

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

COMMON GROUND HEALTHCARE COOPERATIVE,
ON BEHALF OF ITSELF AND ALL OTHERS
SIMILARLY SITUATED

*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
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 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). Respondent brought this class action, on behalf of itself and similarly situated insurers, seeking money damages for unpaid CSR payments. In *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020), petition and conditional cross-petition for cert. pending, No. 20-1162 (filed Feb. 19, 2021), and No. 20-1432 (filed Apr. 9, 2021), the court of appeals held that the government is liable to insurers for unpaid CSR payments but that an insurer’s damages must be offset to account for additional premium tax credits it received. In this case, the court entered judgment applying those holdings. 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 the government determined that it lacked an appropriation to pay them and that could generally be offset under other ACA provisions that insurers invoked to obtain a recovery.

(I)

RELATED PROCEEDINGS

United States Court of Federal Claims:

Common Ground Healthcare Coop. v. United States, No. 17-cv-877 (Oct. 22, 2019)

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

Common Ground Healthcare Coop. v. United States, No. 20-1286 (Sept. 30, 2020)

Supreme Court of the United States:

Common Ground Healthcare Coop. v. United States, No. 20-1200 (petition for writ of certiorari filed Feb. 24, 2021)

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

COMMON GROUND HEALTHCARE COOPERATIVE,
ON BEHALF OF ITSELF AND ALL OTHERS
SIMILARLY SITUATED

*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 judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (20-1200 Pet. App. (Pet. App.) 1a-2a) is unreported. The opinion and order of the Court of Federal Claims (Pet. App. 3a-36a) is reported at 142 Fed. Cl. 38.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2020. A petition for rehearing was denied on December 16, 2020 (Pet. App. 37a-38a). 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 this case to May 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the petition for a writ of certiorari in No. 20-1200 (at 5).

STATEMENT

1. 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. Pet. App. 11a-12a. For 2018 and subsequent years, many insurers offset the absence of CSR payments by increasing their silver-plan premiums. *Id.* at 12a-14a. 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. See *ibid.*; 26 U.S.C. 36B(b)(2)(B).

2. a. Respondent (petitioner in No. 20-1200) is an insurer that offers health plans on Wisconsin’s ACA Exchange. Pet. App. 16a. It brought this action, on behalf of itself and a class of similarly situated insurers, against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, alleging (as relevant) 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. 16a-17a. The court certified a class, *id.* at 17a, and subsequently granted summary judgment to the class, *id.* at 18a-36a.

b. The government appealed. At the government’s request, however, the court of appeals stayed further proceedings in the appeal in this case pending its disposition of several other pending, previously argued cases that involve claims for unpaid CSR payments and that present the same issues. C.A. Doc. 12 (Jan. 28, 2020).

The Federal Circuit subsequently decided those other pending cases in two opinions issued the same day, captioned as *Sanford Health Plan v. United States*, 969 F.3d 1370 (2020), and *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (2020), petition and conditional cross-petition for cert. pending, No. 20-1162 (filed Feb. 19, 2021), and No. 20-1432 (filed Apr. 9, 2021). In *Sanford*, the court of appeals held that the government was liable to insurers for unpaid CSR payments and that insurers could enforce that liability in Tucker Act suits. 969 F.3d at 1373-1383. In *Community Health Choice*, however, the court held that insurers’ damages must be offset to account for the additional premium tax credits that they received for 2018 as a “direct result”

of increasing their silver-plan premiums. 970 F.3d at 1377; see *id.* at 1372-1381.

The court of appeals in *Community Health Choice* explained that, under this Court's and its own precedent, where a statute like Section 1402 imposes an obligation but "does not provide its own remedies," courts look to traditional contract-law principles to determine the scope of an appropriate damages remedy. 970 F.3d 1374. Among those principles, the court of appeals observed, is the well-settled rule that, where a plaintiff mitigates its own damages, "there must be a reduction in damages equal to the amount of benefit that resulted from the mitigation efforts that the non-breaching party in fact undertook." *Id.* at 1376; see *id.* at 1374-1377.

Applying that rule, the court of appeals in *Community Health Choice* determined that the plaintiffs had "mitigated the effects of the government's breach by applying for increased premiums and, as a result, received additional premium tax credits in 2018 as a direct result of the government's nonpayment of [CSR] reimbursements." 970 F.3d at 1377. The court concluded that the plaintiffs' damages had to be reduced accordingly. *Id.* at 1377-1379. It remanded to the trial court to determine the amount of the offset. *Id.* at 1379-1381.

c. Following the court of appeals' decisions in *Sanford* and *Community Health Choice*, respondent moved unopposed to lift the stay in this appeal and for entry of judgment "consistent with *Community Health Choice*." Pet. App. 1a-2a. The court granted the motion and entered judgment accordingly, acknowledging that the parties had each reserved their rights to challenge the substance of the court's decision. *Id.* at 1a-2a & n.*. The court denied respondent's petition for rehearing. *Id.* at 37a-38a.

**REASONS FOR GRANTING
THE CONDITIONAL CROSS-PETITION**

The petition for a writ of certiorari in this case (No. 20-1200) presents the same question as the pending petition in No. 20-1162 (filed Feb. 19, 2021), which seeks review of the Federal Circuit’s decision in *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (2020), holding that an insurer bringing suit for money damages against the United States under the Tucker Act, 28 U.S.C. 1491, for unpaid CSR payments must have its damages offset to account for the insurer’s own successful mitigation efforts. As we explain in our brief in opposition in No. 20-1162, and in our response to the petition in this case, the court of appeals’ damages holding in *Community Health Choice*, which was applied to this case, see Pet. App. 1a-2a, is correct and does not warrant further review. 20-1162 Br. in Opp. 15-29; 20-1200 Gov’t Cert. Mem. 4-5. Because the disposition of the petition in No. 20-1162 may affect the appropriate disposition of the petition in this case, however, the petition in this case should be held pending the disposition of the petition in No. 20-1162 and then disposed of as appropriate. 20-1200 Gov’t Cert. Mem. 5.

As we further explain in our conditional cross-petition in No. 20-1432, if the Court were to grant review in No. 20-1162 of the court of appeals’ damages holding in *Community Health Choice*, it should also grant review of the court’s antecedent holding in that case—applying its decision in *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020)—that the government can be liable for unpaid CSR payments in a Tucker Act suit seeking money damages. 20-1432 Conditional Cross-Pet. 13-21. Alternatively, if the Court grants the petition in No. 20-1162, the Court should hold the conditional cross-petition in No. 20-1432 pending its decision in No. 20-1162. *Id.* at 21-22. The court’s liability

ruling in *Sanford* was expressly predicated in part on its damages determination in *Community Health Choice*. *Id.* at 13, 15-16. Although the liability ruling does not independently warrant review, if the court's damages ruling were set aside, its liability ruling would then be called into doubt and take on greater practical significance, and it would warrant review. *Id.* at 16-21.

For the same reasons, if the Court grants the petition in this case (No. 20-1200) seeking review of the court of appeals' judgment applying its damages holding here, the Court should also grant this conditional cross-petition to review that judgment to the extent that it held the government liable based on *Sanford*—or alternatively hold the conditional cross-petition pending the Court's resolution of the damages issue on the merits. In the interim, because this conditional cross-petition seeks relief that is materially identical to that requested in the government's conditional cross-petition in No. 20-1432, this conditional cross-petition should be held pending the conditional cross-petition in that case.

CONCLUSION

For the reasons set forth in our response to the petition for a writ of certiorari in No. 20-1200, the petition in that case should be held pending the disposition of the petition in No. 20-1162. If the petition in No. 20-1200 is granted, the conditional cross-petition in this case should be granted, or held pending the Court's decision on the merits in No. 20-1200. In the interim, this conditional cross-petition should be held pending the disposition of the conditional cross-petition in No. 20-1432.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

APRIL 2021