No. 18-1023

IN THE
Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government's Opposition does not question the practical importance of the decision below, or its importance as a statement of legal principles.

As shown in Petitioner's opening brief, the decision departs dramatically from core presumptions guiding statutory interpretation: (1) against implied repeal; and (2) against retroactive legislation. Both presumptions derive much of their rigor from the understanding that Congress communicates its intent—to repeal or to legislate retroactively—through the words of the statutes it enacts. Intuitions about Congress's intentions are no substitute for statutory text. Citizens should be able to presume that the federal government, Congress included, is bound by the law as written and will pay its bills.

The Opposition gives these foundational principles scant attention. And it persistently ignores the language of the statutes at issue in both this case and the case law that it discusses. The statutory language determined the outcome in previous cases and should do so here as well.

The practical impact of this case on Petitioner and other Affordable Care Act insurers is uncontroverted. Section 1342 of the ACA (42 U.S.C. §18062) induced insurers to provide coverage by promising them that the government would share in their financial risk. Then, after insurers experienced the excess costs in which the government was supposed to share, Congress limited HHS's access to funds to provide the promised compensation without repealing the underlying statutory mandate. The Government does not question that the decision below, if allowed to stand, will undermine

the willingness of persons to participate in federal programs based on statutory promises.

The Government principally contents itself with trying to show that the decision below is consistent with this Court's salary appropriations act cases. But in those cases, the *words* of subsequent statutes addressed the government's underlying obligation, making it clear that the obligation created by the prior statute was superseded or suspended, giving rise to implied repeal. And none of those cases authorized implied repeals with retroactive effect: the laws putting in place a new salary structure were passed before the government employee earned his salary, not after the work was done. Here, the Government argues that Congress intended to retroactively repeal a statutory obligation to pay for services already provided via appropriations riders that on their faces do not supersede or replace the underlying statutory obligation.

Finally, the Government seeks to complicate the Petition by arguing that the Federal Circuit erred in holding that Section 1342 created an obligation to pay, enforceable in a Tucker Act action. As shown below, the Government is wrong based on more than a century of precedent. When Congress uses mandatory language, it creates an obligation to pay. When Congress wants to limit an obligation by making it subject to a later Congress appropriating funds, the enactment states that the obligation is "subject to appropriations" (or words to that same effect). Congress did not do so here.

I. THIS CASE PRESENTS IMPORTANT ISSUES WARRANTING REVIEW.

As described in the Petition, the text of the statutes at issue should have determined the outcome below, particularly in view of the controlling presumptions. In Section 1342, Congress created an obligation ("shall pay"). The subsequent riders addressed agency access to appropriated funds, not that obligation. There is no inconsistency between the language of Section 1342 and the subsequent appropriations riders. And Congress did not use words limiting risk corridors payments to later appropriations (such as "shall pay, subject to the availability of appropriations") either in Section 1342 or by amendment.

A. There is no irreconcilable conflict between Section 1342 and the Riders.

Section 1342 specified that *insurers* "shall pay" the government if they realized excess cost savings, as defined by statute and regulations, and that the *government* "shall pay" insurers that incurred excess costs. The appropriations riders, for their part, did not modify or contain any words inconsistent with that obligation. Consequently, no Representative or Senator examining the riders could have detected any override of the underlying statutory rights at issue. And knowledgeable legislators would have also known (1) that various amendments had been proposed to change the underlying obligation but had failed; and (2) that the limitation on the use of general appropriated funds was consistent with the Department of Health and Human Services' position that it was administering the program in a budget neutral manner.

HHS acknowledged, before and after the riders, that any amount unpaid was "an obligation of the United States Government for which full payment is required." See Pet. 8-9. Since no one reviewing the subsequent statute could have detected inconsistency between the old statute and the new, it is impossible to find implied repeal.

B. The Government cannot overcome the presumption against retroactive legislation.

The Government sees no retroactivity problem here because insurers purportedly had no "already-existing" rights or "entitlement to risk-corridors payments" if the amount due for the coverage they provided in 2014 "could not even be calculated until the conclusion of the 2014 year, and the submission of data." Gov't Op. at 22-23.

But that view of retroactivity would render retroactivity doctrine a nullity. An obligation to pay necessarily vests when a party provides the services, and incurs the losses that give rise to the obligation, not when accountants calculate the precise amounts due. Here, insurers provided coverage, reimbursed providers and policyholders, and incurred the excess costs that entitled them to payment before enactment of even the first of the riders.

The Government argues that even if the presumption against retroactivity applies, it is overcome because Congress's retroactive intent is clear from its passage of appropriations riders in each of three years. Gov't Op. at 6-7. But that argument misses the mark. The question is whether any of these riders should be *construed* to have the retroactive effect of cancelling the underlying obligation

to pay after insurers provided the coverage and suffered the excess costs that gave rise to the Government's Section 1342 payment obligation. Nothing in the riders' text or history evinces such an intent.

II. THE SALARY APPROPRIATION CASES DO NOT SUPPORT THE GOVERNMENT.

The Government relies on the salary appropriation cases, but they do not support its position. Indeed, as shown in the Petition, the Federal Circuit's confusion about the salary appropriation cases confirms the need for this Court's review.

The key to those cases lies in the facial inconsistency between the description of the salary or bonus obligation in the original statute and the *words* of the subsequent statute describing differently how salary or bonus was to be paid in the appropriation year. In *United States* v. *Mitchell*, the first statute stated the salary for paying interpreters; the second stated that the salary for that year would be something else. 109 U.S. 146, 150 (1883). In *United States* v. *Vulte*, 233 U.S. 509 (1914), the first appropriations measure described how bonuses were to be paid; the later statute stated exceptions for that period.

The Government relies on *United States* v. *Dickerson*, 310 U.S. 554 (1940) and *United States* v. *Will*, 449 U.S. 200 (1989) but the decisive circumstances there are not present here.

In *Dickerson*, Congress had *explicitly* suspended reenlistment allowances for four years, stating that the subject allowance "is hereby suspended." 310 U.S. at 556. In the fifth year, a different "form of words" was used, directing that "no part of any

appropriation contained in this *or any other Act*" shall be used to pay the allowances. *Id.* at 556-57. Legislative history, squarely on point—explanatory statements and floor debate—explicitly confirmed the intention to "discontinue[ ] for another year the payment of the reenlistment allowances." *Id.* at 561.

Will was similar. The rider in one year explicitly stated that an automatic cost-of-living salary increase "shall not take effect." 449 U.S. at 207. In two others, riders barred use of appropriations "by this Act *or any other Act*," as blessed in *Dickerson. Id.* (emphases added). The last stated that funds "shall not be used." *Id.* at 208. The definitive, explicit legislative history confirmed that notwithstanding the different wording, the intent to keep the cost-of-living increase from taking effect was consistent over four years. *Id.* at 223.

The Government likens this case to *Dickerson* and *Will*, but ignores the explicit statutory language suspending payments in those cases, and also the absence here of the kind of directly on-point legislative history that the Court credited in those cases. The Government argues that, in this case, Congress could not have been clear in the text of the riders by saying "no part of the appropriation in this or any other Act" because Congress wanted to allow "payments out" to be funded by "payments in." But the Government's argument is nonsense: There is no shortage of words in the English language that could have been used by Congress to communicate an intention to change the basis for payment under Section 1342. Congress did not communicate that intention in the text of the riders. The Federal Circuit should not have redlined

the riders to add words that Congress chose not to include.

Moreover, the salary cases cannot support the decision below for a second reason. In none of them was the repeal retroactive—except for very brief periods in *Will* (when the cost-of-living adjustment was suspended shortly after the increase was triggered, and the suspension was held unconstitutional under the Compensation Clause). To the contrary, in each case, Congress enacted the law changing the remuneration before the employee or agent performed substantial work.

III. WHAT CONGRESS INTENDED

It is hard to imagine that legislative history alone could evidence the clear statement of intent necessary to impliedly repeal a statutory payment obligation, let alone retroactively. But the legislative history here provided no support at all.

HHS believed it could successfully administer the program with "payments in" funding "payments out." HHS confirmed each year that, in the event of a shortfall, the Government ultimately remained obligated to make the full payments mandated by Section 1342. See Pet. at 6-9; see also Pet.App. 131a-133a.

GAO opined that HHS could make Section 1342 payments by using both "payments in" (which would be budget neutral) and general appropriated funds. Congress then limited HHS from using general appropriated funds. And Chairman Rogers suggested that this was consistent with an HHS

"regulation" stating that the risk corridors program will be budget neutral.[1]

This history certainly supports the proposition that Congress limited HHS's ability to make payments using general appropriated funds, while allowing HHS to use payments in. But (in sharp contrast with the salary cases) nothing in this history, or the riders, addresses the underlying Section 1342 obligation itself. All that was addressed was the appropriation.

The court below asked, "[w]hat else could Congress have intended?" Yet it is difficult to imagine that Congress could not find the words to communicate—either in the text of the statute, or at least in the legislative history on which the Government purports to rely—the intent to "suspend" the underlying Section 1342 obligation. Indeed, Congress's intent is best evidenced by its rejection of repealers both before *and after* the riders. See Pet.App. 27a.

As to what else Congress could have intended, the answer is that it could have intended exactly what the riders said: that HHS have available to it only what it said it needed. Or perhaps Congress believed (as the Government contended below),

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[1] The Government says (at 18 n.4) that Judge Newman erred in commenting that Chairman Rogers mistakenly referenced an HHS *regulation*. Judge Newman believed Chairman Rogers was referring to an April 2014 guidance document explaining HHS's approach in detail. Pet.App. 131a-133a. The Government says that Chairman Rogers was instead referring to 79 Fed. Reg. 13,787, from March 2014. The Government's point is confusing because the Federal Register citation is also not to a regulation.

that Section 1342 was always supposed to be budget neutral, thus putting insurers to their proof (in the Court of Federal Claims) to demonstrate entitlement to Section 1342 payments.

In any event, it is clear that the Federal Circuit asked the wrong question. The correct question is whether the riders cutting off agency access to funds cancelled the "shall pay" obligation. The answer is "No."

IV. THE GOVERNMENT'S PROPOSED ALTERNATIVE GROUND FOR AFFIRMANCE IS WITHOUT MERIT.

The Government tries to ward off certiorari by invoking an alternative theory for sustaining the judgment. It asserts that the Federal Circuit panel erred in unanimously holding that Section 1342, as enacted, created a payment obligation enforceable under the Tucker Act. The Government's theory is inconsistent with longstanding law.

Section 1342's mandatory "shall pay" language stands squarely within the class of money-mandating statutes long held to give rise to Tucker Act jurisdiction and a right of action against the government. The jurisdictional test is whether the statute "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 217 (1983). The "use of the word 'shall' generally makes a statute money-mandating." See *Greenlee Cty.* v. *United States*, 487 F.3d 871, 876-77 (Fed. Cir. 2007) (citing *Agwiak* v. *United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)).

The money-mandating directive is "determinative both as to the question of [Tucker Act] jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action." *Fisher* v. *United States*, 402 F.3d 1167, 1173 (*en banc* in relevant part). As Justice Scalia summed it up three decades ago: "[A] statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount." *Bowen* v. *Massachusetts*, 487 U.S. 879, 923-24 (1988) (Scalia, J., dissenting).

It is equally well-established that a failure to appropriate funds does not absolve the government of its payment obligations. See *Slattery* v. *United States*, 635 F.3d 1298, 1303, 1321 (Fed. Cir. 2011) (en banc). The Judgment Fund is available for that purpose. Just as for any other debtor, Congress's refusal to pay, or to allot funds for payment, does not cancel a payment obligation.

Congress's failure here to appropriate funds to HHS thus barred HHS from making payments but did not address, let alone negate, the underlying statutory payment obligation. "An appropriation *per se* merely imposes limitations upon the Government's own agents," but its "insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties". *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892). That principle is encapsulated in the Anti-Deficiency Act. See *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (citing *Ferris*).

As the Federal Circuit explained below, the Anti-Deficiency Act "provides that "[a]n officer or employee of the United States Government … may not … make or authorize an expenditure … exceeding an amount available in an appropriation … for the expenditure." 31 U.S.C. §1341(a)(1)(A). This Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government …. The Anti-Deficiency Act simply constrains government officials." *Moda Health Plan, Inc.* v. *United States*, 892 F.3d 1311, 1322 (Fed. Cir. 2018) (citing *Salazar*).

The Government says that the Federal Circuit has it wrong,[2] and tries to illustrate with another Federal Circuit case, *Highland Falls-Fort Montgomery Cent. Sch. Dist.* v. *United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995). It describes that case as endorsing an agency's *pro rata* reductions in payments after Congress declined to appropriate sufficient funds to pay all obligations. See Gov't Op. at 26-27. In fact, the decision simply affirmed

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[2] The Government asserts that in *Prairie Cty.* v. *United States*, 782 F.3d 685 (Fed. Cir. 2015), the Federal Circuit held that *Salazar* did not reach statutory claims. Gov't Op. at 29-30. But *Salazar*'s relevant holding, that the Anti-Deficiency Act limits government agents, not Congress, was not at issue in *Prairie County*. *Prairie County* addressed a statute that *expressly* conditioned payment obligations on available appropriations. See 31 U.S.C. §6906. The Federal Circuit held that such an express limitation must be respected, and that *Salazar* had simply held that such express limitations did not limit the government's responsibility to pay damages in contract cases. 782 F.3d at 689-90.

the agency's decision to follow Congress's clear direction in the form of earmarked appropriations.

The Government's description of *Highland Falls* suffers from the same defect as its description of many of the other cases it cites in its Opposition: It ignores the statutory language. The key to *Highland Falls* (and *Prairie County*, which the Government also cites) was that the underlying *statute* specified that government payments would be owed only to the extent of subsequent appropriations.[3] When Congress intends to limit its obligations to amounts appropriated, it says so. Congress did not do so here.

Finally, the Government cites *United States* v. *Bormes*, 568 U.S. 6 (2012), but *Bormes* addressed whether the remedial scheme provided by a separate statute "displaced" Tucker Act jurisdiction. See *id*. at 12-13. This Court simply held that the "Tucker Act is displaced … when a law assertedly imposing monetary liability on the United States contains its own judicial remedies." *Id.* at 12.

Missing here, of course, is any suggestion of an alternative remedial scheme. And missing in *Bormes* was the "shall pay" directive long been held

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[3] As the Federal Circuit noted, the statute explicitly recognized that Congress might "appropriate less money for entitlements under the Act than is required to fund those entitlements fully," a situation addressed through a prescribed allocation [in a statutory section entitled] "(c) Adjustments where necessitated by appropriations." *Highland Falls*, 48 F.3d at 1168. The issue before the court involved reconciling that section with subsequent appropriations that earmarked funds for particular entitlements. The court readily held that the earmarking controlled, and the allocation only applied to lump sum appropriations. *Id.* at 1171-72.

to give rise both to Tucker Act jurisdiction and a cause of action.

CONCLUSION

The Petition should be granted.

Respectfully submitted.

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