No. 20-1162

IN THE

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. The Chamber filed *amicus* briefs in *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308 (2020), at both the certiorari and merits stages.

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

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[1] The parties received timely notice of this brief under Rule 37.2(a). Petitioners filed a blanket consent to the filing of *amicus* briefs and respondent consented to the filing of this brief. Under Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission.

By holding that the insurers' remedy for the government's admitted breach of its statutory obligations is something less—and possibly much less—than the amounts specified as due under the statute, the decision below creates profound uncertainty for companies that do business and partner with the federal government. If allowed to stand, the decision will chill the business community from working with the federal government in the future, and make it more difficult and expensive for the federal government to accomplish important policy objectives. The Chamber thus has substantial interests in the Court's review of the decision below.

SUMMARY OF ARGUMENT

I. Review is warranted because the decision below, if left uncorrected, would have far-reaching consequences for myriad areas in which U.S. businesses partner with the federal government to provide vital goods and services. In addition to the health insurance context, public-private partnerships serve essential roles in areas as diverse as public housing, infrastructure development, public health, transportation, and nuclear energy. Congress often induces the cooperation of private industry through financial incentives, risk-sharing arrangements, and other provisions. Businesses invest substantial financial and other resources to participate in federal programs, and their willingness to do so depends on having assurance that the government will honor its statutory commitments. If permitted to stand, the Federal Circuit's view that "mitigation" principles can diminish the sum-certain payments that private industry relied on in partnering with the federal government will undermine public-private partnerships across a broad array of critical areas.

II. Review is also warranted because the Federal Circuit's novel mitigation rule conflicts with basic common law principles. Even if mitigation could otherwise apply to the government's statutory payment obligation, this Court and others hold that (a) mitigation does not apply if one party fully performs and the other simply refuses to pay, and (b) losses recovered *indirectly* through higher prices do not mitigate damages.

A. This Court has long recognized that, when the plaintiff performs its duties but the defendant breaches its "agreement to pay" for that performance, "the measure of the damages is the full amount agreed to be paid." *Wicker* v. *Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867). Once the plaintiff performs, this payment obligation becomes "absolute," *id.* at 100, and the plaintiff has "a contract right" to the "full value" of its promised compensation, 11 *Corbin on Contracts* § 57.10 (2020).

The decision below—applying mitigation even though the government unequivocally promised to pay and the insurers fully performed—conflicts directly with these cases. And in doing so, it creates harmful incentives, giving the government permission to stiff its contractors and effectively requiring the contractors to pass along those losses elsewhere. This result is particularly perverse here because the ACA was designed to *lower* health care costs. But the logical implication of the decision below is that insurers must *raise* their premiums to account for the government's violation of its statutory obligation. That outcome clashes with the statutory regime and common-law mitigation principles.

B. The decision below also conflicts with the settled rule that damages do "not . . . go beyond the first step." *S. Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). The law thus holds the defendant liable for the loss it proximately caused, whether or not the plaintiff was "able to pass on the damage" somehow. *Id.* This Court has reaffirmed repeatedly that "the possibility that plaintiffs had recouped" their losses from other sources is "irrelevant in assessing damages." *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 490 (1968). And the Court has just as insistently rebuffed efforts to cabin this rule, see *Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 734–35 (1977), or to "litigate a series of exceptions" to it, *Kansas* v. *UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990).

Yet, the decision below creates just such an exception—based on a particularly attenuated mitigation theory. The Affordable Care Act's cost-sharing reduction payments (which the government stopped making) are separate from the statute's premium tax credits (which, it contends, mitigated the insurers' losses). The government's payment of one statutory obligation cannot mitigate its refusal to satisfy a separate statutory obligation.

Indeed, the theory of mitigation is especially attenuated here. Cost-sharing reductions cover specific out-of-pocket costs for eligible people on *some* plans, while the premium-tax credits apply to *all* plans, based on a statutory formula based on the cost of the second-cheapest silver plan on each exchange. Thus, for petitioners here to "mitigate" their losses, *other* insurers selling plans in the same exchanges had to seek and receive state regulatory approval to raise their own premiums. Only then could "some" of the lost cost-sharing reimbursements be passed along indirectly to the government, via a different statutory program. Pet. App. 26–27. That attenuated theory goes far beyond the "first step" in the causal chain.

The Court should grant the petition to resolve these conflicts and reaffirm that the government must satisfy its statutory commitments.

ARGUMENT

I. REVIEW IS NECESSARY BECAUSE THE FEDERAL CIRCUIT'S DECISION UNDERMINES PUBLIC-PRIVATE PARTNERSHIPS IN AREAS CRITICALLY IMPORTANT TO THE NATIONAL ECONOMY.

Although this case involves the ACA and the health care industry, the Federal Circuit's decision—if allowed to stand—will have far-reaching consequences for myriad areas where U.S. businesses partner with the federal government to provide vital goods and services. Congress often induces private industry's cooperation through direct and indirect financial incentives, risk-sharing arrangements and liability limitations that cabin financial risks, and other provisions. Private entities rely on the financial terms specified by statutes when deciding whether to participate. If the federal government can unilaterally alter those terms by repudiating a full-payment remedy when it reneges on statutory commitments, as the Federal Circuit concluded here, that would jeopardize the future of public-private partnerships and the benefits that they provide to both the government and the private sector.

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

A. Congress And The Executive Branch Have Encouraged A Wide Variety Of Efforts By Private Industry To Implement Important Governmental Priorities.

Private sector businesses, large and small, are deeply involved in implementing federal programs of all types. In addition to the health insurance exchanges at issue in this case, health care in the United States is frequently delivered through programs in which the federal government partners with the private sector, including Medicare and Medicaid. See, *e.g.*, Brief for *Amicus Curiae* Blue Cross Blue Shield Association in Support of Petitioners 18–20, *Maine Community*, 140 S. Ct. 1308 (No. 18-1023), 2019 WL 1170257 (discussing the Medicare and Medicaid programs). Most recently, the federal government has relied on critical partnerships with companies in the pharmaceutical and health-care industries to combat the COVID-19 pandemic. Indeed, the government has explained that "a public-private partnership with 21 national pharmacy partners" is "a key component of the Administration's National Strategy to expand equitable access to vaccines for the American public."[2]

The federal government's efforts to ensure affordable housing also depend upon the participation of private businesses. Indeed, the Department of Housing and Urban Development ("HUD"), has stated that "most HUD programs are structurally public-private

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[2] *See* The White House, *FACT SHEET: President Biden Announces Increased Vaccine Supply, Initial Launch of the Federal Retail Pharmacy Program, and Expansion of FEMA Reimbursement to States* (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-announces-increased-vaccine-supply-initial-launch-of-the-federal-retail-pharmacy-program-and-expansion-of-fema-reimbursement-to-states/.

partnerships" or "have some public-private aspects."[3] HUD has favored public-private partnerships because they "enable government to share risks with the private sector, leverage investments for far greater effect, take advantage of efficiencies outside government, and employ broader knowledge and skills." *Id.* at 2.

Infrastructure and energy development are other areas that utilize public-private partnerships to achieve key federal objectives. The Department of Homeland Security has made "[p]ublic-private partnerships" the "foundation for effective critical infrastructure security and resilience strategies."[4] Because "[t]he private sector owns and operates a vast majority of the nation's critical infrastructure"—in essential industries such as transportation, communications and energy—these partnerships "create an environment to share critical threat information, risk mitigation, and other vital information and resources."[5] The Department of

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

[4] Cybersecurity & Infrastructure Sec. Agency, *Critical Infrastructure Partnerships and Information Sharing*, https://www.cisa.gov/critical-infrastructure-partnerships-and-information-sharing (last visited Mar. 24, 2021).

[5] Cybersecurity & Infrastructure Sec. Agency, *Critical Infrastructure Sector Partnerships*, https://www.cisa.gov/critical-infrastructure-sector-partnerships (last visited Mar. 24, 2021). The Chamber believes that the use of public-private partnerships is essential to modernizing America's infrastructure. *See* U.S. Chamber of Commerce, *Modernizing America's Infrastructure Requires Public-Private Partnerships* (Jan. 17, 2018), https://www.

Energy also has used public-private partnerships to spur innovation and the development of new energy sources.[6]

Several federal loan guarantee programs rely upon the participation of private financial institutions to extend the loans to beneficiaries. For example, the U.S. Department of Agriculture's Rural Development agency "promote[s] economic development" in rural America "by supporting loans to businesses through banks, credit unions and community-managed lending pools."[7] The U.S. Small Business Administration similarly offers programs in which it "guarantee[s] loans made to small businesses by private and other institutions."[8] In addition, the Department of Energy operates the Tribal Energy Loan Guarantee Program, which guarantees up to $2 billion in loans to tribes for

uschamber.com/issue-brief/modernizing-americas-infrastructure-requires-public-private-partnerships (urging Congress to expand existing federal loan programs, create new loan and loan guarantee programs, make discretionary grants, and remove barriers to public-private partnerships to modernize the nation's airports, ports, rail systems, dams, and waterways).

[6] *See, e.g.*, Office of Science, U.S. Dep't of Energy, *Department of Energy Announces Next Round of Public-Private Partnership Awards to Advance Fusion Energy* (Sept. 3, 2020), https://www.energy.gov/science/articles/department-energy-announces-next-round-public-private-partnership-awards-advance.

[7] U.S. Dep't of Agric. Rural Dev., *About RD*, https://www.rd.usda.gov/about-rd (last visited Mar. 24, 2021).

[8] Office of Fin. Assistance, U.S. Small Bus. Admin., *Resources*, https://www.sba.gov/offices/headquarters/ofa/resources/11421 (last visited Mar. 24, 2021).

energy development projects, with "non-federal lenders" providing the debt.[9]

As with the ACA, federal statutes that create public-private partnerships often include incentives and protections that cabin the financial risks for private companies and thereby induce them to participate. Congress, for example, enacted the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), 42 U.S.C. §§ 300aa-1 to 300aa-34, to "stabilize the vaccine market," which many manufacturers had exited due to the high costs of tort liability for vaccine injuries. *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 228 (2011). The Vaccine Act provided incentives for vaccine manufacturers to re-enter the market by creating a no-fault compensation scheme. This scheme is funded by industry contributions, but provides a valuable "*quid pro quo*" to manufacturers because they are "generally immunized from liability" for tort claims. *Id.* at 229. This Court in *Wyeth* recognized the importance of this "structural *quid pro quo*," when it construed the Vaccine Act as preempting state-law design defect claims. *Id.* at 239–40. The Court reasoned that Congress "would hardly coax manufacturers back into the market" if it had preserved their liability for design defects. *Id.* at 240.

The Atomic Energy Act similarly includes provisions that limit liability for accidents resulting from the operation of private nuclear power plants. See 42 U.S.C. § 2210. Congress designed these liability caps to "encourage[] the private sector to become involved in the development of atomic energy for peaceful purposes." *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*,

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[9] Loan Programs Office, U.S. Dep't of Energy, *Tribal Energy Loan Guarantee Program*, https://www.energy.gov/sites/default/files/2020/01/f70/DOE-LPO-Tribal-Energy-Jan2020.pdf.

438 U.S. 59, 63 (1978). This Court upheld the liability limitations, ruling that the record "fully support[ed] the need for the imposition of a statutory limit on liability to encourage private industry participation" in nuclear energy production. *Id.* at 84.

The government's partnership with industry sometimes takes the form of direct financial support to ensure that private companies can provide vital services. For example, after the September 11, 2001 terrorist attacks, Congress enacted the Air Transportation Safety and System Stabilization Act "to 'preserve the continued viability of the United States air transportation system' from potentially ruinous tort liability in the wake of the attacks." *Schneider* v. *Feinberg*, 345 F.3d 135, 139 (2d Cir. 2003) (per curiam). The statute included "financial and tax relief to the airline industry, including federal support for airline insurance." *Can. Life Assurance Co.* v. *Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003). It also capped the tort liability of airlines and created a victim compensation fund that conditions claimants' recovery upon waiver of the right to sue in court. *Schneider*, 345 F.3d at 139.

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

B. The Federal Circuit's Decision Undermines Public-Private Partnerships By Creating Uncertainty And Destroying Private Parties' Trust That Congress Will Abide By Its Legal Obligations.

Businesses that partner with the federal government make substantial investments of money, time, and resources to comply with congressional mandates and regulatory requirements. Given the need for these investments, it is crucial that businesses have certainty that the government will honor its statutory obligations and pay what it owes. Without reasonable certainty that Congress will maintain and respect the incentives for participation, potential participants will be far less willing to put significant investments at risk, particularly when faced with novel market conditions, such as those that existed when the ACA's health insurance exchanges were first launched.

For private industry confidently to rely on Congress' statutory commitments, the federal government must follow through on them and pay all amounts due under federal legislation. These principles of government integrity underlie this Court's holding in *Maine Community* that the federal government remains liable for risk-corridor payments under the ACA despite Congress' failure to appropriate funds. That liability ruling helps ensure that private parties will continue to participate in federal programs because they can have confidence that they will receive full payment when they perform their statutory obligations.

The Federal Circuit's decision, however, threatens to take away the certainty and assurances that *Maine Community* provided, and thereby destroy the trust necessary for public-private partnerships to flourish. By holding that the insurers' remedy for the government's failure to abide by its statutory obligations is something less than the sum-certain due under the statute, the Federal Circuit has substantially increased the risks for all private parties that their investment-backed expectations will be undone if they participate in federal programs. If the federal government can so easily repudiate a full-payment remedy when it reneges on a statutory obligation, private industry will avoid public-private partnerships.

In a related context, this Court has recognized that if the federal government does not act as "'a reliable contracting partner'" that adheres to its commitments, then "contracting would become more cumbersome and expensive for the Government, and willing partners more scarce." *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 191–92 (2012) (quoting *United States* v. *Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion)).

The Federal Circuit's application of "mitigation" principles to reduce damages not only puts in peril the sum-certain payments that private entities often rely on in partnering with the federal government, but also places an additional burden on private parties. The Federal Circuit has effectively rewritten the statutory obligation by imposing on private insurers an extra burden to prove the amount of premium tax credits "attributable to the government's failure to make cost-sharing reduction payments." Pet. App. 30; *id.* at 31 (insurers "bear the burden of persuasion"). In a complex regulatory scheme such as the ACA—which is common in the context of public-private partnerships—this is a formidable burden. Attempting to unscramble the eggs and determine the portion of the premium tax increases that was "attributable" to the government's breach of its statutory obligations may be difficult and entail significant time and expense. Indeed, the Federal Circuit acknowledged that this "factintensive task" will necessitate "either new summary judgment motions or a trial." *Id.* at 29–30. Perversely, even though the government has breached its statutory obligation, the Federal Circuit requires private parties to bear the risk of the complexity of proof on mitigation issues, since they will have their remedy curtailed if they cannot satisfy this daunting burden.

This additional burden on private parties imposed by the Federal Circuit—to prove that their sum-certain damages should not be offset by alleged "mitigation" amounts—compounds the risk and uncertainty surrounding their remedy in the event of government non-payment, and will further discourage the private sector from participating in public-private partnerships. Accordingly, if the decision below is allowed to stand, the government will be required to expend greater resources than necessary to partner with private industry. The government will incur greater costs and risks of running existing public-private partnerships, and of pursuing new partnerships in the future.

II. REVIEW IS NECESSARY BECAUSE THE FEDERAL CIRCUIT'S NOVEL RULE CONFLICTS WITH MITIGATION PRINCIPLES REFLECTED IN THIS COURT'S DECISIONS.

The Court should also grant review because the decision below conflicts with longstanding mitigation doctrines recognized by this Court and others. The Federal Circuit effectively replaced the government's statutory sum-certain obligation with an amorphous mitigation principle based on an "analogy to contract law." Pet. App. 16. As the petition explains, common law mitigation principles do not apply here because Congress dictated how much the government "shall" pay. Pet. 27–29. But even if that were not so, the decision below would still conflict with two basic mitigation principles: Mitigation does not apply when one party fully performs and the other just refuses to pay, and losses the plaintiff recovers *indirectly* through higher prices do not mitigate the defendant's damages. See *id.* at 29–32 & n.1.

A. When One Party Fully Performs Its Obligations And The Other Party Refuses To Pay, Mitigation Does Not Apply.

Although the Federal Circuit invoked contract-law mitigation principles, its rule conflicts with a basic contract doctrine: Mitigation does not apply if one party performs in full and the other just refuses to pay. In that situation, the breaching party has an absolute duty to pay the full amount due under the contract. Thus, even if contract-law principles applied here, they would dictate the same result as the statutory text—the government must pay what it owes. Any other rule would create perverse incentives.

1. The law is settled that when a plaintiff performs its own duties "in full," it "has a contract right" to the "full value" of what it was promised in return. 11 *Corbin on Contracts* § 57.10 (2020). So, if a breach occurs, "damages are measured by the full value of the performance that was promised." *Id.* That is, if "the promisee can recover the full value of what was promised and that value has been definitely liquidated in terms of money, the promisor owes a money debt." *Id.* These principles apply when the promisee has fully performed and thus cannot save any expense (or cannot reasonably stop performing): "If the promisee acting reasonably saves no expense by reason of the breach, the promisee can recover the full value of the promised performance." *Id.*

Under this "well-settled" doctrine, if the defendant breaches an "agreement to pay," "recovery may be had as soon as there is a breach of the contract, *and the measure of the damages is the full amount agreed to be paid*." *Wicker*, 73 U.S. (6 Wall.) at 99 (emphasis added). Once the plaintiff performs, this payment obligation is "absolute." *Id.* at 100. "An obligation to minimize avoidable consequences does not exist if the plaintiff has a vested contract right to recover the amount sought," as when an "absolute promise to pay" exists. 22 Am. Jur. 2d *Damages* § 362 & n.1.

Common law mitigation cases uniformly reflect this rule. In 1925, the California Supreme Court could find "[n]o case" applying "the duty to minimize the damages" where "the defendant's breach of duty consisted solely of the failure or refusal to pay a liquidated sum of money when due." *Vitagraph, Inc.* v. *Liberty Theatres Co. of Cal.*, 242 P. 709, 711 (Cal. 1925). Rather, the non-breaching party "had a right to stand upon its contract and to recover the full amount which had become due thereunder in accordance with its terms." *Id.* at 712; see also *Boise-Payette Lumber Co.* v. *Phx. Indem. Co.*, 280 P.2d 448, 451 (Utah 1955) (if a "covenant[ ] to pay" is "unpaid" when due, "the liability then comes absolute"). In short: "While under the rule in damage cases it is the duty of a party to use ordinary care to minimize damages, this rule has no application to a contract to pay absolutely a certain sum of money." *Superior Woolen Co. Tailors* v. *M. Samuels & Co.*, 293 S.W. 1078, 1079 (Ky. 1927).

The same holds true today. "For example, in a sales contract in which the seller fully performs and the buyer does not pay at all, the seller is entitled to the sales price specified in the contract." *Leaf Invenergy Co.* v. *Invenergy Renewables LLC*, 210 A.3d 688, 702 (Del. 2019); see 24 *Williston on Contracts* § 66:21 (4th ed.) (UCC "gives an aggrieved seller the right to recover the unpaid price," with "no obligation to mitigate its damages"). Likewise, if an employment contract says an employer "will pay" an employee for abiding by a noncompete clause, and the employee "complied with" the clause, the promise to pay becomes "absolute" and the employee has no "duty to mitigate his damages" by seeking income elsewhere. *Reed* v. *Getco, LLC*, 65 N.E.3d 904, 913–15 (Ill. App. Ct. 2016). The same holds true for a contractual promise to pay "commissions based on revenues from the sale of . . . advertisements." *Publishers Res., Inc.* v. *Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 558 (7th Cir. 1985). If the defendant refuses to pay, and the plaintiff sues to recover "the amount of commissions owed to it under the contract," the plaintiff does "not have any duty to mitigate." *Id.* at 560. The defendant's "obligation to pay these commissions would in no way be affected by the amount of income [the plaintiff] was able to produce from other sources." *Id.* And "where the payment of interest is an express term" of a contract, "the right to recover contractual interest is not subject to mitigation." *TruServ Corp.* v. *Morgan's Tool & Supply Co.*, 39 A.3d 253, 262 (Pa. 2012).

These decisions reflect the settled common law principle that mitigation "is not applicable when there is an absolute promise to pay." *Universal Inv. Co.* v. *Sahara Motor Inn, Inc.*, 619 P.2d 485, 487 (Ariz. Ct. App. 1980). And as this Court has long recognized, the duty to pay becomes "absolute" "[a]s soon as [the other party] perform[s]." *Wicker*, 73 U.S. (6 Wall.) at 100. Yet the Federal Circuit held below that "there must be a reduction in damages," Pet. App. 21—even though it recognized that the cost-sharing reduction statute "imposes an unambiguous obligation on the government to pay money," *id.* at 2, and the insurers fully performed their own duties, see Pet. 9.

2. The decision below also creates perverse incentives. The Federal Circuit's rule encourages the government not to pay an obligation when its counterparty has fully performed. Under the decision below, the government has an incentive to withhold payment if it thinks that it can argue that the contractor can recoup its losses by raising prices or otherwise passing along those losses to others. This dynamic will make the government a less reliable contracting partner, shift costs where they do not belong, and lead to unpredictable and costly litigation—all discouraging public-private partnerships. See *supra* § I. And because this kind of dispute will likely result in "a Tucker Act suit for damages in the Court of Federal Claims," *Maine Community*, 140 S. Ct. at 1328, the Federal Circuit's decision below will control all of them—and thus risks distorting incentives across a range of programs involving statutory payments to government contractors.

These incentives are particularly misguided here. A key purpose of the Affordable Care Act in general, and the cost-sharing reduction program in particular, was to make health care and health insurance less expensive. See *id.* at 1315. Yet the logical consequence of the Federal Circuit's reasoning is that insurers not only can but *must* raise their premiums to compensate for the government's refusal to make cost-sharing reduction reimbursements. See Pet. 32–33. That cannot be right. And, unlike the risk-corridors program the Court considered in *Maine Community*, the cost-sharing reduction program is permanent. See *id.* at 34–35. Thus, the insurers' statutory obligations continue, but the Federal Circuit has handed the government a permission slip to avoid reimbursing them—indefinitely.

Review is warranted to restore the proper functioning of this important health-care program and to prevent the distortion of other government programs through the Federal Circuit's misguided mitigation principle.

B. Mitigation Does Not Apply To Losses Indirectly Avoided Through Passed-On Prices.

The Federal Circuit's decision also conflicts with a separate damages doctrine this Court has repeatedly reaffirmed: Losses the plaintiff *indirectly* avoids through higher prices do not mitigate the defendant's damages. That well-established rule applies here. To be sure, when insurers raised premiums to compensate for the government's refusal to pay, the government ultimately paid some of those higher prices through premium tax credits. But the Court has consistently refused to contemplate exceptions to the rule barring passing-on defenses. And in any event, the relationship between stopped cost-sharing reduction payments and increased tax credits is too attenuated for mitigation to apply. The government cannot avoid satisfying one of its statutory obligations by arguing that it has satisfied a separate statutory obligation.

1. As this Court has explained, that a plaintiff is "able to pass on the damage" caused by a legal wrong does not reduce its recovery from the wrongdoer. *S. Pac.*, 245 U.S. at 533. In *Southern Pacific*, shippers sued railroads for charging unreasonable rates. *Id.* The "only question" was "whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from [their customers], prevents their recovering the overpayment from" the railroads. *Id.* The Court, through Justice Holmes, concluded that the answer was "not difficult": "The general tendency of the law, in regard to damages

at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss." *Id.* at 533–34. "The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events." *Id.* "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." *Id.*; accord *Adams* v. *Mills*, 286 U.S. 397, 407 (1932) ("subsequent reimbursement" is irrelevant to a "claim for damages"); see Pet. 32 n.1.

The Court has repeatedly reaffirmed that "the possibility that plaintiffs ha[ve] recouped" their losses is "irrelevant in assessing damages." *Hanover Shoe*, 392 U.S. at 490. In *Hanover Shoe*, the Court held that the plaintiff "proved injury and the amount of its damages" when it proved the fact and amount of an overcharge; the defendant "was not entitled to assert a passing-on defense." 392 U.S. at 494. Likewise, in *Illinois Brick*, the Court again held that "direct purchasers" are entitled to a "full recovery," regardless of how much loss they "absorbed" or passed on. 431 U.S. at 735; see *id.* at 750 (Brennan, J., dissenting) ("a defendant . . . could not escape liability . . . by proof that the plaintiff had passed on illegal overcharges to others"). The Court emphasized (i) the "uncertainties and difficulties in analyzing price and output decisions" and (ii) "the costs to the judicial system . . . of attempting to reconstruct those decisions in the courtroom," which a pass-on defense would require. *Id.* at 731–32 (majority op.).

The Court again affirmed these principles in *Kansas*. There, the Court emphasized "the complications of apportioning" price pass-throughs and held that the first-step rule applies even if those complications do not exist (there, because overcharges were passed on through state-regulated utility rates). 497 U.S. at 208. Litigating "exceptions" to the rule barring pass-on defenses would be "unwarranted and counterproductive." *Id.* at 217. And the Court has returned to this rule in various contexts, reiterating the "ancient" principle that damages do not "go beyond the first step." See *Apple Inc.* v. *Pepper*, 139 S. Ct. 1514, 1526 (2019) (Gorsuch, J., dissenting) (noting examples); *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 271–72 (1992); *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983). As Judge Easterbrook observed, this "approach prevails throughout the law." *Carter* v. *Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985) (giving examples).

2. The decision below conflicts with the "first step" rule and the many cases applying it. The Federal Circuit deemed these cases distinguishable "because they concern situations where costs are passed to a third-party." Pet. App. 26 n.12. In the court's view, the "underlying economic reality" was reason enough to overlook the "complexity of the process" by which "some of the increased costs" were passed along to the government. *Id.* at 26–27. But this is precisely the kind of "exception" that *Kansas* rejected—"even assuming that any economic assumptions underlying the [first step] rule might be disproved in a specific case." 497 U.S. at 217. "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216.

In any event, the pass-along here is not the "direct" mechanism the Federal Circuit posited. *Contra* Pet. App. 29. As the court recognized, the increased tax credits "did not automatically flow from the elimination of cost sharing reduction payments." *Id.* at 24. Rather, the cost-sharing reduction provision is entirely separate from the premium-tax-credit regime. The cost-sharing provision covers certain out-of-pocket costs for eligible people on silver plans, like "deductibles, coinsurance, copayments, or similar charges." 42 U.S.C. § 18022(c)(3)(A). The premium-tax credit provision uses the same eligibility threshold, but applies differently: It covers any qualified health plan purchased on an exchange. See 26 U.S.C. § 36B(b)(1), (c)(2)(A), (3). A statutory formula sets each person's premium tax credit based on household income and the premiums for the second-cheapest silver plan on the local ACA exchange—whether or not the person chooses that plan. See *id.* § 36B(b)(2)(B), (3).

As a result, each insurer's premium tax credits do not depend on what that insurer charges. That means no insurer (including petitioners) could "mitigate" its lost cost-sharing reduction payments with higher tax credits just by raising its premiums. Indeed, insurers cannot raise their premiums unilaterally anyway; they need permission from state regulators. See Pet. App. 7–8.

Petitioners' supposedly "direct" mitigation thus required *other* insurers to seek and receive regulatory approval to raise *their* rates, increasing the premiums for the second-cheapest silver plan in each market, which serves as the benchmark for tax credits. Only then were "*some* of the increased costs" passed along to the government through tax credits. Pet. App. 26–27 (emphasis added). That goes well beyond the "first step." *S. Pac.*, 245 U.S. at 533. Indeed, the Federal Circuit cited no case requiring "mitigation" based on such an elaborate and attenuated pass-through mechanism, and amicus is not aware of any. The decision below thus conflicts with this Court's precedents.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition.

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