2019-1633, 2019-2102

United States Court of Appeals for the Federal Circuit

COMMUNITY HEALTH CHOICE, INC.,
Plaintiff-Appellee,

– v. –

UNITED STATES,
Defendant-Appellant.

MAINE COMMUNITY HEALTH OPTIONS,
Plaintiff-Appellee,

– v. –

UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims in Nos. 18-SC and 17-2057, Chief Judge Margaret M. Sweeney

BRIEF FOR *AMICUS CURIAE* COMMON GROUND HEALTHCARE COOPERATIVE IN SUPPORT OF APPELLEES AND AFFIRMANCE

J.D. HORTON
ADAM B. WOLFSON
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017
(213) 443-3000

STEPHEN A. SWEDLOW
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 North Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 705-7400

DAVID M. COOPER
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Counsel for Amicus Curiae

CERTIFICATE OF INTEREST

Counsel for amicus curiae certifies the following:

1. Full name of every party represented by me:

Common Ground Healthcare Cooperative.

2. Name of real party in interest represented by me is:

Common Ground Healthcare Cooperative.

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, & *Maine Community Health Options v. United States of America*, No. 2019-2102 are companion cases to the present case.

Also before this Court is *Common Ground Healthcare Coop. v. United States*, No. 20-1286, which presents nearly identical issues 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.)
- *Molina Healthcare of California, Inc. v. United States*, No. 18-333 (Wheeler, J.)

Date: March 17, 2020

/s/ Stephen A. Swedlow
Stephen A. Swedlow
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 North Wacker Drive
Suite 2700
Chicago, IL 60606
(312) 705-7400

J.D. Horton
Adam B. Wolfson
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017
(213) 443-3000

David M. Cooper
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Ave.
22nd Floor
New York, NY 10010
(212) 849-7000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

STATUTORY AUTHORITIES

RULES AND REGULATIONS

ADDITIONAL AUTHORITIES

IDENTITY OF AMICUS CURIAE, INTEREST IN THE CASE, AND AUTHORITY TO FILE

Amicus curiae is Common Ground Healthcare Cooperative ("Common Ground"), on behalf of itself and a certified opt-in class. That class constitutes Plaintiffs-Appellees in *Common Ground Healthcare Coop. v. United States*, No. 20-1286 (Fed. Cir.), an appeal raising nearly identical issues to those here. At oral argument in the instant appeals, the United States recognized that the issues at stake for Common Ground were virtually identical to those here. *See Community Health Choice, Inc. v. United States*, No. 19-1633, Oral Arg. at 4:50-5:14, available at http://www.cafc.uscourts.gov/oral-argument-recordings.

Common Ground filed the first case in the nation alleging that, pursuant to the Tucker Act, the United States owes qualified health plan ("QHP") issuers back payments under the cost-sharing reduction ("CSR") program established by section 1402 of the Patient Protection and Affordable Care Act ("ACA"). On April 17, 2018, the Court of Federal Claims granted Common Ground's motion to certify a class of QHP issuers that were owed CSR reimbursements for the 2017 and/or 2018 benefit years. *Common Ground Healthcare Coop. v. United States*, 137 Fed. Cl. 630 (2018). Ultimately, 101 plaintiffs chose to opt-in to the *Common Ground* CSR class action, making this the largest CSR-related Tucker Act case in the nation. *See Common Ground Healthcare Coop. v. United States*, No. 1:17-cv-00877-MMS (Fed. Cl.), Dkt. Nos. 38, 60, 67, 69.

On February 15, 2019, the Court of Federal Claims granted Common Ground's motion for summary judgment. *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 53 (2019). The court held that Section 1402 was "a money-mandating statute for Tucker Act purposes." *Id.* at 51 (citations omitted). The court also rejected the government's argument that the claims were barred because the class would receive a "double recovery." *Id.* at 52-53.

Common Ground unquestionably has a strong interest in the correct resolution of the issue to be addressed on supplemental briefing. The decision on whether damages should be reduced will effectively decide the same issue for Common Ground's class of 101 opt-in plaintiffs.

Common Ground has authority to file because this Court granted its motion for leave to file an amicus curiae brief on February 3, 2020.[1]

SUMMARY OF ARGUMENT

The government's supplemental brief overcomplicates a very simple point: the remedy when the government does not pay what a statute requires is for the government to make the statutorily-required payment. Instead, the government tries to twist the ACA into a pretzel, so that the government may avoid

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

indisputably-required payments by arguing aggrieved plaintiffs were, through other means, able to avoid the worst of the harm the government caused by not making those payments. If the government were correct, the result would be a system that rewrites the ACA by contradicting well-established law and, by the government's own admission, cost taxpayers $194 billion *more* over the next ten years—notwithstanding that the statutory scheme is meant to *decrease* federal healthcare spending. The government's approach also would ensure extensive, annual CSR-related litigation rather than, via collateral estoppel, creating a regime where the government simply must abide by its self-imposed obligations to pay. The legally unsupported theory that leads to such results should be rejected—not only for the reasons appellees provide in their supplemental brief, but for the additional reasons set forth below that appellees and the government largely fail to address.

I. QHP issuers' CSR reimbursements should not be reduced for the simple reason that the statute defines the required relief as those reimbursements. The government's supplemental brief ignores the statute's plain language entirely, but there is no legal basis to do so.

First, Plaintiffs' claims are for specific relief in the form of the unmade CSR reimbursements. The Supreme Court and this Court consistently hold that a claim for money a statute requires the government to pay is one for specific relief. And the government presents no legal basis to reduce such specific relief.

Second, even if Plaintiffs' claims were for money damages rather than specific relief, the statute still defines those damages as the unmade CSR reimbursements. Even with silver loading, *i.e.*, increasing premiums for silver-level QHPs, the statute unquestionably and unconditionally requires the government to make *both* CSR reimbursements and provide premium tax credits. The government's theory thus depends upon creating an unwritten statutory exception, whereby the government need not make CSR reimbursements if the reason for an increase in premiums was the failure to make CSR reimbursements. But there is no legal or factual basis to create this exception.

Third, the government's approach distorts the entire statutory scheme. The ACA set up a process whereby the government would make CSR reimbursements in addition to premium tax credits because they accomplish different goals. If the government obtains this Court's blessing to persist in refusing to make CSR reimbursements, that will fundamentally alter the plans low-income insureds are choosing and the coverage that insurers provide, and it will costs taxpayers nearly $200 billion more as a result.

II. Even if the contractual principle of mitigation were relevant here, it would not support a reduction of damages. Mitigation does not apply to the breach of an absolute promise to pay. Regardless, mitigation applies only to direct consequences of a breach, and the link between the failure to make CSR

reimbursements and the supposed benefit to Plaintiffs is far too speculative to satisfy this requirement. There are numerous factors other than CSR non-payment that the government's own citations recognize caused silver loading—in particular, the government's other efforts to undermine the ACA. And there is no evidence that silver loading would have stopped had CSR reimbursements been made. The government also does not attempt to explain how it could separate out the effect of CSR non-payment, and how much silver loading would have occurred regardless. Indeed, these hypotheticals are essentially impossible to answer, which is why courts do not engage in speculation about everything that might have happened but for the breach. Rather, they look only at the direct result—here, that Plaintiffs did not receive the CSR reimbursements to which they are entitled by law.

ARGUMENT

I. THE REMEDY FOR THE STATUTORY CLAIM IS THE PAYMENT SPECIFIED BY THE STATUTE

A. This Is A Claim For Specific Relief, Not Money Damages

1. Plaintiffs seek specific relief for money to which they are entitled, not compensation for the failure to pay.

Plaintiffs are entitled to unmade CSR reimbursements under Section 1402's plain terms: a QHP issuer "making reductions under this subsection shall notify the Secretary of such [cost-sharing] reductions and the Secretary *shall make periodic and timely payments* to the issuer equal to the value of the reductions." 42 U.S.C. §•18071(c)(3)(A) (emphasis added). Incredibly, the government does not

mention this statutory language in its supplemental brief. Yet it controls.

The Supreme Court has recognized that a money-mandating statute creates both the right to the money at issue and the remedy for specific relief in the form of that same money. *See Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, states sued to enforce section 1396b(a) of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services. *Id.* at 900. The Court held that this "is not a suit seeking money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." *Id.* at 895 (quotation marks omitted). Because the plaintiff "is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that [the State] will suffer or has suffered by virtue of the withholding of those funds," "the nature of the relief sought" is "specific relief, not relief in the form of damages." *Id.* at 901 (quotation marks omitted).[2]

Such claims for specific relief are common when enforcing a money-

[2] *Bowen* found no Tucker Act jurisdiction, but as explained *infra* at I.A.3, this jurisdictional holding is based on particularities in *Bowen* plainly absent here.

mandating statute. *Bowen* recognized that "[t]here are, of course, many statutory actions over which the Claims Court has jurisdiction that enforce a statutory mandate for the payment of money rather than obtain compensation for the Government's failure to so pay." *Id.* at 900 n.31. This Court has similarly explained that a claim for statutorily-mandated payments is "specific relief in the form of money to which [the plaintiff] was entitled, rather than money damages." *Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1120 (Fed. Cir. 2007); *id.* at 1123, 1125 (claim is for specific relief where "the plaintiff requests funds to which a statute allegedly entitles it, rather than money in compensation for sustained losses").

The government misunderstands the statutory claim by characterizing it (Br. 18) as one "to put the insurer in the position it would have occupied if Congress had chosen to fund the [CSR] payments directly." Plaintiffs simply want the payments to which they are statutorily entitled. Thus, because the claim is not for a "substitute" for the unmade CSR reimbursements, but rather for the payments themselves—the "very thing to which [they were] entitled"—the claim here is for specific relief. *See Bowen*, 487 U.S. at 895 (quotation marks omitted).[3]

[3] While the D.C. Circuit has previously suggested that a specific appropriation is required for specific relief, *City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994), more recently it recognized plaintiff's "claim represents specific relief … not consequential damages compensating for an

2. The specific relief of CSR reimbursements cannot be reduced by premium tax credits.

Given that the claim is for specific relief in the form of the CSR reimbursements, there is no legal basis to reduce or eliminate that relief. Specific relief, by definition, is for the money Plaintiffs are entitled to under the statute. And the statute states that QHP issuers are entitled to CSR reimbursements in the amount of the cost-sharing reductions provided to insureds. The government identifies no statutory basis to undermine the entitlement to those payments. Indeed, the government's entire enterprise of determining what would have happened had the payments been made, to determine compensation for the harm of not being paid, is irrelevant to a claim for specific relief.

The government cites no case reducing a claim for specific relief based on a contract-based "mitigation" theory. In the analogous context of restitution, it is well established that a party is entitled to the payments it is owed, *regardless* of whether it may have profited from the breach. *See Mobil Oil Expl. & Producing*

---

injury" even where "the FDIC no longer possesses the precise funds," *Am.'s Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 829-30 (D.C. Cir. 2000). And while a divided Tenth Circuit opinion suggested specific relief requires a specific appropriation, *see Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1198 (10th Cir. 2017), the Supreme Court has always considered only the nature of the relief, not the source of the appropriation, in deciding whether a claim is for specific relief, *see id*. at 1201 (Matheson, J., concurring in part and dissenting in part). The same is true of this Court. In short, specific relief is for a particular payment, not for particular currency from a particular source.

Se., Inc. v. United States, 530 U.S. 604, 623-24 (2000) ("[T]he Government argues that repudiation could not have hurt the companies …. This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. … [T]he law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain …."); *Amber Res. Co. v. United States*, 538 F.3d 1358, 1376 (Fed. Cir. 2008) ("[B]ecause the lessees are seeking restitution of their initial payments, not expectancy damages, it is irrelevant that other causes may also have prevented them from obtaining the requested suspensions. … [T]he lessees are not required to show that they would … ultimately have profited from the leases."). Likewise, here, Plaintiffs' statutory claims are not based on expectancy damages, and thus the ultimate consequences of the government's failure to pay are irrelevant to Plaintiffs' right to those payments as specific relief.

The government surely would dispute that QHP issuers could receive *more* than the CSR reimbursements if the failure to pay caused QHP issuers additional harm. Yet the government's theory would require such additional compensation based on its speculative venture into a but-for world with full CSR payments.[4]

[4] To the extent the government suggests that "but for" causation only decreases damages but never increases them above the statutory entitlement, that approach is legally untenable and would improperly incentivize the government always to refuse payment in the hope of having it reduced later based on mitigation.

There is no need (or basis) for this overcomplication: by law, the government must pay what it is statutorily required to pay.

3. The Court of Federal Claims has jurisdiction to provide specific relief in the form of a money judgment.

There is no jurisdictional concern with treating the claim as one for specific relief. As this Court has explained: "If [the Court of Federal Claims] can provide an adequate remedy—if a money judgment will give the plaintiff essentially the remedy he seeks—then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the Tucker Act." *Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1126 (Fed. Cir. 2007); *id.* at 1125 (noting that if "a money judgment[ ]will provide an adequate remedy, the [jurisdictional] inquiry is at an end"). More generally, it is well established that jurisdiction is based on whether the claim is ultimately for money, regardless of whether it could be characterized as equitable, declaratory, or injunctive relief. *See Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004); *Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998). Here, a money judgment is precisely what Plaintiffs seek. Thus, regardless of whether it is considered specific relief or compensatory damages, and regardless of how the money judgment might affect a suit for future payments, the Court of Federal Claims has jurisdiction.

While *Bowen* found no jurisdiction in the Court of Claims, that portion of its

holding is plainly inapplicable here. *Bowen* held that there was district court jurisdiction under the APA—rather than Tucker Act jurisdiction—because "the interaction between the State's administration of its responsibilities under an approved Medicaid plan and the Secretary's interpretation of his regulations may make it appropriate for judicial review to culminate in the entry of declaratory or injunctive relief that requires the Secretary to modify future practices." 487 U.S. at 905. Nonetheless, *Bowen* recognized that "[t]he jurisdiction of the Claims Court … is not expressly limited to actions for 'money damages,'" and applies to "statutes that provide compensation for specific instances of past injuries or labors" because they do not "require the type of injunctive and declaratory powers that the district courts can bring to bear." *Id.* at 900 n.31; *see also id.* at 904 n.39.

Thus, *Bowen* is limited to situations where the claim requires declaratory or injunctive relief and where it implicates complexities of the federal-state relationship. *See, e.g.*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (distinguishing *Bowen* because it "was not merely for past due sums, but for an injunction"). Here, the claim is strictly for past, unmade payments and requires no interference with federal-state relations.

This Court has repeatedly emphasized the narrowness of *Bowen*'s holding and recognized jurisdiction in cases like this one. For instance, in *Consolidated Edison Co. v. United States*, 247 F.3d 1378 (Fed. Cir. 2001), this Court held that

Bowen did not enunciate a "categorical rule" and instead rested on "the complexity of the continuous relationship between the federal and state governments administering the Medicaid program." *Id.* at 1383-84. In contrast, where the claim "does not involve the complexities of government-to-government relationships," *Bowen*'s reasoning is inapposite. *Id.* at 1384. Thus, the Court of Federal Claims had jurisdiction over claims regarding "a known and fixed series of payments over time." *Id.* Similarly, *Suburban* held that there was Tucker Act jurisdiction where, "unlike *Bowen*, this case does not involve a complex, ongoing relationship between plaintiff and the Government in which the plaintiff seeks declaratory or injunctive relief to modify the Government's future obligations under the program." 480 F.3d at 1127; *see also, e.g.*, *Kanemoto v. Reno*, 41 F.3d 641, 647 (Fed. Cir. 1994) (holding that where "there is simply no need to resort to declaratory or injunctive powers to afford Kanemoto complete relief," there is Tucker Act jurisdiction). As the instant case neither implicates the state-federal context of *Bowen* nor requires prospective relief, there is no basis to deny jurisdiction here.

B. Even If The Claim Were For Money Damages, The Statutory Measure Of Those Damages Is Controlling

1. The money damages are the CSR reimbursements under the statute.

Even assuming, *arguendo*, that the CSR reimbursements Plaintiffs seek should be considered money damages, the statute still defines those damages as the

CSR reimbursements themselves. The government's distinction between implied and express damages remedies (Br. 17-22) is a red herring: regardless of whether it is called implied or express, the statute entitles QHP issuers to CSR reimbursements. That is clear when considering not the hypotheticals the government suggests, but the situation as it currently stands. If this Court looks at the government's obligation right now, under the plain language of the statute, the government must make CSR reimbursements and provide premium tax credits, regardless of whether the latter increased due to silver loading.[5]

The government's proposal to deduct the increase in premium tax credits from CSR reimbursements conflicts with the statute's plain language. The ACA states that, entirely apart from the CSR reimbursements, QHP issuers are entitled to a "[r]efundable [tax] credit for coverage under a qualified health plan." 26 U.S.C. § 36B. Thus, the statute requires *both* CSR reimbursements and premium tax credits, and does not allow for reduction of one based on increase of the other, let alone based on speculation about why one increased.

Indeed, the government essentially asks this Court to revise clear language that it "shall make periodic and timely payments to the issuer equal to the value of the reductions," 42 U.S.C. §•18071(c)(3)(A), into "shall see what happens, and if it

[5] This is undisputable because state regulators could have allowed silver loading even if the government made CSR payments. And in that instance, the government could not plausibly seek repayment of the premium tax credits or CSR payments.

turns out the QHP issuers are doing well without the payments, the government does not have to make the payments." But such a deduction (which statutorily does not exist) cannot be inserted without any indication of congressional intent to provide one. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 640 (2005); *D.C. v. United States*, 67 Fed. Cl. 292, 330 (2005).[6] This is not a task the government attempts to perform in its supplemental brief—because it cannot.

2. The common law doctrine of mitigation for contractual damages is inapplicable here.

Contrary to the government's suggestion (Br. 18), courts consistently recognize that statutory claims must be treated differently than contract claims. "The Federal Circuit … has taken care to maintain the division between contract claims and claims based upon the Constitution, a statute, or a regulation, which are subject to the requirement that they fairly be interpreted as mandating compensation by the federal government." *Speed v. United States*, 97 Fed. Cl. 58, 66-67 (2011) (citing cases). Other circuits are in accord.[7] Thus, the government

[6] The government relies (Br. 17, 20) on *United States v. Bormes*, 568 U.S. 6 (2012), to argue that the claim is for the "damages sustained," but that simply begs the question of what constitutes the damages, which is based on the statute itself. That is why *Bormes* held the Tucker Act could not grant jurisdiction in that case, because the statute there contained its own judicial remedy scheme to impose liability. *See id.* at 13. Here, in contrast, the ACA did not provide QHP issuers with a separate remedial scheme beyond access to the Court of Federal Claims, if (as happened) the government failed to make statutorily-required payments.

[7] *See Modoc*, 881 F.3d at 1194 ("[T]he rules that traditionally govern contractual

cannot reduce damages based on common law ideas that have no statutory basis. *See Bell v. United States*, 23 Cl. Ct. 73, 79-80 (1991) ("Equity considerations cannot override the direct statutory entitlement to severance pay….").

The government advances two arguments for importing contract principles here, both of which are meritless.

First, the government relies (Br. 18-19) on cases under the Back Pay Act. However, those are not cases under the current, generally applicable Back Pay Act, which expressly has a provision for offset—unlike the statute here. *See* 5 U.S.C. § 5596(b)(1) (An employee "(A) is entitled, on correction of the personnel action, to receive … —(i) an amount equal to all or any part of the pay, allowances, or differentials, … less any amounts earned by the employee ….").[8]

---

relationships don't necessarily apply in the context of federal grant programs."); *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014) (rejecting as "problematic" "the whole notion of importing contract doctrines into an area that is a complex statutory and regulatory scheme" because "[u]pon joining the Medicare program … the hospitals received a statutory entitlement, not a contractual right") (quotation marks omitted); *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 762 F.2d 406, 409 (4th Cir. 1985) (rejecting argument to apply "contractual principles" of impossibility of performance to federal grant program, which is instead "governed by the applicable statute[s] and implementing regulations").

[8] Similarly, when a court awards back pay under Title VII of the Civil Rights Act, an express provision of that statute requires the court deduct "interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against" from the award of damages. 42 U.S.C. § 20003-5(g)(1). Thus, unlike here, when Congress wishes to limit a remedy for a violation of a statutorily-created right, it does so expressly.

The government relies exclusively on decades-old cases dealing with the very particular context of military back pay. Those cases expressly recognize they are unique to the military back pay situation, given the particular nature of the relief claimed there: "The theory of the deduction was delineated in *Motto*; the offset is based on the unusual jurisdiction of the Court of Claims in pay cases, and, in essence, is an equitable condition imposed by the sovereign through this court on parties who seek to invoke its jurisdiction." *Craft v. United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978) (footnote omitted). And they relied on the "principle that the Government is entitled to the complete services and undivided attention of its employee during working hours." *Id.* In other words, a military employee cannot as a matter of law obtain both military pay and outside earnings (unless specifically exempted). *See id.*; *Silver v. United States*, 551 F.2d 295, 297 (Ct. Cl. 1977). Here, in contrast, the statute says *nothing* to suggest that CSR reimbursements and an increase in premium tax credits cannot both be provided. In any event, *Craft* recognized it was not applying "setoff … or even mitigation of damages in the traditional sense," 589 F.2d at 1068, and provides no basis for the government's attempt to apply it here. Thus, the government identifies no case applying common-law principles of mitigation to reduce its statutory obligation.

Second, the government errs in relying (Br. 20-22) on sovereign immunity. If this Court concludes (as it should) that the statutory provision at issue is money-

mandating, there is no legal basis to hold that sovereign immunity was waived as to the statutory claim but not as to the statutory damages. The only case the government cites (Br. 21-22) discussing this issue refutes the government's argument. *See Heinzelman v. Sec'y of Health & Human Servs.*, 681 F.3d 1374 (Fed. Cir. 2012). *Heinzelman* stated: "Because the plain language of the statute reveals that Congress did not include SSDI benefits as an offset to compensation under the Vaccine Act, resort to sovereign immunity principles is neither necessary nor proper." *Id.* at 1383. And it rejected the government's appeal from a decision holding that "Petitioner's compensation under the Vaccine Act should not be reduced by the amount of benefits she is eligible to receive through Social Security Disability Insurance ('SSDI')." *Id.* at 1375. Likewise, here, sovereign immunity is inapposite because there is no statutory provision for offset or mitigation.[9]

3. The government effectively seeks offset, but has no legal basis for offset.

To the extent any principle of reduction were applicable, it would be offset, not mitigation. *See Modoc*, 881 F.3d at 1194-95 ("[B]ecause HUD hasn't advanced on appeal any alternative basis for its authority to recapture the funds via administrative offset, we therefore affirm the district court's ruling that HUD acted

[9] The other cases the government relies upon are inapposite because they concern whether sovereign immunity precludes *any* remedy, *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992), or an *additional* remedy (e.g., attorney's fees) not provided by statute, *Graham v. Henegar*, 640 F.2d 732, 735-36 (5th Cir. 1981).

illegally by recapturing the alleged overpayments.") (footnote omitted). Mitigation concerns whether a plaintiff has done its best to limit its damages, but the ACA imposes no obligation of mitigation or anything else for QHP issuers to receive CSR reimbursements. Nor is the government's argument really about what the QHP issuers have done or not done; rather, it is about the premium tax credits the government is providing. This is an argument for offset, which concerns whether payments the government has already made should be considered in determining what it currently owes. It would be improper to allow the government to evade the requirements offset by calling its argument one for "mitigation."

But the government does not argue for offset, and for good reason. "[A] prerequisite to a valid offset is that mutual debts exist between the parties. For a debt to exist, the offsetting party must have a valid claim against the party subject to the offset." *Agility Pub. Warehousing Co., K.S.C.P. v. United States*, 143 Fed. Cl. 157, 169 (2019) (citing *J.G.B. Enters., Inc. v. United States*, 497 F.3d 1259 (Fed. Cir. 2007); *see also Abramson v. United States*, 42 Fed. Cl. 326, 330 (1998) ("The Government is entitled to an offset when able to demonstrate that plaintiffs owe the Government money.") (citing *Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995)). Plaintiffs undisputedly do not owe the government money—and the government has no claim against them—because they have not even received any money through the tax rebate program. Instead, the payments were made to

individuals, which then allowed the QHP issuers to raise rates. Accordingly, there was no direct exchange between the government and the QHP issuers such that the QHP issuers could owe the government money.

C. The Government's Approach Would Undermine The Statutory Scheme And Create Great Uncertainty Over The Proper Functioning Of Other Statutory Schemes

Not only does the government's argument conflict with the plain language of section 1402 of the ACA, but it distorts the proper functioning of the statute as a whole. If the government is allowed to ignore section 1402's mandate, the government itself admits (Br. 4) that such a decision will cost taxpayers $194 billion *more* over the next ten years. The government presents no argument for why it should be able to flout the statute to the enormous detriment of taxpayers.

On a practical level, any ruling in these cases will not unduly benefit QHP issuers either. The ACA prevents QHP issuers from enjoying too-high profits for any benefit year. Specifically, the statute establishes a regime around an issuer's medical loss ratio ("MLR"), wherein QHP issuers must provide a rebate to enrollees if they spend less than 80% of their premiums on incurred claims and medical costs in a benefit year. 45 C.F.R. § 158.210(c). CSR payments must be deducted from the issuer's incurred claims, *id.* § 158.140(b)(1)(iii), so if QHP issuers' collections in these cases lower their MLR for 2017 or 2018, insurers may be required by law to provide a rebate to their insureds. *Id.* Thus, it is *insureds*

that will enjoy any supposed "windfall" from these cases.

The government also errs in suggesting (Br. 12-13) that its practice benefits the overall health insurance market by helping low-income insureds purchase better-coverage gold and bronze plans. If silver loading has made gold and bronze plans more attainable for some insureds and led to higher enrollment, that is because those plans' premiums were too high in the first place due to the government's many other premium-increasing acts, which have shrunk the insurance pool, forced QHP issuers out of business, and created unexpectedly high losses since the ACA went into effect. *See infra* at II.B.1; *see also King v. Burwell*, 135 S. Ct. 2480, 2493 (2015). Thus, silver loading is not inherently beneficial for insurance markets, but is simply a way state regulators and QHP issuers have found to fight back against sustained attacks on the ACA. In any event, this jerry-rigging of a partial solution to the government's unwillingness to comply with the statute is plainly not the system Congress intended in the ACA.

Finally, ruling for the QHP issuers will increase judicial efficiency, reduce the likelihood of future litigation, and return some normalcy to the ACA exchanges, because it will establish issue preclusion on future attempts to avoid paying timely CSR reimbursements. If this Court enforces the government's statutory obligation, any future decision not to pay timely CSR reimbursements will face a quick path to resolution in the Court of Federal Claims. The alternative

is to require QHP issuers to litigate each benefit year for the foreseeable future, with time-intensive inquiries and disputes on each QHP issuer's damages. *Infra* at II.B.3. That latter scenario all but guarantees a multiplicity of lawsuits, whereas enforcing the government's statutory obligation all but guarantees the opposite.

II. EVEN IF CONTRACT PRINCIPLES APPLIED, DAMAGES FOR FAILURE TO MAKE CSR REIMBURSEMENTS SHOULD NOT BE REDUCED BASED ON PREMIUM TAX CREDITS

A. Mitigation Does Not Apply To Damages From The Government's Breach Of An Absolute Promise To Pay

Contractual damages from an absolute promise to pay cannot be reduced by whatever measures the non-breaching party takes to mitigate its losses. Where a "plaintiff simply claims the amount … owed to it under the contract," the breaching party's "obligation to pay these [amounts] would in no way be affected by the amount of income [plaintiff] was able to produce from other sources." *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 560 (7th Cir. 1985) (holding plaintiff "did not have any duty to mitigate").[10] Thus, because

[10] *See also Rice's Lucky Clover Honey, LLC v. Hawley*, 700 F. App'x 852, 863 (10th Cir. 2017) ("[T]here is no duty to make a deduction [of the amount avoided through mitigation] when the contract specifies the amount owed to the injured party."); *Branch Banking & Tr. Co. v. Lichty Bros. Constr.*, 488 F. App'x 430, 434 (11th Cir. 2012) ("Where the [contracts in question] contain absolute promises to pay, there is no duty to mitigate damages."); *McBride v. Mkt. St. Mortg.*, 381 F. App'x 758, 773 n.21 (10th Cir. 2010) (noting "no duty to mitigate" where "under the contract plaintiff's right to severance pay was absolute") (citation and quotation marks omitted); *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1113-14 (8th Cir.

QHP issuers are entitled to CSR reimbursements under the absolute terms of the ACA, those payments may not be reduced by future benefits QHP issuers receive.

The cases the government cites (Br. 8-10) regarding the general duty to mitigate do not involve breaches of contractual obligations to pay specific amounts, as is the case here. For instance, in *Robinson v. United States*, 305 F.3d 1330 (Fed. Cir. 2002), the issue was damages for breach of a contractual promise to purchase a restaurant and land. *Id.* at 1331. Similarly, in *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363 (Fed. Cir. 2003), the government's breach did not involve a payment, and the Court of Federal Claims was forced to determine the "profits that would have been earned but for" the required change in accounting. *Id.* at 1371. No such assessment is necessary here: to put the QHP issuers in the place they would have been had the government paid the CSR subsidies, the government need only pay them. Simply put, outside the context of payments, mitigation is considered in measuring damages; but for payments, no such measurement need occur because the lack of payment itself is the damage.

B. Even If Mitigation Were Applicable, The Supposed Benefit To Plaintiffs Is Not Sufficiently Connected To The Government's Breach To Reduce Damages Here

Even if mitigation were relevant to calculation of damages here, damages

---

2002) (recognizing no duty to mitigate exists where contract entitled plaintiff to "payment of all compensation remaining under the terms of employment").

should not be reduced by any speculative benefits QHP issuers supposedly obtained through increasing premium tax credits because such increases are not a direct result of the government's violation of its statutory obligation. "[M]itigation is limited to actions reasonably directly related to the breach and its proximate consequences." *Slattery v. United States*, 583 F.3d 800, 817 (Fed. Cir. 2009) (quotation marks omitted), *opinion vacated on unrelated grounds*, 369 F. App'x 142 (Fed. Cir. 2010), and *on reh'g en banc*, 635 F.3d 1298 (Fed. Cir. 2011). Thus, "unrelated events and remote consequences … are not appropriate to incorporate into damages for breach of contract." *Home Sav. of Am., F.S.B. v. United States*, 399 F.3d 1341, 1352 (Fed. Cir. 2005) (brackets and quotation marks omitted).[11]

Moreover, courts will not engage in speculation to determine whether damages might have been lower but for the breach. *See Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1072 (Fed. Cir. 2001) (rejecting argument that damages passed on to customers could be deducted

[11] The government relies (Br. 8-10) on *LaSalle*, but *LaSalle* adopts the same standard. 317 F.3d at 1371-72. There, the link was direct because there was a "substitute transaction." *Id.* at 1372. But CSR payments and rising premium tax credits are not substitutes, *see* Appellees' Supp. Br. 18-20 & n.12, as shown by the vast difference in their costs and effects. *See, e.g.*, *Koby v. United States*, 53 Fed. Cl. 493, 498 (2002) (declining to find a substitute transaction where, even though the transaction "involved the same property," "the terms of the two transactions diverged dramatically"); *Slattery*, 583 F.3d at 817-18 (explaining that *LaSalle* is inapplicable and mitigation improper where it is based on "whatever gain or loss in value might have occurred due to subsequent economic conditions").

because it "would entail extremely difficult burdens for the trial court"); *see also, e.g.*, *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1012 (2d Cir. 1991); *Chevron U.S.A., Inc. v. United States*, 110 Fed. Cl. 747, 804-05 (2013). While the government argues (Br. 24) that a "passing on" defense is inapplicable here, the government does not dispute the basic point that speculative reductions of damages are consistently rejected. And while the government suggests (Br. 8) that Plaintiffs have the burden to disprove the decrease in damages, in fact the government has the burden to "identify … with particularity" the "nature and amount" of the benefits Plaintiffs retained as a result of the government's breach. *S. Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1304 (Fed. Cir. 2011); *see also Home Sav.*, 399 F.3d at 1353.

Here, the chain of causation the government postulates is far too remote and speculative to support reduction of damages.

1. Numerous factors other than failure to make CSR reimbursements caused silver loading.

There are many factors affecting premiums that the government simply ignores. The government has taken numerous steps with the unquestioned effect (and, sometimes, explicit goal) of raising insurance premiums, in addition to and independent of the government's decision in October 2017 to cease paying CSR reimbursements. For example, HHS implemented a "transitional policy" in November 2013 that "allowed insurers to continue to offer plans that did not

comply with certain of the ACA's reforms even for non-grandfathered plans," which "dampened ACA enrollment … , especially by healthier individuals," which led to higher premiums for the next benefit year. *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1317 (Fed. Cir. 2018). Shortly before that next benefit year, Congress passed an appropriations bill that included a rider prohibiting the Centers for Medicare and Medicaid Services ("CMS") from using amounts appropriated to CMS for that year to pay "risk corridor" amounts. *Id.* at 1318. Without full risk corridor payments, however, QHP issuers suffered massive, unexpected losses, which led many issuers to go out of business or stop offering QHPs altogether—which, in turn, created even more upward pressure on issuers' premiums.[12] Congress included similar riders in its appropriations bills for 2016 and 2017. *Id.* at 1319. Then, in late 2017, Congress reduced the penalty for the ACA's so-called "individual mandate" to $0, Pub. L. No. 115-97 § 11081, which essentially removed the ACA's key requirement to obtain health coverage. This single change is expected to cause more than 7 million people to drop their health coverage, leading to a less healthy insurance pool and thus higher premiums. Congressional

[12] *See, e.g.*, Daniel W. Sacks, et al., *How Do Insurance Firms Respond to Financial Risk Sharing Regulations? Evidence From the Affordable Care Act*, Nat'l Bureau of Econ. Research, at 2-3 (Dec. 2017, revised July 2019), available at https://www.nber.org/papers/w24129.pdf; Knowledge@Wharton, *How the ACA 'Risk Corridor' Fallout Is Hurting Health Care* (Mar. 29, 2018), available at https:// knowledge.wharton.upenn.edu/article/significance-risk-corridors-lawsuits.

Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2019 to 2029*, at 11 (May 2019), available at https://go.usa.gov/xdB82; *see also King*, 135 S. Ct. at 2485-86 (describing the "death spiral" that results when QHP issuers "were forced to increase premiums to account for that fact that, more and more, it was the sick rather than the healthy who were buying insurance").

The government's argument (Br. 15-17) that silver loading can be tied solely to the lack of CSR reimbursements is therefore meritless. The government's own sources conclude that silver loading is meant to combat several attacks on the ACA. These include the cessation of CSR reimbursements, but also the elimination of the individual mandate penalty and the fact that many insurance markets now only have one QHP issuer due to competitors' insolvency or withdrawal from ACA exchanges. *See, e.g.*, Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 2 (May 23, 2018) ("May 2018 CBO Report"), available at https://go.usa.gov/xdBQa. These intervening, unaccounted-for factors belie direct causation. *See La Van v. United States*, 382 F.3d 1340, 1351 (Fed. Cir. 2004) ("For a damage to be direct there must appear no intervening incident … to complicate or confuse the certainty of the result between the cause and the damage; the cause must produce the effect inevitably and naturally, not possibly nor even probably.") (quotation marks omitted).

2. There is no evidence that silver loading would end if the government made CSR reimbursements.

The government's argument is even more tenuous than assuming that not making CSR reimbursements alone caused silver loading, because the silver loading occurred *before* most of the CSR reimbursements at issue. *See* Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026*, at 33-34 (March 2016), available at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-healthinsurancebaselineonecol.pdf. Thus, the question is whether silver loading would have been *disallowed* if the government had started making CSR reimbursements, and there is no evidence at all to suggest this would occur given the other government actions that have caused increasing premiums. Indeed, Congress recently protected silver loading in its annual appropriations bill, even while maintaining the requirement that the government reimburse QHP issuers for their CSR reimbursements. Pub. L. No. 116-94 § 609. This strongly indicates that, now that silver loading has been discovered, it will not disappear even if this Court forces the government to pay the CSR amounts it owes. Indeed, there is no incentive for state insurance regulators to disallow it given that it imposes extra costs on the federal government, not the states or the insureds.[13]

[13] The government relies (Br. 14) on actuarial memoranda of Community Health

3. The government fails to provide any basis to show the degree to which CSR non-payment caused silver loading.

The government errs in presuming (Br. 15, 20) that silver loading is an all-or-nothing proposition. The question is not simply whether CSR non-payment caused silver loading, but *how much* silver loading, premiums, and tax credits increased—and *how much* they would have increased due to the other actions discussed above, increasing health care costs, and other market conditions. And as appellees explain (Supp. Br. 4, 26-27), many conditions affect silver loading.

The government presents no evidentiary basis to disaggregate the lack of CSR reimbursements from all of these factors to determine what amount can be attributed to CSR non-payment. That would be a nearly impossible task, which is precisely why courts do not engage in this kind of attenuated analysis of the but-for world. Indeed, the government's own evidence is that the total increase is due to many factors in combination. *Supra* at II.B.2; May 2018 CBO Report at 2 ("In

---

Choice and Maine Community Health Options, but those memoranda do not suggest that factors other than CSR non-payment were irrelevant to silver loading, let alone that silver loading would cease if CSR payments were made. To the contrary, some of the actuarial memoranda include lists of "Reasons for Rate Change" or "Reasons for Rate Increase" and *do not* include the government's failure to issue CSR reimbursements on those lists. *See* Milliman, *Part III Actuarial Memorandum, Maine Community Health Options Individual Alternate Rate Filing Effective January 1, 2019* at 3 (rev. July 25, 2018), available at https://go.usa.gov/xdruk; Milliman, *Part III Actuarial Memorandum, Maine Community Health Options, Individual Rate Filing Effective January 1, 2020* at 3 (rev. Aug. 14, 2019), available at https://go.usa.gov/xdru9.

2018, the average premium for a benchmark plan … is about 34 percent higher than it was in 2017. By CBO and JCT's estimates, in addition to rising health care costs per person, the increase was caused by three primary factors: First, insurers are no longer reimbursed for the costs of [CSRs] … ; second, a larger percentage of the population lives in areas with only one insurer in the marketplace; and third, some insurers expected less enforcement of the individual mandate ….").

4. The government provides no basis to show the degree to which insurers actually benefited from silver loading.

Even if the effect of CSR reimbursements on silver loading and premium tax credits could be measured, the question would remain how much insurers have benefited. Contrary to the government's assumption that the insurers simply receive a dollar-for-dollar benefit for every increase in the tax credit, the reality is that silver loading does not just affect tax credits; it also changes the pool of insureds and the coverage they receive, and thus changes both the premiums and costs for insurance companies. *See* Appellees' Supp. Br. 4, 27-28.[14] Again, the

[14] *See also* Susannah Luthi, *Is silver-loading the silver bullet? Actuaries wary of long-term impact of CSR cutoff*, Modern Healthcare (Apr. 5, 2018), available at https://www.modernhealthcare.com/article/20180405/NEWS/180409943/is-silver-loading-the-silver-bullet-actuaries-wary-of-long-term-impact-of-csr-cutoff (noting that actuaries are worried that people shifting to other metal plans will not be able to afford out-of-pocket costs during the year, which is what CSRs provide); Bipartisan Policy Center, *Stabilizing the Individual Insurance Market: What Happened and What Next?*, at 6 (Mar. 2018), available at https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Health-Stabilizing-The-

government does not even attempt to explain how these effects could be measured.

Finally, the government errs in relying (Br. 7) on the idea that a non-breaching party cannot be put into a position superior to the one it would have occupied but for the breach. The position that Plaintiffs would be in but for the breach is that they would have the CSR reimbursements; further speculation about how the world might have been different had the CSR reimbursements been made is improper under the statute and common law—and, as discussed above, wholly speculative. In any event, Plaintiffs are not asking for double recovery, but for payments and credits under two different statutory provisions. It is the government that is asking for double-counting one set of payments for two separate statutory provisions. Indeed, this Court has recognized that when a contract requires a particular payment, the contractual damages must be the full amount of that payment, even if it renders the non-breaching party better off than if payment had been made in the first place. *See Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1364-65 (Fed. Cir. 2011). *A fortiori*, a *statutory* obligation to make a payment cannot be disregarded based on the supposed threat of double recovery.

CONCLUSION

The judgment should be affirmed.

Individual-Health-Insurance-Market.pdf (similar).

Dated: March 17, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

/s/ Stephen A. Swedlow
Stephen A. Swedlow
191 North Wacker Drive
Suite 2700
Chicago, IL 60606
(312) 705-7400

J.D. Horton
Adam B. Wolfson
865 S. Figueroa Street
10th Floor
Los Angeles, CA 90017
(213) 443-3000

David M. Cooper
51 Madison Ave.
22nd Floor
New York, NY 10010
(212) 849-7000

Attorneys for Amicus Curiae

CERTIFICATION PURSUANT TO FRAP 32(A)(7)(C)

This brief complies with the type-volume limitation stated in this Court's order because it contains 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman, 14-point type.

/s/ Stephen A. Swedlow
Stephen A. Swedlow
Attorney for Amicus Curiae

Dated: March 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2020, I served the foregoing brief on counsel for all parties via CM/ECF.

/s/ Stephen A. Swedlow
Stephen A. Swedlow
Attorney for Amicus Curiae

Dated: March 17, 2020