NO. 20-1162

In the

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,

Petitioner,

v.

UNITED STATES,

Respondent.

COMMUNITY HEALTH CHOICE, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The government has no real defense for the Federal Circuit's latest attempt to excuse it from complying with its unambiguous shall-pay obligations under the Affordable Care Act ("ACA"). As this Court held just last Term in *Maine Community*, when the government fails to honor a clear statutory shall-pay obligation, a private party that performs in full has a Tucker Act remedy for the shall-pay amount. That holding leaves no room for the Federal Circuit's misguided attempt to reduce the government's obligations by inventing a novel "mitigation" theory with no basis in the statutory text or the common law.

The government does not unearth a single case in the history of the common law that invokes mitigation principles to reduce the recovery of someone who has fully performed in response to a promise to pay a sum certain for that performance. Not one. Nor does it identify anything in the ACA or the Tucker Act that supports paying petitioners less than the specific amounts Congress mandated. When the government defaults on unambiguous shall-pay obligations under a money-mandating statute, the plain and obvious remedy is to mandate payment of the full amount of money Congress mandated. The government's convoluted alternative, under which clear statutory obligations are zeroed out and the government may ignore statutory mandates in perpetuity, has nothing to recommend it. It contradicts *Maine Community*, unsettles well-settled law, and makes the government an unreliable contracting partner. The stakes here run to the billions and extend well beyond this case. This Court should grant review.

I. The Federal Circuit's Decision Cannot Be Reconciled With *Maine Community*.

As *Maine Community* made crystal clear, when Congress enacts a statute unambiguously requiring the government to make specified payments, and the government defaults on its shall-pay obligations, the remedy is straightforward: the government must pay the full "unpaid amounts" that the statute mandates. *Maine Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1315 (2020); *see* Pet.21-26. That was neither a stray remark nor dictum. This Court was acutely aware of both the outsized stakes and the government's effort to pay pennies on the dollar. *Maine Community* nonetheless reiterated the government's obligation to pay in full, emphasizing that the government was required "to pay insurers the full amount set out in [the statutory] formula," 140 S.Ct. at 1319; stressing the government's obligation to pay "whatever amount the statutory formula provides," *id.* at 1321; and explicitly rejecting the government's view that "a partial payment would satisfy the Government's whole obligation," insisting instead that the government was required to pay "the sum that [the statute] prescribes." *Id.* In short, when a statute sets out a clear money-mandating command that the government shall pay "specific sums already calculated, past due, and designed to compensate for completed labors," the remedy for a breach of that statutory command is an order to pay the "specific sums" that the statute requires. *Id.* at 1330-31. *Maine Community* leaves no room for the government's attempt to escape its clear statutory obligations by paying some lesser amount.

The government has no plausible basis to distinguish *Maine Community*. It claims that *Maine Community* "did not present" this mitigation issue, BIO.22-23, but that is only because the Federal Circuit's theory is so implausible that it never occurred to the government in either *Maine Community* or the earlier stages of this litigation. It is not because the argument would have been inapplicable in the risk-corridors context. The briefing in *Maine Community* made clear that the government's failure to make risk-corridor payments "caused premiums to increase," meaning that at least some insurers received additional premium tax credits. U.S.Br.49, *Maine Cmty. Health Options v. United States*, No. 18-1023 (U.S. filed Oct. 21, 2019). The fact that the government never even suggested that those increased tax credits should decrease its shall-pay obligations under §1342 is a testament to the argument's implausibility, but it is not a basis for distinguishing *Maine Community* or disregarding the basic principle that the violation of a shall-pay obligation calls for a shall-pay remedy. Pet.25-26.[1]

Indeed, even the government is ultimately forced to concede that *Maine Community* unequivocally recognized "a Government obligation to pay insurers *the full amount* set out" in the statute. BIO.23 (emphasis added) (quoting *Maine Cmty.*, 140 S.Ct. at

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[1] The government suggests *Maine Community* was different because insurers set premiums and sold coverage before Congress enacted its appropriations riders each year. BIO.22-23. But here too, insurers set premiums and sold coverage each year *before* Congress decided whether to appropriate funds to meet the government's unambiguous obligations under §1402. Pet.8-10.

1319); *see also Maine Cmty.*, 140 S.Ct. at 1321 ("whatever amount the statutory formula provides"); *id.* ("the sum that [the statute] prescribes"). Its suggestion that this unambiguous language addressed only "the duty imposed," not the resulting "damages owed," BIO.23, is flatly inconsistent with *Maine Community*'s instruction (which the government never addresses) that the remedy for breach of a mandatory shall-pay obligation is "a damages remedy *for the unpaid amounts*." 140 S.Ct. at 1315 (emphasis added). It is also inconsistent with the reality that the government in fact paid the full amount of its §1342 shall-pay obligations, sans any "mitigation" or other discounts. That full payment was neither voluntary nor profligate. It is the remedy this Court commanded in *Maine Community*.

II. The Federal Circuit's Novel "Mitigation" Theory Has No Grounding In The Statutory Text Or The Common Law.

The decision below contravenes not only *Maine Community*, but also the clear statutory text and the common-law principles it purports to apply. The plain text of §1402 establishes unambiguous obligations on insurers and the government: Insurers must provide the required cost-sharing reductions (as petitioners did), and in return, the government "shall make periodic and timely payments" to the insurer "equal to the value of the reductions." 42 U.S.C. §18071(c)(3)(A). The Federal Circuit had no license to judicially amend the latter statutory command by reducing the amounts the government indisputably owed under §1402 by the amounts it was equally required to pay under §1401. Those are two separate statutory requirements, and nothing in the text of either so much as hints that payments under one reduce the government's obligations under the other. Pet.27-29. Nor is there any support in the annals of the common law for the notion that "mitigation" principles have a role to play when a party performs in full in response to a promise to pay a sum certain. Challenged to come up with a single case supporting mitigation in those circumstances, the government came up empty, while countless decisions (including from this Court) hold the opposite. Pet.29-32. The Federal Circuit's dramatic departure from statutory text and settled common-law doctrine cannot stand.

1. The government suggests that the Federal Circuit properly reached outside the statutory text because the ACA "does not provide a remedial framework." BIO.16 (quoting Pet.App.14-15). But as *Maine Community* makes abundantly clear, the absence of a separate ACA remedy is a necessary precondition for a Tucker Act remedy, not an excuse for judicial free-lancing. And under the Tucker Act, the remedy for the government's violation of a money-mandating statute is clear: The government must pay "the sum that [the statute] prescribes," not some smaller sum reduced by judicial fiat. 140 S.Ct. at 1321. Or in Justice Scalia's words (twice quoted in *Maine Community*), a statute like §1402 "impliedly authorizes (absent other indication) a claim for damages *in the defaulted amount*"—not whatever lesser amount the Federal Circuit deems appropriate. *Id.* at 1328 n.12, 1329 (emphasis added) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting)).

The government's principal support for its contrary argument is *Barnes v. Gorman*, 536 U.S. 181 (2002). *See* BIO.17-18, 24. But even the briefest glance at *Gorman* is enough to distinguish it. *Gorman* is limited to spending-power conditions and does not so much as mention "mitigation," which likely explains why the government never mentioned *Gorman* in its merits briefs below.[2]

Gorman held that the judicially inferred cause of action against federal-funds recipients under Title VI does not allow punitive damages. 536 U.S. at 185-86. The Court observed that spending-power "legislation [i]s much in the nature of a contract," and that conditions imposed on recipients of federal moneys must be unambiguous. *Id.* at 186 (emphasis omitted). Because nothing put recipients on notice of liability for punitive damages, which "are generally not available for breach of contract," *id.* at 187-88, the Court refused to allow punitive damages.

Nothing in *Gorman* justified the Federal Circuit's deviation from the text here. Section 1402 does not impose spending-power conditions on recipients of federal funding, so *Gorman* is wholly inapposite. The cost-sharing-reduction obligations are not grant conditions, *cf.* BIO.25 (describing them as "freestanding obligation[s]"), and it is undisputed that petitioners satisfied them. And to the extent *Gorman* requires unambiguous text before the judiciary can impose novel judge-made remedies burdening participants in a federal program, *Gorman* would

[2] That makes the government's effort (at 20-21) to chide petitioners for not devoting attention to that plainly inapposite case rather rich.

seem to preclude the Federal Circuit's modification of a clear statutory shall-pay obligation in favor of a judge-made "mitigation" doctrine. Finally, the notion that anything in Justice Scalia's opinion for the Court in *Gorman* addressing punitive damages under Title VI meant to undermine his considered views about Tucker Act remedies in *Bowen* does not pass the straight-face test.[3]

2. Even if *Gorman* made contract-law principles relevant, it would not justify the Federal Circuit's novel "mitigation" theory, which deviates from settled contract-law principles. As this Court recognized long ago, and countless courts have repeated since, there is no role for mitigation when one party performs and the other simply fails to pay the amount owed in return. *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 100 (1867); *see* Pet.30 (citing cases); Chamber.Br.13-16. The government makes no attempt to respond to those cases, let alone identify any contrary decision in the long history of the common law. Indeed, the government's Table of Authorities speaks volumes: It cites just eight federal cases, and not a single state-court decision or treatise. In fact, the government's entire discussion of mitigation doctrine does not cite a single case or treatise. BIO.24-29. That complete absence of support underscores that the Federal

[3] The Back Pay Act cases likewise provide the government no support. *Contra* BIO.18. That statute *explicitly* provides for mitigation of damages, *see* 5 U.S.C. §5596(b)(1), underscoring that Congress knows how to incorporate mitigation principles when it chooses. Moreover, the mitigation doctrine courts have applied under the Back Pay Act is the traditional common-law doctrine—not the unprecedented theory that the Federal Circuit invented here. *See* Pet.29-32.

Circuit was not importing common-law contract principles or anything else. It was just deviating from statutory text and inventing a doctrine to dilute the government's shall-pay obligations out of whole cloth.

Unable to identify any authority for the Federal Circuit's novel "mitigation" theory, the government tries to change the subject, accusing petitioners of "mischaracteriz[ing] the nature of the statutory bargain" and not upholding their end of the bargain. BIO.25-26. That is both remarkable and untethered to anything in the decision below. Section 1402 imposes a clear obligation on insurers: They "shall reduce the cost-sharing" for their eligible insureds in accordance with the statute's requirements. 42 U.S.C. §18071(a)(2), (c). In exchange, it imposes an equally clear reimbursement obligation on the government: The Secretary "shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. §18071(c)(3)(A). It is undisputed that petitioners fully performed their statutory obligation under §1402 to provide cost-sharing reductions to their eligible insureds (at a cost of tens of millions of dollars). Pet.10-11. That full performance by petitioners demands full reciprocal performance by the government. It should be that simple.

The government emphasizes that insurers have a "freestanding obligation" under §1402 to provide the cost-sharing reductions. BIO.25. No doubt. Unlike the government, insurers well understood that they could not shirk their statutory obligations with impunity. But Congress promised them something in return—namely, dollar-for-dollar reimbursement. 42

U.S.C. §18071(a), (c). In providing the cost-sharing reductions, petitioners plainly lived up to their end of the actual statutory bargain. In shirking its reimbursement obligations, the government just as plainly defaulted on its end of that bargain.

The government's effort to reconceptualize the bargain has no basis in the statute (or even the decision below). According to the government, the "statutory bargain" was that insurers "would not increase their premiums to cover the expense of [the] statutorily mandated cost-sharing reductions." BIO.25-26. But that is simply not what the statute says. Nothing in §1402 or anything else in the ACA imposed a duty on insurers not to increase premiums to cover the expense of cost-sharing reductions (presumably because the government was statutorily obligated to reimburse those cost-sharing reductions directly). Congress did not purport to restrict insurers from seeking premium increases in the event of a government default because it expected the government to honor the statutory bargain. For the government to breach its unambiguous obligation to reimburse cost-reduction payments and then turn around and accuse insurers of breaching a different "statutory bargain" with no grounding in the statute is an impressive display of chutzpah.

The government likewise argues that petitioners "distort[] the sequence of the relevant events" by maintaining that they fully performed, because petitioners foresaw that the government might fail to carry out its unambiguous shall-pay obligation under §1402 and so sought permission from state regulators to price that risk into their 2018 premiums. BIO.26-

27. But the statute itself prescribes the relevant sequence of events. Insurers must first provide cost-reductions, and the government must then reimburse those reductions. In 2018 (and in subsequent years), insurers upheld their end of the bargain and the government subsequently defaulted. Separately, some insurers sought and (only sometimes) received premium increases for the next year and received increased tax credits for some (but not all) of the insureds paying those higher state-approved premiums. But the premium-setting and tax-credit processes were entirely separate from §1402. If, for example, Congress appropriated funds to make cost-reduction payments in the middle of a year, it would have no immediate effect on state-approved premiums and the resulting level of tax credits.[4]

The government's analogy to an employee who was promised compensation partly in cash and partly in stock and paid both only to demand an additional cash payment for the stock portion, BIO.27, is mystifying. Petitioners were promised reimbursement, and so far have not received it in any specie. If there is an analogy, it would be to a government that promises full payment to a worker who works an eight-hour shift and separately promises $10 an item for workers who do different piecemeal work. If the government improperly refuses

[4] The government announcement in October 2017 that it would not comply with its unambiguous §1402 obligations "unless and until a valid appropriation exists" is equally irrelevant. Pet.App.51-52, 108. Insurers still needed to wait until the end of the fiscal year, well after premium rates were set and policies sold, to learn whether Congress in fact appropriated any funds.

to pay a worker for the eight-hour shift she worked in full, and she is consequently forced to do additional piecemeal work on the weekend to feed her family, the government is not entitled to a reduction of what it owes her for her eight-hour shift just because it paid her for the piecemeal work. They are separate promises, and principles of mitigation and dire warnings about a "duplicative recovery," BIO.28-29, have no place. The same is true of §1401 and §1402; they are separate provisions imposing separate obligations on the government, and nothing in statutory text, common law, or commonsense gives the government some two-for-one discount or excuses it from full payment for petitioners' full performance under §1402.[5]

3. The government has equally little to say in defense of the Federal Circuit's refusal to accept the logical consequences of its "mitigation" theory. *See* Pet.32-33. The government claims there was "no need" for the Federal Circuit to address whether its theory would effectively *require* insurers to raise premiums in order to mitigate. BIO.28. But if "mitigation" principles really were applicable, the government would be entitled to a reduction whether or not insurers actually raised their rates, and insurers would have little practical alternative to raising rates. The government's unwillingness to defend that result exposes the flaws in the Federal Circuit's novel "mitigation" theory. It is not really a

[5] Moreover, the government does not deny that the ACA includes other provisions that protect against windfalls by capping insurers' profits and requiring rebates of any excess to insureds. Pet.33-34.

mitigation theory at all, but an offset for payments actually received under a separate statutory provision that provides no indication that payments under one provision should offset obligations under the other. Worse still, any doctrine that would require insurers to *increase* their premiums, and make health care *less affordable*, cannot draw support from the Affordable Care Act.

III. The Question Presented Is Exceptionally Important.

The government does not deny the enormous stakes; to the contrary, its cross-petition confirms them. U.S.Pet.20-21, No. 20-1432. As petitioners and their amici have explained, this case implicates not only billions of dollars in past-due obligations under §1402, but also the government's broader credibility as a reliable business partner. Pet.34-36; *see* Chamber.Br.5-13; ACAP.Br.4-17; Anthem.Br.20-22. Moreover, in contrast to the risk-corridors program in *Maine Community*, which was a limited three-year program, the government's obligations under §1402 are ongoing. Thus, not only do the government's already staggering unpaid obligations continue to mount, but the Federal Circuit's "mitigation" ruling, like the government's cross-petition argument, threatens to make the government's disregard of its §1402 obligations permanent. The government has not made a §1402 payment since 2017, and the Federal Circuit's decision eliminates (or at least substantially dulls) the government's incentive to come into compliance and keep its word. This Court should not sanction this extended disregard of the government's statutory obligations.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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