No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

MAINE COMMUNITY HEALTH OPTIONS

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

COMMUNITY HEALTH CHOICE, INC.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 1402 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 220, requires insurers to reduce cost sharing (such as deductibles and copayments) for certain individuals who purchase "silver" plans through an ACA Exchange. 42 U.S.C. 18071. "[I]n order to reduce the premiums," 42 U.S.C. 18082(a)(3), the ACA also directs the government to make advance payments to insurers equal to the value of such cost-sharing reductions (CSR payments), 42 U.S.C. 18082(c)(3). In October 2017, the government ceased making CSR payments to insurers after determining that it lacked any appropriation to pay them. For 2018 and subsequent years, many insurers—including respondents—offset the absence of CSR payments by increasing their silver-plan premiums. By operation of the ACA's formula, increasing silver-plan premiums also resulted in a substantial increase in premium tax credits that the government pays to insurers on behalf of lower-income individuals. 26 U.S.C. 36B(b)(2)(B). Respondents brought these actions seeking money damages for unpaid CSR payments. The court of appeals held that the government was liable to insurers for unpaid CSR payments but that an insurer's damages must be offset to account for the additional premium tax credits that the insurer received. The question presented is as follows:

Whether the court of appeals erred in concluding that Congress intended to afford insurers an implied money-damages remedy as compensation for CSR payments that were not made because Congress declined to appropriate funds to pay them and that could generally be offset under other ACA provisions that insurers invoked to obtain a recovery.

RELATED PROCEEDINGS

United States Court of Federal Claims:

Community Health Choice, Inc. v. *United States*, No. 18-5C (Feb. 15, 2019)

Maine Community Health Options v. *United States*, No. 17-2057C (June 10, 2019)

United States Court of Appeals (Fed. Cir.):

Community Health Choice, Inc. v. *United States*, No. 2019-1633 (Aug. 14, 2020)

Maine Community Health Options v. *United States*, No. 2019-2102 (Aug. 14, 2020)

Supreme Court of the United States:

Maine Community Health Options v. *United States*, No. 20-1162 (petition for writ of certiorari filed Feb. 19, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

MAINE COMMUNITY HEALTH OPTIONS

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

COMMUNITY HEALTH CHOICE, INC.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully files this conditional cross-petition for a writ of certiorari pursuant to this Court's Rule 12.5 to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases. Pursuant to this Court's Rule 12.4, the United States is filing a "single [conditional cross-]petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34)[1] is reported at 970 F.3d 1364. The opinion of the Court of Federal Claims in the action brought by respondent Maine Community Health Options (Pet. App. 95-148) is reported at 143 Fed. Cl. 381. The opinion of the Court of Federal Claims in the action brought by respondent Community Health Choice, Inc. (Pet. App. 39-94) is reported at 141 Fed. Cl. 744.

JURISDICTION

The judgments of the court of appeals were entered on August 14, 2020. Petitions for rehearing were denied on November 10, 2020 (Pet. App. 35-36, 37-38). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari in these cases to April 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at Pet. App. 149-176.

STATEMENT

1. a. These cases concern the relationship between two mechanisms that Congress enacted in the Patient Protection and Affordable Care Act (ACA), Pub. L. No.

---

[1] Unless otherwise indicated, the term "Pet. App." in this conditional cross-petition refers to the appendix to the petition for a writ of certiorari in No. 20-1162. See Sup. Ct. R. 12.5.

111-148, 124 Stat. 119, to "make [health] insurance more affordable." *King* v. *Burwell*, 576 U.S. 473, 482 (2015).

First, in Section 1401 of the ACA, 124 Stat. 213 (26 U.S.C. 36B), Congress provided for "refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line." *King*, 576 U.S. at 482. "Individuals who meet the Act's requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual's insurer." *Ibid.*; see ACA § 1412, 124 Stat. 231 (42 U.S.C. 18082). The vast majority of individuals who purchase coverage through an Exchange receive premium tax credits. See *King*, 576 U.S. at 494 (87% in 2014).

Second, Section 1402 of the ACA, 124 Stat. 220 (42 U.S.C. 18071), requires insurers to reduce the cost-sharing obligations (such as deductibles and copayments) of certain lower-income individuals who enroll in "silver" plans through an Exchange.[2] Congress recognized, however, that requiring insurers to reduce cost sharing would prompt insurers to raise their premiums to cover the increased costs. Accordingly, "in order to reduce the premiums," ACA § 1412(a)(3), 124 Stat. 232 (42 U.S.C. 18082(a)(3)), Congress directed the government to make advance payments to insurers equal to the amount of those mandated cost-sharing reductions (CSR payments), ACA §§ 1402(c)(3), 1412(c)(3), 124 Stat. 222, 233 (42 U.S.C. 18071(c)(3), 18082(c)(3)), just as premium

---

[2] The ACA classifies most plans offered on the Exchanges into one of four metal levels based on their cost-sharing requirements. 42 U.S.C. 18022(d)(1). A "silver" plan is a plan structured so that the insurer pays on average 70% of an enrollee's health-care costs, leaving the enrollee responsible for the remainder. 42 U.S.C. 18022(d)(1)(B).

tax credits are paid to insurers in advance, see ACA § 1412(c)(2), 124 Stat. 232 (42 U.S.C. 18082(c)(2)).

b. For several years, the government made direct CSR payments to insurers from the same permanent appropriation that it used to pay premium tax credits to insurers. Pet. App. 49-50. In 2016, however, the United States District Court for the District of Columbia concluded that CSR payments could not be made from that permanent appropriation. See *id.* at 50-51 (discussing *United States House of Representatives* v. *Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), appeal dismissed, No. 16-5202 (D.C. Cir. May 16, 2018) (per curiam)). In October 2017, the Attorney General made the same determination, and the government accordingly announced that it would cease making direct CSR payments to insurers. *Id.* at 51-52. The appropriation question is not at issue here.

The cessation of direct CSR payments to insurers did not relieve insurers of their obligation under Section 1402 of the ACA to reduce cost sharing for eligible individuals enrolled in silver plans. Pet. App. 6. States accordingly "began working with the insurance companies to develop a plan for how to respond," but "in a fashion that would avoid harm to consumers" caused by increased out-of-pocket costs. *Ibid.* (quoting *California* v. *Trump*, 267 F. Supp. 3d 1119, 1134 (N.D. Cal. 2017)).

The solution that most insurers (including repondents) and States adopted—and which the Department of Health and Human Services (HHS) had anticipated several years earlier—was for insurers to increase their premiums for silver plans (to which the cost-sharing-reduction requirement is applicable), a practice known as "silver loading." Pet. App. 8 (citation

omitted); see *id.* at 6-8; Pet. 9; see also Office of the Assistant Secretary for Planning and Evaluation (ASPE), HHS, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* (Dec. 2015) (2015 ASPE Issue Brief), https://go.usa.gov/xyjS2. The amount of the premium tax credits provided for under Section 1401 of the ACA is calculated based on the premium for the second-lowest-cost silver plan in a rating area. See ACA § 1401(a), 124 Stat. 213-214 (26 U.S.C. 36B(b)(2)); Pet. App. 6-7. As the court of appeals observed, "[i]n effect, if the insurers increased the monthly premium for their benchmark silver plans," then "each insurer would receive" a corresponding "increase in the amount of the premium tax credit for each applicable taxpayer under its silver plans, all while keeping the out-of-pocket premiums paid by each applicable taxpayer the same." Pet. App. 7; see 2015 ASPE Issue Brief 2.

Silver loading not only enabled insurers to offset the CSR payments they did not receive for their silver plans, but it also "ha[d] an effect on other plans as well." Pet. App. 7. As the court of appeals explained, because premium tax credits may be used for any metal-level plan (not just silver plans), and because the amount of those credits is keyed to benchmark silver-plan premiums, "premium increases for silver-level plans" meant that insurers "would also receive additional tax credits for applicable taxpayers that were enrolled in bronze, gold, and platinum plans, whether or not the premiums for those plans were increased." *Ibid.* Thus, "[e]ven if the insurers kept premiums the same for those other plans, they would receive additional tax credits." *Ibid.* "As a result," in States that allowed insurers to raise silver-plan premiums (as nearly all did), "for everyone

between 100% and 400% of the federal poverty level who wished to purchase insurance on the [E]xchanges, the available tax credits rose substantially"—and "[n]ot just for people who purchased the silver plans, but for people who purchased other plans too." *Id.* at 7-8 (brackets and citations omitted); see Congressional Budget Office (CBO), *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 8-9 & n.2 (May 2018) (May 2018 CBO Report), https://go.usa.gov/xdBQa; 2019-1633 Gov't C.A. Br. 12 n.7.

The CBO has explained that the across-the-board increase in premium tax credits caused by silver loading resulted in a substantial net increase in the government's aggregate payments to insurers and made plans on the Exchanges more affordable for millions of individuals. See May 2018 CBO Report 9. The CBO projected that, due to silver loading, federal payments to insurers would increase by $194 billion over a decade. See CBO, *The Effects of Terminating Payments for Cost-Sharing Reductions* 2, 7 (Aug. 2017) (August 2017 CBO Report), https://go.usa.gov/xdZQ8. And the CBO observed that silver loading enabled "more people * * * to use their higher premium tax credits to obtain bronze plans * * * for free or for very low out-of-pocket payments for premiums," or to "purchase gold plans, which cover a greater share of benefits than do silver plans, with similar or lower premiums after tax credits." May 2018 CBO Report 9; see *California*, 267 F. Supp. 3d at 1135 (providing illustrative examples, such as a 50-year-old single person at 300% of the federal poverty level living in San Jose, for whom the area's most popular bronze plan would have cost her $134 per month in 2017, but for whom the same bronze plan would cost her only $53 per month in 2018).

The CBO estimated that, "in most years, between 2 million and 3 million more people" would "purchase subsidized plans in the marketplaces than would have if the federal government had directly reimbursed insurers for the costs of" reducing cost sharing for insureds. May 2018 CBO Report 9; see August 2017 CBO Report 2; CBO, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2019 to 2029*, at 31-34 (May 2019), https://go.usa.gov/xdB82. Conversely, a private study by the RAND Corporation in 2019 projected that a return to direct CSR payments would "decrease both federal spending and health insurance enrollment," and that "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." Preethi Rao & Sarah Nowak, *Effects of Alternative Insurer Responses to Discontinued Federal Cost-Sharing Reduction Payments: Broad Loading as an Alternative to Silver Loading* 13-14 (2019) (RAND Report), https://www.rand.org/pubs/research_reports/RR2963.html.

HHS recognized that silver loading would not benefit the small percentage of silver-plan enrollees who were not eligible for premium tax credits (typically because their incomes exceed the statutory threshold). Memorandum from Samara Lorenz, Director, Oversight Group, Center for Consumer Info. & Ins. Oversight, Centers for Medicare & Medicaid Servs., HHS, *Insurance Standards Bulletin Series—Information: Offering of Plans that are not QHPs without CSR "loading"* 1 (Aug. 3, 2018) (August 2018 HHS Memorandum), https://go.usa.gov/xdDH3; see May 2018 CBO Report 9; Pet. App. 8. To assist such consumers, HHS "encourag[ed] states to allow Exchange issuers to offer individual market plans * * * outside the

Exchange[s]" that "do not include this [silver] load," *i.e.*, for which the premiums were not increased. August 2018 HHS Memorandum 1; see *id.* at 1-2. The CBO found that "many people who are not eligible for subsidies are able to select a plan besides a silver one or a silver plan sold outside the marketplaces and avoid paying the premium increases stemming from the lack of a direct appropriation for" CSR payments. May 2018 CBO Report 9.

Congress has since enacted legislation that protects the practice of silver loading through 2021. In December 2019, it enacted a provision, captioned "Protection of silver loading practice," which states that, "[w]ith respect to plan year 2021, the Secretary of [HHS] may not take any action to prohibit or otherwise restrict the practice commonly known as 'silver loading'" as defined in HHS's pertinent regulations. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. N, § 609, 133 Stat. 3130 (capitalization altered; emphasis omitted).

2. Respondents Maine Community Health Options and Community Health Choice, Inc. (petitioners in No. 20-1162), are health insurers that sell plans on the Exchanges in Maine and Texas, respectively. Pet. App. 8. As required by Section 1402 of the ACA, both reduced the cost sharing for eligible insured individuals who enrolled in silver plans. *Id.* at 9. Beginning in October 2017, like other insurers, respondents no longer received direct CSR payments. *Ibid.* And like other insurers, they engaged in silver loading—*i.e.*, raised their silver-

plan premiums—to offset the absence of CSR payments. Pet. App. 23.[3]

Respondents nevertheless filed separate actions against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, alleging that the government is liable on an ongoing basis for the full value of CSR payments not made and seeking money damages for the years 2017 and 2018. Pet. App. 9. As relevant here, respondents claimed both that the government's failure to make direct CSR payments violated the ACA and that it "constituted a 'breach of an implied-in-fact contract.'" *Id.* at 10 (brackets and citation omitted).

The Court of Federal Claims granted summary judgment for respondents in separate (but materially identical) decisions on both their statutory and contractual theories. Pet. App. 39-94, 95-148. The court acknowledged that silver loading "would help mitigate the loss of the cost-sharing reduction payments" and that "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for [CSR] payments." *Id.* at 53-54. But it concluded that "allowing insurers to both obtain greater premium tax credits and obtain a judgment for their lost cost-sharing reduction payments" is not "an unwarranted windfall for insurers." *Id.* at 77-78.

---

[3] Respondents raised their rates before the October 2017 announcement that HHS would cease making direct CSR payments, but they did so on the explicit assumption that such payments would no longer be made. See Milliman, *Part III Actuarial Memorandum, Maine Community Health Options (d/b/a Community Health Options) Individual Rate Filing Effective January 1, 2018*, at 2-3 (Sept. 5, 2017); Milliman, *Part III Actuarial Memorandum: Community Health Choice Individual Rate Filing Effective January 1, 2018*, at 3 (Sept. 18, 2017).

3. The court of appeals affirmed in part, reversed in part, and remanded in a single decision. Pet. App. 1-34.

a. The court of appeals affirmed the Court of Federal Claims' holding that the government is liable under the ACA for outstanding CSR payments.[4] Pet. App. 11-12. The court of appeals reached that conclusion based on its opinion in *Sanford Health Plan* v. *United States*, 969 F.3d 1370 (Fed. Cir. 2020), issued the same day by the same panel, in which the court had

> h[e]ld that the government violated its obligation to make cost-sharing reduction payments under section 1402; "that the cost-sharing-reduction reimbursement provision imposes an unambiguous obligation on the government to pay money; and that the obligation is enforceable through a damages action in the [Court of Federal Claims] under the Tucker Act."

Pet. App. 11 (brackets and citation omitted). Like these cases, *Sanford* involved actions by insurers claiming unpaid CSR payments. 969 F.3d at 1372. Unlike these cases, however, the plaintiffs in *Sanford* sought to recover damages for missed CSR payments only for the final months of 2017, *ibid.*—*i.e.*, after the government ceased making direct CSR payments, but before insurers were able to offset the value of such payments by engaging in silver loading, which was not possible in 2017 because premiums for that year had already been set, see *id.* at 1376. *Sanford* accordingly presented only the question of the government's liability, and not the effect of insurers' receipt of increased premium tax credits on the computation of their asserted damages.

---

[4] The court of appeals did not reach respondents' contract-based claim. Pet. App. 12, 33-34.

The *Sanford* panel concluded that its liability ruling was dictated by this Court's decision in *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308 (2020). 969 F.3d at 1378-1382. In *Maine Community*, the Court held that the government was liable to insurers in suits for money damages for having failed to make payments to insurers that were required by a different ACA provision (establishing the risk-corridors program) despite Congress's failure to appropriate funds to make payments in the amounts prescribed. 140 S. Ct. at 1319-1331. The court of appeals in *Sanford* found "no sufficient basis for reaching a different conclusion" with respect to CSR payments not made due to the lack of available appropriations. 969 F.3d at 1381; see *id.* at 1380-1383.

The court of appeals in *Sanford* rejected the government's argument that a damages remedy for outstanding CSR payments should not be inferred from the ACA's structure, which allows insurers to offset such losses by increasing premium tax credits through silver loading. 969 F.3d at 1382-1383. The court acknowledged the "premise of the government's argument": that "the premium tax credit provision can indeed lead to partial or complete offsetting of losses from nonreimbursement 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.* at 1383. The court concluded, however, that "a categorical displacement of the availability of Tucker Act damages actions is not necessary to avoid such overpayment." *Ibid.* It reasoned that "there is a separate body of law that more precisely addresses the problem the government identifie[d]": the

law of damages. *Ibid.* The *Sanford* panel explained that "[d]amages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries" and "accommodates the practical interaction of the two subsidy mechanisms." *Ibid.* In support, the *Sanford* panel pointed to the decision below in these cases issued the same day. *Ibid.*

b. In the decision below in these cases, the same panel that decided *Sanford* directly addressed "the appropriate measure of damages," which was "not presented in *Sanford*." Pet. App. 2. These cases, unlike *Sanford*, include not only claims for CSR payments not made in the last several months of 2017, but also claims for missed CSR payments in 2018—after most insurers were able to increase silver-plan premiums, as respondents did. *Ibid.* Applying its holding in *Sanford*, the court of appeals in these cases "conclude[d] that the government is not entitled to a reduction in damages with respect to cost-sharing reductions not paid in 2017." *Ibid.*; see *id.* at 12.

With respect to 2018, however, the court of appeals "h[e]ld that the [Court of Federal Claims] 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." Pet. App. 2; see *id.* at 12-29. The court remanded the cases to the trial court "for a determination of the amount of premium increases (and resultant premium tax credits) attributable to the government's failure to make [CSR] payments." *Id.* at 30.

4. Respondents filed petitions for rehearing en banc with respect to the court of appeals' damages holding. The government opposed rehearing but filed a conditional cross-petition for rehearing arguing that, if the court

granted rehearing as to damages, it should also grant rehearing as to liability. 2019-1633 C.A. Doc. 86, at 1-22 (Oct. 23, 2020). The court denied rehearing. Pet. App. 35-38.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

For the reasons set forth in our brief in opposition to the petition for a writ of certiorari in No. 20-1162, the petition in that case should be denied. The court of appeals correctly determined that the damages of the plaintiffs (respondents here) should be offset by the amount of increased premium tax credits they received as a "direct result of the government's nonpayment of cost-sharing reduction reimbursements." Pet. App. 23. If the Court grants that petition as to mitigation of damages, however, it should also grant review of the court of appeals' antecedent determination of the government's liability.

The court of appeals expressly premised its liability holding in *Sanford Health Plan* v. *United States*, 969 F.3d 1370 (Fed. Cir. 2020)—that the government is liable to insurers for money damages under the Tucker Act for unpaid CSR payments—in part on its determination here that the plaintiffs' damages should be offset by the amount of premium tax credits they received as a result of the government's non-payment of CSR payments. See *id.* at 1383. If the court of appeals' damages holding is set aside, its holding that the government is liable would be infirm, and that holding would have substantially greater practical significance. At a minimum, that court should have the opportunity to revisit its conclusion as to liability in light of this Court's resolution of the damages issue.

Thus, if the petition in No. 20-1162 is granted, the conditional cross-petition should be granted, or alternatively

held pending this Court's decision on the merits in that case.

1. The court of appeals concluded that, to the extent the government is liable in suits for money damages under the Tucker Act for CSR payments not made, those damages should be offset by the increased premium tax credit that a plaintiff received as a "direct result of the government's nonpayment of cost-sharing reduction reimbursements." Pet. App. 23. As we explain in our brief in opposition to the petition for a writ of certiorari in No. 20-1162, that conclusion is correct. In determining the "scope of [a] damages remedy" in this context, where the ACA "'contains no express remedies' at all," *id.* at 18, the court below adhered to this Court's precedent in looking to contract-law principles to inform its understanding of the limits of monetary relief. Applying that precedent, the court of appeals properly determined that respondents' damages should be offset by increased premium tax credits they received.

For the reasons set forth in our brief in opposition in No. 20-1162, that conclusion is correct and does not warrant further review. Respondents (petitioners in No. 20-1162) do not identify any material error in the court of appeals' damages analysis. See 20-1162 Br. in Opp. at 16-21, 24-29. And their contention that *Maine Community Health Options* v. *United States*, 140 S. Ct. 1308 (2020), compels a contrary result rests on a misreading of that decision. See 20-1162 Br. in Opp. at 21-24.

2. If the Court grants the petition in No. 20-1162 concerning the court of appeals' conclusion regarding the computation of damages, however, it should also grant review of that court's liability determination. The court's liability determination in *Sanford* was predicated in part on its damages holding in this case.

969 F.3d at 1383. If the court of appeals' damages holding were set aside, its liability holding would be called into doubt, and it would also take on much greater practical significance that would warrant further review.

a. The court of appeals' liability and damages determinations in the decision below are the product of the panel's interlocking decisions in these cases and *Sanford*. The panel held here that the liability issue was resolved by *Sanford*. Pet. App. 2, 12. That liability determination in *Sanford*, in turn, was expressly premised in part on the court's damages ruling in these cases. 969 F.3d at 1383.

i. In holding that the government is liable in a Tucker Act suit for money damages for unpaid CSR payments, the court of appeals in *Sanford* emphasized that "there is a separate body of law that more precisely addresses the problem the government identifies." 969 F.3d at 1383. The *Sanford* panel thus recognized "[t]he premise of the government's argument" on liability: *i.e.* "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 a [Section 1402] violation, once through raised premium tax credits and again through a damages award under the Tucker Act." *Ibid.*

The court of appeals in *Sanford* concluded, however, that "categorical displacement of the availability of Tucker Act damages actions [wa]s not necessary to avoid such overpayment." 969 F.3d at 1383. That was so, the court reasoned, 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," *i.e.*, the decision below in these cases. *Ibid.* The *Sanford* panel stated that damages law "accommodates the practical interaction of the two subsidy mechanisms without departing from the established principles governing Tucker Act coverage of payment-mandating provisions." *Ibid.* The panel here, in turn, deemed *Sanford*'s liability holding controlling. Pet. App. 2, 12.

ii. The court of appeals' conclusion in *Sanford* (which it applied here) that the government can be held liable for money damages in a suit by insurers under the Tucker Act for CSR payments not made thus reflected in part its determination in the decision below that plaintiffs like respondents cannot recover damages for claimed losses that they had already mitigated. The Federal Circuit's ruling largely addresses the government's need to safeguard the federal fisc from duplicative recoveries.

If the court of appeals' offsetting damages determination in the decision below were set aside, however, the basis of its liability ruling would be undermined in both legal and practical terms. If the trial court were precluded from taking account of respondents' receipt of increased premium tax credits as a "direct result" of their mitigation efforts undertaken in "direct response" to the cessation of CSR payments in calculating their damages, Pet. App. 23, 25, the *Sanford* panel's premise that damages law stands ready to prevent "double recoveries," 969 F.3d at 1383, would be inaccurate. And without that premise, the court's conclusion that Congress intended to grant insurers an implied money-damages remedy for unpaid CSR payments would be unsound.

iii. The court of appeals in *Sanford* also believed that its liability conclusion was compelled by this Court's decision in *Maine Community*, *supra*. See 969 F.3d at 1380-1383. That belief, however, was mistaken. *Maine Community* rejected in the context of the ACA's risk-corridors program, 42 U.S.C. 18062, certain arguments that the government had advanced in the lower courts here with respect to liability for CSR payments. For example, the *Maine Community* decision forecloses the contention that the Anti-Deficiency Act, 31 U.S.C. 1341, made the government's statutory obligation to make CSR payments contingent on the availability of appropriations. See 140 S. Ct. at 1321-1323. The government accordingly withdrew that argument below, 2019-1633 C.A. Doc. 68, at 1 (May 19, 2020), and we do not rely on it here.

Fundamental differences exist, however, between the risk-corridors program at issue in *Maine Community* and the cost-sharing reductions required by Section 1402. The risk-corridors program was a temporary subsidy program, in effect only from 2014 to 2016, that collected payments from profitable insurers and made payments to unprofitable insurers at the end of each of those years—one of several programs created by the ACA to address risks that might dissuade insurers from offering plans on the new Exchanges. *Maine Community*, 140 S. Ct. at 1316 & n.1. After the program was already underway, but before payments out to insurers were made, Congress enacted appropriations legislation prohibiting HHS from making risk-corridors payments out to insurers from the only source that the government had previously identified (other than risk-corridors payments in collected from insurers). See *id.* at 1317; Gov't Br. at 7-10, *Maine Community Health*

Options v. *United States*, No. 18-1023 et al. (Oct. 21, 2019) (Gov't *Maine Community* Br.). The government accordingly made payments out using only sums collected as payments in, resulting in a shortfall of approximately $12 billion over the program's three-year span. *Maine Community*, 140 S. Ct. at 1317-1318; Gov't *Maine Community* Br. 10-11.

The insurer-plaintiffs in *Maine Community* emphasized that insurers had no avenue to avoid incurring losses due to risk-corridors payments not received. They asserted that they could not, for example, recoup their losses through higher premiums because the funding restrictions were not enacted until after their premiums were fixed for the relevant year. Maine Community represented that it and other insurers had already "set premiums, offered and sold coverage on the exchanges * * * and suffered the resulting injury in the form of out-of-pocket costs, all before Congress enacted the riders for each year." Pet. Br. at 47, *Maine Community Health Options* v. *United States*, No. 18-1023 (Aug. 30, 2019); see also, *e.g.*, Pet. Br. at 1, 32, *Moda Health Plan, Inc.* v. *United States*, No. 18-1028 (Aug. 30, 2019) (consolidated and decided together with *Maine Community*, see 140 S. Ct. at 1308 n.*). The government did not dispute that the funding restrictions on risk-corridors payments had left insurers with more than $12 billion in unreimbursed losses. See *Maine Community*, 140 S. Ct. at 1318.

In rejecting the government's argument that it could not be liable in a Tucker Act suit for those losses, this Court emphasized the risk-corridors program's "backwards-looking" nature, which "compensate[d] insurers for past conduct." *Maine Community*, 140 S. Ct. at 1329. And it observed that "finding a repeal" of the

government's obligation to make risk-corridors payments based on the later-enacted funding restrictions "in th[o]se circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment." *Id.* at 1324. The Court concluded that "[t]he Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims" that Congress has not expressly authorized. *Id.* at 1329.

The cost-sharing reductions and associated CSR payments established by Section 1402 operate differently than the risk-corridors program, and the circumstances of insurers such as respondents who did not receive CSR payments differ starkly from those of the plaintiffs in *Maine Community*. By virtue of the intersection of the relevant statutory provisions in the ACA itself, the predictable (and predicted) effect of the failure to make direct CSR payments was that insurers raised premiums to cover the cost of making cost-sharing reductions. See pp. 4-5, *supra*. Those premium increases, in turn, triggered an outsized increase in premium tax credits under the ACA's formula. See pp. 5-7, *supra*. The ACA's structure thus does not leave "past injuries or labors" to compensate when CSR payments are not directly paid. *Maine Community*, 140 S. Ct. at 1329 (citation omitted). No sound basis exists to infer that Congress intended to allow insurers to recover in suits for money damages the value of CSR payments that are not paid. The ACA itself includes a built-in mechanism by which insurers that do not receive CSR payments can recover their costs of making cost-sharing reductions, and for the vast majority of their customers insurers could do so without increasing customers' out-of-pocket costs. Any inference that Congress

intended to provide an unstated money-damages remedy for insurers is especially unsound with respect to 2018 (and later years), for which insurers including respondents did raise premiums and received increased premium tax credits as a result.

A closer question may arise for the period in 2017 when insurers' rates did not yet account for their expenses of reduced cost sharing. But when it enacted the ACA, Congress would not have anticipated that scenario, which arose only because direct CSR subsidies had for a time been paid from a permanent appropriation. At a minimum, however, the ACA should not be interpreted to provide a damages remedy for periods after an insurer's rates accounted for the absence of direct CSR payments.

In short, if the court of appeals' premise that damages law would prevent double recoveries is overturned, its conclusion on liability would warrant reconsideration.

b. In addition, if the court of appeals' damages determination were overturned, the prospective practical import of the court's liability ruling would be greatly magnified. If respondents' (and other insurers') damages cannot be offset to reflect the increased premium tax credits they received—which may well equal or exceed the direct CSR payments that are not made going forward—the government would undoubtedly face claims by insurers for immense sums, both immediately and into the future, unless and until Congress appropriates funds for direct CSR payments. In 2018 alone, the amount of direct CSR payments not made exceeds $6 billion. 2019-1633 Gov't C.A. Br. 13.

The government would face such exposure even though the practice of silver loading—which Congress has expressly protected, see p. 8, *supra*—has caused the government to pay insurers many billions of dollars *more* (in

increased premium tax credits) than they would receive from directly funded CSR payments. The CBO projected that silver loading would increase federal payments to insurers by $194 billion over a decade, and that in most years between 2 and 3 million more individuals will obtain subsidized coverage as a result. See pp. 6-7, *supra*. If the court of appeals' damages ruling is set aside, its liability ruling would take on outsized practical significance and yield a windfall to insurers that have already benefited at the public's expense by receiving billions of dollars more in subsidies that have expanded access to health insurance.

* * * * *

Accordingly, if the Court were to grant review of the court of appeals' damages determination in the decision below, it should not allow the court's liability holding predicated on that damages determination to persist unexamined. To ensure that this Court or the court of appeals remains able to revisit the liability decision, if the Court grants the petition in No. 20-1162, the Court should also grant the conditional cross-petition presenting the liability question, or alternatively hold the conditional cross-petition pending its resolution of the merits in No. 20-1162.

CONCLUSION

For the reasons set forth in our brief in opposition in No. 20-1162, the petition for a writ of certiorari in that case should be denied. If the petition in No. 20-1162 is granted, however, then the conditional cross-petition for a writ of certiorari should be granted, or held pending the Court's decision on the merits in No. 20-1162.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

APRIL 2021