No. 18-1028

IN THE

Supreme Court of the United States

MODA HEALTH PLAN, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This case is significant to the Chamber because many of its members do business and partner with the federal government in a variety of critical areas. These dealings are often conducted pursuant to federal statutes that include financial incentives, risk-sharing arrangements, liability limitations and other provisions that Congress implemented to induce the private sector to participate in the federal program. Such statutory commitments can only be effective, however, if the federal government honors its obligations to the business community and conducts itself as a reliable business partner.

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[1] After timely notification pursuant to Supreme Court Rule 37.2(a), the parties consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to fund its preparation or submission.

By holding that the appropriations riders at issue repealed the government's undisputed statutory obligations—despite the absence of any clear statement to that effect in the riders—the decision below frustrates the legitimate expectations of and creates profound uncertainty for companies that do business and partner with the federal government. If allowed to stand, the decision will chill the business community from working with the federal government in the future, and make it more difficult and expensive for the federal government to accomplish important policy objectives. For all of these reasons, the Chamber has substantial interests in the Court's review of the decision below.

SUMMARY OF ARGUMENT

The Federal Circuit concluded that Congress had designed a system to encourage private participation in Affordable Care Act ("ACA") health exchanges by agreeing to mitigate the risks faced by private insurers. But the court below then concluded that, after insurers began participating in ACA health exchanges, Congress in subsequent appropriations bills pulled the rug out from under them by relieving the government of any obligation to share risk with its private partners.

I. Review is warranted because the decision below, if left uncorrected, would have far-reaching consequences for myriad areas in which U.S. businesses partner with the federal government to provide vital goods and services. In addition to the health insurance context, public-private partnerships serve essential roles in areas as diverse as public housing, infrastructure development, public health, transportation and nuclear energy. Congress often obtains the cooperation of private industry through

financial incentives, risk-sharing arrangements, technical assistance, and other provisions. Businesses invest substantial financial and other resources to participate in federal programs, and their willingness to do so is based on having assurance that the government will honor its statutory commitments.

If the Federal Circuit's view prevails and vague appropriations language can be read as excusing the government from abiding by its commitments, then this precedent will discourage and harm those who do business with the government. At a minimum, the government will incur greater costs and risks in running existing public-private partnerships and in pursuing new partnerships.

II. Review is also warranted because the decision below cannot be reconciled with this Court's precedent establishing the standards that govern whether Congress has repealed, by implication, an existing statutory obligation to private parties. The Federal Circuit's ruling is contrary to this Court's decisions holding that implied repeals of statutory obligations are disfavored and must be clear and manifest. The conflict is all the more stark because, according to the Federal Circuit, Congress implemented the implied repeal through appropriations riders even though (i) such riders presumptively do not affect Congress' existing statutory obligations; (ii) such a repeal violates the presumption against retroactive legislation; and (iii) the Federal Circuit's construction raises substantial constitutional doubts under the Due Process Clause and Takings Clause.

The Petition should be granted.

ARGUMENT

I. REVIEW IS NECESSARY BECAUSE THE FEDERAL CIRCUIT'S DECISION UNDERMINES PUBLIC-PRIVATE PARTNERSHIPS IN A WIDE VARIETY OF AREAS OF CRITICAL IMPORTANCE TO THE NATIONAL ECONOMY.

Although this case involves the ACA and the health care industry, the Federal Circuit's decision—if allowed to stand—will have far-reaching consequences for myriad areas in which U.S. businesses partner with the federal government to provide vital goods and services. In addition to the health insurance context, public-private partnerships serve essential roles in areas as diverse as public housing, infrastructure development, public health, transportation and nuclear energy.

In all of these fields, businesses invest substantial financial and other resources to participate in federal programs. Congress often induces the cooperation of private industry through direct and indirect financial incentives, risk-sharing and risk-mitigation measures (such as indemnification and liability limitations), technical assistance, and other provisions. Private entities rely on the federal government's statutory commitments when deciding whether to participate. If the government can be deemed to renege on those commitments through ambiguous language tucked inside appropriations riders, as the Federal Circuit concluded it did with respect to the ACA's risk corridors program, then that ruling jeopardizes the future of public-private partnerships and the benefits that they provide to both the government and the private sector.

For these reasons, the issues presented by the petition affect numerous members of private industry beyond those before the Court. The petition also broadly affects the public interest because the legal uncertainty created by the decision below will jeopardize the ability of the federal government to find willing partners in the business community. At a minimum, that uncertainty will increase the government's costs of entering into public-private partnerships.

A. Congress Has Encouraged A Wide Variety Of Efforts By Private Industry To Implement Important Governmental Priorities.

Private sector businesses are deeply involved in implementing federal programs of all types. The U.S. Department of Housing and Urban Development ("HUD"), for example, has stated that "most HUD programs are structurally public-private partnerships" or "have some public-private aspects."[2] HUD has favored public-private partnerships because they "enable government to share risks with the private sector, leverage investments for far greater effect, take advantage of efficiencies outside government, and employ broader knowledge and skills." *Id.* at 2.

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[2] Office of Policy & Research, U.S. Dep't of Hous. & Urban Dev., *The Evolution of HUD's Public-Private Partnerships*: *A HUD 50th Anniversary Publication*, at 1 (2015), https://www.huduser.gov/hud50th/HUD2-048-Public-Private_Partnership_508.pdf (citing as examples "[t]he nation's foremost low-income tenant assistance subsidy," community development block grants, and the Federal Housing Administration's single-family home mortgage insurance program).

Infrastructure and energy development are other areas that utilize public-private partnerships to achieve key federal objectives. The Department of Homeland Security's National Infrastructure Protection Plan ("NIPP"), for example, states that "[v]oluntary collaboration between private sector owners and operators . . . and their government counterparts has been and will remain the primary mechanism for advancing collective action toward national critical infrastructure security and resilience."[3] The Department of Energy also has used public-private partnerships to spur innovation and the development of new energy sources.[4]

As with the ACA, federal statutes that create public-private partnerships often include incentives and protections for private industry to induce its participation. Congress, for example, enacted the National Child Vaccine Injury Act of 1986 ("Vaccine

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[3] U.S. Dep't of Homeland Sec., *NIPP 2013: Partnering for Critical Infrastructure Security and Resilience*, at 10 (2013), https://www.dhs.gov/sites/default/files/publications/national-infrastructure-protection-plan-2013-508.pdf. The Chamber believes that the use of public-private partnerships is essential to modernizing America's infrastructure. *See* U.S. Chamber of Commerce, *Modernizing America's Infrastructure Requires Public-Private Partnerships* (Jan. 17, 2018), *available at* https://www.uschamber.com/issue-brief/modernizing-americas-infrastructure-requires-public-private-partnerships (urging Congress to expand existing federal loan programs, create new loan and loan guarantee programs, make discretionary grants, and remove barriers to public-private partnerships to modernize the nation's airports, ports, rail systems, dams, and waterways).

[4] *See* Office of Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, *Small Businesses, Big Opportunities: Advancing Building Energy Efficiency through Public-Private Collaboration* (Oct. 27, 2016), https://www.energy.gov/eere/buildings/articles/small-businesses-big-opportunities-advancing-building-energy-efficiency.

Act"), 42 U.S.C. §§ 300aa-1 to 300aa-34, to "stabilize the vaccine market," which many manufacturers had exited due to the high costs of tort liability for vaccine injuries. *Bruesewitz* v. *Wyeth*, 562 U.S. 223, 228 (2011). The Vaccine Act incented vaccine manufacturers to re-enter the market by creating a no-fault compensation scheme. This scheme is funded by industry contributions, but provides a valuable "*quid pro quo*" to manufacturers because they are "generally immunized from liability" for tort claims. *Id.* at 229. This Court in *Wyeth* recognized the importance of this "structural *quid pro quo,*" when it construed the Vaccine Act as preempting state-law design defect claims. *Id.* at 239. The Court reasoned that Congress "would hardly coax manufacturers back into the market" if it had preserved their liability for design defects. *Id.* at 240.

The Atomic Energy Act similarly includes provisions that limit liability for accidents resulting from the operation of private nuclear power plants. See 42 U.S.C. § 2210. Congress designed these liability caps to "encourage[] the private sector to become involved in the development of atomic energy for peaceful purposes." *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 63 (1978). This Court rejected due process and equal protection challenges to the liability limitations extended to nuclear power plant operators, finding that the record "fully support[ed] the need for the imposition of a statutory limit on liability to encourage private industry participation" in the production of nuclear energy. *Id.* at 84.

The government's partnership with industry sometimes takes the form of direct financial support to ensure that private companies can provide vital services. For example, in the aftermath of the

September 11, 2001 terrorist attacks, Congress enacted the Air Transportation Safety and System Stabilization Act "to preserve the continued viability of the United States air transportation system from potentially ruinous tort liability in the wake of the attacks." *Schneider* v. *Feinberg*, 345 F.3d 135, 139 (2d Cir. 2003) (per curiam). The legislation included "financial and tax relief to the airline industry, including federal support for airline insurance." *Can. Life Assurance Co.* v. *Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003). It also capped the tort liability of air carriers and created a victim compensation fund, which conditions claimants' recovery upon waiver of the right to file court actions. *Schneider*, 345 F.3d at 139.

Regardless of the precise forms such programs take, the federal government's statutory commitments are a necessary precondition to the participation and cooperation of private businesses and, therefore, a critical component of the success of these programs.

B. Critical To Any Public-Private Partnership Is A Need For Certainty And A Shared Understanding That, Absent A Clear And Explicit Repeal, Congress Will Abide By Its Legal Obligations To Private Parties.

Businesses that partner with the federal government make substantial investments of money, time, and resources to comply with Congressional mandates and regulatory requirements. Given the need for these investments, it is crucial that businesses have certainty that the government will honor its statutory obligations. Absent reasonable certainty that Congress will maintain the incentives for participation, potential participants will be far less willing to put significant investments at risk,

particularly when faced with novel market conditions, such as those that existed when the ACA's health insurance exchanges were first launched.

In order for private industry confidently to rely upon Congress' statutory commitments, Congress must adhere to them unless and until it implements changes through clear and express statements that apply prospectively. These policy considerations underlie the principles that this Court has adopted disfavoring repeals by implication, retroactive legislation, and statutory constructions that raise serious constitutional questions. See Part II, *infra.* Those principles ensure that private parties will continue to participate in federal programs because they understand the ground rules up front.

The Federal Circuit's decision, in contrast, threatens to destroy the trust necessary for public-private partnerships to work. By permitting implied repeal based upon ambiguous language in appropriations riders, the Federal Circuit has substantially increased the risks of participation in federal programs. Entities considering such participation will understand they face a significant risk that their investment-backed expectations can be easily undone. Indeed, the large losses incurred by health insurers as well as the many health cooperatives that went out of business due to the lack of promised risk corridor payments, see Pet. App. 84, stand as a cautionary tale to all businesses that are considering participation in public-private partnerships.

As Judge Newman cogently stated in her dissent from the denial of *en banc* review, "[t]his is a question of the integrity of government." Pet. App. 67. The government cannot demand that its private sector partners "turn square corners," yet treat that

obligation as "a one-way street." *Id.* (quoting *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting)). Companies that suffer losses due to broken government promises will cease doing business with the government altogether. At the end of the day, "[t]he government's access to private sector products and services is undermined if non-payment is readily achieved after performance by the private sector." *Id.* at 68.

In a related context, this Court has similarly recognized that if the federal government does not act as "'a reliable contracting partner'" that adheres to its commitments, then "contracting would become more cumbersome and expensive for the Government, and willing partners more scarce." *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 191-92 (2012) (quoting *United States* v. *Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion)). In particular, "[i]f the Government could be trusted to fulfill its promise to pay only when more pressing fiscal needs did not arise, would-be contractors would bargain warily—if at all—and only at a premium large enough to account for the risk of nonpayment." *Id.*

Accordingly, if the decision below is allowed to stand, the government will be required to expend greater resources than necessary to partner with private industry. The government will incur greater costs and risks of running existing public-private partnerships, and of pursuing new partnerships in the future.

II. REVIEW IS NECESSARY BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT GOVERNING THE REPEAL OF EXISTING STATUTORY OBLIGATIONS.

Review is doubly warranted because the decision below squarely presents the question whether Congress intended the appropriations riders to retroactively renege on statutory promises that the government employed to induce private participation in the ACA's health exchanges. As to that question, the Federal Circuit's decision conflicts with this Court's precedent establishing the standards for assessing whether Congress has repealed an existing statutory obligation. The Federal Circuit's decision undermines this Court's cases disfavoring implied repeals, especially when they take the form of appropriations measures, operate retroactively to upset reasonable reliance interests, and call into question the constitutionality of government action under the Due Process and Takings Clauses.

A. The Decision Below Squarely Presents Whether The Appropriations Riders At Issue Retroactively Alter The Government's Obligations Under Section 1342.

None of the judges below disputed that the "plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program." Pet. App. 20. Through this statutory language, Congress induced private insurers to participate in the ACA by granting them a statutory right to payments that would reduce the risks that insurance premiums would be inadequate to cover their allowable costs. Through its "risk corridors

program," codified in Section 1342, Congress unequivocally provided that if a plan's "allowable costs for any plan year" were "more than 103 percent but not more than 108 percent of the target amount," then "the Secretary *shall pay* the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount." Pet. App. 3 (emphasis added) (quoting section 1342(b)(1)(A)). Further, the Secretary "*shall pay*" "80 percent of allowable costs in excess of 108 percent of the target amount." *Id.* at 4 (emphasis added) (quoting Section 1342(b)(1)(B)).

Put simply, Section 1342 directed "the Secretary of HHS to establish a program whereby participating plans whose costs of providing coverage exceeded the premiums received (as determined by a statutory formula) would be paid a share of their excess costs by the Secretary—'payments out.'" Pet. App. 5. In turn, "plans whose premiums exceeded their costs (according to the same formula) would pay a share of their profits to the Secretary—'payments in.'" *Id.*[5] The risk corridors program thereby "permit[ted] issuers to lower [premiums] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." *Id.* at 5-6 (quoting *HHS Notice of Benefit and Payment Parameters for 2014*, 78 Fed. Reg. 15,410, 15,413 (Mar. 11, 2013)).

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[5] If a plan's "allowable costs" for any "plan year" were less than 97 percent of the target amount, then the Plan would be required to pay to the Secretary a portion of the difference between the target amount and the allowable costs (50 percent where allowable costs were between 92 and 97 percent of the allowable amount and 80 percent "of the excess of 92 percent of the target amount over the allowable costs"). Pet. App. 4 (quoting section 1342(b)(2)(B)).

The government further induced reasonable reliance on the part of private industry through official pronouncements by HHS. In March 2013, HHS published parameters for payments for the first year of the exchanges under the risk corridors program, Pet. App. 7, and explained that "'the risk corridors program is not required to be budget neutral,' so HHS would make full payments 'as required under Section 1342.'" *Id.* (quoting 78 Fed. Reg. at 15,473). In November 2013, *after* insurers had set premiums to be used on the exchanges in 2014, "HHS announced a one-year transitional policy that allowed insurers to continue to offer plans that did not comply with certain of ACA's reforms." *Id.* at 8. Although the transitional policy "dampened" enrollment, and thereby left "insurers participating in the exchanges to bear greater risk," *id.*, HHS assured insurers that "the risk corridor program should help ameliorate unanticipated changes in premium revenue," *id.* at 9.

HHS extended the transitional period "to last the duration of the risk corridor program," Pet. App. 9, and informed insurers that it would adjust its operation of the risk corridor program to "offset losses that might occur under the transitional policy as a result of increased claims costs not accounted for when setting 2014 premiums," *id.* (quoting *HHS Notice of Benefit and Payment Parameters for 2015*, 79 Fed. Reg. 13,744, 13,786 (Mar. 11, 2014)).[6]

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[6] In April 2014, the division of HHS responsible for administering the risk corridors program released guidance providing that "if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall." Pet. App. 10. Even so, participants were assured that "[r]isk corridors collections received for the next year will

In sum, Section 1342 unambiguously required the government to make risk corridor payments to participating insurers pursuant to the statutory formula without regard to whether the balance of payments in and out under the risk corridor program was budget neutral. Pet. App. 17-18.

B. The Decision Below Conflicts With This Court's Decisions By Concluding That Congress Reneged On Its Statutory Obligations To Private Parties Through Ambiguous Appropriations Riders.

The Federal Circuit's determination that Congress repealed its statutory obligation to make risk corridor payments is irreconcilable with this Court's precedent. See Sup. Ct. R. 10(a).

1. The decision below conflicts with long-established law that (i) "repeals by implication are not favored," *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) (per curiam), and (ii) a party advocating such a repeal "bears a heavy burden of persuasion," *Amell* v. *United States*, 384 U.S. 158, 165 (1966).[7] The decision in *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936), is instructive. There, this Court considered the legality of taxes imposed by the Philippine Government on bank branches established by the National City Bank in the Philippine Islands under Section 25 of the Federal Reserve Act of 1913 ("Section 25"). *Id.* at 498-99.

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first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner." *Id.*

[7] *See also* 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 23.10, at 475-76 (7th ed. 2009) (the presumption against implied repeals is designed "to give harmonious effect to all acts on a subject where reasonably possible").

Section 25 authorized the establishment of branches "in foreign countries or dependencies of the United States." *Id.* at 500. The Court explained that "without regard to later legislation," the taxes "imposed by the Philippine Government [were] invalid" under Section 25 of the 1913 Act. *Id.* Posadas, however, alleged that "subsequent legislation ha[d] the effect of repealing and abrogating Section 25 of the 1913 Act." *Id.* at 501.

In rejecting the argument that Section 25 had been implicitly repealed by an amendment to that same section in the later Act, the *Posadas* Court relied upon the "cardinal rule . . . that repeals by implication are not favored," *id.* at 503, and "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed," *id.* at 504. Accordingly, this Court explained that repeals must be "clear and manifest," and the "implication" of repeal "must be a *necessary* implication." *Id.* (emphasis added). Applying those demanding standards, the Court held that "nothing" "justifie[d] the conclusion that by the amendment of 1916[,] Congress intended to repeal the old section 25 of the Federal Reserve Act." *Id.* at 505.

Here, the appropriations rider adopted on December 16, 2014 stated:

> None of the funds made available by *this Act* from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of [the ACA] (relating to risk corridors).

Pet. App. 12 (quoting Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014) (emphasis added)). Congress adopted "identical riders in FY 2016 and FY 2017." *Id.* at 13.

By their terms, these appropriations riders restrict the use of funds "for payments under section 1342(b)(1)" *only* from specific identified sources from "this Act." The riders do not purport to repeal (expressly or impliedly) the obligation of the Secretary to make the mandatory risk corridor payments pursuant to the formula in Section 1342. Nor do the riders alter the mandatory nature of Congress' obligation by making risk corridor payments contingent on budget neutrality within the scope of Section 1342.

Even if the appropriation riders plausibly could be read to repeal the government's obligation to make risk corridor payments (as opposed merely to restricting how funds made available by "this Act" could be used), Congress hardly made such intent "clear and manifest." Indeed, had Congress intended to strike a fundamentally different bargain than the one set forth in Section 1342, this Court's cases require that it "say so" in the text of the statute. *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1953 (2016). Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); see also *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1627 (2018) (same). And, the "vague" and "ancillary language" of the appropriations riders cannot overcome the "cardinal rule . . . that repeals by implication are not favored," *Posadas*, 296 U.S. at 503, or satisfy this

Court's requirement of "clear and manifest" language making the "implication" of repeal a "necessary" one, *id*. at 504.

2. The Federal Circuit's decision also conflicts with this Court's precedent confirming that appropriations riders are a particularly inapt mechanism for Congress to repeal substantive statutory obligations. Specifically, the "doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 190 (1978).[8] In *Hill*, after acknowledging that "both substantive enactments and appropriations measures are 'Acts of Congress,'" this Court held that "the latter have the limited and specific purpose of providing funds for authorized programs," *id.*, and adopted a presumption that appropriations measures do not repeal existing law because otherwise "every appropriations measure would be pregnant with prospects of altering substantive legislation," *id.*

Here, the lower court ignored *Hill* and its command that the presumption against "repeals by implication" applies "with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.* at 190. Indeed, the *Hill* Court highlighted that Congress' operating rules dictate that appropriations bills may not change existing law. *Id.* at 190-91

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[8] *See also United States* v. *Langston*, 118 U.S. 389, 394 (1886) (holding that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments" when those enactments "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").

(citing House Rule XXI(2); Rule 16.4 of the Standing Rules of the Senate). As explained below in Judge Newman's dissenting opinion, "burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate." Pet. App. 47.

Further, the Federal Circuit relied heavily upon an explanatory statement by the House Appropriations Chairman as the basis for its conclusion that Congress intended to modify the government's obligations under Section 1342. Pet. App. 26 (citing 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014)). Under *Hill*, however, the presumption against implied repeals via appropriations measures applies all the more to mere statements by Appropriations Committees or their members. That is because "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Hill*, 437 U.S. at 191 (rejecting argument that "Congress as a whole was aware" of appropriations committee's statements "dealing with requests for appropriations").

3. In addition, the Federal Circuit's decision ignores that "deeply rooted in our jurisprudence" is "the presumption against retroactive legislation." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). A retroactive statute is defined as one "tak[ing] away or impair[ing] vested rights acquired under existing laws . . . in respect to transactions or considerations already past." *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) (alterations in original). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly

disrupted." *Landgraf*, 511 U.S. at 265. As a result, "a statute shall not be given retroactive effect unless such construction is required by explicit language or necessary implication." *Fernandez-Vargas*, 548 U.S. at 37.

Further, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp.* v. *Romein,* 503 U.S. 181, 191 (1992). Accordingly, "[b]oth stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive legislation." *E. Enters.* v. *Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in judgment); see *id.* at 537 (plurality opinion) (retroactive nature of legislation supported plurality's determination that it effected an unconstitutional taking).

Here, the appropriations riders at issue operate retroactively because Congress' creation of the risk corridor program induced reliance by the insurance industry before Congress enacted the appropriations riders. Pet. App. 57 (Newman, J., dissenting). Accordingly, they are presumed not to repeal Congress' statutory obligations under the risk corridors program "unless that construction is required by explicit language or by necessary implication." *Fernandez-Vargas*, 548 U.S. at 37. As discussed above, the language of the appropriations riders does not remotely satisfy this high standard.

4. Finally, the decision below conflicts with this Court's cases requiring that congressional action be interpreted, where reasonably possible, to avoid serious constitutional questions. See Pet. 17, 23. The "cardinal principle of statutory construction is to save

and not to destroy," and therefore this Court has held that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("Even to avoid a serious doubt the rule is the same"). Indeed, "where an otherwise acceptable construction of a statute *would raise serious constitutional problems*, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De Bartolo Corp.* v. *Fla. Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added) (citing cases); accord *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 499-501 (1979). "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress . . . is bound by and swears an oath to uphold the Constitution" and thus courts will not lightly assume that "Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. De Bartolo Corp.*, 485 U.S. at 575; see also *Miller* v. *French*, 530 U.S. 327, 336 (2000) ("constitutionally doubtful constructions should be avoided where 'fairly possible'") (quoting *Commc'ns Workers* v. *Beck,* 487 U.S. 735, 762 (1988)).

Here, the Federal Circuit ignored this canon of constitutional avoidance. It did so even though its construction of the appropriations riders to repeal statutory promises that induced participation by private insurance carriers raises serious questions under the Due Process Clause and the Takings Clause. See, *e.g.*, *Apfel*, 524 U.S. at 549 (Kennedy, J., concurring in judgment) (concluding that retroactive

imposition of liability violated the Takings Clause); see *id.* at 537 (plurality opinion) (retroactive nature of legislation supported that it violated the Takings Clause). Construing the appropriations riders to allow Congress to disavow the government's responsibility to pay private insurers $12.3 billion under the risk corridors program conflicts with the Court's cases mandating that courts construe congressional statutes to avoid serious constitutional questions.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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