No. 20-1162

In the Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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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 petitioners—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). Petitioners 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 correctly determined that, in calculating the damages that the cessation of CSR payments caused an insurer, the trial court must deduct the additional premium tax credits that the insurer received as the result of the termination of CSR payments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 970 F.3d 1364. The opinion of the Court of Federal Claims in the action brought by petitioner 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 petitioner 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 petition for a writ of certiorari was filed on February 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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. 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.[1] Congress recognized, however, that requiring insurers to reduce cost-sharing would

[1] 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).

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 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 petitioners) 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) (May 2019 CBO Report), 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. Petitioners Maine Community Health Options and Community Health Choice, Inc., 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, petitioners no longer received direct CSR payments. *Ibid.* And like other insurers, petitioners engaged in silver loading—*i.e.*, raised their

silver-plan premiums—to offset the absence of CSR payments. Pet. App. 23.[2]

Petitioners 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, petitioners 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 petitioners 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.

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[2] Petitioners 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.[3] 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.

[3] The court of appeals did not reach petitioners' 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 non-reimbursement 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 petitioners 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. But with respect to 2018, the court "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." *Id.* at 2; see *id.* at 12-29.

The court of appeals observed that, in addressing other Spending Clause statutes that "impose an affirmative obligation or condition in exchange for federal funding," Pet. App. 13 (brackets, citation, and internal quotation marks omitted), and "where the statute itself does not provide a remedial framework," this Court has held that "a contract-law 'analogy applies . . . in determining the scope of damages remedies' in a suit by the government against the recipient of federal funds," *id.* at 14-15 (quoting

Barnes v. *Gorman*, 536 U.S. 181, 187 (2002)) (emphasis omitted). The panel noted that in *Gorman*, for example, the Court had explained that, where a Spending Clause statute "'contain[ed] no express remedies,'" a funding recipient was "'subject to suit for compensatory damages,'" which are "'traditionally available in suits for breach of contract,'" but not for "punitive damages," which are "'generally not available for breach of contract.'" *Id.* at 15 (quoting *Gorman*, 536 U.S. at 187). The court of appeals reasoned that "[t]he same * * * is true when an action for damages is brought against the government, under this type of Spending Clause legislation," and that "[t]he available remedy is defined by analogy to contract law where the statute does not provide its own remedies." *Id.* at 16.

The court of appeals explained that its "predecessor court" (the Court of Claims) had "previously applied th[at] contract-law analogy to limit damages in suits against the government under the Back Pay Act, 5 U.S.C. § 5596," which does not provide an express cause of action. Pet. App. 16-17; see *id.* at 17 n.7. The court explained that its predecessor had applied damages-mitigation principles to determine that, "in suits brought for improper discharge f[rom] federal employment, damages had to be reduced by the amount earned by the federal employee in the private sector under a mitigation theory." *Id.* at 17 (citing *Craft* v. *United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978) (per curiam)).

The court of appeals reasoned that the same "contract-law analogy applies" to petitioners' suits to recover damages for CSR payments not made, "because the statute 'contains no express remedies' at all with respect to the government's obligation" to make those payments. Pet. App. 18 (quoting *Gorman*, 536 U.S. at 187). The court noted that, although "the ACA provides

specific remedies for failure of the insurers or insured[s] to comply with their obligations, '[it] did not establish a statutory remedial scheme' for the government's non-compliance." *Ibid.* (brackets and citation omitted). The court determined that, in light of "Section 1402's silence as to remedies," redress is properly limited to "'forms of relief traditionally available in suits for breach of contract.'" *Ibid.* (quoting *Gorman*, 536 U.S. at 187).

The court of appeals further observed that "[t]he traditional damages remedy under contract law is compensatory in nature." Pet. App. 18. The court noted that this Court and others have "uniformly held—as a matter of both state and federal law—that a plaintiff suing for breach of contract is not entitled to a windfall, i.e., the non-breaching party 'is not entitled to be put in a better position by the recovery than if the breaching party had fully performed the contract.'" *Id.* at 18-19 (quoting *Miller* v. *Robertson*, 266 U.S. 243, 260 (1924)) (brackets omitted). The court of appeals explained that contract-law principles address that "concern to limit contract damages to compensatory amounts" through (*inter alia*) "the doctrine of mitigation." *Id.* at 20. It observed that one "aspect of the mitigation doctrine" is the rule that "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 21; see *id.* at 21-23 & n.10.

Applying that principle in these cases, the court of appeals determined that petitioners' "damages were correctly reduced 'by the amount of the benefit received in mitigating the government's partial breach of the . . . contract.'" Pet. App. 23 (brackets and citation omitted). The court found that "each insurer 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 cost-sharing reduction reimbursements." *Ibid.* The court observed that, under "[t]he text of the ACA," "a direct relationship" exists "between cost-sharing reductions and premiums, and between premiums and tax credits." *Id.* at 24. It explained that Section 1412 provides for "advance determination and payment of premium tax credits and cost-sharing reductions * * * in order to reduce the premiums payable by individuals eligible for such credit." *Ibid.* (quoting 42 U.S.C. 18082) (brackets omitted).

The court of appeals additionally observed that the trial court's own "findings show[ed] that the premium tax credits flowed directly from the insurers' mitigation efforts." Pet. App. 24. The panel noted the Court of Federal Claims' finding that petitioners "themselves [had] recognized th[at] connection" and had "negotiated for increased premiums (leading to the increased tax credits) in direct response to the cessation of [CSR] payments." *Id.* at 25. The court of appeals concluded that "[t]he government's payment of the premium tax credits is directly traceable to the premium increase, and the premium increase is directly traceable to the government's breach," and petitioners thus had "'received a benefit as a direct result of their mitigation activity.'" *Id.* at 25-26 (citation omitted). The court noted that "[t]he argument for an offset is particularly strong here because [petitioners] received direct payments (rather than indirect benefits, such as efficiency gains) from the government due to their mitigation efforts." *Id.* at 26. The panel rejected petitioners' contentions that it should apply an exception to general mitigation

principles, finding that neither of the exceptions petitioner invoked was applicable in these circumstances. *Id.* at 26-29.

The court of appeals remanded the cases to the Court of Federal Claims "for a determination of the amount of premium increases (and resultant premium tax credits) attributable to the government's failure to make [CSR] payments." Pet. App. 30. The panel observed that, in accordance with the "clear" rule in federal contract law, petitioners "will bear the burden of persuasion with respect to the amount of the tax-credit increase attributable to the loss of cost-sharing reduction reimbursements." *Id.* at 31. The court noted that applying that settled rule is "particularly appropriate here" because petitioners were independently required by the ACA to provide justifications for their premium increases. *Id.* at 32.

4. Petitioners 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.

ARGUMENT

Applying this Court's precedents, the court of appeals correctly determined that, in calculating the damages that petitioners may recover in their Tucker Act suits predicated on the cessation of CSR payments, the trial court must deduct the increased premium tax credits that petitioners received "as a direct result of the government's nonpayment of [CSR payments]." Pet. App. 23. Petitioners resist that conclusion, contending (Pet. 21-34) that they should be allowed to recover the full

amount of CSR payments not made, without taking into account their undisputed receipt of the increased premium tax credits. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.[4]

1. Petitioners' suits under the Tucker Act seek money damages for the amount of CSR payments that they contend Section 1402 of the ACA, 42 U.S.C. 18071, required the government to make but that petitioners did not receive. Pet. App. 2, 9-10. The government ceased making such payments to insurers in October 2017, following the Attorney General's determination that no applicable appropriation existed from which those payments could be made. *Id.* at 6, 51-52. Petitioners have not contested that determination in this Court.

Although petitioners' claims for damages are premised on asserted violations of an obligation imposed by Section 1402 to make CSR payments, the ACA itself "does not provide a remedial framework." Pet. App. 14-15. As the court of appeals noted, "[w]hile the ACA provides specific remedies for failure of the insurers or insured to comply with their obligations, 'the ACA did not establish a statutory remedial scheme' for the government's noncompliance." *Id.* at 18 (quoting *Maine*

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[4] As explained in our conditional cross-petition for a writ of certiorari filed today, if the Court grants petitioners' petition presenting the damages issue, it should also grant review of the court of appeals' ruling that the government can be liable for CSR payments not made in a Tucker Act suit seeking money damages. The court's liability ruling in *Sanford Health Plan* v. *United States*, 969 F.3d 1370 (Fed. Cir. 2020), which the decision below deemed controlling as to liability here, Pet. App. 12, expressly relied on the damages holding in the decision below. See 969 F.3d at 1383.

Cmty. Health Options v. *United States*, 140 S. Ct. 1308, 1330 (2020) (brackets and citation omitted). The ACA does not establish any express cause of action at all, let alone prescribe the parameters of specific remedies.

In light of "Section 1402's silence as to remedies," the court of appeals looked to this Court's and its own precedent addressing the proper "scope of [a] damages remedy" in the absence of congressional direction. Pet. App. 18. As the court of appeals explained, in addressing other, analogous Spending Clause legislation where "the statute itself does not provide a remedial framework," this Court has held that "a contract-law 'analogy applies . . . in determining the scope of damages remedies'" in a suit against the funding recipient brought by the government or a third-party beneficiary. *Id.* at 14-15 (quoting *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002)) (emphasis omitted). Writing for the Court in *Gorman*, Justice Scalia explained that the Court had previously "applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages," and "[t]he same analogy applies * * * in determining the *scope* of damages remedies." 536 U.S. at 186-187. Applying that principle in *Gorman* to another Spending Clause statute that "contain[ed] no express remedies," the Court explained that, whereas an implied compensatory-damages remedy against a funding recipient is available—because that is a "form[ ] of relief traditionally available in suits for breach of contract"—punitive damages are not because, "unlike compensatory damages," punitive damages "are generally not available for breach of contract." *Id.* at 187.

The court of appeals properly applied the same approach here to these suits by funding recipients against

the government for alleged violations of a Spending Clause statute that similarly does not address available remedies. Pet. App. 16-18. As the court explained, it has long "applied the contract-law analogy to limit damages" in suits brought by a federal employee under the Back Pay Act of 1966, 5 U.S.C. 5596. Pet. App. 17. In particular, the court noted, its predecessor (the Court of Claims) held more than four decades ago "that in suits brought for improper discharge f[rom] federal employment" under the Back Pay Act, damages were subject to the contract-law limitation of "mitigation," under which "damages had to be reduced by the amount earned by the federal employee in the private sector." Pet. App. 17 (citing, *inter alia*, *Craft* v. *United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978) (per curiam)).

The court of appeals applied that same settled approach in these cases. Pet. App. 18-21. Although petitioners' Section 1402 claim—like a suit under the Back Pay Act—is not predicated on any asserted contractual relationship, the court of appeals properly "look[ed] to" contract-law principles, including the "doctrine of mitigation," in order "to determine the scope of [petitioners'] damages remedy." *Id.* at 18, 20; see *id.* at 19-22. The court explained that one way in which contract law implements the "uniformly" recognized principle "that a plaintiff suing for breach of contract is not entitled to a windfall" is the mitigation doctrine's requirement that "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 19, 21.

That limitation (among others) "ensures that the non-breaching party will not benefit from a breach." *Id.* at 20.[5]

The court of appeals noted that, in these cases, "each [petitioner] 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 payments]." Pet. App. 23. The court accordingly determined that, under settled mitigation principles, any money-damages award must be offset to account for such increased premium tax credits. See *id.* at 23-29.

Indeed, as the court of appeals explained, petitioners "appear[ed] not to dispute that if the elimination of [CSR] payments directly triggered increased premium tax credits, an offset would be appropriate." Pet. App. 23. They argued instead that the increased premium tax credits did not directly result from the cessation of CSR payments because they "depend[ed] on actions by" petitioners themselves—"the decision to pursue increased premiums." *Id.* at 23-24. The court rejected that argument, explaining that "a direct relationship" exists "between cost-sharing reductions and premiums, and between premiums and tax credits," and "the relationship is no less direct because [petitioners'] tax credits did not

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[5] The court of appeals reserved judgment on the application in this context of a second aspect of the mitigation doctrine: the requirement that "the non-breaching party is expected to take reasonable steps to mitigate his or her damages" and "may not recover damages for any 'loss that the injured party could have avoided without undue risk, burden or humiliation.'" Pet. App. 20 (citation omitted); see *id.* at 21. The court had no need to address that issue in these cases by determining whether petitioners "were obligated to increase premiums to secure increased premium [tax] credits" because petitioners had in fact done so. *Id.* at 21; see *id.* at 23.

automatically flow from the elimination of [CSR] payments" and also involved steps taken by petitioners. *Id.* at 24. It further noted that the trial court's findings showed that "the premium tax credits flowed directly from the [petitioners'] mitigation efforts," *ibid.*, because petitioners had sought and obtained increased premiums "in direct response to the cessation of [CSR] payments," *id.* at 25.

Given its findings that "[t]he government's payment of the premium tax credits is directly traceable to the premium increase, and the premium increase is directly traceable to the government's breach," the court of appeals properly determined that petitioners "'received a benefit as a direct result of their mitigation activity'" that must be offset in calculating any damages award. Pet. App. 25-26 (citation omitted). As the court noted, an offset is especially appropriate here because petitioners "received direct payments (rather than indirect benefits, such as efficiency gains) from the government" itself. *Id.* at 26. That determination does not warrant further review.

2. Petitioners identify no error in the court of appeals' application of damages principles. They do not address the court of appeals' premise that, in the absence of any statutory direction concerning remedies, contract-law principles govern the scope of damages in a case such as this. Indeed, petitioners do not mention this Court's decision in *Gorman* or the longstanding Federal Circuit precedent that applies the same approach reflected in *Gorman* to suits against the government under the Back Pay Act. Cf. Pet. App. 14-18. Nor do petitioners dispute that mitigation is among the contract-law tenets that courts following *Gorman*'s approach to determine the scope of an implied damages remedy for an alleged violation of a duty

imposed by Spending Clause legislation should apply. Cf. *id.* at 18-23.

Apart from a conclusory assertion in a footnote (Pet. 32 n.1), petitioners also do not attempt to refute the court of appeals' finding that the increased premium tax credits they received were the "direct result" of their mitigation efforts of increasing their premiums, which in turn were in "direct response" to the government's cessation of CSR payments. Pet. App. 23, 25. And petitioners do not reprise the arguments they made unsuccessfully in the court of appeals, that either of two "exceptions to the mitigation principle" applies here. *Id.* at 26; see *id.* at 26-29 (rejecting petitioners' contentions that no offset should apply here based on "the prohibition on so-called 'pass-through' defenses" and the "collateral source rule").

Instead, petitioners contend (Pet. 21-34) that the court of appeals' damages ruling contradicts this Court's decision in *Maine Community*, *supra*, and that the mitigation doctrine does not apply because petitioners fully performed their obligations to the government. Neither of those contentions has merit.

a. As the court of appeals correctly recognized, this Court's decision in *Maine Community* does not speak to the damages question presented in these cases. Pet. App. 12. *Maine Community* involved the ACA's temporary risk-corridors program, which was designed "to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years." 140 S. Ct. at 1315. The government acknowledged that funding restrictions enacted by Congress had left insurers with more than $12 billion in unreimbursed losses. *Id.* at 1318. Insurers brought suit, and this Court concluded that the insurers "may sue the Government for damages" for

risk-corridors payments that were directed by the statute but not made. *Id.* at 1315; see *id.* at 1319-1331. The Court held that the language of the relevant statute directing that the government "shall pay" risk-corridors payments, 42 U.S.C. 18062(b)(1), imposed an obligation that was not contingent on the availability of appropriations, and that the insurers could seek money damages to recover those payments in the Court of Federal Claims under the Tucker Act. 140 S. Ct. at 1319-1331.

Maine Community did not present, and this Court's decision did not address, any question concerning the offsetting of the plaintiffs' damages to reflect benefits they secured through mitigation efforts. The government did not contend that the plaintiffs in that litigation had (or should have) mitigated those losses by raising premiums. And the plaintiffs—which included one of the petitioners here, Maine Community—asserted that they could not have done so because the funding restrictions at issue were not enacted until after their premiums had been fixed for the relevant year. For example, Maine Community represented that it and other insurers had "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 Cmty. Health Options* v. *United States*, 140 S. Ct. 1308 (2020) (No. 18-1023); see also, *e.g.*, Pet. Br. at 1, 32, *Moda Health Plan, Inc.* v. *United States*, No. 18-1028 (Aug. 30, 2019) (Moda Br.) (consolidated and decided together with *Maine Community*, see 140 S. Ct. at 1308 n.*).

Here, in contrast, the opposite occurred. The government announced in October 2017 that CSR payments would cease. Insurers (including petitioners)

then provided coverage on the Exchanges in 2018 (and subsequent years) while raising silver-plan premiums to offset the forgone CSR payments. Those premium increases substantially increased the government's aggregate payments to insurers, in the form of higher premium tax credits, see pp. 4-6, *supra*—a result that flows from the ACA's interlocking provisions, as the petitioners in *Maine Community* recognized, see Moda Br. at 4 ("[H]igher premiums on the exchanges would make the promised tax subsidies far more expensive for the government."). Nothing resembling the "bait-and-switch" that the plaintiffs alleged in *Maine Community*, Moda Br. at 1, took place here; to the contrary, petitioners and other insurers could and did mitigate their losses (and more). And the decision below limits petitioners' damages only to the extent that they actually received an offsetting increase in premium tax credits. See Pet. App. 23-33.

Petitioners err in contending (Pet. 3, 24) that this Court's statement in *Maine Community* that the statute at issue "created a Government obligation to pay insurers the full amount set out" in that provision, 140 S. Ct. at 1319, forecloses application of mitigation principles here. The Court was addressing the duty imposed by the statute on the government in the first instance—and rejected the government's contention that the government's statutory obligation was contingent on and limited to available appropriations—not the separate question of the computation of damages owed to a plaintiff that had mitigated its losses. See *id.* at 1319-1323. The court of appeals correctly recognized that *Maine Community* does not "resolve[] th[e] question" presented here concerning such damages offsets. Pet. App. 12.

For similar reasons, petitioners err in asserting (Pet. 26-29) that the statutory text directing that the government "shall make periodic and timely payment[]," 42 U.S.C. 18071(c)(3)(A) precludes any offset. That language (like the similar language at issue in *Maine Community*) speaks to the government's underlying obligation to make CSR payments. It does not address the calculation of damages generally or the consequences that follow if a plaintiff's damages are reduced through mitigation. And because the statute is "silen[t]" on that question, and indeed "'contains no express remedies'" at all, the court of appeals—following this Court's precedent applying a "contract-law analogy" in similar contexts—"look[ed] to government contract law to determine the scope of [petitioners'] damages remedy." Pet. App. 18 (quoting *Gorman*, 536 U.S. at 187).

b. Petitioners alternatively contend (Pet. 29-34) that mitigation principles would not support offsetting their damages to reflect the increased premium tax credits they received. That contention also lacks merit.

In the court of appeals, petitioners contended that the mitigation doctrine did not call for offsetting their damages here on the ground that their receipt of increased premium tax credits was too far removed from the government's cessation of CSR payments and because either of two exceptions to the mitigation doctrine applied. Pet. App. 23-29. The court of appeals rejected those contentions, finding that the increased premium tax credits were the "direct result" of petitioners' mitigation efforts made in "direct response" to the government's action, *id.* at 23, 25; see *id.* at 23-26, and that neither of the exceptions petitioners invoked was applicable here, see *id.* at 26-29. As noted above, petitioners

do not seek this Court's review of the court of appeals' rejection of those arguments. See p. 21, *supra*.

Instead, petitioners now contend (Pet. 29) more broadly that "[t]he doctrine of mitigation has no application" here at all on the theory that petitioners "performed [their] contractual obligations in full" and the government has "simply refused to pay the agreed-upon amount." See Pet. 29-34. Petitioners made that contention below as a part of their argument that damages are determined at what they termed "the first step," and that mitigation "do[es] not go beyond the first step to encompass pass-on and similar indirect recoveries." 2019-1633 C.A. Doc. 63, at 15 (Mar. 13, 2020); see *id.* at 25. The court of appeals rejected that "first step" argument in the circumstances of these cases, Pet. App. 23-24, and did not separately address the argument petitioners now press that offsets for a non-breaching party's actual mitigation efforts never apply where the non-breaching party has fully performed.

In any event, petitioners' argument (Pet. 3, 31) that mitigation principles are inapplicable because they "fully performed" fails for at least two reasons. First, petitioners' contention mischaracterizes the nature of the statutory bargain. Section 1402 did not offer CSR payments as an incentive to encourage insurers to reduce consumers' cost-sharing obligations. As petitioners elsewhere acknowledge (Pet. 2), Section 1402 imposes a freestanding obligation on an insurer to reduce cost sharing for eligible insureds if the insurer elects to sell plans on an Exchange. 42 U.S.C. 18071(a)(2) ("In the case of an eligible insured enrolled in a qualified health plan * * * the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified

in subsection (c).”). An insurer’s obligation to reduce cost sharing for eligible insureds is not contingent on CSR payments by the government.

Instead, the ACA provided for CSR payments so that insurers would not increase their premiums to cover the expense of those statutorily mandated cost-sharing reductions. As the court of appeals correctly noted, the “text of the ACA” reflects this purpose by providing that the government “‘makes advance payments of [premium tax] credits or [cost-sharing] reductions to the [insurers] . . . *in order to reduce the premiums* payable by individuals eligible for such credit.’” Pet. App. 24 (quoting 42 U.S.C. 18082(a)(3)) (emphasis added; brackets in original). Thus, when petitioners increased their premiums for 2018 based on the cessation of CSR payments from the government, they engaged in what they have previously described as a quintessential mitigation step: “stopping performance to avoid costs.” 2019-1633 C.A. Doc. 63, at 23.

Second, petitioners’ contention (Pet. 3, 31) that they had already “fully performed” before taking steps to mitigate their damages distorts the sequence of the relevant events. In these cases, the damages issue that the court of appeals addressed pertains only to 2018—the year following the government’s October 2017 announcement that it would no longer make CSR payments. See Pet. App. 2, 12. At the time of that announcement, petitioners had not yet provided coverage for 2018; open enrollment for 2018 would not begin until November 2017. See *id.* at 52. And by the time of the October 2017 announcement, petitioners had already anticipated that the government would cease the payments, and they set their premiums for 2018 expressly

assuming that payments would not be made. See pp. 7-8 & n.2, *supra*.

Petitioners' situation thus is far removed from that of an employee who enters a contract to work for one year and to be paid at year's end, and who works for 365 days but then is not paid. Cf. Pet. 30. Petitioners knew before the 2018 plan year began that the government would not make CSR payments going forward. They then provided coverage on the Exchanges and offset those lost payments by increasing their silver-plan premiums in a manner designed to secure a corresponding "increase in the amount of the premium tax credit[s]" they received from the government for silver-plan enrollees. Pet. App. 7; see 2015 ASPE Issue Brief 2 ("Because of th[e] structure" of premium tax credits calculated based on benchmark silver-plan premiums, "increases in benchmark premiums generally translate" into corresponding "increases in eligible individuals' [premium tax credits]"). Those increased silver-plan premiums also made increased premium tax credits available to enrollees in other, non-silver plans. See *ibid.* Petitioners' situation is thus more analogous to an employee who agrees to work for a year for a certain salary; who is told before the year begins that the employer will pay the employee partly in cash and partly in time-limited stock options that (if exercised) will yield shares worth at least as much as the remainder of the agreed-upon salary; and who proceeds to work for the employer, accepts the cash portion of the salary, and exercises the stock options constituting the remainder. Contract-law principles would not permit the employee in those circumstances, who has thus realized the full value of or more than the agreed-upon salary, to sue for damages for the portion of the original salary that was paid in stock rather than in cash.

Petitioners' assertion (Pet. 32) that the court of appeals departed from traditional mitigation principles by "refus[ing] to accept the logical consequences of its theory" lacks merit. As petitioners note, and as the court of appeals recognized, "when common-law mitigation does apply, 'the non-breaching party is expected to take reasonable steps to mitigate his or her damages,'" *ibid.* (quoting Pet. App. 20 (emphasis omitted)), and a non-breaching party that fails to take such reasonable mitigation measures cannot recover damages for injuries that such steps would have avoided, see Pet. App. 20-21. Petitioners' assertion (Pet. 33) that the court was "unwilling[] to embrace" that conclusion is inaccurate.

As the court of appeals explained, it did not decide how that principle would apply in this context because there was no need. Pet. App. 21 ("We need not determine whether this first aspect of the mitigation doctrine applies here—such that the insurers were obligated to increase premiums to secure increased premium credits."); see p. 19 n.5, *supra*. Regardless of whether petitioners were *required* by mitigation principles to avoid lost revenue by raising their premiums to secure increased tax credits—such that their damages would have been offset by the amount they could have saved—petitioners actually did so. Pet. App. 23. Whether a non-breaching party must undertake a particular mitigation measure is academic when the party "in fact undertook" that very measure. *Id.* at 21.

It is thus petitioners who seek an unprecedented departure from traditional principles of remedies. Having already taken steps to offset lost revenue from direct CSR payments by securing an increase in other subsidies from the government, petitioners brought suit to recover those same sums again as money damages. Petitioners point to

no decision of this Court or any other court that supports that incongruous result, and they identify no reason why Congress would have intended to allow that duplicative recovery. The court of appeals correctly rejected that contention. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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