Nos. 2019-1633, 2019-2102

**IN THE 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 Case Nos. 18-5C and 17-2057, Chief Judge Margaret M. Sweeney

RESPONSE IN OPPOSITION TO REHEARING PETITIONS, AND CONDITIONAL CROSS-PETITION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

With leave of this Court, the government is filing this conditional cross-petition for rehearing en banc. *See* 9/14/20 Order. The panel ruled for plaintiffs on liability but accepted the government's argument with respect to damages. Based on my professional judgment, if the Court grants plaintiffs' petitions to rehear the damages ruling, these appeals will also require an answer to the following precedent-setting liability question of exceptional importance:

Whether the Patient Protection and Affordable Care Act (ACA) is fairly interpreted to mandate compensation for cost-sharing reduction payments that Congress declined to fund, even though the ACA itself provides a mechanism for compensating insurers through additional premium tax credits.

/s/ Alisa B. Klein
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PRELIMINARY STATEMENT

These cases concern the relationship between two insurance subsidies authorized by the Patient Protection and Affordable Care Act: cost-sharing reduction (CSR) payments and premium tax credits. In October 2017, the Department of Health and Human Services (HHS) ceased making CSR payments because of the absence of an appropriation. Beginning with the 2018 year, plaintiffs and other insurers raised premiums for silver plans sold on Exchanges to offset the absence of CSR payments—a practice known as "silver-loading."

By operation of law under the ACA, silver-loading caused a significant increase in the premium tax credits that the government pays to insurers, because the ACA ties the amount of premium tax credits to silver-plan premiums. The Congressional Budget Office (CBO) projected that the government will pay insurers substantially more in additional premium tax credits than it will save in CSR payments. CBO, *The Effects of Terminating Payments for Cost-Sharing Reductions* at 2 (Aug. 15, 2017) (August 2017 CBO Report), https://go.usa.gov/xdZQ8. Congress has since enacted legislation that protects the practice of silver-loading through the 2021 year. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. N, § 609, 133 Stat. 2534, 3130 (Dec. 19, 2019) ("Protection Of Silver Loading Practice").

Plaintiffs seek damages equal to the full value of unfunded CSR payments. In unanimous decisions, the panel (Dyk, Bryson, Taranto) ruled that the ACA is fairly interpreted to mandate compensation for unfunded CSR payments, but that the trial court must reduce an insurer's damages by the amount of additional premium tax credits that the insurer received due to the termination of CSR payments. *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020) (incorporating the reasoning of *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020)).

Plaintiffs seek review of the damages ruling. That ruling does not conflict with any decision of the Supreme Court or this Court, nor does it present an issue of exceptional importance. Thus, plaintiffs' petitions should be denied. However, with leave of this Court, *see* 9/14/20 Order, the government is filing this conditional cross-petition for rehearing en banc. If the Court decides to rehear the panel's damages ruling, it should also rehear the liability ruling, which was intertwined with the damages ruling. The panel found it unnecessary to consider the ACA's premium tax-credit mechanism in the liability analysis, because the panel concluded that "[d]amages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries." *Sanford*, 969 F.3d at 1383. Those offsets are expected to total billions of dollars each year and, if they were not taken into account, insurers would receive a massive windfall from the public fisc. *See* August 2017 CBO Report at 2 (projecting that the additional premium tax credits will exceed unpaid CSR subsidies by $194 billion over a ten-year period). Thus, if the Court decides to rehear the damages ruling, the liability ruling would also warrant further review.

BACKGROUND

Section 1402 of the ACA requires insurers to reduce cost sharing (such as deductibles and copayments) for certain individuals who purchase silver plans through an Exchange. Congress understood that, without direct payments from the government, insurers would raise premiums to offset that reduced cost sharing. Accordingly, "to reduce the premiums," ACA § 1412(a)(3), Congress directed the government to make advance payments to insurers equal to the value of the cost-sharing reductions, *id.* § 1412(c)(3).

The government ceased making CSR payments in October 2017, based on the determination (uncontested here) that there was no appropriation. For 2018 and subsequent years, plaintiffs and other insurers responded by "silver-loading": they raised silver-plan premiums to offset the absence of CSR payments.[1]

As the CBO has explained, the effect of silver-loading is to substantially increase federal payments to insurers and enrollment through the Exchanges. The vast majority of people who buy coverage through the Exchanges do so using premium tax credits. *King v. Burwell*, 576 U.S. 473, 494 (2015) (87% in 2014). Under

[1] *See, e.g.*, Milliman, *Part III Actuarial Memorandum (Redacted): Community Health Choice Individual Rate Filing Effective January 1, 2018* at 3 (Sept. 18, 2017), https://go.usa.gov/xEFjG (indicating that plaintiff Community Health Choice raised its 2018 rates on the assumption that "CSRs will not continue to be reimbursed"); Milliman, *Part III Actuarial Memorandum, Maine Community Health Options Individual Rate Filing Effective January 1, 2018,* at 2, 3 (Sept. 5, 2017), https://go.usa.gov/xdruZ (indicating that plaintiff Maine Community's 2018 rates assumed "no funding of CSR subsidies in 2018").

the ACA's formula, "[t]he size of premium tax credits is linked to the premiums for the second-lowest-cost silver plans offered" through the Exchanges. CBO, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 9 (May 23, 2018) (May 2018 CBO Report), https://go.usa.gov/xdBQa. Thus, the premium tax credit's structure largely insulates subsidized enrollees from silver-plan premium increases, because the premium tax credits go up when silver-plan premiums rise. *Id.* Furthermore, the economic impact of silver-loading is magnified because the additional premium tax credits can be used for any "metal" level plan (not just silver plans). *Id.* Thus, due to silver-loading, "more people are able to use their higher premium tax credits to obtain bronze plans . . . for free or for very low out-of-pocket payments for premiums." *Id.* Others "can purchase gold plans, which cover a greater share of benefits than do silver plans, with similar or lower premiums after tax credits." *Id.* *See also California v. Trump*, 267 F. Supp. 3d 1119, 1135 (N.D. Cal. 2017) (providing concrete examples of silver-loading's economic impact).

The CBO projected that, due to silver-loading, federal payments to insurers will increase by $194 billion over a decade, and that, in most years, between 2 million and 3 million more people will purchase subsidized plans through the Exchanges than would have if the government made direct CSR payments to insurers. May 2018 CBO Report at 9; August 2017 CBO Report at 2. Conversely, the RAND Corporation warned that direct funding of CSR payments would "decrease both federal spending and health insurance enrollment," and urged that "[p]olicymakers should consider these impacts when contemplating changes to CSR funding and rules related to silver loading." Preethi Rao & Sarah Nowak, *Effects of Alternative Insurer Responses to Discontinued Federal Cost-Sharing Reduction Payments* 14 (2019), https://www.rand.org/pubs/research_reports/RR2963.html; *see also id.* at 13 (warning that, if Congress funds CSR payments directly, "those who purchase bronze, gold, or platinum plans would face higher premiums and lower subsidies simultaneously and would need to spend more to maintain enrollment in those plans").

Against the background of these reports, Congress enacted legislation that protects the practice of silver-loading through the 2021 year—without objection from consumers, insurers, or their trade associations. *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. N, § 609, 133 Stat. 2534, 3130 (Dec. 19, 2019) (subtitled "Protection Of Silver Loading Practice").

ARGUMENT

I. The Panel's Damages Ruling Is Correct And Does Not Conflict With Any Decision Of This Court Or The Supreme Court

Plaintiffs seek damages for the government's failure to make the CSR payments required by the ACA. Plaintiffs do not dispute that they and other insurers raised silver-plan premiums to offset the absence of CSR payments. As the panel explained, the consequence of that "silver-loading" was to increase—by operation of law under the ACA's formula—the premium tax credits that the government paid to insurers. *Community*, 970 F.3d at 1377-78; *see also* May 2018 CBO Report at 8 (explaining that, as a consequence of silver-loading, the CSR subsidies are "being funded through higher premiums and larger premium tax credit subsidies instead of a direct payment"). The panel ruled that, in calculating the damages that the termination of CSR payments caused an insurer, the trial court must deduct the additional premium tax credits that the insurer received as the result of the termination of CSR payments. *Community*, 970 F.3d at 1367.

Assuming liability, that damages ruling is correct and does not conflict with any decision of this Court or the Supreme Court. In a long line of statutory cases involving wrongful discharge from federal employment, this Court's predecessor deducted an employee's outside earnings from an award of back pay, based "on an analogy to the principle of mitigation of damages." *Community*, 970 F.3d at 1374 (quoting *Craft v. United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978)); *see also id.* (citing additional cases). Those statutory cases applied a principle analogous to the contract-law tenet that a non-breaching party "is not entitled, through the award of damages, to achieve a position superior to the one it would reasonably have occupied had the breach not occurred." *Id.* at 1375 (quoting *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003)).

The back-pay cases discussed by the panel are particularly instructive because the Supreme Court has identified the Back Pay Act as the type of statute that may fairly be interpreted to provide an implied damages remedy. *See Community*, 970 F.3d at 1374 n.7 (citing *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988)). Moreover, the reasons for mitigating damages here are even more compelling than they were in the *Craft* line of cases. In the *Craft* line, the mitigating payments came from outside sources (private employers). Here, the additional premium tax credits are paid *by the government itself*. *See Community*, 970 F.3d at 1378-79. If an insurer's additional premium tax credits were not deducted from its damages award, the government (*i.e.*, taxpayers) would be making duplicative payments.

Contrary to plaintiffs' premise, the Supreme Court's recent decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), did not call these damages-mitigation principles into question. There was no issue of mitigation in that case. *Maine Community* involved the ACA's temporary risk-corridors program, which was designed "to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years." *Id.* at 1315. The government conceded that funding restrictions enacted by Congress had left insurers with more than $12 billion in unreimbursed losses for those years. *Id.* at 1318. The government did not claim that the petitioners had mitigated those losses. Indeed, the petitioners emphasized that insurers could not have done so, because the funding restrictions were not enacted until after their premiums were fixed for the relevant year. *See, e.g.*, Brief for Petitioners, *Moda Health Plan, Inc. v. United States*, No. 18-1028, 2019 WL 4235524, at *32 (U.S. Aug. 30, 2019) (Moda Br.). Furthermore, the petitioners stressed that the lower premiums induced by the risk-corridors provision had saved the government billions of dollars in premium tax credits, because "lower premiums on the exchanges translate directly into lower outlays by the government for those tax credits." *Id.* at *4; *see also id.* at *7, 9.

Here, the opposite occurred. The government announced in October 2017 that CSR payments would cease, and plaintiffs and other insurers responded by raising silver-plan premiums for 2018 and subsequent years. Those premium increases dramatically increased the government's payments to insurers for premium tax credits, because "higher premiums on the exchanges" make "tax subsidies far more expensive for the government." Moda Br., 2019 WL 4235524, at *4. Nothing in *Maine Community* suggests that insurers may be doubly compensated for the termination of CSR payments—first by additional premium tax credits and a second time by an unmitigated damages award. That would be a massive windfall for insurers and a massive penalty for the public fisc.

Plaintiffs misunderstand the Supreme Court's statement that "[a] statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount." *Maine Community*, 140 S. Ct. at 1329 (citation omitted). As just explained, the Supreme Court had no occasion to address issues of mitigation. However, a claimant's mitigation of damages is ample "indication" that an award should not be "in the defaulted amount." *Id.* Indeed, *Maine Community* reaffirmed that when the government violates a money-mandating statute, the compensation is limited to "the damage sustained." 140 S. Ct. at 1328 (citations omitted). Here, the additional premium tax credits that plaintiffs received as a result of the termination of CSR payments reduced—and likely eliminated—the "damage sustained" from the termination of CSR payments.

Plaintiffs turn Supreme Court precedent on its head when they assert that the panel's application of damages-mitigation principles raises "separation-of-powers concerns." Community Pet. 2; *see also* Maine Community Pet. 4. Although the ACA directed HHS and the Department of the Treasury to make CSR payments to insurers, the ACA did not expressly provide any remedy if those payments are unfunded. *See Community*, 970 F.3d at 1374 (explaining that "the statute 'contains no express remedies' at all with respect to the government's obligation") (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)). Thus, the liability question (discussed in Part II below) is whether a damages remedy should be implied from the ACA's text and structure. As a general matter, the Supreme Court's modern decisions disfavor implied damages remedies, "caution[ing] that, where Congress intends private litigants to have a cause of action, the far better course is for Congress to confer that remedy in explicit terms." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quotation marks omitted). But assuming that a damages remedy may be implied here, that implied damages remedy is subject to the same mitigation principles as the Back Pay Act's implied damages remedy at issue in the *Craft* line of cases. Maine Community's observation that the Back Pay Act "in its current form" expressly provides for offsets, Pet. 10, is irrelevant, because that amendment did not exist when the *Craft* line of cases was decided, *see Community*, 970 F.3d at 1374 n.8.

Although plaintiffs now fault the panel for employing a contract analogy, plaintiffs themselves have consistently likened the CSR provisions to a "statutory bargain." Maine Community Pet. 2; *see also* Community Pet. 9. Indeed, plaintiffs persuaded the trial court that the CSR provisions operate as a "quid pro quo." *Community Health Choice, Inc. v. United States*, 141 Fed. Cl. 744, 768 (2019); *Maine Cmty. Health Options v. United States*, 143 Fed. Cl. 381, 402 (2019). However, plaintiffs are wrong to suggest that insurers fulfill their part of the bargain by reducing cost-sharing for eligible insureds. As Community acknowledges (Pet. 5), reducing cost-sharing is mandatory for insurers that elect to sell plans on the Exchanges, and the termination of CSR payments "did not relieve the insurers of their statutory obligation" to reduce cost-sharing for eligible insureds. Plaintiffs and other insurers have known since October 2017 that CSRs would be funded indirectly—through additional premium tax credits rather than direct CSR payments—yet have opted to continue offering plans on the Exchanges. Clearly, they are not entitled to *both* the additional premium tax credits *and* damages equal to the full value of CSR payments, on an ongoing and "indefinite[]" basis. Community Pet. 6.[2]

[2] Amici's assertion (Br. 7-8) that they seek "specific relief"—rather than damages—is baseless. Specific relief would be an injunction directing HHS and Treasury to make direct CSR payments pursuant to the ACA. *See Bowen*, 487 U.S. at

Plaintiffs' reliance on decisions involving "pass-through defenses," such as *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060 (Fed. Cir. 2001), is misplaced for the reasons discussed by the panel. *See Community*, 970 F.3d at 1378-79. The "pass-through" doctrine, which was developed primarily in the context of antitrust law, generally holds that a wrongdoer may not reduce damages simply because the victim may have passed on an illegal overcharge to its customers. *See, e.g.*, *Hanover Shoe*, 392 U.S. at 487-94. As the panel explained, the government did not argue that plaintiffs' damages should be reduced merely because plaintiffs passed on their cost-sharing reduction expenses to customers. "The crucial point is that [the] plaintiffs ... passed these expenses on *to the government itself*, which by virtue of the ACA's structure is paying the cost-sharing reduction expenses ... in the form of higher premium tax credits." *Community*, 970 F.3d at 1378-79.

Contrary to Community's contention (Pet. 12-15), those additional premium tax credits are not "unrelated events and remote consequences" of the government's termination of CSR payments. *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1373 (Fed. Cir. 2003). They are the direct and predictable result of the termination of CSR payments. Indeed, they were anticipated by HHS two years

900. The Court of Claims cannot issue equitable relief. *Community*, 970 F.3d at 1374 n.6. And in the CSR context, no court could order specific relief, because there is no appropriation for direct CSR payments.

before the CSR payments ended. *See* Office of the Assistant Secretary for Planning and Evaluation (ASPE), HHS, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* (Dec. 2015), https://go.usa.gov/xyjS2. Community's observation that it benefited from the silver-loading of other insurers, Pet. 13-14, is no reason to ignore the additional premium tax credits that Community itself received as the result of the termination of CSR payments.[3]

In short, the termination of CSR payments caused premium tax credits to increase, and the panel correctly required the trial court to deduct an insurer's additional premium tax credits from its damages award. That holding, which protects the public fisc from duplicative payments, does not warrant rehearing en banc.

II. If The Court Grants Plaintiffs' Petitions To Rehear The Damages Ruling, It Should Rehear The Liability Ruling As Well

As to liability, the panel ruled that the ACA is fairly interpreted to mandate compensation for CSR payments that Congress declined to fund. The panel saw "no persuasive basis for distinguishing these cases from *Maine Community*," where the Supreme Court held that the ACA's risk-corridors provision was fairly interpreted to mandate compensation for risk-corridors payments that Congress declined to fund.

[3] The unpublished decisions cited by Maine Community (Pet. 12-13) are inapposite. *See, e.g., Rice's Lucky Clover Honey, LLC v. Hawley*, 700 F. App'x 852, 864 (10th Cir. 2017) (explaining that "Colorado's common law did not create a duty . . . to mitigate damages" where "the contract stated that Rice Honey's early termination without cause would require payment of the base salary for one year ($162,000), along with $250,000 in liquidated damages").

Sanford Health Plan v. United States, 969 F.3d 1370, 1373 (Fed. Cir. 2020) (incorporated by reference in *Community*, 970 F.3d at 1367).

We respectfully disagree with that liability ruling. We acknowledge that the "shall pay" language in the CSR provisions tracks the "shall pay" language in the risk-corridors provision, and that the Supreme Court relied on that mandatory language in concluding that the risk-corridors provision is money mandating. *Maine Community*, 140 S. Ct. at 1329. However, the Supreme Court also emphasized the "backwards-looking" nature of the "since-expired Risk Corridors statute," the purpose of which was "to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years." *Id.* at 1315, 1329. In holding that "[t]he Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims," the Supreme Court concluded that the program was intended "to compensate a particular class of persons for past injuries or labors." *Id.* at 1329 (quoting *Bowen*, 487 U.S. at 907 n.42).

By contrast, the explicit purpose of CSR payments is "to reduce the premiums" that insurers charge. ACA § 1412(a)(3). If CSR payments are not directly funded, the predictable consequence is that premiums and premium tax credits rise, and the expenses of reduced cost sharing are "funded through higher premiums and larger premium tax credit subsidies instead of a direct [CSR] payment." May 2018 CBO Report at 8. Thus, the ACA's structure leaves no "past injuries or labors" to compensate when CSR payments are not directly funded. *Maine Community*, 140 S. Ct.

at 1329. Accordingly, the ACA is not fairly interpreted to mandate compensation for unfunded CSR payments.

The panel noted that this interpretation of the ACA leaves insurers without a remedy for the period in late 2017 before the insurers raised premiums to offset the absence of CSR payments. *See Sanford*, 969 F.3d at 1383. But Congress, in enacting the ACA, would not have anticipated that scenario, which arose only because CSR payments had been made from a permanent appropriation that plaintiffs concede should not have been used for that purpose. *See, e.g.*, Community Br. 31 (acknowledging that "Congress did not intend for CSR payments to be funded by permanent appropriations"). It is the intent of the Congress that enacted the ACA that dictates whether a damages remedy should be inferred from the Act's text and structure.

Although we disagree with the panel's liability ruling, that ruling does not, by itself, warrant rehearing en banc at this juncture. The liability ruling is interlocutory and, taken together with the damages ruling, its practical effect is limited. As discussed above, the panel correctly held that the trial court on remand "must reduce the insurers' damages by the amount of additional premium tax credit payments that each insurer received as a result of the government's termination of cost-sharing reduction payments." *Community*, 970 F.3d at 1367. Because those additional tax credits likely exceed the value of the unfunded CSR payments, plaintiffs' damages for 2018 and subsequent years will likely be zero. *Cf. Craft*, 589 F.2d at 1058 (concluding that an improperly discharged federal employee was not entitled to any recovery, because his outside earnings during the period of his illegal separation from the government exceeded the amount he was owed in back pay).

However, if the Court were to grant plaintiffs' petitions to rehear the damages ruling, the liability ruling should be reheard as well. The panel's liability ruling is intertwined with its damages ruling. In rejecting the government's liability argument, the panel reasoned that "there is a separate body of law that more precisely addresses the problem the government identifies." *Sanford*, 969 F.3d at 1383. It acknowledged the "premise of the government's argument," which was that "the premium tax credit provision can indeed lead to partial or complete offsetting of losses from non-reimbursement of cost-sharing reductions and that the government should not in effect be charged twice" for terminating CSR payments, "once through raised premium tax credits and again through a damages award under the Tucker Act." *Id.* But the panel found it unnecessary to consider the ACA's premium tax-credits in the liability analysis because "[d]amages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries, as we conclude today in *Community Health Choice, Inc. v. United States*, No. 2019-1633, and *Maine Community Health Options v. United States*, No. 2019-2102." *Id.*

Plaintiffs' rehearing petitions urge the Court to vacate the panel's damages ruling and prohibit the trial court from deducting from plaintiffs' damages awards the additional premium tax credits they received as a result of the termination of CSR payments. Those arguments are meritless for reasons already discussed. But if the Court determines to revisit the damages ruling, it also should revisit the liability ruling, which is explicitly intertwined with the damages ruling.

CONCLUSION

Plaintiffs' rehearing petitions should be denied, but if the Court decides to rehear the panel's damages ruling, it should rehear the liability ruling as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with type volume and typeface requirements in Federal Rule of Appellate Procedure 35 because it has been prepared in 14-point Garamond, a proportionally spaced font, and contains 3,883 words, excluding the parts exempted by Federal Circuit Rule 35(c)(2).

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
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