No. 18-1028

In the Supreme Court of the United States

MODA HEALTH PLAN, INC.,
Petitioner,
v.
UNITED STATES.
Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,
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 HIGHMARK INC., BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, BLUE CROSS AND BLUE SHIELD OF VERMONT, BLUE CROSS OF IDAHO HEALTH SERVICE, INC., MOLINA HEALTHCARE OF CALIFORNIA, INC., AND L.A. CARE HEALTH PLAN AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae Highmark Inc., Blue Cross and Blue Shield of Kansas City, Blue Cross and Blue Shield of Vermont, Blue Cross of Idaho Health Service, Inc., Molina Healthcare of California, Inc., and L.A. Care Health Plan, respectfully submit this brief in support of Petitioners Moda Health Plan, Inc. and Blue Cross and Blue Shield of North Carolina. *Amici* provide health care insurance to more than 11.5 million customers throughout the United States, including over 700,000 on various Patient Protect and Affordable Care Act (ACA) health insurance exchanges.[1]

In 2010, Congress enacted the ACA, which contained a "series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Congress structured the ACA to prevent an economic "death spiral" resulting from the expansion of coverage, in which "premiums rose higher and higher, [ ] the number of people buying insurance sank lower and lower[,] [and] insurers began to leave the market entirely." *Id.* at 2486.

A critical component of the ACA is its "risk corridors" program, one of the statute's three risk-stabilization programs. *See* ACA § 1342, 42 U.S.C. § 18062.

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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 due date.

It was created to protect health insurance providers, such as *amici*, from the enormous and unascertainable risk of providing expanded coverage to a new pool of policyholders—many of whom had been uninsured and had unknown health care needs. Through this risk corridors program, the federal government promised to share the risk of inaccuracy in premiums by paying an offset to participating insurers that experienced excessive losses. Likewise, insurers with outsized gains were required to remit a portion of those gains to the government.

Relying on the government's promise, *amici* and numerous other insurers entered into agreements with the government to become "Qualified Health Plans" under the ACA. As explained in the petition for certiorari, however, the government has refused to honor its promise and make the risk corridors payments that it acknowledges are owed. Indeed, the government owes *amici* alone more than $900 million in risk corridors payments. And all of the *amici* have asserted the same statutory and contractual claims for unpaid risk corridors payments against the government in the Court of Federal Claims that petitioners have raised here. *See Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (Fed. Cl.); *Blue Cross and Blue Shield of Kansas City v. United States,* No. 17-95 (Fed. Cl.); *Blue Cross & Blue Shield of Vt. v. United States*, No. 18-241C (Fed. Cl.); *First Priority Life Ins. Co. v. United States,* No. 16-0587C (Fed. Cl.); *Local Initiative Health Auth. for L.A. Cty., d/b/a L.A. Care Health Plan v. United States*, No. 17-1432C (Fed. Cl.); *Molina Healthcare v. United States*, Nos. 17-97C, 18-333C (Fed. Cl.). *Amici* thus have a direct and substantial interest in these appeals.

Amici urge the Court to grant the petition. *Amici* agree with petitioners that the Federal Circuit majority's decision departs from this Court's controlling precedents and raises exceptionally important questions that warrant this Court's review. In this brief, *amici* will focus on the plain error of the majority's ruling and its grave consequences for the legislative process and the public-private partnerships that have become critical to a well-functioning U.S. economy.

SUMMARY OF ARGUMENT

In the constellation of rules of statutory interpretation, these two stars are among the most constant in illuminating legislative intent: the presumptions against reading a more recently-enacted statute to impliedly repeal an older one and against giving legislation retroactive effect. These centuries-old presumptions are not just guides to determining statutory meaning—they are part of our constitutional firmament, employed to maintain the separation of powers between courts and Congress and to protect fundamental due process reliance and fair-notice rights.

The Court long has zealously enforced these presumptions, just as the Constitution demands. Rarely has it ruled that one statute impliedly repealed another, and only the clearest and most explicit of statutory texts have been found to overcome the two presumptions. This is no accident; it follows from the very high bar the Court has set for finding implied repeals or retroactive applications of statutes.

The Federal Circuit majority below, however, treated these powerful presumptions as little more than speed bumps, overcome not by clear statutory

text, but by—described charitably—legislative history. The majority found no statutory text by which Congress ever purported to repeal the mandatory-payment provision in § 1342 or retroactively destroy petitioners' (and *amici*'s) existing statutory and contractual payment rights. That is because there is no such text. And that alone should have ended the inquiry in favor of the petitioners.

But there is more. The majority also ignored the surrounding statutory context of the provisions that it found to destroy those rights, impliedly and retroactively: budget appropriation acts with various riders, including one limiting the funding sources for risk corridors payments. These acts contained multiple provisions that, unlike the risk corridors provision, expressly repealed existing statutes or cut off all funding for various government obligations. Moreover, on more than a dozen occasions, Congress had actually tried, but failed, to repeal § 1342 or render the government's risk corridors payment obligation budget-neutral. All the majority could cite in response was supposed legislative history that did not speak at all to *Congress's* intent, let alone provide a *textual* basis for the majority's analysis—and certainly not one that would overcome the presumptions.

Even without the controlling interpretive presumptions, then, the majority's statutory interpretation is clearly wrong under settled principles of construction. With the presumptions in play, the majority's reading of the riders is even more plainly incorrect.

This Court's intervention is necessary to forestall the serious consequences of the majority's decision.

By relying on the purported legislative history of budget appropriations provisions instead of their actual text—and then finding that such history alone surmounts the strong presumptions against implied repeals and retroactivity—the majority eviscerates the presumptions and turns statutory interpretation on its head. It lays out a road map for legislators to use the inscrutable appropriations process to achieve legislative change—here, with severe retroactive effect—that they cannot secure openly and directly through substantive amendment. And, perhaps most damagingly of all, the majority makes hash out of the government's binding promises, which will lead those in the private sector to question whether ever to enter into partnerships with the government again—*especially* in important matters.

The Court should grant certiorari so that it can reinforce the time-honored presumptions against implied repeals and retroactivity, restore uniformity in how lower courts must analyze and apply those presumptions, and prevent the harmful consequences that will follow from the Federal Circuit majority's decision—both to the *amici* and petitioners in this case, and more broadly to all who might partner with the government to aid the common good.

ARGUMENT

I. THE PRESUMPTIONS AGAINST IMPLIED REPEALS AND RETROACTIVITY ARE FOUNDATIONAL

This Court strictly enforces the core interpretive presumptions against implied repeals and retroactive effect—with good reason.

The presumption against implied repeals. The presumption against implied repeals is "based primarily upon [the] assumed legislative practice" that Congress acts openly and expressly—not furtively and indirectly—when it intends to revise its own handiwork. *United States v. Hansen*, 772 F.2d 940, 944–45 (D.C. Cir. 1985) (Scalia, J.); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute.") (citation omitted). The presumption thus is the "product of a set of beliefs about the legislative process—in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration another program that was likely the product of sustained attention." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 475 (1989).

Even more fundamentally, the presumption against implied repeals reflects the separation of powers: "under our system of government, … [t]he question of whether existing statutes should be continued in force or repealed is … one which is wholly within the domain of Congress." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 209–210 (1962), *overruled on other grounds by Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *see also Epic Sys. Corp.*, 138 S. Ct. at 1624 ("separation of powers counsels restraint" in finding an implied repeal). "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law *should be*."

Epic Sys. Corp., 138 S. Ct. at 1624. That risk of judicial lawmaking-through-interpretation is no trivial concern, since judges may not "amend[] legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (citation omitted).

"[A]iming for harmony over conflict in statutory interpretation" accordingly recognizes "that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." *Epic Sys. Corp.*, 138 S. Ct. at 1624. "[H]armonizing different statutes" is, in fact, a "superior value[,]" as is "constraining judicial discretion in the interpretation of the laws," and both undergird the presumption against implied repeals. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (citation omitted).

Beyond this, "steady adherence" to the presumption "facilitate[s] … the [very] task of legislating." *Hansen*, 772 F.2d at 944. Without the presumption, "determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose." *Id.*

In light of the powerful policies and constitutional principles that give life to the presumption against implied repeals, this Court time and again has confirmed that those attempting to overcome it "face[]

a stout uphill climb" and "'bear[a] heavy burden[.]'" *Epic Sys. Corp.*, 138 S. Ct. at 1624. "'[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable[,]'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001), and even then, only where the evidence of irreconcilability is "overwhelming[.]" *Id.* at 137; *see also Epic Sys. Corp.*, 138 S. Ct. at 1624 ("A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow.") (citation and some internal quotation marks omitted).

True to this settled view of the great force of the presumption, this Court has rejected implied-repeal arguments in hundreds of cases, and accepted them only rarely. *See* Karen Petroski, *Retheorizing The Presumption Against Implied Repeals*, 92 Cal. L. Rev. 487, 532–40 (Appendix) (2004) (cataloguing decisions); *Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., concurring in part and dissenting in part) ("We have not found *any* implied repeal of a statute since 1975. And outside the antitrust context, we appear not to have found an implied repeal of a statute since 1917.") (citations omitted).

As strict as the presumption against implied repeals is under ordinary circumstances, it "carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (citation omitted). As discussed below (at 19), repealing § 1342's mandatory risk corridors payment obligation would violate due process by

retroactively impairing petitioners'—and *amici*'s—vested rights to risk corridors payments.

Moreover, the presumption "applies with even *greater* force" still where, as here, "the claimed repeal rests solely on an Appropriations Act." *TVA v. Hill*, 437 U.S. 153, 190 (1978). This heightened standard for finding an implied repeal in an appropriations bill aligns with the nature of the appropriations process itself. "[A]ppropriations … 'have the limited and specific purpose of providing funds for authorized programs[.]'" *Id.* Indeed, Congress long has drawn a "traditional distinction … between 'legislation and 'appropriation.'" *Andrus v. Sierra Club*, 442 U.S. 347, 359 (1979). The "rules of both Houses" of Congress themselves explicitly "'prohibit legislation from being added to an appropriation bill.'" *Id.* at 359–60 (citations and internal quotation marks omitted); *see also* Pet. 20 (same and citing current House and Senate Rules to this effect). "The distinction" between legislation and appropriation "is maintained 'to assure that program and financial matters are considered independently of one another." *Andrus*, 442 U.S. at 361. And "[t]his division of labor" not only "is intended to enable the Appropriations Committees to concentrate on financial issues"—it is aimed squarely at "prevent[ing] them from trespassing on substantive legislation.'" *Id.*

Given these background principles, "[w]hen voting on appropriations measures, legislatures are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden." *TVA*, 437 U.S. at 190. "Without such an assurance, every appropriations measure would be pregnant with prospects of altering

substantive legislation, repealing by implication any prior statute which might prohibit the expenditure[, thus] lead[ing] to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation." *Id.*

The presumption against retroactive application of statutes. The presumption against giving statutes retroactive effect has an equally impressive pedigree. It "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"—the fundamental fairness principle "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

"In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265–66. But after-the-fact changes to the consequences of actions already undertaken "destroy the reasonable certainty and security which are the very objects of property ownership...." *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998) (Kennedy, J., concurring). And naturally, where this "leave[s] persons unsure of their entitlements[,] … the underlying commercial activities will be deterred if not stifled." Anthony D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1, 5–6 (1983).

"It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution." *Landgraf*, 511 U.S. at 266;

see also E. Enters., 524 U.S. at 502 (Kennedy, J., concurring) (explaining that "due process protection for property must be understood to incorporate the settled tradition against retroactive laws of great severity"). The very existence of these constitutional "provisions demonstrate[s] that retroactive statutes raise particular concerns"—including, principally, that "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 266.

The Constitution's limitations on retroactivity, however, "are of limited scope[, and] the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf*, 511 U.S. at 267. It is therefore critical that courts faithfully apply the presumption against retroactivity, which requires "that Congress first make its intention clear[, and in turn] helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 267–68. Under this presumption, a statute may not, "absent clear congressional intent," retroactively "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280.

II. THE FEDERAL CIRCUIT'S DECISION BELOW IS WRONG BECAUSE IT FAILED TO ADHERE TO THE CONTROLLING INTERPRETIVE PRESUMPTIONS

The Federal Circuit erred in its divided ruling below because it plainly misapplied—or failed to apply at all—the governing interpretive presumptions

against implied repeals and retroactivity and broke sharply from this Court's precedents applying those presumptions, as well as other settled principles of construction.

Under the controlling presumptions and principles of construction, the dispositive inquiry in this case is clear: whether the one-sentence appropriation-bill provision precluding the use of one funding source to make risk corridors payments is so clearly irreconcilable with the mandatory-payment provision of § 1342 that it meets the "overwhelming"-evidence standard for an implied repeal. *Epic Sys. Inc.*, 138 S. Ct. at 137. The majority never asked or answered this question, however, electing instead to adopt an impermissible, watered-down version of the presumption against implied repeals, and to ignore the presumption against retroactivity altogether.

As for the implied-repeal presumption in particular, the majority simply stated that "[w]hether an appropriations bill impliedly suspends or repeals substantive law 'depends on the intention of [C]ongress as expressed in the statutes.'" Pet. App. 21 (citation omitted). But the interpretation of *every* statute depends on the intention of Congress as expressed in the statutes, and the presumptions are applied to *discern* that intent. As the majority would have it, the presumptions do not change the interpretive calculus at all—they do no work. That, plainly, is not correct.

The fundamental flaw in the majority's statutory analysis is underscored by its speculation, dressed up as the following rhetorical question: "What else could Congress have intended[,]" the majority wondered, but to cap the payments out to insurers at the amount

of payments in? Pet. App. 27. Surely, though, Congress could have intended (and very likely did intend) what the text itself indicated: to limit certain specific sources of funding for risk corridors payments, period. Moreover, the majority's question flies in the face of what the record indisputably shows—that Congress, when faced with the decision whether to repeal the risk corridors provision outright or fundamentally alter it, repeatedly declined express invitations to do so. *See* Pet. App. 50–51 ("It is clear that Congress knew what intent [to repeal] would have looked like, because members of Congress tried, and failed, to achieve budget neutrality in the risk corridors program."). So if anything, Congress, having eschewed any express repealing language in the riders and rejected express proposals to directly repeal § 1342 or make it budget-neutral, must *not* have meant the riders to cap payments out at the amount of payments in.

Additionally, even in "ordinary cases of statutory interpretation[,]" courts have "no roving license … to disregard clear language [based] simply on the view that [] Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014); *see also Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (it is not a court's "function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended") (citation omitted). And the Federal Circuit majority's improper substitution of speculation for the text's plain meaning is particularly unwarranted here, where the governing principles of construction require an especially clear and manifest showing of Congressional intent *in the text enacted*.

Despite the fact that the singular focus of the implied-repeal standard is the enacted text, the majority did not even "suggest that intent to repeal can be found in the [text of the] rider itself." Pet. App. 50. And in fact, the text of the appropriations riders does not come close to clearing the bar. As Judge Wallach correctly explained in his dissent from the denial of rehearing, the riders' text simply does "not address whether" the government's mandatory obligation "remains payable and, at most, only address[es] from whence the funds to pay the obligation may come." Pet. App. 76 (emphasis omitted). Nor does the text indicate that the funds appropriated "serve[] as full satisfaction of the Government's obligation under § 1342" or "cut off all sources of funding for the risk corridors program." Pet. App. 77 (emphasis omitted).

This last fact—that the text of the riders plainly does not purport to cut off all sources of funding—is salient since literally dozens of other provisions in the same appropriations bills use far more explicit words cutting off the use of funds from "any other Act[,]"[2] "any" being a word typically of "expansive" import. *Ali*

[2] *See*, *e.g.*, 128 Stat. 2163, Sec. 716 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay the salaries and expenses of personnel to carry out the following…"); 128 Stat. 2163, Sec. 718 ("None of the funds appropriated by this or any other Act shall be used to pay the salaries and expenses of personnel who prepare or submit appropriations language as part of the President's budget submission to the Congress…"); 128 Stat. 2170, Sec. 741 ("Hereafter, none of the funds appropriated by this or any other Act may be used to carry out section 410 of the Federal Meat Inspection Act (21 U.S.C. 679a) or section 30 of the Poultry Products Inspection Act (21 U.S.C. 471).").

v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (citations omitted). These provisions "confirm that [the same] Congress" that enacted the risk corridors rider provisions knew "how to limit" the government's payment obligation through appropriations "when it so desire[d]." *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 384 (2013) (citation omitted). Yet Congress declined to do so in the risk corridors provisions, and such disparate terms in the same appropriation bills must be given disparate meaning. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018).

The evidence contradicting the majority's erroneous implied-repeal analysis does not stop there. *First*, the appropriation bills at issue also contained provisions that, unlike the risk corridors provisions, *do* expressly repeal or amend existing statutory provisions.[3] This is further proof that "[w]hen Congress want[ed] to use [the] appropriations" riders to repeal existing law, "it kn[e]w[] precisely how to do so...." *Calloway v. Dist. of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) (pointing to provision of 2000 appropriations act stating that "section 5 of the Y2K Act … is amended"). And here again, such disparate terms in the same appropriation bills must be accorded different meanings. *See Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631.

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[3] *See*, *e.g.*, 2015 Consolidated Appropriations Act, Pub. L. 113-235, (Dec. 16, 2014) at 128 Stat. 2492, ("Section 414 of the Social Security Act (42 U.S.C. 614) is repealed."); 128 Stat. 2525 ("Sections 65, 66, 67, and 68 of the Revised Statutes (2 U.S.C. 6569, 6570, 6571) are repealed."); 128 Stat. 2774 ("Subtitle C of title II of the Pension Protection Act of 2006 (26 U.S.C. 412 note) is repealed.").

Second, as noted, on more than a dozen occasions, Congress tried, but failed, to amend § 1342 to make it budget-neutral or to eliminate the risk corridors payment obligations altogether.[4] As Judges Newman and Wallach rightly concluded (*see* Pet. App. 50 n.3; Pet. App. 80–81), where "the repeal of a highly significant law is urged upon [Congress] and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision." *Sinclair Refining Co.*, 370 U.S. at 210; *see also Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, No. 17-571, 2019 WL 1005829, at *6 (U.S. Mar. 4, 2019) (finding it "[n]oteworthy" in construing Copyright Act's registration requirement for bringing suit that "Congress [had] resisted efforts to eliminate" that requirement—"Time and again, … Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration"). In short, "it would … appear improper for [the courts] to give a reading to [an a]ct that Congress considered and rejected." *Pac. Gas & Elec. Co. v. State*

[4] *See* S. 1726, 113th Cong. (2013) (would eliminate § 1342); H.R. 3541, 113th Cong. (2013) (same); H.R. 3812, 113th Cong. (2014) (same); H.R. 3851, 113th Cong. (2014) (same); H.R. 5175, 113th Cong. (2014) (same); S. 123, 114th Cong. (2015) (same); H.R. 221, 114th Cong. (2015) (same); H.R. 3985, 113th Cong. (2014) (seeking to eliminate § 1342 after 2014); 161 Cong. Rec. S8420-21 (daily ed. Dec. 3, 2015) (noting consideration and rejection of amendment providing that "Secretary shall not collect fees and shall not make payments under" risk-corridors program); S. 2214, 113th Cong. (2014) (would amend § 1342 to "ensur[e] budget neutrality"); H.R. 4354, 113th Cong. (2014) (same); H.R. 4406, 113th Cong. (2014) (would limit payments out to the amount of payments in); S. 359, 114th Cong. (2015) (same); H.R. 724, 114th Cong. (2015) (same).

Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 220 (1983).

The majority largely ignored Congress's repeated but failed attempts to repeal § 1342's payment obligation while finding it had done so implicitly based on questionable legislative history—and that was plain error. Congress's presumably conscious decision not to use in the risk corridors appropriation provision the kind of explicit funding-cut-off or repealing language it used elsewhere in the same appropriations bills is powerful evidence of Congress's intent. It is even more powerful in context—the government claiming that the one-sentence risk corridors rider provisions, microscopic pieces of massive appropriation bills, repealed a key feature of "carefully constructed" legislation such as the ACA. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983) (rejecting implied repeal of "carefully constructed package" of legislation where "Congress knew the significance and meaning of the language it employed" in that legislation but did not attempt to explicitly override it). The fact is, "Congress does not make 'radical—but entirely implicit—change[s]'" to statutes "through 'technical and conforming amendments[,]'" *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061, 1071 (2018), much less through one-sentence riders buried in sprawling appropriations bills.

The majority then compounded its erroneous textual and contextual analysis (or lack thereof) by relying on two pieces of *non*-textual evidence—(i) a letter from the General Accounting Office's (GAO's) general counsel to two congressmen and (ii) two sentences written by one congressman addressing regulatory

guidance provided by the Department of Health & Human Services (HHS). This was error right out of the gate because the interpretation of appropriations bills must focus strictly on "the 'text of the appropriation,' not [on] Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (citation omitted); *see also United States v. McIntosh*, 833 F.3d 1163, 1178–79 (9th Cir. 2016) (O'Scannlain, J.) ("It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history.").

Even if the majority properly considered the two non-textual pieces of evidence it relied upon, moreover, neither supports the majority's conclusion that they reveal Congress's intent to cap risk corridors payments. As for the GAO letter, there is not a shred of evidence that Congress even considered it, let alone enacted the riders "in response to" it. Pet. App. 48; *see also Tafflin v. Levitt*, 493 U.S. 455, 461 (1990) (rejecting interpretation where there was "no evidence that Congress even considered the" underlying issue). And, as noted, it is not a court's "function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." *Wisconsin Cent. Ltd.*, 138 S. Ct. at 2073.

As for the explanatory statement by the single congressman, it does not actually reflect any individual legislator's view of the meaning of the riders at all. Rather, it refers only to *HHS's guidance*, not the riders, and states only that making the risk corridors program budget neutral "was the goal" of HHS's regulation. Pet. App. 80. If one legislator's views of a

statute cannot override the statute's text, *see NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."), surely his views of an agency's non-binding guidance—issued to accomplish what no statute itself had done—cannot do so. Given this, Congress certainly would be "surprised to learn that [its] careful work on the [ACA] had been undone by the simple—and brief—insertion of some [purportedly] inconsistent language in" the legislative history of the appropriations bill. *TVA*, 437 U.S. at 191.

Further still, the majority's finding of an implied repeal has a severe and impermissible retroactive effect on existing statutory and contractual rights. Pet. 17. By the time the first of the riders was passed in December 2014, *amici* already had completed their performance for 2014 and had committed to doing so again in 2015. Yet the majority—despite the absence of any text in the riders indicating Congress meant for them to apply retroactively—applies the riders to strip petitioners' and *amici*'s established rights to receive all risk corridors payments owed. And it does so with nary a mention of the presumption against retroactivity or the serious impairment of petitioners' vested rights.

The Court should grant review to correct these manifest errors and the gross unfairness they will impose on petitioners, *amici*, and the other insurers who participated in the risk corridors program.

III. THE FEDERAL CIRCUIT'S DECISION THREATENS TO SKEW THE LEGISLATIVE PROCESS AND IMPERIL PUBLIC-PRIVATE PARTNERSHIPS

Rather than follow the path for ascertaining Congress's intent behind the appropriations riders well-marked by controlling interpretive presumptions and principles, the Federal Circuit majority instead speculated about what Congress must have meant, relying on two non-textual sources of supposed legislative intent. In doing so, the majority turns back the clock on statutory construction, encouraging courts to look past the enacted statutory text and base their desired reading on the flimsiest evidence of intent in supposed legislative history.

The majority's decision thus will only further incentivize members of Congress to try to achieve significant and substantive legislative change through the less-than-transparent budget appropriation process, all the while doing great harm to the public-private partnerships that help the government carry out essential functions and that drive the American economy. This, too, is wrong under controlling law; it is bad public policy; and certiorari is necessary to undo and prevent it these serious adverse effects.

By finding an implied repeal on this record, the majority's decision threatens to distort the legislative process. It promotes "an end-run around the substantive debates that a repeal might precipitate"—"burying a repeal in a standard appropriations bill" now becomes an accepted, and perhaps strategically superior, option, and one that may be especially tempting where the earlier legislation is high-profile or controversial. Pet. App. 47 (quoting *Moda Health Plan, Inc.*

v. United States, 130 Fed. Cl. 436, 458 (2017)). More perniciously, it impairs the public's ability to determine the meaning of the law itself—is it to be found in the text of the statutes Congress enacted; the ambiguous remarks of individual legislators; or, in this case, letters from agencies (or others) that Congress may or may not have considered in crafting and passing legislation? The question readily answers itself. *See Epic Sys. Corp.*, 138 S. Ct. at 1631 ("[L]egislative history is not the law").

Separately, the majority's ruling undermines the reliability of public-private partnerships. The law must "safeguard[] both the expectations of Government contractors and the long-term fiscal interests of the United States." *Ramah Navajo Chapter*, 567 U.S. at 191. To say that such expectations are upended by the majority's ruling is an understatement. It cannot be debated that "[o]ur system of public-private partnership depends on trust in the government as a fair partner." Pet. App. 67. And it would have been nothing short of "'madness'" for *amici* "to have engaged in these [risk corridors] transactions" with the government only to have their vested rights to payment obliterated by temporary funding caps imposed retroactively by appropriations bills. *United States v. Winstar*, 518 U.S. 839, 910 (1996) (plurality op.) (citation omitted).

The majority's decision unfortunately pays these concerns no mind and renders the government's binding promise here nothing more than a "promise to pay, with a reserved right to deny or change the effect of the promise" unilaterally, that this Court has condemned as "an absurdity." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (citation

omitted). To put it bluntly, "to say to" petitioners, *amici*, and other participating insurers that "'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

Rather, "[i]f we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." John MacArthur Maguire & Philip Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935) (quoting *Rock Island, A. & L. R. R. v. United States*, 254 U.S. 141, 143 (1920)). The majority declined to hold the government so accountable, and thus, "would-be contractors" will, in the future, "bargain warily—if at all—and only at a premium large enough to account for the risk of nonpayment." *Ramah Navajo*, 567 U.S. at 191–92; *see also* Pet. App. 82 ("The [Federal Circuit's] holding casts doubt on the Government's continued reliability as a business partner in all sectors.").

Finally, the majority's approach to statutory construction represents a sharp departure from the settled ground rules this Court has repeatedly emphasized and a return to an era where the enacted text was but one piece of evidence—and often a secondary one—to consider in divining Congress's intent. The majority substituted its speculation about what Congress must—or more precisely, must not—have meant in enacting the riders in place of the riders' text itself. And it grounded that speculation not in the riders' text but in non-textual "legislative history"—if it can even be called that.

It goes without saying that courts are never "free to pave over bumpy statutory texts[,]" *New Prime Inc.*, 139 S. Ct. at 543, or change or add to the words Congress actually used, *see Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'") (citations omitted). And this is nowhere more true than when courts face the circumstances presented in this case—determining whether a one-sentence provision in a 700-page budget appropriations bill impliedly repealed a critical component of one of the landmark pieces of legislation of the day, and thus retroactively stripped a host of private parties that willingly partnered with the government of their right to receive more than $12 billion owed.

CONCLUSION

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

Respectfully submitted.

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