Nos. 19-1290(L), 19-1302 and 1633

IN THE

United States Court of Appeals for the Federal Circuit

SANFORD HEALTH PLAN and MONTANA HEALTH CO-OP,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

COMMUNITY HEALTH CHOICE,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
NOS. 18-136C AND 18-143C (KAPLAN, J.) AND NO. 18-5C (SWEENEY, J.)

BRIEF OF AMICI CURIAE BLUE CROSS BLUE SHIELD OF NORTH DAKOTA, BLUE CROSS AND BLUE SHIELD OF VERMONT, LOCAL INITIATIVE HEALTH AUTHORITY FOR L.A. COUNTY, d/b/a/ L.A. CARE HEALTH PLAN, AND MOLINA HEALTHCARE OF CALIFORNIA, INC. IN SUPPORT OF APPELLEES AND AFFIRMANCE

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sanford Health Plan **v.** United States

Case No. 2019-1290(L)

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

See attached

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Blue Cross and Blue Shield of North Dakota	n/a	Parent corporation--HealthyDakota Mutual Holdings
Blue Cross and Blue Shield of Vermont	n/a	None
Local Initiative Health Authority of L.A. County, d/b/a/ L.A. Care	n/a	n/a
Molina Healthcare of California, Inc.	n/a	Parent corporation--Molina Healthcare, Inc.

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:

STRIS & MAHER LLP
Michael Donofrio
Bridget Asay
Peter K. Stris
Brendan Maher

FORM 9. Certificate of Interest **Form 9**
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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. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Montana Health Co-Op v. United States, No. 2019-1302 (Fed. Cir.) (consolidated with this appeal (No. 2019-1290(L)))
Community Health Choice v. United States, No. 2019-1633 (Fed. Cir.) (designated as a companion case with this appeal and Montana Health Co-Op, No. 2019-1302)
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.)
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.)
Blue Cross and Blue Shield of North Dakota v. United States, No. 18-1983 (Horn, J.)

5/8/2019
Date

/s/ Lawrence S. Sher
Signature of counsel

Please Note: All questions must be answered

Lawrence S. Sher
Printed name of counsel

cc: All counsel of record via CM/ECF

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***Sanford Health Plan v. United States*, 2019-1290 (L) (Fed. Cir.)**

Attachment to Form 9 – Certificate of Interest

Parties Represented by Reed Smith LLP as *Amici Curiae*

1. Blue Cross and Blue Shield of North Dakota
2. Blue Cross and Blue Shield of Vermont
3. Local Initiative Health Authority for L.A. County, d/b/a L.A. Care Health Plan
4. Molina Healthcare of California, Inc.

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STATEMENT OF INTEREST

Amici curiae Blue Cross Blue Shield of North Dakota, Blue Cross and Blue Shield of Vermont, Local Initiative Health Authority for L.A. County, d/b/a L.A. Care Health Plan, and Molina Healthcare of California, Inc. respectfully submit this brief in support of plaintiffs-appellees and affirmance in these appeals.[1] Amici provide healthcare insurance to more than 6 million customers throughout the United States, including over 480,000 on various Affordable Care Act (ACA) health insurance exchanges. Like plaintiffs, amici have been denied substantial "cost-share reduction" payments due and owing to them by the federal government under mandatory statutory obligations. These unsatisfied mandates are at the heart of these appeals.

The ACA "created a tectonic shift in the insurance market," "drastically en-larg[ing] the pool of eligible insurance purchasers" while "prohibit[ing] insurers from denying coverage or setting increased premiums based on a purchaser's medical history." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 442 (2017), *rev'd on other grounds*, 892 F.3d 1311 (Fed. Cir. 2018), *cert. filed*, No. 18-1028 (U.S. Feb. 4, 2019).

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici represents that counsel and amici authored this brief in its entirety and that none of the parties or their counsel, or any person or entity other than amici or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for amici further represents that plaintiffs-appellees Sanford Health Plan, Montana Health Co-Op and Community Health Choice and defendant the federal government have consented to the filing of this brief.

"Central to the Act's infrastructure was a network of 'Health Benefit Exchanges' (Exchanges) on which insurers would offer Qualified Health Plans (QHPs)" to provide uninsured and underinsured individuals with access to the newly-created health insurance exchanges. *Id.* at 441. The ACA included "a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). One of these reforms, the ACA's Cost-Sharing Reduction ("CSR") program enacted in Sections 1402 and 1412, 42 U.S.C. §§ 18071 and 18082, was specifically aimed at ensuring that low-income individuals had access to affordable insurance coverage and healthcare.

Under the CSR program, Congress expressly mandated that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance of, and "equal to the value of[,]" the CSRs insurers are required to make to individual consumers. *See* 42 U.S.C. §§ 18071(c)(3), 18071(a)(2), 18082(c)(3). These statutorily mandated CSRs offset eligible consumers' out-of-pocket expenses, such as deductibles, copayments, and coinsurance. *See* 42 U.S.C. §§ 18082(c)(3)(A), 18071(c)(2); *accord* 45 C.F.R. §§ 155.305(g), 156.410(a). "[T]he ACA, in turn, provides a mechanism to compensate insurers for the cost of making these reductions." *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 215 (2018) (citing Section 1402).

As required by law, and since the inception of the CSR program, plaintiffs and amici have provided CSRs to their customers. The government likewise satisfied its express promise, beginning in January 2014 and for the next forty-five months—

spanning both the Obama and Trump Administrations—by making the CSR payments to plaintiffs and amici under Section 1402. As detailed in plaintiffs' brief, however, starting in October 2017, the government ceased all CSR payments to insurers, claiming that Congress had not appropriated funds to make those payments.

Plaintiffs and amici accordingly brought lawsuits against the government in the U.S. Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), for recovery of the statutorily mandated CSR payments as money damages. Plaintiffs prevailed at summary judgment, and the government filed these appeals seeking to avoid its clear obligation to pay what it owes under Section 1402.[2]

The government owes amici alone nearly a quarter-*billion* dollars in CSR payments for the period of January 2017 through March 2019. Amici accordingly have a direct and substantial interest in these appeals. For the reasons stated in plaintiffs' brief, amici urge the Court to affirm the decisions below granting summary judgment in plaintiffs' favor on their claims for unmade CSR payments and denying the government's motions to dismiss those claims. Amici will not repeat all of those arguments here.

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[2] Amicus L.A. Care likewise has prevailed at summary judgment on its Tucker Act claims. *See Local Initiative Health Auth. for L.A. Cnty. v. United States* ("*L.A. Care*"), 142 Fed. Cl. 1 (2019). The other amici's Tucker Act suits remain pending in the Court of Federal Claims. *See Blue Cross Blue Shield of N.D. v. United States*, No. 18-1983; *Blue Cross and Blue Shield of Vt. v. United States*, No. 18-373; *Molina Healthcare of Cal., Inc. v. United States*, No. 18-333.

Instead, amici focus on the government's meritless arguments for reversal, which squarely contradict controlling precedents of this Court and the U.S. Supreme Court, not to mention fundamental principles of statutory construction. Indeed, if accepted by this Court, the government's arguments would effect a wholesale revamping of long-established Tucker Act jurisprudence and settled statutory construction principles. The Court should reject the government's dangerous and unfounded contentions and affirm the judgments below.

ARGUMENT

I. The Government's Unprecedented Interpretations Of The Tucker Act And The Anti-Deficiency Act Contravene Well-Settled And Controlling Precedent.

The government argues for a radical revision of the law governing the Tucker Act and asserts an unprecedented interpretation of the Anti-Deficiency Act, 31 U.S.C. § 1341. Binding precedent clearly forecloses these contentions, however, and the Court should decline the government's invitation to remake settled law.

A. Tucker Act Plaintiffs Need Not Show That The Money-Mandating Statute At Issue Provides For A Damages Remedy Or That Congress Appropriated Funds To Pay For The Government's Mandatory Obligation.

"The Tucker Act contains" a clear "waiver" of the government's sovereign immunity, subjecting the government to suit for money damages. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citation omitted). In order to establish a Tucker Act claim for money damages against the government, plaintiffs

must rely upon a statute that is "money-mandating"— one that can "'fairly be interpreted as mandating compensation by the Federal Government for damage sustained.'" *Roberts v. United States*, 745 F.3d 1158, 1161–1162 (Fed. Cir. 2014) (citation omitted). This showing brings a claim against the government "within the waiver of sovereign immunity" effected by the Tucker Act, *White Mountain Apache Tribe*, 537 U.S. at 472 (citation omitted), and is "determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action[.]" *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc).

Beyond this "money-mandating" requirement, the Tucker Act does not require a showing of any "second waiver" of immunity in a statute. *Slattery v. United States*, 635 F.3d 1298, 1316 (Fed. Cir. 2011) (en banc) (citing *Mitchell v. United States*, 463 U.S. 206, 218 (1983)). In particular, and as relevant here, "[n]either the Tucker Act, nor Supreme Court precedent, nor most of the jurisprudence of the Court of Claims and the Federal Circuit, limits jurisdiction over the claim by the source of funds to pay any judgment on the claim." *Id.* at 1316.

The statute at issue in these appeals—Section 1402 of the ACA—plainly is money-mandating, and the government does not contend otherwise. That ends the jurisdictional inquiry. Nevertheless, the government now asserts that a Tucker Act plaintiff must establish at least two *additional* elements before it may recover damages from the government:

(i) First, "that Congress intended to mandate compensation in the event the [relevant executive] agency fails to perform" by providing a "damages remedy" (Doc. 21 at 2, 3 (citing *United States v. Bormes*, 568 U.S. 6, 15–16 (2012)); and

(ii) Second, that Congress appropriated funds specifically for the purpose of paying the government's "money-mandating" obligation (Doc. 21 at 23–32).

The Government's would-be second and third waiver requirements defy controlling precedent and must be rejected.

The Supreme Court and this Court have expressly rejected the notion that "an explicit provision for money damages [is required] to support every claim that might be brought under the Tucker Act." *White Mountain Apache Tribe*, 537 U.S. at 477; *see also N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 881 (Fed. Cir. 2018) ("[W]e reiterate that there is no requirement of a 'plain and explicit statement' that money damages are due.") (citing *White Mountain Apache Tribe*, 537 U.S. at 477). Indeed, if the government were right about the need for a "damages remedy" in the statutory text, precedents too numerous to count—finding Tucker Act jurisdiction under a host of statutes lacking any such remedy—would be wrongly decided. *See, e.g., James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998) (stating that 37 U.S.C. § 204 "serves as a money-mandating statute" even though it lacks a separate provision authorizing a damages remedy); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 51 n.17 (2019) (rejecting government's argument and explaining that, "[a]lthough some money-mandating statutes include a separate provision authorizing a damages remedy,

other money-mandating statutes pursuant to which the Court of Federal Claims can enter judgment do not") (citations omitted).

The government cites only *Bormes* for its proposed "second waiver"/"damages remedy" requirement, Doc. 21 at 3, 17–18, but that decision cuts *against* the government's position. *Bormes* holds that where the underlying money-mandating statute "provides a detailed judicial remedy against those who are subject to its requirements"—its own 'remedial scheme"—it cannot serve as the predicate for a Tucker Act claim. 568 U.S. at 16. The statute at issue in *Bormes*, the Fair Credit Reporting Act (FCRA), contains its own remedial scheme—"'set[ting] out a carefully circumscribed, time-limited, plaintiff-specific' cause of action"; "precisely defin[ing] the appropriate forum"; "authoriz[ing] aggrieved consumers to hold" certain violators "liable for specified damages"; and creating federal jurisdiction over FCRA claims—so it could not support a Tucker Act claim. *Id.* at 14.

Far from *requiring* that a statute provide a damages remedy in order to support a Tucker Act claim—as the government contends—*Bormes* simply recognizes that a statute (like the FCRA) containing its own specific remedial scheme cannot also form the basis for a Tucker Act claim. And because § 1402 does *not* include its own remedial scheme or "damages remedy," *Bormes* has no bearing here.[3]

[3] The Court of Federal Claims repeatedly has rejected the government's "damages remedy" argument in these CSR cases. *See Montana Health Co-Op v. United States*, 139 (continued)

The government's proposed "third waiver" requirement—that there must be an appropriation of funds to make the mandated payments in the underlying statute—also clearly contradicts settled law, as plaintiffs detail at length. *See* Doc. 24 at 25–28 (citing cases). This Court recently confirmed this longstanding principle in *Moda*, continuing an unbroken line of precedent running back 133 years to the U.S. Supreme Court's seminal decision in *United States v. Langston*, 118 U.S. 389 (1886). *See Moda*, 892 F.3d at 1321 (explaining that under *Langston*, "the government's statutory obligation to pay persist[s] independent of the appropriation of funds to satisfy that obligation").

In the face of these controlling precedents, the government fails to cite a single case adopting its "no liability without appropriation" theory, or rejecting a Tucker Act claim because the underlying money-mandating statute did not itself appropriate money to fund the government's obligation. Its position is as wrong now as it was in *Moda*.

Fed. Cl. 213, 217 n.5 (2018); *Sanford Health Plan v. United States*, 139 Fed. Cl. 701, 706 n.5 (2018); *Cmty. Health Choice v. United States*, 141 Fed. Cl. 744, 762 n.19 (2019); *Common Ground Healthcare Coop.*, 142 Fed. Cl. at 55 n.17; *Maine Cmty. Health Options v. United States*, 142 Fed. Cl. 53, 71 n.18 (2019); *L.A. Care*, 142 Fed. Cl. at 9–10.

B. The Anti-Deficiency Act Does Not Preclude Tucker Act Claims Where Congress Has Not Appropriated Funds to Make Statutorily Mandated Payments.

Undeterred, the government, for the first time on appeal, claims its "no liability without appropriation" theory finds support in the Anti-Deficiency Act which, in the government's telling, requires an appropriation of funds from Congress to support any Tucker Act claim.[4] Here again, *Moda* and longstanding precedent block the government's unprecedented claim.

The government hinges its Anti-Deficiency Act argument on the principle that two statutes capable of co-existence must be harmonized, and claims that this means Section 1402—in order to be consistent with the Anti-Deficiency Act—can be read to require payments only where there are funds appropriated to make them. Interpreting Section 1402 as giving rise to money damages for failure to make CSR payments, the government claims, "would read the ACA as vitiating the Anti-Deficiency Act's central command by directing agency officials to make payments for which no appropriation exists[.]" Doc. 21 at 24. In other words, according to the government, the Anti-Deficiency Act is baked into all money-mandating statutes such that there

[4] In the Court of Federal Claims, the Government did not assert the Anti-Deficiency Act challenge to plaintiffs' statutory claims that it raises on appeal—it cited the statute in its briefing, but only in the context of plaintiffs' implied-in-fact contract claims. As a result, its argument on appeal is waived. *See Novartis AG v. Torrent Pharm. Ltd.*, 853 F.3d 1316, 1329 (Fed. Cir. 2017) (finding waiver where "the argument raised to the Board below was quite different than [appellants'] characterization of that argument on appeal").

must be an appropriation of funds to meet mandatory payment obligations in order to support a Tucker Act claim for breaching those obligations.

Given the age of the Anti-Deficiency Act (it's almost 150 years old; *see* GAO, *Principles of Federal Appropriations Law*, 6-35 (3d ed. 2006)), one would expect the government to have a phalanx of authorities to back up its sweeping theory. But it doesn't. Quite the contrary: no court has construed the Anti-Deficiency Act to apply to the determination whether the government has a statutory payment obligation actionable under the Tucker Act, much less to bar courts from enforcing such an obligation where Congress has not appropriated the funds to pay for it.[5] This comes as no surprise because as this Court and its predecessor court repeatedly have held, an appropriation *is not necessary* for a court to render a Tucker Act judgment for failure to make the payment. *See Moda*, 892 F.3d at 1321–22 (citing cases).

Driven by this settled law, this Court, in *Moda*, specifically rejected the government's Anti-Deficiency Act argument. The Court reasoned that it was "of no moment that, as the government notes, HHS could not have made payments out to

[5] The government claims support for its contention in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995). Doc. 21 at 23–24. But in that case, the Court contrasted specific earmarks in a subsequent appropriations bill with the original underlying act appropriating a lump sum. Given that contrast, the Court thus could easily harmonize the two enactments—the first appropriating a lump sum, the second earmarking a specific, lesser amount—and that was sufficient to decide the case. There obviously is no analogy to the circumstances presented here.

insurers in an amount totaling more than the amount of payments in without running afoul of the Anti-Deficiency Act." *Moda*, 892 F.3d at 1322. That Act "simply constrains government officials" from making unfunded payments—it does not, as the Supreme Court made clear in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012), "somehow defeat the obligations of the government" themselves. *Moda*, 892 F.3d at 1322.

Unwilling to accept this Court's binding interpretation of the Anti-Deficiency Act and the import of *Ramah Navajo*, the government insists this aspect of *Moda* is mere dictum and "misunderstand[s]" *Ramah Navajo*. Doc. 21 at 25. The former claim of dicta is baseless, as plaintiffs correctly demonstrate. Doc. 24 at 33–35. The latter contention is nothing more than a disagreement with controlling precedent that is binding on this Court (*see Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006) ("Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*.")—a disagreement that, in any event, is without merit. Doc. 24 at 29–32.

II. The Government's Proposed Construction Of Section 1402 Contradicts Its Plain Language And Fundamental Principles Of Construction.

The government's attempts to overcome the clear text of Section 1402's mandatory payment obligation are similarly ineffective. The government relies on a deeply flawed approach to statutory construction that elevates pure speculation about Congress's supposed intent and policy rationales over the plain language of Section

1402's unambiguous "shall" pay obligation, as reinforced by the surrounding context of the ACA.

The government's desire to escape its mandatory obligation to make the billions of dollars of CSR payments simply cannot justify its tortured interpretive arguments. The Court should reject the government's current result-driven approach, which contradicts the understanding of Section 1402 it articulated in litigation less than four years ago.[6]

That the government manufactures a for-these-appeals-only model of statutory construction is apparent right from the start, as the government pays virtually no mind to Section 1402's plain text, which says that the government "shall make" CSR payments, without limit or qualification. No different from the ACA provision this Court found to be "unambiguously mandatory" in *Moda*, 892 F.3d at 1320, Section 1402 clearly and unambiguously mandates payments and makes no mention of appropriations or whether funds are available to make those payments. "Because the plain language of [Section 1402] is 'unambiguous,' [the Court's] 'inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted).

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[6] *See* Defs. Mem. ISO Mot. for Summ. J., *House v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 55-1 (D.D.C. filed Dec. 2, 2015) (government stating that the ACA "requires the government to pay cost-sharing reductions to issuers" and that the "absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation").

Yet the government conspicuously avoids this clear text, resigned instead to speculating about what Congress must have meant and about the intended meaning of the *absence* of language appropriating funds to make the CSR payments. Doc. 24 at 18–24. Taking the second claim first, "[l]egislative silence [ordinarily] is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). Indeed, silence ordinarily is understood to conform to, not displace, the controlling background legal principle—here, that Congress need not appropriate funds for mandatory payment obligations it creates in order for those obligations to be enforceable in court under the Tucker Act. *See*, *e.g.*, *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 380 (2013) (reasoning that statutory "silence does not displace the background" legal principle at issue).

This settled background rule likewise forecloses the government's suggestion that the absence of appropriation language in Section 1402 is significant because a neighboring provision—Section 1401—does contain reference to an appropriation for tax credits. Doc. 21 at 18. Although the disparate use of language in related statutes may suggest Congress meant to give the statutes different meaning, the "force of any negative implication" from a statute's disparate use of language "depends on context" and "background" legal principles. *Marx*, 568 U.S. at 381. As noted, the "background" law is binding and clear—a money-mandating statute requiring the government to make payments gives rise to damages liability whether or not Congress has appropriated funds for those payments. Thus, the presence of appropriations

language in Section 1401, and the absence of that language in Section 1402, cannot be read to mean Section 1402 mandates payments only where Congress has appropriated funds to make them.

In the face of this, the government offers no reason to think Congress intended, through this difference in wording, to preclude an enforceable government obligation under Section 1402, nor is there any legislative history suggesting that was Congress's intention. As plaintiffs persuasively demonstrate, the much more reasonable inference is that Congress simply intended for Section 1402 obligations to be funded by future appropriations, but had no need to do so for Section 1401 tax credits because there already was a permanent appropriation available for those. Doc. 24 at 39–41. Other reasonable possibilities can also be surmised. *See Maine Cmty. Health Options*, 142 Fed. Cl. at 68–69 (listing possible explanations). But the government's rank speculation on Congressional intent cannot be credited. *See Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (holding that it is not this Court's "function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended").

Despite its intense focus on particular words missing from Section 1402, the government ignores the missing words that actually shed light on its meaning—"subject to the availability of appropriations" or the like. This Court has explained how Congress can (and does) limit a mandatory statutory obligation to available appropriations when it so chooses by enacting language like "subject to the availability

of appropriations." *See Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007) ("[I]n some instances the statute creating the right to compensation…may restrict the government's liability…to the amount appropriated by Congress…. [T]he language 'subject to the availability of appropriations' is commonly used[.]"); *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir. 2015) (holding that statute providing that "[a]mounts are available" to make mandatory payments "only as provided in appropriation laws" "reflect[ed] congressional intent to limit the government's liability").

Section 1402, however, contains no such appropriation-limiting language. This is particularly salient because as noted, three years *before* the ACA's enactment, in *Greenlee County*, this Court specifically outlined the type of language Congress can use when it wishes to limit a money-mandating statutory obligation to funds appropriated to pay it, and "Congress is presumed to know the law, particularly recent precedents that are directly applicable to the issue before it." *Hesse v. Dep't of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (citation omitted). Moreover, Congress did use that very same language—"subject to the availability of appropriations"—in multiple other provisions of the ACA.[7] Congress's refusal to use that same or similar limiting language in Section 1402 thus "confirm[s] that [the same] Congress" that enacted Section 1402

[7] *See* 42 U.S.C. § 280k(a); 42 U.S.C. § 300hh-31(a); 42 U.S.C. § 293k-2(e); 42 U.S.C. § 1397m-1(b)(2)(A).

knew "how to limit" the government's payment obligation through appropriations "when it so desire[d]." *Marx*, 568 U.S. at 384; *see L.A. Care*, 142 Fed. Cl. at 8 (absence of "subject to availability of appropriations" language in Section 1402 "shows a decision to create a binding obligation to make CSR payments…not predicated on the presence of an appropriation").

The government also takes aim at yet another firmly entrenched principle of statutory construction—that policy arguments cannot "overcome the statute's plain language[.]" *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017). It claims that under plaintiffs' interpretation, plaintiffs and other insurers will reap a "double recovery" in the form of both Section 1402 CSR payments and Section 1401 premium tax credits resulting from raising premiums on "silver" insurance plans—so-called "silver-loading"—an "unwarranted" outcome that defies "common sense." Doc. 21 at 21–22.

But there is no "anti-double recovery" principle of statutory interpretation that justifies substituting an alleged policy preference for plain text, and "[t]here is no evidence in either the language of the ACA or its legislative history 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." *Montana Health Co-Op*, 139 Fed. Cl. at 221. Likewise, notwithstanding the government's assertions about the "unwarranted" effect of its statutory violation, the plain text of the statute still controls. *See N.Y. & Presbyterian Hosp.*, 881 F.3d at 885 (holding that "even if we were

to agree that the Hospital's interpretation" of a statute as money-mandating "leads to unreasonable results," that interpretation followed from the statute's plain text, and "'it is for Congress, not this [c]ourt, to rewrite the statute'") (citation omitted).

Nor, moreover, does the law recognize the kind of limitless statutory mitigation or collateral-source doctrine the government advances, whereby an unambiguous statutory payment obligation can be defeated by a suggestion (with no evidence) that third parties may, in the future, help reduce the harm to the aggrieved party caused by the government's non-payment through some other means. Again, the government cites no precedent supporting such a doctrine—because there is none.

In any event, there is not even a "double recovery" as the government depicts it. That term connotes dual, overlapping benefits received from Defendant's statutory violation—which obviously has not occurred here. Section 1402 CSR payments flow from an express mandatory statutory payment obligation that does not provide for any "offsets" based on other sources of revenue. Increased annual premiums, on the other hand, flow from the independent discretionary acts of each state's insurance regulators designed to ensure that the insurers they regulate in each market remain solvent and that their rates are actuarially sound. The two thus are far from inextricably linked. Amici's own experiences illustrate as much. As the government acknowledges (Doc. 21 at 11 n.7), with respect to Blue Cross Blue Shield of North Dakota and Blue Cross and Blue Shield of Vermont—which have not received a penny in

CSR payments since January 2017—state insurance regulators in North Dakota and Vermont refused to allow any silver loading for 2018.

Unbowed, the government claims that "[n]othing in the text or legislative history of the ACA suggests Congress intended for insurers to be compensated for their cost-sharing expenses twice[.]" Doc. 21 at 20. This cart-before-the-horse approach to statutory construction is plainly erroneous—and dangerous. For good reason, courts do not start statutory analysis by looking first at the potential effect of a particular reading of the statute, and then asking whether there is any evidence that Congress specifically intended that effect. Rather, courts "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose[,]" *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009), and where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citations omitted). Courts may not "rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended. … If [an] effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Lewis v. City of Chicago*, 560 U.S. 205, 215, 217 (2010).

Having exhausted its efforts to read something into Section 1402 that is not there, the government turns to an implied-repeal argument based on Congress's failure to appropriate funds to pay its CSR obligations. Doc. 21 at 31–32. This Court already rejected this argument in *Moda*, 892 F.3d at 1321–22, and even if it hadn't, the

argument founders on the ironclad rule against construing the mere failure to appropriate funds as an implied repeal.

"'[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable[,]'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001) (citation omitted), and even then, only where the evidence of irreconcilability is "overwhelming[,]" *id.* at 137. This presumption "applies with even *greater* force" where "the claimed repeal rests solely upon an Appropriations Act[,]" *TVA v. Hill*, 437 U.S. 153, 190 (1978), and its focus is on the text Congress actually enacted. *See Langston*, 118 U.S. at 394 (implied repeal requires "express words of repeal, or … such provisions as would compel the courts to say that harmony between the old and the new statute was impossible").

An implied-repeal claim based on the absence of an appropriations act is exceptionally weak. "'Congressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (citation omitted), and it certainly "cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (citation and internal quotation marks omitted). This is particularly so where, as here, that "inaction" or silence is offered to show that Congress intended to impliedly repeal a significant provision of a landmark statute, since it is "'strongly presumed that Congress will specifically address language on the statute books that it wishes to change.'" *Hymas v. United States*, 810 F.3d 1312, 1320 (Fed. Cir. 2016) (citation

omitted). Congress also is presumed to know the law—especially centuries-old principles like the interpretive rule that the failure to appropriate funds, without more, does not repeal substantive statutory provisions. *See Kirkendall v. Dep't of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) ("[W]e 'presume congressional understanding of…interpretive principles[]' at the time of enactment") (citation omitted).

As this Court found in *Moda*, these principles lead to an ineluctable conclusion: When Congress fails to appropriate funds—without also enacting specific text that explicitly amends existing law—it is strongly presumed not to be carrying out a repeal of that existing law, implied or otherwise.

The government makes little effort to overcome this powerful presumption. Indeed, since it cannot point to any actual text in the appropriation bills, the government resorts to a single Senate committee report that refers to the absence from the committee's recommendation of an appropriation for CSR payments—in other words, a mere failure to appropriate. Doc. 21 at 31. Even outside the appropriations context, this argument is a non-starter because "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (citation omitted). But it is particularly meritless here because the Supreme Court forbids the use of legislative history in determining Congress's intent in appropriations bills. *See Ramah Navajo Chapter*, 567 U.S. at 200 (holding that the construction of appropriation bills must focus strictly on "the 'text of the appropriation,' not [on] Congress' expectations of how the funds will be spent,

as might be reflected by legislative history") (citation omitted); *see also Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) ("[I]t is inappropriate to rely upon legislative history to establish the existence of a statutory cap [on the Government's Tucker Act liability] that is not contained in the text of the statute itself.") (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005)).

Accordingly, Congress's failure to appropriate funds for Section 1402 CSR payments and its continued silence thereafter is no evidence of any intent to repeal the government's obligation to make those payments.

III. The Government's Implied-In-Fact Contract Arguments Ignore The Controlling Law.

Plaintiffs comprehensively detail why the government has an implied-in-fact contractual duty to make CSR payments and amici will not till that same ground. Instead, amici highlight certain key errors in how the government argues this Court should analyze the implied-in-fact contract claims here.

Although it mentions the Supreme Court's leading precedent in this area—*Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985)—the government fails to acknowledge the central holding in that case. Blinders on, the government proceeds to narrow the implied-in-fact contract inquiry to the text of Section 1402 itself—and then finds that text insufficient to overcome the presumption that statutes do not create contractual rights. Doc. 21 at 33–36.

But the holding in *National Railroad* calls for a broader and more holistic analysis of implied-in-fact contract claims, consistent with contractual analysis generally. Specifically, it requires courts to "first…examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties, including their "legitimate expectation[s]" and whether "Congress would have struck" the bargain under such circumstances. 470 U.S. at 466, 468–69; *see also Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (intent to contract can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding"); *L.A. Care*, 142 Fed. Cl. at 16 (concluding "*National Railroad* encourage[s] courts not to treat one source as dispositive, but instead examine all potentially relevant signs" and "look at all relevant circumstances" to discern contractual intent).

The Supreme Court in *National Railroad* held that Congress did not, through passage of the statute at issue, intend to contractually bar itself from re-imposing any rail passenger service responsibilities on the freight railroads. *See National Railroad*, 470 U.S. at 471. Instead, the Court found that the statute did not obligate the government to "agree[] with anyone to do anything," emphasizing that, by its terms, Congress had "'expressly reserved' its right to 'repeal, alter or amend,'" the statute "'at any time.'" *Id.* at 467, 470. Here, in contrast to the statute in *National Railroad*, Sections 1402 and 1412 unambiguously required that the Secretary "shall make" the mandatory CSR

payments through monthly advances. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3).

With respect to surrounding circumstances, the Supreme Court in *National Railroad* observed that "Congress would have struck a profoundly inequitable bargain" had it agreed to the contractual terms urged by the railroads because, the Court found, Congress would have received little in exchange for a promise *never* to impose rail passenger service obligations on the profitable freight railroads. 470 U.S. at 468. The Court also determined that the "circumstances of the Act's passage belie[d] an intent to contract away" the government's "pervasive" regulation of the freight railroads, which historically included requiring them to undertake such passenger rail service obligations. *Id.* The Court observed that Congress would not have "nonchalantly shed" its "pervasive" regulatory powers and that "the railroads had no legitimate expectation" that Congress would be contractually bound. *Id.* at 468–69; *see also L.A. Care*, 142 Fed. Cl. at 16–17 (discussing *National Railroad*'s contract analysis).

Here, unlike the historical, pervasive regulation of the freight railroads which previously had required them to undertake rail passenger service obligations, the newly-created ACA Exchange markets were unprecedented, uncertain, and risky—there had been no prior, longstanding regulatory regime requiring insurers to provide health coverage to existing (much less new) members on the ACA Exchanges. *See King*, 135 S. Ct. at 2485. Moreover, unlike the freight railroads, the health insurers had a "legitimate expectation" that Congress would be bound to honor its "shall make"

obligation to make advance monthly CSR payments to insurers selling QHPs on the ACA Exchanges that, correspondingly, were bound to "reduce" their eligible customer's out-of-pocket healthcare costs under 42 U.S.C. § 18071(a). *Cf. Nat'l R.R. Passenger Corp.*, 470 U.S at 469.

Further, unlike the "profoundly inequitable bargain" that Congress would have made by promising to lift the freight railroads' passenger rail service obligations, *Nat'l R.R. Passenger Corp.* at 468, the Government without question received valuable consideration from insurers participating on the ACA Exchanges, which were "[c]entral to" the ACA's infrastructure and furthered the ACA's stated goals of expanding healthcare coverage to millions of new and previously uninsured Americans. *Moda*, 130 Fed. Cl. at 441–42, 465. Congress obligated itself to make advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit to eligible recipients was for insurers to serve as the conduit. In exchange for providing that service on behalf of the government, insurers legitimately expected to be paid the agreed-upon advance monthly CSR payments. *See L.A. Care*, 142 Fed. Cl. at 17 (finding "the Government is not getting a raw deal" where "the CSR program's design makes issuers the sole means for distributing these out-of-pocket healthcare costs to target recipients" and the insurer's participation is "vital to the success of both the CSR program and ACA generally"). Thus, the CSR program, together with and in light of the circumstances surrounding its enactment and implementation, established an implied-in-fact contract between the government and plaintiffs.

This Court's decision in *Moda* does not counsel a different result for two reasons. First, the Court declined to find an implied-in-fact-contract only after labeling risk corridors as an "incentive program," and finding no express indication in the relevant statute "evinc[ing] an intention to form a contract." *Moda*, 892 F.3d at 1330. This Court in *Moda* did not strictly apply, but is bound by, *National Railroad*. *See Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1356 (Fed. Cir. 2015) ("We are duty bound to follow the law given us by the Supreme Court unless and until it is changed.").

Second, *Moda* involved a distinct statutory program—risk corridors—not the CSR program. Under the latter, in exchange for the government's promise to make mandatory advance CSR payments, QHPs agreed to participate in the ACA Exchanges, provide expanded coverage to previously uninsured Americans, and timely provide eligible members with cost-sharing offsets to reduce their healthcare costs. Thus, in contrast to the Court's characterization of the risk corridors program in *Moda*, 892 F.3d at 1330, here, there was "undoubtedly a traditional 'quid pro quo' exchange[.]" *L.A. Care*, 142 Fed. Cl. at 16–17 (reciting contractual distinctions between risk corridors incentive program and "quid pro quo exchange" of CSR program). The CSR program is not a "safety net. Rather, it is a means for distributing a Government subsidy. The Government chose to distribute that subsidy by asking insurers to act as conduits for payment of certain eligible insureds' out-of-pocket healthcare costs." *Id.* at 17; *see also Maine Cmty. Health Options*, 142 Fed. Cl. at 75 (finding *Moda*'s analysis

"inapplicable in this case" because the CSR program is "less of an incentive program and more of a quid pro quo"); *Cmty. Health Choice*, 141 Fed. Cl. at 768 (same).

For these reasons, and those set forth more fully in plaintiffs' opening brief, the Court should affirm the trial court's summary judgment ruling in favor of Community Health Choice on its implied-in-fact contract claim.

IV. Accepting The Government's Position And Reversing The Rulings Below Would Impair Public-Private Partnerships And Create Perverse Legislative Incentives.

Controlling legal principles and precedents dictate affirmance in this case. But there are also compelling policy reasons for that outcome. Permitting Congress to circumvent explicit statutory payment promises by not funding payment—either in the present or the future—would distort the legislative process, allow future Congresses to effectively amend substantive legislation through the comparatively simple expedient of appropriations bills, and imperil the increasingly essential role of private-public partnerships.

It hardly needs to be stated that private-public partnerships are part of the backbone of our national economy. Everywhere from housing to healthcare, energy to infrastructure, these partnerships are essential to our most critical industries. But they only work if the law "safeguards both the expectations of Government contractors and the long-term fiscal interests of the United States." *Ramah Navajo*, 567 U.S. at 191; *see also Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 741 (Fed. Cir. 2018)

(Newman, J., dissenting from denial of rehearing en banc) ("Our system of public-private partnership depends on trust in the government as a fair partner.").

Accepting the government's legal position in these appeals would do neither, since it would effectively sanction what the Court long has condemned as "an absurdity"—a "promise to pay, with a reserved right to deny or change the effect of the promise." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (citation omitted). And if the government no longer is viewed as a ""reliable contracting partner"" that honors its commitments, it stands to reason that "contracting would become more cumbersome and expensive for the Government, and willing partners more scarce." *Ramah Navajo*, 567 U.S. at 191–92 (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion)). In that reality, no one wins.

The government's position also would promote irresponsible legislative experimentation without the extensive study and deliberation that should precede any Congressional enactment. Were Congress allowed to jettison unambiguous statutory promises simply by not providing the funds to pay for them, it would be incentivized to give even half-baked programs a test drive, free in the knowledge that it later could abandon them if they turned out to be ineffective or economic conditions made fulfilling the promises prohibitive—and just leave private-sector promisees holding the bag. But that would "hardly [be] worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970). And it would further repel much-needed private actors from considering any future partnerships with the government.

As for the government's implied-repeal argument in particular, that only heightens the risk of upsetting the reasonable expectations of private entities to whom Congress made its statutory promise. That is what happened here. Insurers subject to the ACA's mandate that they reduce costs for consumers reasonably expected that they would be reimbursed for those reductions through the CSR payments Congress explicitly promised through Section 1402.

Just as perniciously, accepting the government's implied-repeal argument would promote "an end-run around the substantive debates that a repeal might precipitate." *Moda*, 892 F.3d at 1334 (Newman, J., dissenting) (citation omitted). "Burying a repeal in a standard appropriations bill" would become an accepted, and perhaps strategically superior, option, especially tempting where the earlier legislation is high-profile or controversial. *Id.*

All of these negative repercussions are avoidable—simply by following the plain text of Section 1402, consistent with settled principles of construction. We urge the Court to do so.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgments of the Court of Federal Claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On this eighth day of May, 2019, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. Cir. R. 32(a) because this brief contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Garamond font.

/s/ Lawrence S. Sher
Lawrence S. Sher

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on May 8, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lawrence S. Sher
Lawrence S. Sher