No. 2019-1633

**UNITED STATES COURT OF APPEALS**

**FOR THE FEDERAL CIRCUIT**

COMMUNITY HEALTH CHOICE, INC.,
*Plaintiff-Appellee*,

v.

UNITED STATES OF AMERICA,
*Defendant-Appellant*.

Appeal from the U.S. Court of Federal Claims,
Case No. 18-5C, Chief Judge Margaret M. Sweeney

# BRIEF FOR APPELLEE COMMUNITY HEALTH CHOICE, INC.

FAEGRE BAKER DANIELS LLP
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000

*Attorneys for Appellee Community Health Choice, Inc.*

## CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellee certifies the following:

1. Full name of every party represented by me:

Community Health Choice, Inc.

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

Community Health Choice, Inc.

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

None.

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

None.

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

*Sanford Health Plan v. United States*, No. 2019-1290(L) & *Montana Health Co-Op v. United States*, No. 2019-1302, are companion cases to the present case.

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

- *Blue Cross and Blue Shield of North Dakota v. United States*, No. 18-1983 (Horn, J.)
- *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373 (Horn, J.)
- *Common Ground Healthcare Cooperative v. United States*, No. 17-877 (Sweeney, C.J.)
- *Guidewell Mutual Holding Corp. v. United States*, No. 18-1791 (Griggsby, J.)
- *Harvard Pilgrim Health Care, Inc. v. United States*, No. 18-1820 (Smith, J.)
- *Health Alliance Medical Plans, Inc. v. United States*, No. 18-334 (Campbell-Smith, J.)
- *Linda A. Lacewell, in her capacity as Liquidator of Health Republic Insurance of New York, Corp. v. United States,* No. 17-1185 (Wolski, V.)
- *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542 (Wheeler, J.)
- *Maine Community Health Options v. United States*, No. 17-2057 (Sweeney, C.J.)
- *Molina Healthcare of California, Inc. v. United States*, No. 18-333 (Wheeler, J.)

Dated: June 10, 2019

*/s/ William L. Roberts*
William L. Roberts

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

**STATE CASES**



**FEDERAL STATUTES**

**REGULATIONS**

**OTHER AUTHORITIES**

## STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this Court or any other appellate court. This appeal and the consolidated appeals in *Sanford Health Plan v. United States*, No. 2019-1290(L) & *Montana Health Co-Op v. United States*, No. 2019-1302, are companion cases.

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

- *Blue Cross and Blue Shield of North Dakota v. United States*, No. 18-1983 (Horn, J.)
- *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373 (Horn, J.)
- *Common Ground Healthcare Cooperative v. United States*, No. 17-877 (Sweeney, C.J.)
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## ISSUES PRESENTED

1. In Section 1402 of the Affordable Care Act, Congress states that the government "shall make periodic and timely payments" to insurers in an amount "equal to the value of the [cost-sharing] reductions" that insurers, in turn, must provide to insureds. The lower court held that the government is legally obligated to make these CSR payments to insurers. Must the government pay the amounts dictated by Section 1402?

2. In light of the quid pro quo nature of the CSR program, its text and implementing regulations, the parties' course of performance for 45 months, and the Secretary's broad authority to administer the ACA, did the lower court correctly hold the government liable for breach of an implied-in-fact contract?

## STATEMENT OF THE CASE

This case is about "cost-sharing reductions" (CSRs) under the Affordable Care Act ("ACA"). Through the ACA's CSR program, the United States pays a significant portion of copayment, coinsurance, and deductible costs for people with qualifying incomes and health plans. To deliver this subsidy, Congress used the insurance provider as an intermediary between the government and the insured. Thus, Section 1402 of the ACA requires the government to pay CSR money directly to insurers. Then, when CSR-eligible insureds receive health care, insurers must use the money to pay health-care providers, thereby reducing the insured's cost.

For the first 45 months, this is how this system worked. Insurers like Community Health Choice, Inc. ("CHC") reduced their insureds' out-of-pocket costs, and the government paid insurers an equal amount for those costs. Since October 2017, however, insurers have continued to provide insureds with the CSRs, but the government has failed to make its Section 1402 CSR payments.

Three judges of the United States Court of Federal Claims, including Chief Judge Sweeney in this case, have held the government's failure to make CSR payments constitutes a violation of Section 1402 and have entered judgment against the government for the full amount of CSR payments due to the insurer. For all the reasons set forth in those courts' opinions, and herein, this Court should do the same.

### A. The Patient Protection And Affordable Care Act ("ACA")

"Congress enacted the Affordable Care Act as part of a comprehensive scheme of health insurance reform." Appx4; *see* Patent Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *King v. Burwell*, 135 S. Ct. 2480, 2486–87 (2015). "The central purpose of the Affordable Care Act is to provide health coverage for the millions of people who don't get it through their jobs." *California v. Trump*, 267 F. Supp. 3d 1119, 1122 (N.D. Cal. 2017). As part of the ACA, Congress authorized the creation of health insurance exchanges—"virtual marketplaces in each state wherein individuals and small groups [can] purchase health coverage." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1314 (Fed. Cir. 2018) (citing 42 U.S.C. § 18031(b)(1)). Insurers sell "Qualified Health Plans" ("QHPs") on the exchanges. 42 U.S.C. § 18031.

"Qualified health plans can be offered at four levels (bronze, silver, gold, and platinum)," Appx5, which respectively cover 60%, 70%, 80%, and 90% of a patient's qualifying medical costs. 42 U.S.C. § 18022(d)(1).

To sell on any exchange, an insurer must meet the ACA's criteria for "QHP issuers" or "QHPIs." The ACA creates detailed requirements for QHPIs. *Moda*, 892 F.3d at 1314. Among other things, every QHPI must offer at least one silver plan to customers in each exchange where it participates. 42 U.S.C. § 18021(a)(1)(C)(ii). And every silver plan must offer CSRs to eligible individuals. The ACA was passed in 2010, Pub. L. No. 111-148, 124 Stat. 119, and the CSR program, as part of silver plans offered on the new exchanges, began in 2014, 42 U.S.C. § 18022(c)(1).

### 1. The Cost-Sharing Reductions Program

ACA Section 1402, codified at 42 U.S.C. § 18071, establishes "Cost-sharing Reductions," by which the United States helps eligible individuals pay doctors for costs not covered by insurance, such as copayments and deductibles.[1] Congress recognized that even when people have health

[1] The relevant portions of Section 1402 were amended shortly after enactment. Health Care and Education Reconciliation Act of 2010, Pub. L.

insurance, they still must share the cost of their healthcare by paying deductibles, co-payments, and similar costs to their health-care providers—which, if they cannot afford it, might cause them to forego healthcare. To address that concern, Congress decided that, for lower-income insureds, the government will help pay these cost-sharing expenses. *California v. Trump,* 267 F. Supp. 3d at 1123. And the process Congress put in place to provide this help is that insurers "shall reduce the cost-sharing," and the government "shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(a)(2), (c)(3)(A).

The ACA defines "cost-sharing" consistent with general industry usage.[2] 42 U.S.C. § 18022(c)(3)(A); *see also California v. Trump,* 267 F. Supp. 3d at 1123. Under Section 1402, people with qualifying incomes are entitled to CSRs if they buy a silver plan. 42 U.S.C. § 18071(c)(1)-(2). Specifically, for

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111-152, title I, § 1001(b), 124 Stat. 1031 (Mar. 30, 2010). The particulars of the amendments are not germane to the issues here.

[2] A deductible requires "that you must pay the full cost of your health-care expenses until you reach the deductible amount [for the year], at which point your insurance kicks in." *California v. Trump*, 267 F. Supp. 3d at 1123. "Co-insurance is triggered after you've reached your annual deductible and requires you to pay a percentage, say 20%, of your [post-deductible] doctor's bill … ; the insurance company pays the remaining share." *Id.*

people with incomes between 100% and 150% of the poverty line, Section 1402 requires that the insurer reduce cost-sharing until the plan covers 94 percent of all eligible costs. *Id.* § 18071(c)(2)(A). For those with incomes between 150% and 200% of the poverty line, the number is 87 percent; and for those with incomes from 200% to 250% of the poverty line, it is 73 percent. *Id.* § 18071(c)(2)(B)-(C).

Congress implemented this program using the insurer as an intermediary. Section 1402 provides that insurers "shall reduce the cost-sharing," and "the Secretary [of HHS] shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(a)(2), (c)(3)(A). This is accomplished as follows: Section 1412 provides that when insureds buy silver plans, HHS makes "advance determination[s]" whether they qualify for CSRs. *Id.* § 18082(a)(1). HHS notifies QHPIs which of their insureds qualify for CSRs, *id.* § 18071(a)(1), and the Treasury "makes advance payments of" the estimated CSR amounts "to the issuers of the qualified health plans," *id.* § 18082(a)(3). This allows QHPIs to reduce the amount of the deductible, co-payment, or other costs that the patient must pay, as those costs arise. *Id.* § 18071(a)(2). An

annual reconciliation process follows after the coverage year ends. 45 C.F.R. § 156.430.

In short, as court described in *California v. Trump*: "the federal government estimates in advance the amount of subsidy … and makes a CSR payment in that amount to your insurance company. As a result, the insurer can reduce your cost sharing … on the federal government's dime." 267 F. Supp. 3d at 1123. The patient gets reduced copays and deductibles; the insurers (QHPIs) and health-care providers get the same financial result as for non-CSR insureds; and the CSR payment—from government to insurer to provider—bridges that financial gap.

**2. Premium Tax Credits**

The ACA separately provides subsidies to help eligible people pay their health insurance premiums, through premium tax credits. Section 1401 amends the Internal Revenue Code to allow a "refundable [tax] credit for coverage under a qualified health plan." 26 U.S.C. § 36B. Congress made a permanent appropriation for these tax credits. 31 U.S.C. § 1324. The premium tax credit program serves a distinct purpose from the CSR program. One reduces costs of obtaining insurance, and the other reduces costs of actual care. Appx18; *California v. Trump*, 267 F. Supp. 3d at 1131.

The programs are also codified separately and have different eligibility requirements. *Compare* 26 U.S.C. § 36B (codifying ACA Section 1401; tax credits), *with* 42 U.S.C. § 18071 (codifying ACA Section 1402; CSRs). Section 1402 does not make the amount of CSR payments to which an insurer is entitled dependent upon the amount that insurer receives in tax credit payments. CSRs and premium tax credits are distinct programs and payments.

### B. CHC Provides The Required CSRs

CHC "is a nonprofit corporation that offers qualified health plans on Texas's exchange" and has done so since 2014. Appx13. CHC focuses on serving low-income, underserved individuals and was created specifically to provide affordable insurance to those individuals. Appx113, ¶ 2.

For the 2017 coverage year, CHC set its rates in 2016, as required by its 2017 QHP Issuer Agreement and related regulations. Appx115, ¶ 10; *e.g.*, 45 C.F.R. § 156.420. CHC sold QHPs to individuals during the "open enrollment" period beginning on October 1, 2016, for health insurance coverage effective January 1, 2017. Appx115, ¶ 11. Once set, CHC's premiums were fixed for all of 2017, and CHC could not change them. Appx115, ¶ 10. Similarly, for the 2018 coverage year, CHC signed a QHP

Issuer Agreement, set its premium rates, and sold QHPs in 2017. Appx114, ¶ 6, Appx116, ¶ 14. "In 2017, approximately 58% of [CHC's] insured population—over 80,000 individuals—received cost-sharing reductions, and [CHC] continued to reduce the cost-sharing obligations of its eligible insured population in 2018." Appx13; Appx115, ¶ 13; Appx117, ¶¶ 19-20. CHC has fulfilled its obligations under the CSR program.

For 45 months—from the beginning of the CSR program until September 2017—the government also fulfilled its obligations under the CSR program and made timely CSR payments to CHC. Appx13; s*ee also* Appx9-10. During that period HHS took the view that Congress had permanently appropriated funding for CSR payments. *See* Appx9; *U.S. House of Reps. v. Burwell*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), *vacated in part after settlement, U.S. House of Reps. v. Azar*, 14-cv-01967-RMC (D.D.C. May 18, 2018).

### C. The Government Stops CSR Payments In October 2017

Congress has taken no steps to rescind or amend Section 1402. Nevertheless, in October 2017 HHS changed its view of the status of appropriations for CSR payments and declared that "CSR payments to issuers must stop, effective immediately." Appx10. The purported reason

was an opinion from the Attorney General that the permanent appropriation in 31 U.S.C. § 1324, "for refunding internal revenue collections as provided by law," does not cover CSR payments. *Id.* Soon afterward, CMS notified CHC that it would receive no further CSR payments. Appx143.

This created a severe problem for insurers like CHC. Section 1402 does not excuse insurers from providing CSRs if the government fails to pay for them. Thus, CHC continues to provide CSRs to its insureds—meaning that it still reduces their copayments and deductibles and correspondingly increases its own payments to doctors. Appx117, ¶¶ 19, 20. But since the government is no longer making CSR payments, CHC and other insurers have been left to bear the cost of CSRs themselves.

### D. Decisions Below

Several insurers filed suit in the Court of Federal Claims, seeking to recover their lost CSR payments. *See* Appx13 n.12 (collecting cases). In cases that have reached a decision, judges have been unanimous in finding the government liable for the unpaid CSRs amounts.

### 1. Chief Judge Sweeney's Opinion And Judgment

Chief Judge Sweeney addressed CHC's case upon the parties' cross-motions. The court granted summary judgment in favor of CHC on its claims for violation of Section 1402's payment mandate and breach of implied-in-fact contract. The court granted the government's motion to dismiss CHC's express contract claim.[3]

On the statutory claim, Chief Judge Sweeney concluded that the CSR statute "sets forth an unambiguous mandate." Appx15. The court reasoned that "the mandatory payment obligation fits logically within the statutory scheme": "The cost-sharing reduction payments were meant to reimburse insurers for paying an increased share of their insureds' cost-sharing obligations, and the reduction of insureds' cost-sharing obligations was meant to make obtaining health care more affordable." Appx16 (citations omitted). "[T]he plain language, structure, and purpose of the Affordable

[3] CHC initially filed this lawsuit seeking to enforce the government's risk-corridors payment obligations. Appx13. After the government ceased making CSR payments, CHC amended its complaint to assert claims based on the government's failure to make CSR payments as well. Appx13. CHC's risk-corridors claims have been stayed pending the resolution of related cases by the U.S. Supreme Court, *see* Appx13 n.11, but the CSR claims have proceeded.

Care Act reflect the intent of Congress to require the Secretary of HHS to make cost-sharing reduction payments to insurers." Appx16.

The court rejected the government's argument that the lack of a specific appropriation for CSR payments reflected an intent of Congress to preclude liability for CSR payments. Appx16. First, the court noted that "it is well settled that the government can create a liability without providing for the means to pay for it," so "the absence of a specific appropriation for [CSR] payments in the [ACA] does not … extinguish the government's obligation to make the payments." Appx17.

Second, the court concluded that providing a funding mechanism for premium tax credits but not CSR payments "does not reflect congressional intent to foreclose liability for the latter," finding it "difficult to discern what [Congress's] intent might be" in treating the two provisions differently, and declining "to ascribe any particular intent to Congress based on Congress's disparate treatment of the two provisions." Appx17 (describing "other reasonable explanations" and concluding that "it is unclear which of these explanations—if any—is correct").

Third, the court was unconvinced that insurers' ability to increase premiums for silver QHPs is evidence that Congress did not intend to

provide a statutory damages remedy for the government's failure to make CSR payments. Appx17. As the court noted, the government pointed to no statutory provision or legislative history contemplating such a limit on liability. Appx17. Chief Judge Sweeney emphasized that "[t]he increased amount of premium tax credit payments that insurers receive from increasing silver-level plan premiums are still premium tax credit payments, not cost-sharing reduction payments," and "they are not substitutes for each other." Appx18.

The court further reasoned that it would "defy common sense to conclude that Congress obligated the Secretary of HHS to reimburse insurers for their mandatory cost-sharing reductions without intending to actually reimburse the insurers." Appx18. For all these reasons, the court found that "Congress's failure to include any appropriating language in the Affordable Care Act does not reflect congressional intent to preclude liability for cost-sharing reduction payments." Appx18.

The court also rejected the notion that Congress's failure to appropriate funds for CSR payments through legislation after the ACA reflects congressional intent to foreclose liability for the payments. Appx20. The court concluded that "[n]one of the appropriations acts enacted after

the Affordable Care Act expressly or impliedly disavowed the payment obligation; they were completely silent on the issue." Appx19. This stood in contrast to the risk-corridors program, under which Congress later "prohibited appropriated funds from being used to make risk corridors payments." *Id.* "[T]he congressional inaction" regarding CSRs thus "may be interpreted … as a decision not to suspend or terminate the government's [CSR] obligation." Appx19-20.

The court further found that Section 1402 is a money-mandating statute for Tucker Act purposes, so an insurer entitled to payments can recover the amount due in the Court of Federal Claims. Appx20-21. Moreover, "the lack of an appropriation, standing alone, does not constrain the court's ability to entertain a claim that the government has not discharged the underlying statutory obligation or to enter judgment for the plaintiff on that claim." Appx21. The court further noted that the government's "[apparent contention] that for plaintiffs to recover under a money-mandating statute, they must separately establish that the statute authorizes a damages remedy for its violation … is incorrect." Appx21 n.19.

Having found the government liable, Chief Judge Sweeney ruled that "[CHC] is entitled to recover the [CSR] payments that the government did not make for 2017." Appx22-23. Regarding 2018 payments, the court rejected the government's arguments that insurers' ability to raise premiums in light of the government's nonpayment of CSR amounts precludes recovery and found "that [CHC] may recover the [CSR] payments that the government did not make for 2018." Appx23.

Considering CHC's implied-in-fact contract claim, the court noted that the CSR program involves a "quid pro quo," Appx27, where "the government offered to reimburse insurers for their mandated [CSRs]," and "plaintiff accepted that offer by offering the [QHPs]," Appx28. It concluded that "the parties' intent to enter into a contractual relationship can be implied from the quid pro quo nature of the [CSR] program, [CHC]'s offering of [QHPs] on the exchange with the mandated [CSRs], and the government's reimbursement of [CHC's CSRs] from January 2014 … until October 2017." Appx27.

The court also determined that "the Secretary of HHS and his delegate, the Administrator of CMS, possessed the authority to enter into

[this] contract" because "making [CSR] payments is an integral part of the duties assigned to the Secretary." Appx28.

The Court of Federal Claims therefore entered summary judgment holding the government liable to CHC for CSR payments for 2017 and 2018, in the amounts contemplated by the statute. Appx23, Appx30. The parties subsequently stipulated that CHC suffered "$11,174,299.10 in unpaid cost-sharing reduction reimbursements for 2017 and $60,386,972.26 in unpaid cost-sharing reduction reimbursements for 2018." Appx2. The court entered a partial final judgment for that sum. Appx2-3. This appeal followed.

**2. Decisions In Other Cases**

The two appeals consolidated at No. 19-1290 are companions to this one. In those cases, the Court of Federal Claims also entered summary judgment in favor of insurers seeking CSR payments. Judge Kaplan issued very similar opinions in both cases, holding "that the government violated a statutory obligation created by Congress in the ACA when it failed to provide … full [CSR] payments for 2017, and that Congress's failure to appropriate funds … did not vitiate that obligation." No. 19-1290, Appx3. Judge Kaplan added that "[t]here is no evidence … that Congress intended

that the statutory obligation … should or would be subject to an offset based on an insurer's premium rates." No. 19-1290, Appx11.

In addition to ruling in CHC's case, Chief Judge Sweeney ruled in favor of the insurers and issued similar opinions to the decision below here in *Common Ground Healthcare Cooperative v. United States*, 142 Fed. Cl. 38 (2019) (Sweeney, C.J.) (class action) (statutory claim only), and *Maine Community Health Options v. United States*, 142 Fed. Cl. 53 (2019) (Sweeney, C.J.) (statutory and implied-in-fact contract claims). Judge Wheeler decided the same. *Local Initiative Health Authority for L.A. County v. United States*, 142 Fed. Cl. 1 (2019) (Wheeler, J.) (statutory and implied-in-fact contract claims).

## SUMMARY OF THE ARGUMENT

Section 1402 has a clear and specific mandate: the government "shall make periodic and timely payments" to insurers for cost-sharing reductions "in an amount equal to the value of the reductions" that insurers, in turn, must provide to insureds. The government has failed to meet this obligation since October 2017, when it stopped all cost-sharing reduction payments. Like every judge of the Court of Federal Claims who

has considered the issue, this Court should hold the government liable for the CSR payments it has withheld from insurers.

The government's attempt to avoid liability is foreclosed by 130 years of settled law, as recently confirmed by this Court in *Moda*, 892 F.3d at 1321–22. *First,* when Congress enacts a permanent statute requiring the United States to pay a specified amount of money, it creates a legal obligation on the government to pay the full amount. *Second,* a mere failure to appropriate funds does not repeal or suspend that obligation. *Third,* such a money-mandating statute is enforceable in the Court of Federal Claims pursuant to the Tucker Act. All of these settled points of law apply here, and the government has provided no persuasive rebuttal to any of them.

The government primarily insists on appeal that Congress must not have intended for insurers to have a damages remedy for non-payment under Section 1402, because insurers can supposedly avoid any loss by raising premiums. This argument, too, flies in the face of the statute's text and controlling precedent. Section 1402 is a money-mandating statute and courts, including *Moda*, have consistently construed such statutes as creating a cause of action for recovery of unpaid amounts. Nothing in the

text or legislative history of Section 1402, or any other part of the ACA, justifies a contrary finding here.

Moreover, notwithstanding the government's rosy portrayal, raising premiums in the highly regulated, competitive ACA exchanges is no panacea. For 2017, premiums were locked-in, making any effort to cope with the CSR payment stoppage impossible. Long term, premium pricing is controlled by state regulators, whose policies differ and change over time. Competitive market forces also exact a cost for any pricing changes. The regulatory and economic realities undermine any notion that Congress intended "just raise your premiums" as insurers' only remedy for the government's failure to meet its obligations.

The government's alternative argument, that insurers' damage awards should be reduced by any increased tax credits an insurer receives "as a result of the cessation of cost-sharing payments" (Br. at 17), falls short as well. Section 1402 mandates payment in a specified amount—"equal to the value of the [cost-sharing] reductions." It makes no provision for reducing that amount based upon tax credits received pursuant to the premium tax credit program. A tax credit payment is not a substitute for a CSR payment. Particularly on a claim for violation of a money-mandating

statute, the proper remedy is to enforce the statute as written and award insurers the full amount of their unpaid CSRs.

Finally, the court below correctly held that CHC and the government entered into an implied-in-fact contract regarding CSR payments. The parties' mutual intent to contract is reasonably inferred from the text of the statute, implementing regulations, the quid pro quo nature of the CSR program, and the parties' course of performance for 45 months. The Secretary of HHS, as the head of the agency charged with implementation and management of the entire ACA, had ample authority to enter into a contract on CSR payments.

The judgment should be affirmed.

## ARGUMENT

### I. Section 1402 Unambiguously Obligates The Government To Make CSR Payments.

#### A. The Statutory Language Mandates CSR Payments.

The ACA's plain language requires the government to make CSR payments to insurers like CHC. Section 1402 commands that "the Secretary *shall make* periodic and timely payments to the issuer equal to the value of the [cost-sharing] reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added). Section 1412 further emphasizes that, when a QHPI is eligible for "an

advance payment of the cost-sharing reductions," then "[t]he Secretary of the Treasury *shall make* such advance payment" as noticed by HHS. *Id.* § 18082(c)(3) (emphasis added).

When Congress speaks so clearly, the task of interpretation "begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018); *accord McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008) ("[W]here 'statutory language is clear and unambiguous, the inquiry ends with the plain meaning.'"). Even "cogent policy arguments" rooted in "the statute's purposes" are "insufficient to overcome the plain meaning of the statutory text." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 100–01 (2006); *see RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) ("nothing in the generalized statutory purpose … can overcome the specific … text").

The Court of Federal Claims correctly applied this rule here. Chief Judge Sweeney concluded that Section 1402 "sets forth an unambiguous mandate" requiring government payments, and "the plain language, structure, and purpose of the [ACA] reflect the intent of Congress to require the Secretary of HHS to make [CSR] payments." Appx15, 16. Judge Kaplan held that Section 1402 "clearly and unambiguously imposes an

obligation" to pay. No. 19-1290, Appx8. Other courts have likewise described CSR payments in mandatory terms. *E.g., California v. Trump*, 267 F. Supp. 3d at 1133 (The ACA "requires the federal government to pay … the cost-sharing reductions," and the government "is failing to meet that obligation.").[4]

This Court's *Moda* decision confirms this conclusion. *Moda* involved the ACA's "risk corridors" program. Regarding risk corridors, the *Moda* Court noted that the ACA says "'the Secretary shall pay' an amount according to a statutory formula." 892 F.3d at 1320 (quoting 42 U.S.C. § 18062). The Court held that this statute "is unambiguously mandatory" and that its "plain language … created an obligation of the government to pay … the full amount." *Id.* at 1320, 1322. The statutory language in *Moda* ("the Secretary shall pay") is indistinguishable from the statutory language in this case ("The Secretary shall make periodic and timely payments").

[4] In *U.S. House of Representatives v. Burwell*, the government itself asserted that Section 1402 gives insurers a "corresponding legal right to payments equal to" the CSRs. Defendants' Memorandum in Support of Their Motion for Summary Judgment at 7, *U.S. House of Reps.*, 185 F. Supp. 3d 165 (No. 14-cv-01967-RMC), 2015 WL 9316243.

The Court of Federal Claims therefore was correct to hold that the plain language of Section 1402 reflects the intent of Congress to require the government to make CSR payments. *See* Appx16.

### B. The ACA's CSR Payment Mandate Is Not Contingent On Appropriations.

As Chief Judge Sweeney recognized, "it is well settled that the government can create a liability without providing for the means to pay for it." Appx17. When a permanent statute unambiguously commits the government to pay money, the United States has a legal obligation to pay that money, even if an appropriation for it never materializes.[5] And under equally clear precedent, the Anti-Deficiency Act does not change this.

#### 1. Congress Can Create Spending Obligations Independent Of Appropriations And Did So Here.

Congress may "enact permanent legislation stating that particular payments will be made in the future." U.S. Government Accountability

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[5] Contrary to the government's assertion (Br. at 12; *see id.* at 17, 19), CHC has made clear that it does *not* concede that Congress did not provide funding for CSR payments. Appx98 (summary judgment opening brief) ("the question is still open whether Congress actually has appropriated funds for CSR payments"); Appx194 n.3 (reply brief) ("CHC does not concede that there has been no appropriation for CSR payments."). Whether an appropriation exists from which CSR payments could be made is an open question, but the issue need not be decided for CHC to prevail.

Office, *Principles of Federal Appropriations Law*, at 2-62 (4th ed.) (hereinafter "GAO Redbook"). Since these payments are mandated by statute, they are legal obligations of the United States.

Congress need not simultaneously create a permanent appropriation to pay such an obligation; indeed, "annual appropriations [are] the default way in which Congress provides funds" for a wide variety of federal programs. *California v. Trump*, 267 F. Supp. 3d at 1132 (citing GAO Redbook at 2-13, 2-41 (3d ed. 2004), and *Civil Rights Comm'n*, 71 Comp. Gen. 378 (1992)). What happens if an annual appropriation is not made or not sufficient? This Court has repeatedly stated the rule:

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.

*Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Prairie Cty., Mont. v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *accord Moda*, 892 F.3d at 1321 (citation omitted) ("[A]n appropriation *per se* merely imposes limitations upon the Government's own agents; … but its insufficiency does not pay the Government's debts, nor cancel its obligations").

This rule has been settled since at least 1886, when the Supreme Court ruled that a permanent statute requiring a money payment cannot be overridden by "subsequent enactments which merely appropriated a less amount … for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." *United States v. Langston*, 118 U.S. 389, 394 (1886). "That is, the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation." *Moda*, 892 F.3d at 1321. Thus,

> [r]ather than limiting the government's obligation, a failure of Congress to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights remain enforceable in the Court of Claims.

*Greenlee Cty.*, 487 F.3d at 877; *accord* GAO Redbook at 2-63 (a mere insufficient appropriation "will prevent administrative agencies from making payment, but is unlikely to prevent recovery by way of a lawsuit"); *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) ("[T]he jurisdictional foundation of the Tucker Act is not limited by the

appropriation status of the agency's funds or the source of funds by which any judgment may be paid.").[6]

Sound policy supports this rule. When the law of the land says that the United States "shall make periodic and timely payments" to those who engage in certain activities, the people should be able to trust that representation. The government's position, by contrast, would require citizens to treat such unambiguous, unqualified statutory promises as meaningless; everything would depend on a later Congress's appropriation decision. This has never been, and should not become, the law.

Congress is well aware of this rule in crafting legislation. When Congress enacts a payment obligation but wishes to limit its amount to future appropriations, it specifies in the statute that the obligation is "subject to appropriations," or uses other substantially equivalent

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[6] The government suggests that "a damages award in the circumstances presented here would … be unprecedented" (Br. at 29-31), but that is not accurate. *Langston* itself is one such precedent. While the judgment fund did not exist when *Langston* was decided, that certainly does not mean *Langston* was "[i]n effect" a non-binding "recommendation." (Br. at 31.) That in the modern era judgments like in *Langston* are paid through the judgment fund makes no difference.

language. The U.S. Code contains many limitations like this.[7] This Court construed one of them in *Greenlee County* and found it to be outcome-determinative. 487 F.3d at 878.

Even in the ACA itself, Congress included several "subject-to-appropriations" provisos. *E.g.*, ACA Section 5303(e) (5-year "grant[s] or contract[s]" for dental training "shall be subject to annual approval by the Secretary and subject to the availability of appropriations for the fiscal year involved"); ACA Section 6703 (amending 42 U.S.C. 2042(b)(2) to state that adult-protective-services grants to states "shall equal" a certain amount, but "[s]ubject to the availability of appropriations").

Here, as Judge Kaplan observed, "[a]ll that exists is the government obligation spelled out by the plain language of § 1402 and the 'bare failure to appropriate funds' that the Supreme Court [has] found insufficient to …

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[7] *E.g.*, 34 U.S.C. § 12473(b)(1) (law-enforcement scholarship program); 20 U.S.C. § 9133 (funding for library services and technology); 34 U.S.C. § 10671(d)(1)(E) (student-loan repayment for certain prosecutors and public defenders); 46 U.S.C. § 51504(f)(1) (reimbursement to state maritime academies for fuel used by training vessels); 46 U.S.C. § 53106(a)(1) (payments to contractors for maritime-security operating agreements); 42 U.S.C. § 1471(e) (interest payments on escrowed funds from certain farm-housing loans).

vitiate a statutory payment obligation." No. 19-1290, Appx10. And as Chief Judge Sweeney observed, "[n]one of the appropriations acts enacted after the [ACA]," or any other acts of Congress, "expressly or impliedly disavowed the payment obligation; they were completely silent on the issue." Appx19.

On these facts, *Moda* compels a result in favor of the insureds. Unlike with CSRs, Congress took affirmative steps after the ACA's enactment to limit appropriations for risk corridors. Specifically, "[a]fter GAO identified only two sources of funding for the risk corridors program", Congress enacted appropriations legislation that expressly "cut off access to" one of the two sources. *Moda*, 892 F.3d at 1328. This Court held that this additional legislation amended the original payment obligation. *Id.* at 1329.[8]

The government can point to nothing similar here. Congress enacted a law that says the government "shall make" CSR payments—and then did nothing else. Thus, as Chief Judge Sweeney noted, "Congress's inaction"

[8] To be clear, CHC disagrees with the ultimate outcome in *Moda*. CHC recognizes, however, that this panel must follow *Moda* unless and until the Supreme Court says otherwise. *See* Pet. for Cert., *Moda*, No. 18-1028 (U.S., filed Feb. 4, 2019).

on CSRs "stands in stark contrast to its treatment of … risk corridors." Appx19. "Congress has had ample opportunity to modify, suspend, or eliminate the statutory obligation to make cost-sharing reduction payments but has not done so"—not "even when [CSR] payments were [actually] being made." *Id.*

The government protests that this "is not congressional 'inaction'" because "Congress enact[ed] an appropriations bill for HHS that," through silence, "provides no funding for HHS to make cost-sharing payments." (Br. at 33.) This, says the government, provides the "clear implication" needed to "suspend[] section 1402's instruction to HHS to make such payments." (Br. at 33.) That would turn *Moda* on its head.

Indeed, even the government has described its current argument as weak. In *House of Representatives v. Burwell*, the government told the court that "[t]he mere absence of a more specific appropriation is not necessarily a defense to recovery from [the Judgment] Fund," and that "seek[ing] to draw meaning from congressional silence" on CSRs in later appropriations laws is a "basic error of statutory construction." Defendants' Memorandum in Support of Their Motion for Summary Judgment at 20, 31, *U.S. House of Reps.*, 185 F. Supp. 3d 165 (No. 14-cv-01967-RMC), 2015 WL 9316243. The

government cannot identify any authority for its new approach, and it is contrary to *Moda*, *Langston*, and a long line of binding precedent.

### 2. Nothing In The Structure Or History Of The ACA Supports A Contrary Conclusion.

The government has all but abandoned one of its primary arguments in the Court of Federal Claims: that Section 1402 must not create any spending obligation because, unlike Section 1401's premium-tax-credit provision, it does not contain a permanent appropriation. The principles just discussed reveal that as a *non sequitur*. Congress appropriates money—permanently, annually, and otherwise—for many government programs. But that does not mean that the failure to do so wipes out payment obligations that are dictated by the statutory language. Nor does anything about Sections 1401 and 1402 warrant a departure from that rule. Section 1401 amends the Internal Revenue Code and is codified in Title 26 at Section 36B, while Section 1402 is codified in Title 42 at Section 18071. Section 1401 does not contain an appropriation but takes advantage of the preexisting permanent appropriation for tax refunds by adding a reference to Section 36B. *See* 31 U.S.C. § 1324. There was no similar preexisting

appropriation for CSR payments, and Section 1402 does not refer to Section 1401's appropriation regime.

Judge Kaplan's conclusion therefore was correct:

> The most one can say about Congress's decision to permanently appropriate funds for the tax credits but not for CSR payments is that it reveals that Congress did not intend for CSR payments to be funded by permanent appropriations.

No. 19-1290, Appx22 (*Mont. Health*); *see also* No. 19-1290, Appx10 (*Sanford Health*). Judge Sweeney agreed. Appx17.

If anything, the structure of Section 1402 reinforces that the payment obligation is not contingent on appropriations. The requirement that the government "shall make" CSR payments is only a part of Section 1402. The rest of that section requires insurers to reduce the cost-sharing obligations for eligible insureds, and mandates that insurers pay the difference. This requirement is directly related to the government-spending provision and is equally unconditional. It would be incongruous to construe Section 1402 as optional for the government but obligatory for insurers.

### 3. The Anti-Deficiency Act Does Not Save The Government's Argument.

On the books since 1884, the Anti-Deficiency Act, 31 U.S.C. § 1341 (codifying Pub. L. 97-258, 96 Stat. 923), codifies the Constitution's

requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. But the government cites no authority for the notion this provision means payment obligations can arise only from appropriations laws.

In fact, the law is the opposite. Under both the Constitution and the Anti-Deficiency Act, whether the executive branch may spend money is determined by whether Congress has enacted an appropriation. But whether the United States has a legal obligation to pay the money is a separate question, which is not affected by appropriations measures absent clearly expressed Congressional intent. *See supra* 24–25. Thus, as this Court explained in *Moda*, "the Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." 892 F.3d at 1322.

Many spending provisions, including some in the ACA itself, expressly make their obligations "subject to appropriations." *See supra* 26–27. On the government's view, such provisions are surplusage, because the Anti-Deficiency Act grafts a "subject-to-appropriations" requirement onto every federal payment statute. This contradicts this Court's conclusions in *Moda*. As a result, the government is forced to argue against *Moda* as mere

dictum. (Br. at 26.) But *Moda* is binding precedent on this point. This portion of *Moda* is "necessary to the … analysis such that [this panel is] bound by it." *See DaimlerChrysler Corp. v. United States*, 361 F.3d 1378, 1385 (Fed. Cir. 2004). The binding nature of the risk-corridors statute, and the effect of the later appropriations riders on that statute, were the two key legal issues in the case. The *Moda* court could not have reached its second conclusion without first deciding that there was a binding payment obligation to be suspended. Equally important, *Moda* "broke no new ground" in this regard (No. 19-1290, Appx9), but rather is grounded in a long line of decisions going back to *Langston*. *See supra* 24–26.

Ultimately, the government argues that *Moda* was wrong about the Anti-Deficiency Act. (Br. at 28-29.) That argument is not properly addressed to this panel, which "ha[s] no authority" to overrule "an earlier Federal Circuit panel decision." *Deckers Corp. v. United States*, 752 F.3d 949, 965 (Fed. Cir. 2014). It is also mistaken. The government points out that *Moda* involved a statutory obligation not a contractual obligation (*see* Br. at 26-27), but it fails to explain how that was material in *Moda* or is material here. When a statute says that a payment is "subject to appropriations," this Court has held that restriction applies with greater force to a statutory

benefits program than to contractual obligations. *See Prairie Cty.*, 782 F.3d at 687, 690; *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 192–94 (2012). But that is inapposite to *Moda* and to this case: the ACA's language does not limit payments to amounts appropriated, either for risk corridors or CSRs.[9]

The government cites no case in which a court construed the Anti-Deficiency Act to cancel what otherwise would have been a statutory payment obligation. This Court's decision in *Highland Falls-Fort Montgomery Central School District v. United States* (*see* Br. at 24-25) did not do that. There, permanent legislation and appropriations legislation specified different methods of calculating payment amounts, and the court chose the method of the appropriations legislation. 48 F.3d 1166, 1168–69, 1171 (Fed. Cir. 1995). But the court did not say that the permanent legislation could not create a payment obligation. *Highland Falls* thus did not disturb the settled law on this point. *See Kane Cty. v. United States*, 136 Fed. Cl. 644, 651 (2018) ("In *Highland Falls*, the court of appeals did not rule

[9] The CSR payment obligation is not a "benefits program" for insurers but rather is a statutory mandate whereby the government "shall" make advanced payments of CSRs to the insurers, which insurers must then provide to their insureds.

that the earmarks in the appropriations acts modified the … payment obligations … .").

The Anti-Deficiency Act does not modify Section 1402's unambiguous payment mandate.

### C. Section 1402 Is A Judicially Enforceable Money-Mandating Statute.

The government argues that even if it is legally required to make CSR payments, this Court still cannot enter judgment for that amount unless "Congress intended to mandate compensation in the event the agency fails to perform." (Br. at 2-3 (citing *United States v. Bormes*, 568 U.S. 6, 15–16 (2012).). This argument is misplaced because Section 1402 requires the government to pay money, squarely qualifying as a "money-mandating" statute. The courts have consistently construed such statutes as supporting a cause of action for money damages. *Moda*, 892 F.3d at 1320 n.2. No separate inquiry into Congressional intent or additional "remedy" language is necessary. *Id.*; No. 19-1290, Appx19 n.5 (Kaplan, J.) (citing *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005), *and United States v. Testan*, 424 U.S. 392, 401–02 (1976)).

*Bormes* is inapposite for at least two reasons. First, *Bormes* held that the Fair Credit Reporting Act includes its "own remedial framework [that] exclude[s] alternative relief under the general terms of the Tucker Act." 568 U.S. at 13. Because the specific remedial scheme under the FCRA pre-empted the more general remedy available under the Tucker Act, there was no basis for a Tucker Act claim. But this case involves no statute that enacts an alternative judicial remedial scheme, so no such issue exists here.

Second, unlike here, the *Bormes* court cited a line of cases that imposed obligations on the government to perform specific non-monetary actions—like maintaining buildings (*United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)) or managing timberlands (*United States v. Mitchell*, 463 U.S. 206, (1983))—and where the plaintiffs claimed injuries from the government's failure to perform these tasks properly. 568 U.S. at 15; *see also Testan*, 424 U.S. at 402 (classifying federal employees). Those statutes lacked any "mandatory provision[s]" for money payments, *Testan*, 424 U.S. at 403, and so the courts had to determine "whether the statute can fairly be interpreted as mandating compensation for the damage sustained," *see Bormes*, 568 U.S. at 15 (citation omitted).

Here, by contrast, Section 1402 *does* mandate that HHS "shall make periodic and timely payments" for CSRs. That makes all the difference. This Court "ha[s] repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating" and thus enforceable in the Court of Federal Claims. *Greenlee Cty.*, 487 F.3d at 877 ("shall make a payment" is money-mandating); *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) (same, for "shall be paid"; collecting additional cases); *accord Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) (same, for "will pay"); *New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018) (same, for "shall be indemnified"). Indeed, the author of the *Bormes* opinion, Justice Scalia, previously recognized that when a statute "does not, in so many words, mandate damages, a statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount." *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (collecting many more cases).

As this Court has explained, the test is simple: a "statute is money-mandating" if, "when the requirements of the statute are met … the [plaintiff] is entitled to compensation." *Fisher*, 402 F.3d at 1175. Here,

Section 1402 mandates compensation to insurers in an amount "equal to the value of the [cost-sharing] reductions." All requirements for payment have been met. As Judge Kaplan explained, if a statute commands a payment of money, a claimant is not "required to make some separate showing that the … statute … also grants them an express (or implied) cause of action for damages." No. 19-1290, Appx19 n.5. The government cites no case in which such a statute was found to be judicially unenforceable.

In sum, "it would defy common sense to conclude that Congress obligated" HHS to make CSR payments "without intending to actually reimburse the insurers. If Congress did not intend to create such an obligation it would not have included any provision for [paying CSRs] in the Act." Appx18. Section 1402 is a judicially enforceable money-mandating statute.

## II. Insurers' Potential To Increase Premiums Does Not Preclude Or Reduce The Government's Liability for Nonpayment of CSRs.

Despite the mandate of Section 1402 and the long line of precedent supporting a cause of action for damages, the government contends that "Congress had no reason to give insurers a damages remedy," because

insurers can recoup CSRs by raising premiums "equal to those expenses." (Br. at 2). In CHC's case, the government adds an alternative argument that any award of damages "should be reduced by the increased tax credits an insurer receives" after the government stopped its CSR payments. (Br. at 4).

Neither of these arguments can withstand scrutiny. The first—that Congress intended no damages remedy—is wholly speculative as to Congressional intent, contrary to the text and purpose of Section 1402, and based on faulty assumptions. The second—that increased tax credits should offset mandatory CSR payments—lacks any legal basis. Nothing in the ACA permits the government to use tax credits to offset its CSR payment obligation. The government's obligation is clear, and the government should be required to live up to it.

### A. The ACA Provides No Basis To Conclude That Congress Intended To Make CSR Payments Unenforceable.

In arguing that Congress intended no damages remedy for nonpayment of CSRs, the government is in essence suggesting that Congress intended CSR payments to be unenforceable—that is, the payments are optional rather than mandatory. That suggestion, of course,

contradicts the statutory text that the government "shall make periodic and timely payments" for CSRs in specified amounts.

The government cites no statutory text or legislative history to support its argument. It is left to argue inferences from the "structure" of the ACA. (Br. at 20, 22, 41-42.) But the arguments are speculative. As Chief Judge Sweeney observed, one cannot reasonably infer from the use of a permanent funding mechanisms for tax credits, and the use of the annual appropriations process for funding CSRs, that Congress intended to preclude any remedy for the government's failure to make CSR payments. Appx16-17. The absence of a specific appropriation for CSRs, standing alone, says nothing about Congress's intent. *Supra* at 23–30. And the presence of a permanent appropriation in a different program sheds no additional light. Reliably discerning Congress's intent from this circumstance is not possible. Appx17 (describing various explanations and concluding that "it is unclear which of these explanations—if any—is correct"). Courts should not engage in such speculation. *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) ("It is not [the courts'] function to rewrite a … statutory text under the banner of speculation

about what Congress might have intended." (quotation marks and citation omitted)).

Similarly, one cannot infer from insurers' potential to raise premiums, and the impact on premium tax credits, that Congress intended to preclude liability for nonpayment of CSRs. The tax credit program is distinct from the CSR program. They each have their own statutory section, requirements for eligibility, and methods of calculating amounts due. *Compare* 42 U.S.C. § 18071(c)(2), *with* 26 U.S.C. § 36B. They serve different purposes—one seeks to reduce the cost of health plan premiums; the other seeks to reduce the cost to an insured of using her plan. Appx18 ("to obtain insurance and to obtain health care, respectively"). The ACA does not make the amount of CSR payments dependent on tax credits amounts. Nothing in the text or history of the ACA suggests that Congress viewed tax credits as substitutes for CSR payments. Appx18 ("[Premium tax credit and CSR provisions] are not substitutes for each other.").

The inference for which the government advocates is not sufficient to overcome the plain language of Section 1402. The statutory language should prevail.

### B. The Government's Theory Of Congressional Intent Ignores Reality.

The government's theory about charging higher premiums as a remedy for lost CSR payments finds no support in record evidence and ignores regulatory and economic realities.

#### 1. Premiums Are Set In Advance, Not After Costs Are Incurred.

The process of setting premiums is prospective. QHPIs must set premiums for an upcoming coverage year in advance, months before the current coverage year ends and the next coverage year begins. This allows sufficient time for state regulators to review and approve rates and consumers to compare and choose plans. Accordingly, QHPIs must set their premiums based on *projected* costs for the upcoming coverage year.

For its 2017 plans, CHC set its premiums and began enrolling individuals by October 1, 2016. Appx115, ¶¶ 10-11. When the government terminated CSR payments in October 2017, CHC's premiums for 2017 were locked-in and could not be changed. Appx115, ¶ 10. At least for 2017, to say that Congress intended to preclude government liability for non-payment of CSRs is to suggest that Congress intended to allow the government to stiff QHPIs with impunity.

Long term, the government's theory works no better. Again, insurers base premiums on a forecast of what they think their anticipated costs are going to be, well before they know what they actually are. Pricing CSRs into the premium forces insurers to bear the risk of forecast errors. The government's assertion that CSR reimbursement could be decided anew by Congress during each annual appropriations process only makes matters worse. Congress often does not pass appropriations for the next fiscal year until December or later, well after insurers must set their rates and begin selling plans.[10] A remedy like this—where the party incurring the costs must each year guess in advance whether the costs are going to be reimbursed, and also forecast their amount—would be unprecedented and bizarre.

[10] *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (Jan. 17, 2014) (appropriating for the fiscal year ending Sept. 30, 2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (Dec. 16, 2014) (appropriating for the fiscal year ending Sept. 30, 2015); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (Mar. 23, 2018) (appropriating for the fiscal year ending Sept. 30, 2018).

### 2. Premiums Are Subject To Regulatory Approval And Market Competition.

The government's theory also collides with the reality that insurers do not have ultimate control over their premiums. Premiums are subject to state regulatory approval, and approval policies vary widely across the country. (*See, e.g.,* Br. at 12 n.7.) Indeed, as the government admits, for 2018 two states disallowed premium increases based on the loss of CSR payments, and D.C. continues to disallow them. (*Id.*) Moreover, states change their policies over time. As Judge Kaplan held, "approval of premium rates is a matter for the states" and the amount at which they are set provides no justification for denying CSR recovery under Section 1402. No. 19-1290, Appx11.

Market competition also serves as a barrier to price increases. Within ACA exchanges, consumers compare and choose between competing policies. ACA-compliant policies also compete with policies offered outside of the exchanges, which do not need to comply with the ACA. If an insurer raises its premiums to try to compensate for non-payment of CSRs, it faces risks of consumers switching to a competitor who chooses to raise rates less, shifting to a different plan on or off the ACA exchange, or not buying

health insurance. Depriving insurers of statutorily mandated payments and then sending them off to fight it out with their competitors in the marketplace provides no "recovery" at all.

### 3. "Silver Loading" Only Magnifies The Problem With The Government's Argument.

The government reluctantly concedes that Congress "may not have specifically contemplated … 'silver loading'" (Br. at 22), and nothing in the statutory text or legislative history suggests that Congress did. Yet that phenomenon was a consequence of the government's failure to meet its CSR obligations. Indeed, the potential impact of "silver loading" belies the notion that Congress intended premium increases to be the solution for non-payment of CSRs.

Congress adopted Section 1402's CSR program to reduce the cost to insureds of using their health insurance by reducing copays and deductibles. In so doing, Congress was encouraging lower income individuals to enroll in silver plans. "Silver loading" causes the opposite effect. It makes silver plans more expensive relative to gold and platinum plans that provide greater benefits (but not CSRs), as well as to bronze plans with fewer benefits (but not CSRs). Long-term, this means fewer

people will buy a plan with the CSR benefit. This frustrates, not furthers, the purpose of the CSR program.

Moreover, since the ACA's premium tax credit is pegged to the cost of silver plans, raising premiums for silver plans also increases the premium tax credit that low- and moderate-income customers can receive on whatever plan they select, driving up the government's costs on non-silver plans. Because of this, the government goes so far as to speculate that it has "likely" paid more in increased tax credits than the value of its unpaid CSR obligations.[11] (Br. at 21.) Had Congress pegged tax credits to another plan type, the "silver loading" phenomenon would not exist.

This reveals the government's argument as a perverse theory of Congressional intent: instead of judicial enforcement of the CSR payment obligation under the Tucker Act, Congress supposedly wanted insurers to follow an unexpressed, convoluted remedial scheme that could

[11] That the government may have paid more does not mean that insurers earned more. It means only that the government may have paid a larger portion of the premium (via tax credits) than it otherwise would have. Insurers still receive the same premium amount.

disproportionately increase the government's overall healthcare expenditures.

This is not the stuff of which intentionally designed remedies are made. The way to further Congressional intent is by enforcing the plain language of Section 1402.

### C. Courts Reject The Defense That A Victim Passed-On Its Losses By Raising Premiums Or Prices.

The government's theory that Congress intended to deprive insurers of a remedy for unpaid CSRs because it believed they could pass on those costs by raising their premiums is similar to the "passing on" defense that has been discredited in antitrust and other areas of law.

Judge Easterbook discussed the issue this way:

> When the buyer is a middleman, such as a retailer or a construction contractor, it may pass [an illegal] overcharge along … . The next purchaser in line will be stuck with some, perhaps all, of the overcharge. The response of antitrust law is stark: the direct purchaser recovers from the wrongdoer the full overcharge, trebled, even if it also recovered the whole overcharge by raising its own prices.
> * * * *
>
> The same approach prevails throughout the law. The person who pays an excessive charge for transportation recovers the overage, even though it may have collected an enhanced fee from its own customers. *See Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533 (1918), in which Justice

> Holmes remarked that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." A firm that catches an employee with a hand in the till is entitled to recover the stolen money in court, even though it may also "recover" the money by withholding a bonus and may have offset the loss by reducing the employee's salary after suspecting theft. A pedestrian is entitled to recover for loss caused by being run over by a speeding motorist, even though the pedestrian also has insurance.

*Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985) (citations omitted).

In particular, the Supreme Court has held that a passing-on defense is not available in the context of a state-regulated rate-setting process. In *Kansas v. Utilicorp United, Inc.*, the petitioner argued that a passing-on defense should be available "when a utility passes on its costs to its customers pursuant to state regulations or tariffs filed with a utility commission," because "in such cases, … the customers pay the entire overcharge." 497 U.S. 199, 208 (1990). The Supreme Court disagreed and rejected the defense as a matter of law. *Id.* at 209.

Courts have similarly rejected arguments seeking to avoid liability because insurance companies passed on increased costs in the form of higher premiums. *In re Neurontin Mktg. & Sales Practices Litig.*, 799 F. Supp. 2d 110, 120 (D. Mass. 2011) ("[T]his Court will take a pass on defendants' Hail Mary pass-on theory regarding increased premiums"). Courts have

rejected passing-on defenses in other contexts as well. *E.g., Cty. of Oakland v. City of Detroit*, 866 F.2d 839, 847 (6th Cir. 1989) (rejecting passing-on defense to RICO action involving sewer overcharges); *Scottsdale Ins. Co. v. Nat'l Emergency Servs., Inc.*, 175 S.W.3d 284, 300 (Tex. Ct. App. 1st Dist. 2004) (rejecting pass-on defense to claims under a contract and under Texas's insurance-regulation statutes).

Since Congress expects its statutes to be read in conformity with precedent, *e.g., Clay v. United States*, 537 U.S. 522, 527 (2003), courts' rejection of this theory undermines its use to infer congressional intent here.

### D. Premium Tax Credits Cannot Properly Be Used To Reduce The Government's Liability For CSR Payments.

The government asserts one argument on this appeal that it does not assert in the *Sanford Health Plan* companion case. It argues, in the alternative, that if a money damages remedy is allowed, any damages award should be "reduced by the increased tax credits an insurer receives as a result of the cessation of cost-sharing payments." (Br. at 17, 40-41). This argument fails. There is no basis for offsetting tax credits against the government's CSR payment obligation.

The government made a similar argument below solely against CHC's statutory claim, albeit in an effort to avoid liability altogether rather than merely reduce the award. Chief Judge Sweeney squarely rejected it:

> Defendant does not identify any statutory provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligation (even if insurers intentionally increased premiums to obtain larger premium tax credit payments to make up for the lost cost-sharing reduction payments). Nor does defendant identify any evidence in the Affordable Care Act's legislative history suggesting that Congress intended to limit its liability to make cost-sharing reduction payments by increasing its premium tax credit payments. … While the premium tax credit and cost-sharing reduction provisions were enacted to reduce an individual's health-care-related costs (to obtain insurance and to obtain health care, respectively), they are not substitutes for each other.

Appx18. Judges Kaplan and Wheeler also found no basis for such an offset. No. 19-1290, Appx11 ("There is no evidence … that Congress intended that the statutory obligation to make CSR payments should or would be subject to an offset based on an insurer's premium rates.") (Kaplan, J.); *Local Initiative*, 142 Fed. Cl. at 15 (Wheeler, J.) ("Nowhere … are CSR payments subject to alteration based on the availability of offsetting funds derived from premium increases permitted by state regulators … .").

Section 1402's mandate is specific. It requires that the government make CSR payments to insurers "in an amount equal to the value of the reductions." As a money-mandating statute, it defines the amount that the government must pay, making no allowance for reduction based on tax credits. Nor does the ACA elsewhere provide a basis for such a reduction. Tax credits are distinct from CSR reimbursements. They are paid through a distinct program with a distinct purpose, and distinct regulations govern their terms of payment and methods of calculation.

In *Moda,* this Court concluded that, before Congress enacted the appropriations riders, "section 1342 obligated the government to pay the full amount of risk corridors payments according to the formula it set forth." 892 F.3d at 1320. Likewise, the remedy for violation of Section 1402 is as clear as its mandate: the government should pay the full CSR amounts owed to CHC for 2017 and 2018.

The government raises the specter of a "windfall" to insurers if Section 1402 is enforced as written, because insurers will "most likely" receive more in increased tax credits than the government withholds in CSR payments. (Br. at 41). But no record evidence supports the suggestion. *Id.* at 40. To the contrary, the evidence is undisputed that CHC could do

nothing in response to its lost 2017 CSR payments of $11 million. Appx115, ¶ 10. And tax credits reduce the portion of the premium that the insured must pay; they do no result in additional money to the insurer. *See supra* 46 n.11.

For reasons discussed *supra* at 44–45, CHC's and other insurers' full economic losses are not necessarily limited to the amount of their lost CSR payments, given lost sales, lost market share, and disruption to the ACA exchanges that may be caused by the government's stoppage of CSR payments. Indeed, CHC's total CSR costs in 2018 were 30% below its 2017 total CSR costs, suggesting a significant drop in silver plan sales.[12]

Moreover, just as state regulators may have a duty to assure that insurers price their products in a manner likely to avoid insolvency (Br. at 6), those same regulators and the federal government impose limits on insurers' profits, to the point of mandating premium rebates in order to prevent insurer "windfalls." 42 U.S.C. § 300gg-18(b); 45 C.F.R. § 158.210(c), (d).

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[12] *Compare* Appx149-150 ($87,134,981.39 in CSRs provided in 2017), *with* Appx2 ($60,386,972.26 in unpaid CSR reimbursements for 2018).

In the end, the courts need not delve into complex questions surrounding the impacts of the government's stoppage of CSR payments, because the remedy for the government's violation of Section 1402 does not depend on the answers. The proper remedy for violation of Section 1402 is the one on which Chief Judge Sweeney, Judge Kaplan, and Judge Wheeler of the Court of Federal Claims all agree. The government should be required to pay the amounts dictated by that statute. Failing to do so will erode the public's confidence that the government can be trusted to meet its obligations. *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 740–42 (Fed. Cir. 2018) (Newman, J., dissenting from denial of rehearing en banc).

## III. The Government Entered Into A Valid Implied-In-Fact Contract To Make CSR Payments.

The Court of Federal Claims also held that the government breached its implied-in-fact contract to make CSR payments. Appx29-30. In reaching this holding, the court applied the elements of an implied-in-fact contract claim: (1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity in offer and acceptance; and (4) authority on the part of the government agent entering into the contract. Appx25-30. On appeal, the

government disputes only two elements—mutuality of intent and HHS's authority. (Br. at 33-40.) The trial court was correct on both. Appx27-28.

**A. There Was Mutuality Of Intent To Contract.**

"An implied-in-fact agreement must be 'founded upon a meeting of the minds, which … is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996)). The government focuses solely on the text of section 1402, arguing that since it contains no "language traditionally associated with contracting" that should end the analysis. (Br. at 34, 36). But the law requires consideration of all surrounding circumstances, and the broader picture here supports the court's conclusion.

The CSR statute creates obligations for both parties—insurers "shall reduce" insureds' cost-sharing, and in turn the HHS Secretary "shall make … payments equal to the value of the reductions" to insurers. 42 U.S.C. § 18071(a)(2), (c)(3)(A). These are reciprocal obligations. Insures must provide the reductions, and HHS must make the payments to insurers. *See Local Initiative*, 142 Fed. Cl. at 16 (Wheeler, J.) ("Once a QHP sold its plan on

an exchange and [provided CSRs], the statutory 'shall' used in both sections imposed a discretionless requirement on the Government to pay issuers."). The CSR program's implementing regulations parallel the statute and also support a finding of intent to contract. *See* 45 C.F.R. § 156.430. The program is accurately described as a quid pro quo exchange, in which insurers perform a service to the specifications of the government, and the government pays a certain sum for that performance. *See* Appx27; *Local Initiative*, 142 Fed. Cl. at 17 (Wheeler, J.); *cf. Moda*, 892 F.3d at 1327 (concluding that "the risk corridors program is an incentive program, not a quid pro quo exchange for services rendered").

The conduct of the parties reflects contractual intent as well. For 45 months, from the beginning of the program until September 2017, CHC met its obligation to provide cost-sharing reductions to its insureds, and the government performed its obligation to make CSR payments to CHC. Since October 2017, however, the government has failed to meet its obligation while CHC continues to perform.

The government's cases are not to the contrary. The government first relies on *Brooks v. Dunlop Manufacturing Inc.*, 702 F.3d 624 (Fed. Cir. 2012), but the government only tells half the story. Although this Court found a

lack of "words typically associated with contract formation," it stated that this was "not necessarily determinative" and went on to examine "whether the circumstances surrounding the statute's passage manifested any intent by Congress to bind itself contractually." *Id.* at 631 (citation omitted). In *Brooks*, the plaintiff pointed to no evidence of contractual intent. *Id.* Here, by contrast, contractual intent is evident from the reciprocal nature of the CSR program embodied in the statute, regulations, and the parties' course of conduct. *Brooks* is additionally distinguishable because "the history of *qui tam* provisions" confirmed that "amendments to *qui tam* statutes that interfere with a relator's pending action do not deprive him of rights guaranteed by the Constitution." *Id.* at 632 (quotation marks and citation omitted). No such special legal history exists here.

The government next relies on *Schism v. United States*. There, too, the legal history on the specific subject matter of the claim—this time, military pay and benefits—undermined the contract claim. 316 F.3d 1259, 1271 (Fed. Cir. 2002) (en banc) (noting "the irrelevance of contract law for members of the military" and "[t]he doctrine that statutes are the exclusive source of law governing [military] compensation rights"). The principles quoted by the government (Br. at 35) do not apply to contract claims generally.

In *Moda*, the government's next case, this Court found no implied-in-fact contract in part because "[t]he [risk-corridors] statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program." 892 F.3d at 1330. But the CSR program is different than risk corridors. It involves a quid pro quo rather than an incentive program. Appx27; *see also Local Initiative*, 142 Fed. Cl. at 17 (Wheeler, J.) ("Like the risk corridors program, the CSR program aims to provide affordable healthcare," but "that is where the similarities between these programs end.").

The government's allegation that the lower court had "a basic misunderstanding of the way section 1402 works," because the CSR program contains merely "two distinct provisions that do two different things" (Br. at 37), is belied by Judge Wheeler's thorough description of the program's operation. Judge Wheeler noted that the CSR program "aims to provide affordable healthcare" and so "is a means for distributing a Government subsidy" "by asking insurers to act as conduits for payment of [CSRs]." *Local Initiative*, 142 Fed. Cl. at 17. He continued:

> Put in *Radium Mines*' terms, the Government "guaranteed" to cover QHPs' CSR expenses if QHPs made CSR payments to eligible recipients. There is, undoubtedly, a traditional quid pro

> quo exchange in that transaction. … Additionally, unlike the risk corridors program, whether a QHP is entitlement to CSR repayment depends entirely on whether it has made CSR distributions to qualifying customers.

*Id.* [13]

The parties' mutual intent to contract is properly inferred from the circumstances surrounding the CSR program.

### B. The Secretary Of HHS Had Actual Authority To Contract For CSR Payments.

The court below correctly held that "the Secretary of HHS possesses at least the implied actual authority to contractually bind the government to make cost-sharing reduction payments." Appx28.

"Authority to bind the [g]overnment is generally implied when such authority is considered to be an integral part of the duties assigned to a [g]overnment employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) *as amended on reh'g* (Dec. 11, 1989) (citation omitted). This principle applies here. Making CSR payments is an integral part of the

[13] The government apparently views these two provisions within 1402 as so unrelated that the workings of one provision have no bearing on the other (Br. at 37), but views Section 1401 and 1402—two distinct statutory sections—as so closely related that the mere existence of 1401 should be deemed to re-write the plain text of 1402. (Br. at 20). Neither view should prevail.

Secretary's duties. Indeed, Section 1402 requires the Secretary of HHS to make them. More generally, the Secretary has broad authority to administer the ACA, including the CSR program. *See* Pub. L. No. 111-148, 124 Stat. 119, §§ 1001, 1301(a)(1)(C)(iv), 1302(a)-(b), 1311(c)-(d). Contracting with insurers is integral to that authority, to the point that the Secretary is required to enter into certain contracts with QHPIs. *See* 45 C.F.R. § 155.260(b)(2).

*Schism*, on which the government primarily relies to dispute actual authority, is inapposite. It involved military recruiters who had no duty or authority to make payments on behalf of the government, let alone authority to promise free lifetime medical care. *See* 316 F.3d at 1284. Here, the Secretary of HHS was acting well within the scope of extremely broad authority. Further, Congress did not authorize the pay and benefits promised in *Schism*. *See id.* Here, the CSR statute expressly mandates the payments that are the subject of the parties' contract.

Finally, 31 U.S.C. § 1301(d) presents no barrier to the Secretary's contracting authority. (Br. at 38.) That statute is part of a subtitle and chapter on the budget process and appropriations. It is a rule "regarding appropriations" that applies only when "the parties are disputing the

meaning of an appropriations statute." *California v. Trump*, 267 F. Supp. at 1132.

In summary, the government's arguments disputing the implied-in-fact contract fail. And once the contract is recognized, there is no dispute that the government has breached it. Accordingly, the judgment on the implied-in-fact breach of contract claim should be affirmed.

## CONCLUSION

The judgment should be affirmed.

June 10, 2019

**FAEGRE BAKER DANIELS LLP**

/s/William L. Roberts
William L. Roberts
Jonathan W. Dettmann
Nicholas J. Nelson
Elizabeth M.C. Scheibel
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-7000
Fax: (612) 766-1600
*William.Roberts@FaegreBD.com*
*Jon.Dettmann@FaegreBD.com*
*Nicholas.Nelson@FaegreBD.com*
*Elizabeth.Scheibel@FaegreBD.com*

*Attorneys for Plaintiff-Appellee*
*Community Health Choice, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

June 10, 2019 /s/*William L. Roberts*
William L. Roberts

## CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Federal Circuit Rule 32(a) because it contains 11,808 words.

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*/s/William L. Roberts*
William L. Roberts