No. 20-1162

In the Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,
Petitioner,
v.
UNITED STATES.
Respondent.

COMMUNITY HEALTH CHOICE, INC.,
Petitioner,
v.
UNITED STATES.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR ANTHEM, INC., BLUE CROSS OF IDAHO HEALTH SERVICE, INC., HIGHMARK INC., L.A. CARE HEALTH PLAN, AND MOLINA HEALTHCARE OF CALIFORNIA, INC. AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

INTEREST OF *AMICI CURIAE*

Amici curiae Anthem, Inc., Blue Cross of Idaho Health Service, Inc., Highmark Inc., L.A. Care Health Plan, and Molina Healthcare of California, Inc., respectfully submit this brief in support of Petitioners Maine Community Health Options and Community Health Choice, Inc. *Amici* provide health care insurance to more than 12 million customers throughout the United States, including over 800,000 on various Patient Protect and Affordable Care Act (ACA) health insurance exchanges.[1]

In 2010, Congress passed the ACA, "seeking to improve national health-insurance markets and extend coverage to millions of people without adequate (or any) health insurance." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1315 (2020). "[T]he Act 'ensure[s] that anyone can buy insurance." *Id.* (citation omitted). It also includes features designed to contain healthcare costs. One such feature is the "cost-sharing reduction" (CSR) provision, ACA § 1402, 42 U.S.C. § 18071, which targets insureds' "cost-sharing" payments such as deductibles and copayments. *Id.* § 18022(c)(3)(A). Section 1402 requires insurers such as *amici* to reduce those cost-sharing payments for eligible insureds who have so-called "silver" health-insurance plans under the ACA. *Id.* § 18071(b). At the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a blanket consent to the filing of *amicus* briefs, and respondent has consented to the filing of this brief. Counsel of record for petitioners and respondent received notice of *amici*'s intent to file this brief more than ten days before the brief's due date.

same time, § 1402 requires the government to pay those insurers "equal to the value of the reductions" provided to eligible insureds. *Id.* § 18071(c)(3)(A). Separately, under ACA § 1401, 26 U.S.C. § 36B, eligible taxpayers can obtain tax credits for premiums paid, and not just for silver plans, but for bronze, gold, and platinum plans as well. Pet.7.

Despite § 1402(c)'s clear text, beginning in October 2017, the government—just as it did to petitioners—refused to make CSR payments to *amici* as required by the statute. Petitioners, *amici*, and other insurers sued to recover those payments in the Court of Federal Claims, and a number of those cases made their way to the Federal Circuit. As petitioners outline, the court of appeals agreed with the insurers that § 1402 imposes a money-mandating obligation on the government to make the requisite CSR payments. But the court of appeals agreed with the government that, if and to the extent insurers receive additional premium tax credits under § 1401 as a result of the government's failure to pay CSRs, the insurers are required to offset—under contract-mitigation principles—those tax credits from the CSR payments to which they are entitled under § 1402. This is the ruling petitioners challenge.

Amici have a substantial interest in this case because, like petitioners and other insurers, *amici* have been denied substantial CSR payments by the government under ACA § 1402, are owed over one-half-billion dollars, and have sued for recovery.[2] But now, as

[2] *See Anthem, Inc. v. United States*, No. 20-606 (Fed. Cl.); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 21-1033 (Fed. Cl.); *Highmark Inc. v. United States*, No. 20-1686

a result of the Federal Circuit's novel and erroneous ruling below that CSR payments the government owes under the statute are subject to contract-mitigation principles and must be reduced by "additional premium tax credits" insurers received for selling certain health-insurance plans, *amici* may recover only a fraction of what they are owed. *Amici* thus have a direct and substantial interest in these appeals and urge the Court to grant the petition.

Amici agree with petitioners that the Federal Circuit's decision departs from this Court's controlling precedents—in particular, its ruling last term in *Maine Community*. *Amici* also echo petitioners' showing that this case raises, again, exceptionally important questions regarding the government's obligation to keep its promises to its private-sector partners. *Amici* focus here on the importance of enforcing that obligation. We also discuss the foundational errors in the Federal Circuit's decision—its failure to adhere to controlling precedent; its abandonment of controlling principles of statutory construction; and its misreading of inapposite authorities—and the serious consequences, practical and legal, that will follow if the court of appeals' ruling is left intact.

SUMMARY OF ARGUMENT

The Court consistently holds that where statutory text is unambiguous, the interpretative "'analysis begins and ends with the text.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (citation omitted). The Court's

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(Fed. Cl.); *Local Initiative Health Auth. for L.A. Cty., d/b/a L.A. Care Health Plan v. United States*, No. 17-1542 (Fed. Cl.); *Molina Healthcare v. United States*, No. 18-333 (Fed. Cl.).

"license to interpret statutes does not include the power to engage in [ ] freewheeling judicial policymaking." *Pereida v. Wilkinson*, 141 S. Ct. 754, 2021 WL 816351, at *9 (U.S. March 4, 2021). And it also does not include the power to "rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [the Court] think[s] Congress really intended." *Lewis v. Chicago*, 560 U. S. 205, 215 (2010).

In this case, the Federal Circuit threw these foundational principles to the wind, speeding past what the text of the relevant statutory provisions actually says—and doesn't say—and engaging in the very "freewheeling judicial policymaking" this Court has long and roundly condemned. To make matters worse, the court of appeals cherry-picked the policy considerations it seemingly cared most about—such as preventing supposed windfall recoveries—while ignoring the many others that run directly counter to its ruling—including the paramount interest in holding the government to its unambiguous legal obligations. Along the way, the Federal Circuit summarily cast aside binding precedents, as if this Court's clear holdings were nothing more than optional suggestions.

Equally disconcerting are the dangerous consequences of the Federal Circuit's decision. By any measure, the most obvious repercussions are profound—billions of dollars in these CSR cases, and the government's reputation as an honest broker and partner, hang in the balance. But the Pandora's Box the Federal Circuit has opened in this case presages much more. There is little doubt the government will see a broad new mandate to scour the U.S. Code and the acts of unrelated third parties for a way to mitigate its liability under a wide range of statutes—and

deny recovery to those Congress specifically intended to protect. And courts, in the Federal Circuit and elsewhere, will flex a newfound judicial muscle, infusing contract principles into statutes without any evidence, textual or otherwise, that this was even a glimmer in Congress's eye—and indeed, even where all the textual evidence proves that it wasn't.

The Court therefore should grant certiorari and intervene to avert these grave consequences and reinforce what should have been clear from its nearly-unanimous reversal of the Federal Circuit in the risk-corridors cases last term—that controlling precedent must be strictly followed; statutory text is preeminent; and the "Government should honor its obligations." *Maine Community*, 140 S. Ct. at 1331.

REASONS FOR GRANTING THE PETITION

As the petition amply demonstrates, prior to the Federal Circuit's decision here, neither this Court, nor any other federal court, had ever concluded that *contract* mitigation-of-damage principles apply to a claim for specific monetary relief mandated by a federal statute where the statutory text makes no mention of such principles. The reason is clear: courts must enforce statutes as written. The same result must follow here, and compellingly so, because neither the remedy-creating statutory provision at issue—ACA § 1402, 42 U.S.C. § 18071—nor the ACA's separate premium-tax-credit provision, § 1401, 26 U.S.C. § 36B—makes any mention of contract-mitigation principles, or even alludes to each other at all.

Unable to deny this textual silence, the Federal Circuit below instead seized upon the purported ab-

sence of a "remedy" provision in § 1402—and then arrogated to itself the unprecedented power to infuse § 1402 with contract-mitigation principles taken from two decisions of this Court involving statutes that provided no remedy, or even an express private right of action. And the court based this newly minted mitigation imperative on a separate ACA provision Congress passed—§ 1401—that says nothing about the scope of remedies recoverable under § 1402.

Section 1402's "shall pay" language is anything but silent when it comes to a remedy. Nor is there any justification—in precedent or elsewhere—for the Federal Circuit's failure to apply bedrock principles of statutory construction. Those principles foreclose the Federal Circuit's unprecedented conclusion and the severe consequences for petitioners, *amici*, and society more broadly that inevitably will follow. To borrow an observation this Court recently made, the Federal Circuit's decision to "tinker with, and then engraft a" contract-law principle onto a statute—without any textual basis for doing so—would "require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1017 (2020). That, of course, is not what courts should or can do. The Court should say so—again.

I. REVIEW IS NECESSARY TO REINFORCE THE CENTRAL TEACHING OF *MAINE COMMUNITY*—THE GOVERNMENT MUST HONOR ITS PROMISES.

As the petition aptly demonstrates, the Federal Circuit's decision is squarely at odds with this Court's recent decision in *Maine Community*. That is reason alone for this Court to grant review. S. Ct. R. 10(c);

Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam) (granting certiorari and vacating decision below because it "contradicts this Court's precedent"). Another is the particular way the decision below breaks from *Maine Community*—by ignoring the statutory text and allowing the government, once again, to renege on its promises. Certiorari is necessary to end the Federal Circuit's habit of devising novel ways for the government to skirt binding legal obligations imposed on it by Congress.

On its own, the court of appeals' cursory treatment of *Maine Community* is difficult to fathom—and wrong. The court opened a wide lane for its flawed conclusion early on, opining without elaboration that "the Supreme Court in *Maine Community*" did not resolve the question whether CSR payments could be recovered where premium tax credits were received. App.12. That framed the scope of this Court's holding and rationale in *Maine Community* far too granularly. True, the Court there did not decide the precise question presented in this case. But *Maine Community*'s core reasoning and holding plainly resolve that question, Pet. 21-26, and the Federal Circuit wrongly concluded otherwise. And there is no warrant to be chary in interpreting the binding force and scope of *Maine Community*.

Maine Community's central command that the government "honor its obligations" is clear and "as old as the Nation itself[.]" 140 S.Ct. at 1331. It is not just a matter of fair play—it is enormously consequential for the health and future of our Nation and its economy. If the COVID-19 pandemic experience has taught us nothing else, it has demonstrated the great potential of public-private partnerships to solve some

of the most pressing and unpredictable of our Nation's problems. But those partnerships depend critically on the assurance that all will be held to the same standard of honoring the promises they make—and be subjected to all the law's remedies if they don't.

This is why the Court repeatedly has emphasized that the law must "safeguard[] both the expectations of Government contractors and the long-term fiscal interests of the United States." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191 (2012). *Maine Community* emphatically revitalized the primacy of this principle. But the Federal Circuit's decision ignores it, and its departure from *Maine Community* is an affront to fairness and justice—and to this Court's established jurisprudence. The Court cannot allow any erosion of the basic requirement that all parties—including the government—must honor their obligations, lest the large loophole the Federal Circuit opened in this case becomes a gaping one.

II. THE FEDERAL CIRCUIT'S DECISION BELOW IS WRONG

As the petition correctly explains, the Federal Circuit's ruling followed from a fundamental breakdown in applying settled principles of statutory construction and an erroneous interpretation of this Court's precedents. *Amici* will further elaborate on these points.

A. The Federal Circuit's Statutory Construction Was Plainly Flawed

The dispositive question in this case is whether ACA § 1402 can be read to contain an unwritten "contract-mitigation" limitation on any recovery of statutory CSR payments the government is obligated to

make. In resolving this question, the Federal Circuit undeniably should have started where all statutory construction must—the statutory text—and determined whether the text includes the limitation the court of appeals ultimately adopted. *See Little Sisters of the Poor*, 140 S. Ct. at 2380 (where the statutory language is unambiguous, the court's "'analysis begins and ends with the text'") (citation omitted). After all, it is the statutory text that has the force of law—not perceived lacunae in it. *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2349 (2020) (rejecting "argument [that] may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will[, b]ut courts today zero in on the precise statutory text").

Courts therefore don't work backwards from gaps in a text or preconceived notions of what Congress "must have meant" to the text itself. *Lewis*, 560 U.S. at 215, 217 (stressing that courts may "not rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended. … If [an] effect was unintended, it is a problem for Congress, not one that federal courts can fix"). And they "construe [a statute's] silence as exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); *see also Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (explaining that "in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write").

Thus, as the Court repeatedly has reminded, conjuring up extra-textual mandates or limits in statutes is verboten, and that is true no matter the policy concerns a court may perceive or wish were addressed in

the statute. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("courts aren't free to rewrite clear statutes under the banner of our own policy concerns"). Particularly pertinent here, courts may not "engraft on a statute additions which [they] think the legislature logically might or should have made[.]" *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1867 n.11 (2019) (citation omitted) (cleaned up). Nor will "[t]he federal judiciary [] engraft a remedy on a statute"—or a limit on a remedy—"no matter how salutary, that Congress did not intend to provide." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985) (citation omitted). These are not mere recommendations—they follow from "our constitutional structure" itself, which "does not permit" judicial rewriting of statutes. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (citation omitted); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) ("we are not at liberty to rewrite the statute passed by Congress and signed by the President").

The court of appeals clearly failed to honor these foundational precepts of construction. To begin with, it pointed to no textual basis for imposing its contract-mitigation limitation on the remedy § 1402 creates—and there is none. Section 1402(c)(3)(A) states that where an insurer makes CSR payments, "the Secretary shall make periodic and timely payments to the issuer equal to the value of the" CSRs. Section 1402 does not mention offsets or mitigation—explicitly or otherwise—nor does it allude to § 1401 or the premium tax credits available thereunder. Given the "clear language" in § 1402, it was "improper to conclude that what Congress omitted from the statute is

nevertheless within its scope." *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (citations omitted); *see also Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 221 (2018) (finding "no evidence in either the language of the ACA or its legislative history that Congress intended that the statutory obligation to make CSR payments should or would be subject to an offset based on an insurer's premium rates").

The Federal Circuit's interpretative errors did not end there. As noted, it found that an insurer must deduct from the CSR payments owed under § 1402 the amount of additional premium tax credits received under § 1401 as a result of the government's violation of § 1402. Yet the court of appeals never actually considered § 1401's text or how it should be read together with § 1402. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'") (citation omitted). In fact, § 1401 reinforces the plain meaning of § 1402, and precludes the court of appeals' invention of its novel "contract-mitigation" rule.

Section 1401 provides that taxpayers are entitled to a "[r]efundable [tax] credit for coverage under a qualified health plan." 26 U.S.C. § 36B. Had Congress intended § 1401 tax credits to affect, much less offset, the insurers' recovery of § 1402 CSR payments, Congress would have said so given that the provisions follow one another in the ACA, were enacted at the same time, and relate to one degree or another to silver health-insurance plans. But § 1401 does not even reference its next-door neighbor, § 1402, or hint that a

credit received by taxpayers under § 1401 might result in an offset or mitigation of CSRs owed to insurers under § 1402. And, as the court of appeals acknowledged, while ACA § 1412, 42 U.S.C. § 18082, references both the premium tax credits and CSRs, App.24, that provision does not tie §§ 1401 and 1402 together in any way.

All of this is further, formidable evidence that § 1402 does not mean what it does not say. Just as Congress knows how "to link the meaning of a statutory provision to a body of [the Supreme] Court's case law" when it "wants to," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014) (citation omitted), the same is true—*a fortiori*—when Congress wants to link together sections of the same *statutory enactment*. Yet as illustrated, the "text of § [1402] fails to provide any cross-reference to § [1401]" or vice versa, and "if Congress had intended to create the scheme [the court of appeals] envision[s], it would have done so in clearer terms." *Whitfield v. United States*, 543 U.S. 209, 215 (2005) (rejecting purported "link between [] two separate statutes" based on one commonality between the statutes' terms). "Talk about" trying to "squeez[e] elephants into mouseholes." *Va. Uranium*, 139 S. Ct. at 1903 (citation omitted).

That Congress would have spoken much more clearly and explicitly had it intended to codify the Federal Circuit's interpretation further follows from the fact that its new contract-mitigation principle is in fact so novel and unprecedented. Courts "expect more than simple statutory silence if, and when, Congress were to intend [such] a major departure" from existing law. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973,

984 (2017) (citation omitted). Unsurprisingly, the court of appeals strained to find any applicable precedent for its reading precisely because its extraordinary rewriting of a clear money-mandating statutory provision that gives rise to Tucker-Act jurisdiction stands alone in the Federal Reporters. In such instances, this Court properly refuses to infer that Congress would provide for such a path-breaking outcome without saying so.

And that is not all. Longstanding precedent treats statutes structured like § 1402 as providing not compensatory damages, but a specific-relief, liquidated-damage-type remedy *not* subject to mitigation under black-letter law. Pet. 29-30; *see also Bowen v. Massachusetts*, 487 U.S. 879, 900 (1988); *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 623-24 (2000). This Court "presume[s] that 'Congress is aware of existing law when it passes legislation.'" *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (citation omitted) (cleaned up). Accordingly, the Federal Circuit should have "assume[d] that Congress—aware of th[e] precedent" deeming similar "shall pay" statutes to provide for the remedy of the specific amount of sums due, immune to offsets or mitigation—"would have intended" § 1402 to provide for just that (*Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020)): payment by the government of CSR amounts as required under the statute, without any offsets or mitigation.

Congress certainly knows how to impose an offset or mitigation limitation on a statutory remedy when it wishes to do so. This is evidenced by the Back Pay Act, which, as the court of appeals itself acknowledged (App.17n.8), explicitly provides for such an offset. *See*

5 U.S.C. § 5596(b)(1)(A)(i). Other statutes predating the ACA do the same. *See*, *e.g.*, 42 U.S.C. § 2000e-5(g)(1) (directing courts to deduct "interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against" from any back-pay damages awarded under Title VII of the Civil Rights Act).[3] Thus, it is clear that, "[h]ad Congress" meant to impose a similar mitigation or offset limitation on the statutory amounts owed under § 1402's specific payment mandate, "it knew how to say so." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018) (citation omitted); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

So "[r]eally, to accomplish all it wants," the government "would have to persuade" this Court to "add" *23 words* to the provision of § 1402(c)(3)(A) at issue, as follows (*Va. Uranium*, 139 S. Ct. at 1903):

> [T]he Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions***, less additional premium tax credits the issuer receives from the sale of silver plans resulting from the Secretary's failure to make such payments***.

[3] As petitioners also note, Congress knows how to prevent supposed "windfalls" from the operation of the statutes it enacts. Pet.33. But it enacted no text designed to do so here.

"That may be a statute some would prefer"—and the statute the government claims Congress intended—"but it is not the statute we have." *Id.*

As the discussion above makes clear, the Federal Circuit again has adopted an approach to reading statutes that "is a relic from a 'bygone era of statutory construction[,]'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted), where statutes were treated as "empty vessel[s]" into which courts could "pour" their preferred "vintage" of policies, *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978), and where textual silence was not the end of the analysis, but an open invitation to mold the statute into a court's desired fit and shape. That era is long gone.

Here, a proper contextual reading of § 1402, applying settled principles of statutory construction, should have led the Federal Circuit to affirm the judgment below and require the government to pay the full amount of the statutory CSR payments owed—just as § 1402 provides.

B. The Federal Circuit Misread and Misapplied This Court's Precedents

Rather than looking for statutory text supporting the mitigation limitation it ultimately applied, and following settled principles of construction, the Federal Circuit took a very different approach, one that ignored the plain statutory text—and the absence of text—and hinged on a plain misunderstanding of this Court's precedents.

As an initial matter, while it overlooked the principal holding of this Court's decision in *Maine Community*, the court of appeals purported to rely on that

ruling for its pivotal finding that the ACA does ***not*** create a "remedial scheme[,]" opening the door to import contract principles in determining "the scope of the insurers' damages remedy." App.18. But that finding is contrary to the Court's decision in *Maine Community*. The Court actually said the ACA "did not establish a *comparable* remedial scheme" to other statutes deemed to displace Tucker-Act jurisdiction and remedies. *Maine Community*, 140 S. Ct. at 1330 (emphasis added). And the Court did so in reaching its *jurisdictional* determination that the ACA did not create "a separate remedial scheme supplanting the Court of Federal Claims' power to adjudicate petitioners' claims" under the Tucker Act. *Id.* at 1329. The Court did not even remotely suggest that there is a "contract-law analogy" applied to § 1402 or provisions like it, as the court of appeals wrongly deduced here.

That threshold error triggered a cascade of others. The court of appeals proceeded to proclaim that § 1402 "'contains no express remedies' at all with respect to the government's obligation" to make CSR payments. App.18 (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)). And with that proclamation in hand, the court then claimed it had the authority to treat § 1402 like a contract and engraft contract-mitigation principles onto that provision that are nowhere mentioned in its text. The court's conclusions were wrong—and demonstrably so.

First, as noted, § 1402 explicitly *does* provide a remedy—CSR "payments … equal to the value of reductions" made. That type of remedy, as this Court explained in *Bowen*, is one for "specific relief" in the form of the "payment of money" required by "the statutory mandate itself[.]" 487 U.S. at 900 (describing similar

statute imposing "shall pay" obligation). The Court reiterated that precise view in *Maine Community*, where it held that the remedy in the ACA's risk-corridors provision—which, like § 1402, imposes a "shall pay" obligation—was one for "specific sums, already calculated, past due, and designed to compensate for completed labors." 140 S. Ct. at 1330-31. The necessary predicate for the Federal Circuit's novel invocation of *Barnes*' "contract-law analogy" principle—the supposed absence of any "express remedies" in § 1402—therefore was simply incorrect.

Rather than acknowledging the holdings in *Bowen* and *Maine Community*, however, the Federal Circuit inexplicably quoted *Bowen*'s observation that "the Court of Claims has no [general] power to grant equitable relief." App.16n.6. That is true, but irrelevant, because the CSR payments are *not* equitable relief, but rather the payment of specific sums mandated under a statute, which falls comfortably within the jurisdiction of the Court of Federal Claims to award. *See Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1126 (Fed. Cir. 2007). Indeed, such relief against the government can *only* be pursued in the Court of Federal Claims. *See Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998).

Second, the broad authority to effectively rewrite § 1402 the court of appeals claimed to derive from *Barnes* and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), has no application to § 1402. Unlike here, the statutes at issue in those cases "mention[ed] *no remedies*" *at all*. *Barnes*, 536 U.S. at 187 (discussing Title VI of the Civil Rights

Act of 1964 and Title IX of the Education Amendments of 1972) (emphasis added); *Sossamon v. Texas.*, 563 U.S. 277, 288 (2011) (pointing out that in *Barnes*, the Court had "no statutory text to interpret") (citation omitted).

In fact, unlike § 1402—which, as the court of appeals correctly noted, creates a money-mandating obligation enforceable through a cause of action authorized under the Tucker Act (App.11)—Title VI and Title IX "fail[ ] to mention even a private right of action" and have been found privately enforceable only through an *implied* right of action not explicitly provided in the statutory text. *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1107-1108 (9th Cir. 2020) (noting that a "damages remedy for Title IX violations is judicially implied, not statutorily created") (citation omitted). Thus, § 1402 plainly is distinct from those statutes and their *implied* rights and remedies.

This distinction, moreover, contemplates a very different and far more expansive judicial function than is warranted in this case. Unlike § 1402, because the cases relied upon by the Federal Circuit involved "judicially implied" rights of action, the Court there reasoned that any question of remedy "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." *Gebser*, 524 U.S. at 284 (citations omitted). Even in that setting, however, the Court in *Gebser* was careful to note that "[t]o guide the analysis, we generally examine *the relevant statute* to ensure that we do not fashion the parameters of an implied right in a manner *at odds with the statutory structure and purpose*." *Id.* (citations omitted) (emphasis added). In other words, even in circumstances—unlike here—where a

court has some "measure of latitude to shape a sensible remedial scheme" in a statute that is silent on the question, it still must hew closely to the statute's text, structure, and purpose.

In contrast, where, as here, Congress created both a statutory right of action and an accompanying remedy in § 1402, the Court does not have such latitude because that impermissibly would intrude on the legislative function. That "'Congress rather than the courts controls the availability of remedies for violations of statutes'" is firmly "'grounded in separation of powers[.]'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (citation omitted); *see also FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 782 (7th Cir. 2019) ("Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action.") (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015)). For these reasons, just as "courts must be especially reluctant to provide additional remedies[]" where "a statute expressly provides a remedy," *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017) (citation omitted) (cleaned up), they must be even more reluctant to impose extra-textual contract-law limits on a remedy that "a statute expressly provides[.]"

Further, the Federal Circuit's broad application of *Barnes* ignores its limited holding. The Court there stressed that it had "been careful not to imply that *all* contract-law rules apply to Spending Clause legislation[.]" *Barnes*, 536 U.S. at 186 (citation omitted) (emphasis added). And it in no way meant to imply "that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all

issues that they raise." *Id.* at 189 n.2; *see also Sossamon*, 563 U.S. at 290 (same) (citing *Barnes*, 536 U.S. at 189 n.2). The Federal Circuit did not mention any of these crucial admonitions and limitations, however, selectively focusing instead on *Barnes*' isolated "contract-law analogy" language—which, as shown, cannot be applied to § 1402.

The wholesale conversion of so-called "Spending-Clause statutes" into contracts contemplated by the Federal Circuit is a bridge too far. As noted, the Supreme Court in *Barnes* did not adopt such an expansive rule, nor has any other decision of this Court—before *Barnes* or since. That is for good reason, since that rule would authorize federal courts to exercise common law-like power to revise a broad spectrum of Congressional enactments, past and future, in the name of the law of contracts. But as this Court often has reminded, "'[f]ederal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (citation omitted). And neither the Constitution nor any statute confers anything like the power of judicial revisionism the Federal Circuit exercised here.

III. THE FEDERAL CIRCUIT'S DECISION IMPERILS PUBLIC-PRIVATE PARTNERSHIPS AND INFLICTS SEVERE HARM ON THE SEPARATION OF POWERS.

If left standing, the grave consequences of the Federal Circuit's decision cannot be overstated. To be sure, when the *Maine Community* risk-corridors case arrived at this Court from the Federal Circuit a few years ago, serious ramifications were in play that resemble those here.

But the effects of the Federal Circuit decision now before the Court are even more dangerous—and destructive—and threaten a far more damaging blow to separation of powers. The ruling actively encourages the government to: (i) shirk its "shall pay" statutory obligations, which arise under "many other federal statutes" besides the ACA (*Maine Community*, 140 S. Ct. at 1333 (Alito, J., dissenting)); (ii) shift the onus to its private-sector partners to sue and pay for costly and protracted litigation;[4] and, in the meantime, (iii) conceive mitigation arguments limited only by the government's imagination—and as to which ***plaintiffs*** seeking to recover statutory payments to which they are entitled will bear the burden of proof. App.31-32.

There is no downside for the government in adopting this strategy to avoid its statutory liability. The government can deploy its vast taxpayer-funded resources to litigate any and all of its mitigation theories. Even if the government ultimately is required to honor its statutory obligations, it need only pay out what was owed in the first place—and many years later, after all appeals have been exhausted.

Thus, we should expect the government to be emboldened to extend the Federal Circuit's inventive

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[4] And make no mistake, litigation in a world where government mitigation arguments are commonplace following the Federal Circuit's ruling will be protracted and complex. The court of appeals acknowledged as much, noting that on remand the Court of Federal Claims will need to undertake the "necessarily fact-intensive task" of determining whether and how an insurer mitigated the effects of the government's statutory violation in the hypothetical, but-for world where the government honored its obligations. App.29,32-33.

new interpretative principle to the full spectrum of contract law by infusing contract-law rules upon statutes that invite no such infusion, thereby restricting the remedies and recoveries available for statutory violations. Courts, not Congress, will be able to employ this new mitigation tool to correct judicially perceived inequities in statutory programs. There is no apparent substantive or jurisdictional limitation on how far this new principle could extend or to what statutes and disputes it could be applied. If history is any guide—and it should be—we should fully expect that many judges and courts will exercise this new power in the supposed interests of fairness and equity, and do precisely what this Court repeatedly has admonished against: inserting unwritten terms into plain statutory text. And this will not be without widespread repercussions, for it will severely disrupt and destabilize the business and expectations of the government's private-sector partners.

In the end, the Federal Circuit's interpretative adventurism is no trivial concern—it strikes at the heart of our separation of powers and is an unconstitutional invasion of Congress's established power to make law. If Congress had been concerned about the interplay of §§ 1401 and 1402 when it came to the ACA's silver health plans—and it surely understood that interplay—it could and would have enacted specific measures to address it. It did not, and that should have been both the beginning and the end of this case.

CONCLUSION

For the foregoing reasons and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

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