1324(b)(2).

The second program Congress enacted was the CSR requirement for issuers. Section 1402 of the ACA requires issuers to reduce the amount of co-payments, deductibles, and other cost-sharing requirements for eligible insureds who have household incomes between 100 and 250 percent of the Federal poverty level and who are enrolled in "silver" health plans in the individual market on ACA Exchanges. *See* ACA § 1402 (*codified at* 42 U.S.C. § 18071). Section 1402 also authorized the Government to reimburse issuers for these amounts, stating that the Secretary of HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions." *Id*. § 1402(c)(3)(A). Unlike its treatment of premium tax credits, however, the ACA did not provide a funding mechanism for this program or otherwise appropriate funds to make CSR reimbursements.

The CSR reimbursement payment is claimed by and paid to the issuer directly. It is the issuer's responsibility to "ensure that an individual . . . pays only the cost sharing required," and the reduction "must be applied when the cost sharing is collected" from the individual. 45 C.F.R. § 156.410(a). Assuming the CSR program is funded, regulations provide that issuers will receive periodic advance payments to cover projected CSR amounts, 45 C.F.R. § 156.430(b), and must thereafter submit information "in the manner and timeframe established by HHS" concerning the actual CSRs provided to insureds, which HHS uses to perform periodic reconciliations. 45 C.F.R. § 156.430(c)-(d).

Although CSRs and tax credits are funded differently, the requirement that issuers reduce cost sharing for insureds can impact premiums (and thus premium tax credits). Plans listed on an Exchange are grouped into metal tiers based on the actuarial value of the plan. The actuarial

value in this context refers to the percentage of health care costs for which the issuer is responsible, with the insured responsible for the remaining costs. The actuarial value of the plan determines the plan's metal tier on the Exchange. Silver plans have an actuarial value of 70 percent, meaning that those plans cover 70 percent of an insured's expected health care costs.

Under the ACA, the amount of premium tax credits is based on the price of the second-lowest-priced silver plan available in the individual's area, *i.e.*, the second-lowest-priced plan designed to cover 70 percent of the individuals' expected health care costs. *See* 26 U.S.C. § 36B. Cost-sharing reductions provided by issuers for insureds increase the actuarial value of silver plans. *See* ACA § 1402(c) (*codified at* 42 U.S.C. § 18071(c)); 45 C.F.R. § 156.420(a). For instance, as a result of reduced cost sharing, an individual with income between 100 and 150 percent of the Federal poverty level will see the issuer's share of his or her expected health care costs under a silver plan increase from at least 70 percent up to 94 percent, leaving the individual to pay only 6 percent of his or her costs.[2] *See* 45 C.F.R. § 156.420(a)(1). An individual with income between 150 and 200 percent of the Federal poverty level will be able to obtain a silver plan under which the reduced cost sharing will increase the actuarial value of those plans from 70 to 87 percent. *Id*. at § 156.420(a)(2). The ACA and its current implementing regulations give issuers the flexibility—subject to state review—to increase premiums to account for the higher actuarial value of plans. *See* 45 C.F.R. § 156.80(d)(2)(i).

II. Congress Declines To Appropriate Funds For CSR Payments

Although the ACA authorized both the tax credit program and the CSR program (as well as advance payment of those items under section 1412 of the ACA), as noted above, the ACA provided funding for the tax credits only. A provision that long predates the ACA provides a

[2] In other words, the CSRs increase the actuarial value of the plan from 70 percent to 94 percent.

permanent appropriation to Treasury "for refunding internal revenue collections," including refunds due from certain enumerated tax credits. *See* 31 U.S.C. § 1324. The ACA amended this provision by adding a reference to Internal Revenue Code § 36B—ACA § 1401's tax credit—to the list of tax expenditures for which this provision permanently appropriates funding. *See* 124 Stat. 119, 213 (2010); 31 U.S.C. § 1324(b)(2).

The ACA did not, however, add the CSR program (which is not a tax program) to that permanent appropriation for tax refunds, or otherwise appropriate money for that program. Instead, it left CSR payments (like most Government programs) to be funded via the regular appropriations process, through which Congress generally funds (or does not fund) Government programs in annual appropriations acts. The prior Administration requested an appropriation in the annual appropriations act for CSR payments for fiscal year 2014, the first year of the CSR program, but Congress did not provide one. *See United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173-74 (D.D.C. 2016).

In January 2014, despite Congress's failure to provide an appropriation, the Government began making monthly advance CSR payments to issuers out of section 1324's permanent appropriation for tax refunds. That prompted a lawsuit by the House of Representatives seeking to enjoin CSR payments on the ground that Congress had not appropriated money for them. In May 2016, the district court ruled in favor of the House and held that Congress had not appropriated funding for CSR payments. The court enjoined further payments until a valid appropriation is made, but stayed that injunction pending appeal. *See House of Representatives*, 185 F. Supp. 3d at 189.

The current Administration subsequently determined that there was no appropriation for CSR payments. In October 2017, in response to an inquiry from the Departments of Treasury

and HHS, the Attorney General concluded "that the best interpretation of the law is that the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, cannot be used to fund the CSR payments to insurers authorized by 42 U.S.C. § 18071." Attorney General Letter at 1 (Oct. 11, 2017). As the Attorney General explained in his letter, it would make little sense to conclude that the permanent appropriation for tax refunds could be used to fund a non-tax program like CSRs:

> [W]hile the two payment provisions [premium tax credits and CSRs] appear sequentially within the ACA, only the section 1401 tax credits are included in the Internal Revenue Code (consistent with their status as tax credits for taxpayers). It is logical that the permanent appropriation in 31 U.S.C. § 1324—which funds a variety of tax expenditures-would fund the ACA's tax credits. But it would make little sense for a provision that appropriates funds for "refunding internal revenue collections," 31 U.S.C. § 1324(a), to also (and without saying so) permanently fund a non-tax program that provides payments to insurers.

Id.

The next day, October 12, HHS sent a memorandum to its Centers for Medicare & Medicaid Services (CMS) explaining that "CSR payments are prohibited unless and until a valid appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017).[3] Accordingly, the Government ceased making CSR payments to issuers.[4]

III. Issuers Increase Premiums To Offset Anticipated Losses

In 2017, some states began working with issuers to permit them to recoup the value of the CSR payments that they anticipated might be discontinued. These states permitted issuers to

[3] The Attorney General's letter, and the subsequent memorandum from the Acting HHS Secretary are available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

[4] The district court has since vacated its injunction pursuant to a settlement agreement. *See United States House of Representatives v. Azar*, No. 14-1967 (D.D.C. May 18, 2018).

increase Exchange plan premiums for 2018 to try to offset the costs of maintaining the actuarial values of the silver plans without CSR payments from the Government. Because premium tax credits are benchmarked to the cost of the second-lowest-priced silver plan, if the premiums for those plans increase, then the tax credits increase generally.[5] Thus, in calculating premiums for the silver plans that set the benchmark for premium tax credits across all metal levels, issuers were permitted by certain states to factor in their anticipated unreimbursed cost of providing CSRs to their insureds, in an effort to offset their CSR costs indirectly through increased tax credits subsidizing premiums. And because premium tax credits—which are available to many more people than CSRs[6]—are tied to the cost of the second-lowest silver plan, increasing premiums for silver plans caused premium tax credits to increase for all insureds eligible for such credits, not just the smaller pool of individuals were eligible for CSRs.

Consistent with this strategy, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See id.* at 1136. After the Government's announcement was made, additional states permitted issuers to rerate their 2018 premiums to account for the cessation of CSR payments. *Id*.

IV. States Sue To Force Resumption Of CSR Payments

Shortly after the Government announced its decision to cease making CSR payments, 17 states and the District of Columbia filed suit in district court seeking declaratory and injunctive relief to compel the Federal Government to resume making CSR payments. The

[5] To the extent issuers raised the premiums of the second-lowest-priced silver plans on the Exchanges, the amount of premium tax credits (which, again, Congress funded through a permanent appropriation) would increase for all qualified health plans.

[6] To be eligible for CSRs, an insured must not only satisfy the criteria for premium tax credits, but must also meet additional income-eligibility requirements. ACA § 1402 (*codified at* 42 U.S.C. § 18071).

district court denied the states' motion for a preliminary injunction. *See California v. Trump*, 267 F. Supp. 3d 1119, 1140 (N.D. Cal. 2017). The court observed that at this initial stage of the proceedings, it appeared that the Federal Government had the stronger position on the merits as to whether Congress had appropriated funds for CSR payments. *See id*. at 1127-33. The court further concluded that the states had not shown irreparable harm because issuers had used the strategy described above to offset the non-payment of CSRs by the Government. The court explained that issuers generally had responded to the unavailability of CSR payments by increasing their silver-plan premiums for 2018, which in turn would increase the advance payments of premium tax credits that the issuers would receive. *See id*. at 1133-39. The district court observed that "the widespread increase in silver plan premiums will qualify many people for higher tax credits," and "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *See id*. at 1139.

V. Montana Health CO-OP Files Suit In This Court

Plaintiff is an issuer that provides coverage on the ACA Exchanges in Montana and Idaho, including sliver plans subject to the CSR program. *See* Complaint, ¶ 23. In this suit, plaintiff seeks CSR payments for the last quarter of 2017. Plaintiff contends it is entitled to recover CSR payments regardless of whether Congress appropriated any funds with which the payments could be made. Plaintiff also alleges that it has an implied-in-fact contract with the Government that entitles it to receive CSR payments.[7]

[7] Other issuers have filed similar suits for CSR payments, including a certified class action that seeks CSR payments for 2018 as well as for the last quarter of 2017. *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.) (class action); *see also Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, J.); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, J.); *Sanford Health Plan v. United States*, No. 18-136C (Firestone, J.); *Molina Healthcare of Cal., v. United States*, No. 18-333C (Wheeler, J.); *Health All. Med.*

ARGUMENT

I. Plaintiff's Claims Fail Because Congress Declined To Appropriate Funds For CSR Payments

Plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim. To avoid dismissal, a plaintiff must "provide the grounds of [its] entitle[ment] to relief" in more than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A "formulaic recitation of the elements of a cause of action" is insufficient. *Twombly*, 550 U.S. at 555. Rather, the complaint must "plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

A. Congress Has Plenary Power Over Federal Spending

The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Courts have long recognized that Congress's control over Federal expenditures is "absolute"; that Congress "is responsible for its exercise of this great power only to the people"; and that Congress "can refuse to appropriate for any or all classes of claims." *Admin'r v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886); *see also United States Dep't of*

Plans, Inc. v. United States, No. 18-334C (Campbell-Smith, J.); *Blue Cross & Blue Shield of Vermont v. United States*, 18-373C (Horn, J.). With the exception of *Sanford Health Plan* and *Blue Cross and & Blue Shield of Vermont*, merits proceedings in these suits have been stayed pending the Federal Circuit's decision *in Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224, and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994.

the Navy v. FLRA, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977)).

Congress's exclusive constitutional authority over the use of public funds—and its corresponding accountability to the public for its exercise of that authority—is a bedrock feature of the Constitution's separation of powers. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (*en banc*); *see generally* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1352-63 (1988). By reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM v. Richmond*, 496 U.S. 414, 427-28 (1990). Congressional control over appropriations is "a bulwark of the Constitution's separation of powers" because, without it, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *United States Dep't of the Navy*, 665 F.3d at 1347 (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)).[8]

B. Congress Exercises Its Constitutional Authority By Enacting, Or Declining To Enact, Appropriations Legislation

The Supreme Court has explained that the Appropriations Clause conveys a "straightforward and explicit command" that no money "can be paid out of the Treasury unless it

[8] Congress must, of course, exercise its appropriations power in a manner consistent with the other provisions of the Constitution. For example, restrictions on appropriations may be invalid if "they encroach on the powers reserved to another branch of the Federal Government." *OPM*, 496 U.S. at 435 (White, J., concurring); *see id.* (rejecting the suggestion "that Congress could impair the President's pardon power by denying him appropriations for pen and paper"). But no such concern is present here.

has been appropriated by an act of Congress." *OPM*, 496 U.S. at 424 (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Money in the Treasury may lawfully be spent only if legislation affirmatively appropriates it. *See United States v. MacCollom*, 426 U.S. 317, 321 (1976). Without an appropriation, an expenditure is unlawful.

Statutory language that authorizes a Federal program does not suffice, by itself, to allow an agency to expend funds on the program. In addition, an appropriation is required before the program may be implemented. "Authorizing legislation" (also referred to as "enabling" or "organic" legislation) is legislation that "establishes and continues the operation of a federal program or agency either indefinitely or for a specific period or that sanctions a particular type of obligation or expenditure within a program." U.S. Gov't Accountability Office (GAO), GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process at 15 (2005) (GAO Glossary)).

To qualify as an *appropriation*, legislation must provide a specific direction to pay, such as for a program, agency, or function, and designate the source of public funds for such payments. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 13-14 (D.C. Cir. 2005) (appropriation requires specific direction to pay and designation of funds to be used). It is not enough for Congress to authorize a program in which it directs that money, if appropriated, shall be spent in particular ways; Congress must *also* provide an appropriation of that money. *See generally GAO Red Book* at 2-54.

Congress has implemented the Appropriations Clause via a series of statutes that establish the basic framework of appropriations law. "Appropriations shall be applied only to the objects for which the appropriations were made," 31 U.S.C. § 1301(a), and a "law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the

payment of money in excess of an appropriation *only* if the law specifically states that an appropriation is made or that such a contract may be made[.]" *Id.* § 1301(d) (emphasis added). Once made, appropriations in the annual appropriations acts are available for obligation only until the end of the fiscal year unless the appropriation "expressly provides that it is available after the fiscal year." *Id.* § 1301(c)(2). Congress permits agencies to incur financial obligations and spend Federal funds by providing the agency with a form of "budget authority," such as through "provisions of law that make funds available for obligation and expenditure." 2 U.S.C. § 622(2)(A)(i).

The Anti-Deficiency Act underlies these rules. That statute prohibits any officer or employee of the United States from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A).

C. Congress Appropriated Funds For Tax Credits And Other ACA Programs, But Did Not Appropriate Funds For CSR Payments

As discussed above, the ACA itself permanently appropriated funds for section 1401 tax credits, just as the ACA itself appropriated funds for many other programs.[9] But the ACA did

[9] *See, e.g.*, 124 Stat. 119, § 1002 (appropriating $30,000,000 "for the first fiscal year for which this section applies" for a grant program to enable States to establish offices of health insurance consumer assistance, or health insurance ombudsman programs); *id*. § 1003 (appropriating $250,000,000 for FY 2010-14 for grant program to enable States to study unreasonable increases in premiums for health insurance); *id*. § 1102(e) (appropriating $5,000,000,000 for reinsurance for early retirees); *id*. § 1311(a)(1) (appropriating "to the Secretary, out of any moneys in the Treasury not otherwise appropriated, an amount necessary to enable the Secretary to make awards" for assistance to states to establish American health benefit exchanges); *id*. § 1322(g) (appropriating $6,000,000,000 for Federal program to assist establishment and operation of non-profit, member- run health insurance issuers); *id*. § 2405 (appropriating "$10,000,000 for each of fiscal years 2010 through 2014" for expansion of state aging and disability resource centers); *id*. § 2701(e) (appropriating "for each of fiscal years 2010 through 2014, $60,000,000" for development of health care quality measures for adults eligible

not appropriate funds for CSR payments or for the advanced payment of CSR payments that Congress authorized under sections 1402 and 1412 of the ACA. Nor has Congress subsequently funded CSR payments through the annual appropriations process. The prior Administration requested an annual appropriation for CSR payments for fiscal year 2014, but Congress did not provide the requested appropriation for HHS. *See* S. Rep. No. 113-71 at 123 (July 11, 2013) (explaining that the Senate committee recommendation did not include the requested appropriation for reduced cost-sharing assistance).[10] Congress likewise has not appropriated any money for CSR payments in appropriations act to date. In the *House of Representatives* litigation, the district court recognized as much, holding that "Congress authorized reduced cost sharing but did not appropriate monies for it, in the FY 2014 budget or since." 185 F. Supp. 3d at 174-175. The Court explained that making CSR payments absent an appropriation would "violate[] the Constitution," because "Congress is the only source for such an appropriation, and no public money can be spent without one." *Id.* As noted above, the Executive Branch subsequently reached the same conclusion.

for Medicaid benefits); *id*. § 2707(e)(1)(A) (appropriating "$75,000,000 for fiscal year 2011" for Medicaid emergency psychiatric demonstration project); *id*. § 2801(a)(5)(C) (appropriating "for fiscal year 2010, $9,000,000" for Medicaid and CHIP Payment and Access Commission); *id*. § 2951(j)(1) (appropriating various amounts for FYs 2010-14 for maternal, infant, and early childhood home visitation programs); *id*. § 2953(f) (appropriating "$75,000,000 for each of fiscal years 2010 through 2014" for personal responsibility education); *id*. § 3021(f)(1)(B) (appropriating $10,000,000,000 for FY 2011-19 for the center for Medicare and Medicaid innovation within CMS); *id*. § 4002(b) (appropriating various amounts for FYs 2010-15 for prevention and public health fund).

[10] A subsequent House committee staff report stated that an Executive Branch official had advised the Senate Committee on Appropriations that the requested line-item appropriation was not needed. *See* Joint Congressional Investigative Report into the Source of Funding for the ACA's Cost Sharing Reduction Program, at 44 (July 2016).

D. Plaintiff Is Not Entitled To CSR Payments In The Absence Of An Appropriation

Rather than identify any lawful appropriation for making CSR payments, plaintiff claims the absence of an appropriation is irrelevant. That is so, plaintiff contends, because "the Government's statutory obligation to make such payments, and plaintiff's right to such payments," exist "[r]egardless of whether Congress appropriated sufficient funds." Complaint, ¶ 17. Plaintiff asks this Court to override Congress's decision to not appropriate funds for CSR payments and order the United States to pay the amount of plaintiff's 2017 CSR reductions from the Judgment Fund, 31 U.S.C. § 1304. The Judgment Fund is a permanent appropriation available to "pay final judgments" against the United States, 31 U.S.C. § 1304(a)(1); that litigation-contingency fund has no bearing on whether a judgment may be entered in the *first place*. The Judgment Fund is not a catch-all appropriation for programs that Congress decides against funding. Here, plaintiff cannot recover from the Judgment Fund because the obligation that plaintiff seeks to enforce does not exist.

Plaintiff's argument rests on the premise that the ACA imposed on the United States a statutory "obligation" to make CSR payments—and conferred on issuers a legally enforceable "right" to receive such payments—even in the absence of appropriations. But absent some indication that Congress legislatively created such an obligation, that argument is contrary to the Appropriations Clause and the laws enacted pursuant to it. Congress generally grants Federal agencies authority to incur binding financial obligations by providing agencies with "budget authority." *GAO Red Book*, Ch. 2 at 2–1. As the GAO Red Book explains: "Agencies may incur obligations *only after* Congress grants budget authority." *Id.* at 2-55 (emphasis added).

Congress has the power to make particular payments an "obligation" of the government without regard to appropriations, or to vest an agency with budget authority in advance of

appropriations. But in the limited circumstances where Congress intends to do so, it does so explicitly.

In the Medicare Part D statute, for example, Congress created a program to pay insurers subsidies "to reduce premium levels applicable to qualified prescription drug coverage for part D eligible individuals." 42 U.S.C. § 1395w-115(a). That statute was similar to the CSR statute, in that it directed that the Secretary of HHS "shall provide for payment to [insurers]" of certain subsidies. *Id.* But in the Medicare Part D statute, Congress also specified that this directive to pay "constitutes budget authority *in advance of appropriations Acts* and *represents the obligation of the Secretary* to provide for the payment of amounts provided under this section." *Id.*[11] Congress has used similar formulations to create unconditional obligations to pay in many other statutes involving health care programs—including another provision of the ACA itself. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, providing "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph."); *see also, e.g.*, 42 U.S.C. §§ 1320b-22(e)(2), 1395w-132(a)(1), 1396b(y)(2), 1396s(a)(2)(A), 1397aa(c).

But Congress did not include that formulation—or anything like it—in the provisions of the ACA addressing CSRs. Instead, the provision on which plaintiff relies (Complaint, ¶ 31) merely provides that the Secretary of HHS "shall make periodic and timely payments to [issuers] equal

[11] For purposes of fiscal law, an "obligation" is "[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." Gov't Accountability Office, GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process 70 (2005).

to the value of the reductions" provided to eligible insured individuals. ACA § 1402(c)(3), *codified at* 42 U.S.C. § 18071(c)(3). That provision undoubtedly requires the Secretary to make CSR payments *if* Congress appropriates money to make them. In sharp contrast to the otherwise-similar Medicare Part D statute (and many other provisions), though, that provision does *not* confer "budget authority in advance of appropriations," and does *not* make CSR payments into an "obligation" of the United States. Congress knows how to create a statutory right to payment when it wants—and has enacted appropriations laws to establish the framework for authorizing agencies to incur such obligations—but it conspicuously declined to do so in Section 1402.

Plaintiff disagrees, appearing to argue that any statute providing a Federal agency "shall" make a specified payment creates an unconditional right to payment and thus allows the beneficiary to recover from the Judgment Fund even if Congress declines to appropriate funds for the program. This Court should reject that sweeping contention for at least three reasons.

First, plaintiff's position ignores the fundamental principle that Federal agencies may expend funds only pursuant to "Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7; *see* Sections I.A and B, *supra*. Because Congress acted against the backdrop of that principle when it provided the Secretary of HHS "shall make periodic and timely payments" to issuers, ACA § 18071 (c)(3) (*codified at* 42 U.S.C. § 18071(c)(3)), that congressional directive is properly understood as providing that the Secretary shall make the required payments *only to the extent appropriations are available*. Section 1402 cannot sensibly be construed to confer on issuers a "right" (Complaint, ¶ 17) to the very payments the Secretary is legally prohibited from making.

Second, plaintiff's interpretation would render language in the Medicare Part D statute and other similar provisions superfluous. *See* 42 U.S.C. § 1395w-115(a) ("This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary

to provide for the payment of amounts provided under this section."); *see also, e.g.*, 42 U.S.C. 1320b-22(e)(2), 1395w-132(a)(1), 1396b(y)(2), 1396s(a)(2)(A), 1397aa(c) (employing similar language to the Medicare Part D statute). If, as plaintiff appears to contend, *every* directive that an agency "shall" make a specified payment created an enforceable obligation in advance of appropriations, there would have been no need for Congress to expressly so provide in each of those statutes. And it is a "cardinal principle of statutory construction" that courts "must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)). That principle is particularly important here because it implicates Congress's exclusive control over the Federal fisc. When Congress wishes to create an "obligation," and thereby relinquish control over appropriations, it does so explicitly—as the examples above indicate. But where Congress merely uses mandatory language directed to an agency, as in the CSR provisions, there is no basis to conclude that Congress wishes to relinquish such control. Such mandatory language exists to control the *discretion of agencies* in implementing the programs Congress authorizes and funds—while retaining for Congress its paramount constitutional control over appropriations.

It is a fundamental rule of appropriations law that "the making of an appropriation must be expressly stated" and "cannot be inferred or made by implication." 1 *GAO Redbook* 2-16; *see* 31 U.S.C. 1301(d). That rule makes eminent sense given the grave importance of expending public funds. Here, far from making an appropriation "expressly," Congress declined to either permanently fund CSR payments or fund those payments on an annual basis. This Court should

not override that congressional choice and divest Congress of a core constitutional power by finding a statutory right to payment enforceable in the absence of appropriations.

Finally, plaintiff cannot circumvent Congress's decisions about what programs to fund by demanding CSR payments from the Judgment Fund. The Judgment Fund is available to "pay final judgments," 31 U.S.C. § 1304(a)(1); it has no bearing on whether a judgment may be entered in the first place. Here, Congress chose not to appropriate money for the CSR program nor make CSR payments an "obligation" of the Government. That is the end of the inquiry. The Judgment Fund is not a last resort for those who cannot obtain their desired appropriations from Congress.

Plaintiff may attempt to rely on cases stating that "the mere failure of Congress to appropriate funds" does not "in and of itself defeat a Government obligation created by statute" or preclude recovery from the Judgment Fund. *Greenlee Cnty. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (citing *United States v. Langston*, 118 U.S. 389 (1886)). But as discussed above, Congress did not make CSR payments an "obligation" of the Government. Nor did Congress designate CSR payments as "entitlements" on the part of recipients. In contrast, in both *Greenlee* and *Langston*, the underlying legislation did explicitly create entitlements. In *Greenlee*, the Payment in Lieu of Taxes Act required the Secretary of Interior to make payments to each local government in which "entitlement land" was located. 487 F.3d at 873 (quoting *Lawrence County v. Lead–Deadwood Sch. Dist. No. 40–1*, 469 U.S. 256, 258 (1985)). (Moreover, because the Payment in Lieu of Taxes Act made those entitlements subject to amounts appropriated, the Federal Circuit held in *Greenlee* that the Government's liability was capped and thus gave effect to Congress's funding decision).

The statute in *Langston* provided an express entitlement by stating that the U.S. Minister to Haiti was "*entitled* to a salary of $7,500 a year," 118 U.S. at 390 (citation omitted) (emphasis added). In that case, decided more than 125 years ago, Congress had appropriated $7,500 per year in prior years and later appropriated $5,000 for the Minister's salary for certain years, without explanation, and the Minister sued to recover the difference. *Id.* at 390-391. While stating that the case was "not free from difficulty," the Supreme Court ultimately concluded that the statute fixing the Minister's salary "should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394. That holding derived from the Court's consideration of all of the legislation that constituted the history relating to the minister's salary and rested on the premise that the original statute had vested the Minister with an entitlement to payment. *Id.* at 390 (citation omitted).[12]

Section 1402 is quite different than the statutes at issue in *Greenlee* or *Langston*. It does not provide that issuers are "entitled" to CSR payments. Instead, it is a direction to the Secretary of HHS, specifying that he "shall make periodic and timely payments" to issuers. Such a directive to an Executive Branch officer must be read against the backdrop of the fundamental rule that Federal officers are constitutionally and statutorily barred from making payments absent available appropriations. Accordingly, absent language like that in the Medicare Part D statute

[12] Importantly, *Langston* was decided 70 years prior to the creation of the Judgment Fund. The holding in that case was thus based upon the intent of Congress to create an entitlement to payment within the statute at issue, rather than on the existence of a catch-all appropriation that could be turned to for funding whenever Congress declines to provide it.

or some other clear congressional intent to create an unconditional entitlement to payment, such obligations exist only to the extent that appropriations are available.

E. Issuers Could Offset Their CSR Expenses By Raising Premiums

Although Congress chose not to fund CSR payments, issuers had the flexibility under the ACA and its current implementing regulations—subject to state review—to offset their CSR expenses by raising premiums. Indeed, the implementing regulations permit premium adjustments based on "[t]he actuarial value and cost-sharing design of the plan." *See* 45 C.F.R. § 156.80(d)(2)(i).

For example, for 2018, many issuers increased premiums for the silver plans for which they are required to reduce cost sharing for eligible individuals. *See California*, 267 F. Supp. 3d at 1134-35. Those premium increases, in turn, have resulted in increased premium tax credits across all plan levels. Judge Chhabria determined that "the widespread increase in silver plan premiums will qualify many people for higher tax credits," and "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *Id*. at 1139.

Given the statutory and regulatory flexibility to offset CSR expenses by raising premiums, it is particularly implausible that Congress nonetheless and without saying so made CSR payments a perpetual "obligation" of the Government, without regard to appropriations, payable from the Judgment Fund. This argument depends on accepting the implausible premise that Congress, by *declining* to appropriate funds for CSR payments, intended to allow issuers to collect full payments via damages from the Judgment Fund, while *also* potentially recouping CSR costs through increased premium tax credits. That position is certainly good for insurance

companies, but it defies common sense that Congress somehow intended to provide a potential double payment of an amount that it never appropriated for in the first place.

II. Plaintiff's Contract Claim Fails Because Section 1402 Establishes a Benefits Program, Not an Implied-In-Fact Contract

Plaintiff's contention that it has an implied-in-fact contract for CSR payments (Complaint, ¶¶ 54-62) also fails. To allege a binding implied-in-fact contract, a plaintiff must allege facts demonstrating "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority' on the part of the government's representative to bind the government." *Schism*, 316 F.3d at 1278. The ACA did not bind the Government in contract to make CSR payments or authorize HHS to enter into such contracts.

A. The ACA Did Not Create Implied-In-Fact Contracts For CSR Payments

Plaintiff's attempt to derive an implied-in-fact contract from the ACA provisions authorizing CSR payments is foreclosed by controlling precedent. "The Supreme Court 'has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Id.* (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* at 630-31 (quoting *Atchison*, 470 U.S. at 466); *see also Baker v.*

United States, 50 Fed. Cl. 483, 489 (2001) ("[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation.").

The Federal Circuit has consistently held that where the language in the applicable statute does not evince an intent on the part of Congress to create contractual rights, no contract will be found to have arisen from the statute. In *Brooks*, for example, the Federal Circuit rejected the contention that a qui tam relator entered into a contract with the United States by filing suit against a third party for false patent marketing. The qui tam statute at issue in *Brooks* provided that "[a]ny person may sue for the penalty, in which one-half shall go to the person suing and the other to the use of the United States." 702 F.3d at 631 (citation omitted). Rejecting the claim that repeal of this statute violated an implied-in-fact contract, the Federal Circuit explained that "[n]othing in this language 'create[s] or speak[s] of a contract' between the United States and a qui tam relator." *Id*. (quoting *Atchison*, 470 U.S. at 467). Nor did the legislative history suggest an intent to create vested contractual rights. *Id.* at 631-32.

Similarly, in *Hanlin v. United States*, 316 F.3d 1325 (Fed. Cir. 2003), the Federal Circuit explained that the statutory provision at issue, which provided in relevant part that "the total amount of the fee payable to the attorney—(i) is to be paid to the attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim" was "a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Id.* at 1328-9 (quoting 38 U.S.C. § 5904(d)). The Court could "discern no language in the statute or regulation that indicates an intent to enter into a contract," nor could the Court "discern any past course of dealing or practice from which the [agency's] intent to enter into such a contractual relationship can be inferred." *Id.* at 1330.

And in *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001), the Federal Circuit rejected a contract claim arising from an amendment to the Alaska Native Claims Settlement Act (ANCSA). The Court reasoned that "[b]ecause ANCSA does not purport to create an express contract between the United States and Bay View, the record of ANCSA's enactment would have to support an implied contract." *Id.* at 1266. Finding no evidence of an offer, acceptance, or consideration in the circumstances surrounding enactment, the Federal Circuit held that ANCSA "was a unilateral act by the United States" that did not create contractual rights. *Id.*

When courts have found an intent to contract with program participants, the statutes at issue clearly expressed Congress's intent for the Government to enter into contracts. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that the "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966) (explaining that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)"); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (opining that agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance").

There is no contract language in section 1402 of the ACA. That provision simply provides for the creation of a CSR program and a formula for determining the amount of payments.

Plaintiff may seek to rely on the trial court's reasoning in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (Wheeler, J.), which is one of the risk-corridors cases now pending before the Federal Circuit. There, the trial court ruled that a statute binds the government in contract if it "create[s] a program that offers specified incentives in return for the voluntary performance of private parties." *Id*. at 463. But as our appellate brief explained, that novel test would transform myriad statutory programs into contractual undertakings. Indeed, under the *Moda* court's reasoning, the claimants in *Brooks* and *Hanlin* should have prevailed on their contract claims. The qui tam statute in *Brooks* offered a specified incentive (a share of the penalty) in return for a voluntary performance by a private party (bringing a successful suit for false patent marketing). Likewise, in *Hanlin*, the statute and regulations offered a specified incentive (direct payment of attorney's fees) to a private attorney who performed a voluntary undertaking (successfully represented a veteran seeking back-due benefits). Despite the incentives for private conduct that these statutory schemes created, the Federal Circuit easily found that they did not create contracts.

B. HHS Has No Authority to Enter Contracts for CSR Payments And Did Not Purport To Enter Into Such Contracts

Plaintiff alternatively seeks to imply a contract from HHS's regulations, conduct, and statements. *See* Compl. ¶¶ 55-61. But HHS has no authority to enter into contracts for CSR payments and, unsurprisingly, HHS did not purport to do so.

An implied-in-fact contract cannot arise without "actual authority" on the part of the Government's representative to bind the Government. *Schism*, 316 F.3d at 1278. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000).

Moreover, budget authority is a prerequisite to contract formation with the United States. Except as authorized by law, the Anti-Deficiency Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation." *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)); 31 U.S.C. § 1341(a)(1)(B). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, the Federal Circuit held that promises of free lifetime medical care made by military recruiters did not bind the Government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." 316 F.3d at 1284. The Court emphasized that even the President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id*. at 1288.

These principles foreclose plaintiff's claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with any contracting authority. And as explained above, no appropriation or budget authority for CSR payments was ever enacted by Congress. Thus, no valid contract for the payment of CSRs could have been formed.

In any event, HHS did not purport to enter into contracts for CSR payments. Plaintiff cites the implementing regulation, 45 C.F.R. § 156.430 (*see e.g.*, Complaint, ¶ 32), but that regulation tracks the statute and contains no contractual language. Plaintiff's vague reference to other HHS "statements" and "conduct" cannot establish either authority to contract for CSR payments or the intent to do so. Accordingly, plaintiff's claim for breach of an implied-in-fact contract must be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss plaintiff's complaint.

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June 1, 2018

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