No. 20-1536

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Cross-Petitioner,
v.
COMMON GROUND HEALTHCARE COOPERATIVE,
ON BEHALF OF ITSELF AND ALL OTHERS
SIMILARLY SITUATED,
Cross-Respondents.

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

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Federal Circuit correctly hold that the Government is liable for failure to make cost-sharing reduction payments where section 1402 of the Patient Protection and Affordable Care Act ("ACA") states unambiguously that the Government "shall make" cost-sharing reduction payments to insurers in set amounts?

RULE 29.6 STATEMENT

Common Ground Healthcare Cooperative has no parent corporation, and no corporation owns more than 10% of its stock.

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INTRODUCTION

The question raised in the Government's conditional cross-petition for a writ of certiorari does not warrant this Court's review because it already was decided in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). In *Maine Community*, this Court held that section 1342 of the ACA creates a right of action and a remedy for risk-corridor payments where the statute states that the Government "shall pay" those amounts. Likewise, here, section 1402 of the ACA states that the Government "shall make" CSR payments in set amounts. *Maine Community* is dispositive, and there is no question worthy of this Court's review as to whether the Government can avoid all liability for failure to make payments that it "shall make."

The cross-petition here incorporates by reference the Government's arguments in No. 20-1432, where the Government brought a conditional cross-petition with respect to different plaintiffs for the same set of underlying Federal Circuit decisions. In the No. 20-1432 cross-petition, the Government attempts to distinguish *Maine Community* because here there is supposedly an offset of the required CSR payments through increased premium tax credits. However, the ACA does not mention any such offset or suggest that an increase in premium tax credits undercuts the obligation to make CSR payments. Thus, there is no material difference between this case and *Maine Community*: in both, a statutory requirement for payments the Government "shall make" gives rise to liability for failure to make those payments. "These holdings reflect a principle as old as the Nation itself: The Government should honor its obligations." *Maine Community*, 140 S. Ct. at 1331.

Moreover, the Government's proposal to hold the cross-petition should be rejected. The Government suggests (Cross-Pet. 6) that the cross-petition in the case here—brought by Common Ground Healthcare Cooperative ("Common Ground") on behalf of itself and a class of 101 opt-in plaintiffs—should be held until the resolution of the conditional cross-petition in No. 20-1432. However, because Common Ground is filing this brief in opposition prior to the deadline, the cross-petitions here and in No. 20-1432 will be considered at the same time, and thus there is no reason to hold this cross-petition.[1] In addition, as an alternative to granting the cross-petition, the Government suggests (Cross-Pet. 5) that, if the petition in No. 20-1162 and/or No. 20-1200 (Common Ground's petition) is granted, then the cross-petitions in No. 20-1432 and here should be held pending resolution of the merits of the petitions. This approach too should be rejected, for it would unduly prolong the proceedings to the detriment of the parties and the Court. If the Court believes that the damages issue could affect the Federal Circuit's liability holding, then it should grant the cross-petitions and decide all issues in these cases at the same time. But as discussed below, there is no such effect, the liability holding is correct, and

[1] For the reasons Common Ground will set forth in detail in its reply in support of its petition for certiorari in No. 20-1200, if certiorari is granted in No. 20-1162 (*i.e.*, the petition of the other plaintiffs challenging the same Federal Circuit decisions), then Common Ground's petition in No. 20-1200 should not be held, but rather granted and the cases consolidated for briefing and argument. Likewise, if certiorari is granted in No. 20-1432, then the conditional cross-petition here should be granted so that all issues in both cases can be briefed and argued together.

accordingly this Court should deny the Government's cross-petition.

STATEMENT

Common Ground set forth the relevant facts in its petition for a writ of certiorari in No. 20-1200. The Government's cross-petition sets forth no new factual issues beyond those already addressed in Common Ground's petition.

ARGUMENT

I. THIS COURT'S REVIEW OF THE GOVERNMENT'S CONDITIONAL CROSS-PETITION IS UNWARRANTED BECAUSE *MAINE COMMUNITY* CONFIRMED THE GOVERNMENT'S LIABILITY FOR FAILURE TO PAY AMOUNTS THAT A STATUTE SAYS THE GOVERNMENT "SHALL MAKE"

The Government does not dispute that its failure to make CSR payments violates the requirement of section 1402 of the ACA that it "shall make" those payments in set amounts. As the Government recognizes (No. 20-1432 Cross-Pet. 4), the sole rationale that the Government provided when it stopped making CSR payments was that it supposedly lacked an appropriation to do so. The Government has now abandoned (*id.*) that rationale, recognizing that it is inconsistent with *Maine Community*. Thus, the Government is left to argue that, although it has violated the ACA, Plaintiffs have no remedy for such a violation. However, as discussed below, that argument cannot be reconciled with *Maine Community* or the text of the ACA.

A. Under *Maine Community*, Plaintiffs Have A Right Of Action And Remedy To Recover Unmade Payments

1. This Court's holding in *Maine Community* is unequivocal and directly on point: Where a statute says that the Government shall make certain payments, then there is a right and remedy to obtain those payments. In *Maine Community*, the Court considered section 1342 of the ACA, which "stated that the eligible profitable plans 'shall pay' the Secretary of the Department of Health and Human Services (HHS), while the Secretary 'shall pay' the eligible unprofitable plans." 140 S. Ct. at 1316. The Court held that insurance companies can "sue the Government under the Tucker Act to recover on that obligation." *Id.* at 1319. In particular, "Section 1342 imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges." *Id.* at 1320.

The Court reached this conclusion based on two points. "The first sign that the statute imposed an obligation is its mandatory language: 'shall.'" *Id.* at 1320. The second is that "the Affordable Care Act differentiates between when the HHS Secretary 'shall' take certain actions and when she 'may' exercise discretion." *Id.* at 1321 (noting that the statute uses the word "may" in sections 1341 and 1343). In short, "the statute meant what it said: The Government 'shall pay' the sum that § 1342 prescribes." *Id.* That "'shall pay' language often reflects congressional intent to create both a right and a remedy under the Tucker Act." *Id.* at 1329 (quotation marks omitted). Section 1342 thus "falls comfortably within the class

of moneymandating statutes that permit recovery of money damages in the Court of Federal Claims." *Id.*

This reasoning applies equally to section 1402 of the ACA. Like section 1342, it states that the Government "shall make" the required payments. 42 U.S.C. § 18071(c)(3)(A) ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions."). And like section 1342, the use of "may" in an adjacent subsection reinforces that "shall" means "must" in the context of the statute. *See, e.g.*, *id.* § 18071(c)(3)(B) ("The Secretary may establish a capitated payment system to carry out the payment of cost-sharing reductions under this section."). Thus, section 1402 is just as unequivocal as section 1342 in requiring the payments at issue and in creating a right and a remedy for failure to make those payments.

B. *Maine Community* Is Materially Indistinguishable From The Instant Case

1. The Government errs in attempting (No. 20-1432 Cross-Pet. 19) to distinguish *Maine Community* on the basis that "[t]he cost-sharing reductions and associated CSR payments established by Section 1402 operate differently than the risk-corridors program . . . ." This difference, according to the Government (*id.*), is that "the predictable (and predicted) effect of the failure to make direct CSR payments was that insurers raised premiums to cover the cost of making cost-sharing reductions," which "triggered an outsized increase in premium tax credits under the ACA's formula." However, this prediction is irrelevant to whether the statute creates a remedy for the Government's failure to make CSR payments because it is not in any way

reflected in the statute itself. The ACA nowhere states that lack of CSR payments would be offset by greater tax credits, let alone that this possibility would obviate the requirement to make CSR payments.

The requirement for the Government to provide premium tax credits is *in addition to* and *separate from* the requirement to make CSR payments. The provision regarding premium tax credits says nothing about CSR payments. 26 U.S.C. § 36B. The provision regarding CSR payments says nothing about premium tax credits. 42 U.S.C. § 18071(c)(3)(A). There is no suggestion in any provision that, if premium tax credits are greater, then CSR payments can be reduced or not made at all. If (as the Government suggests) the increase in premium tax credits might reduce the need for CSR payments, then surely Congress was aware of that fact, and yet it required *both*. In short, the Government cannot manufacture an assumption that Congress intended no remedy for failure to make CSR payments based on the possibility of supposedly offsetting premium tax credits when there is nothing in the statute to support it.

Indeed, this Court rejected the Government's appropriations-based argument in *Maine Community* for precisely this reason. There, the Government argued that "the existence and extent of its obligation . . . is 'subject to the availability of appropriations.'" 140 S. Ct. at 1322. This Court disagreed: "[T]hat language appears nowhere in § 1342, even though Congress could have expressly limited an obligation to available appropriations or specific dollar amounts." *Id.* Likewise, here, section 1402 does not require CSR payments subject to a potential increase in premium tax credits, and such a limitation cannot be implied in the absence of any statutory basis.

2. The Government's premise that increased premium tax credits necessarily would (and did) offset the lack of CSR payments is simply incorrect. Contrary to the Government's suggestion (No. 20-1432 Cross-Pet. 19) of a "built-in mechanism" linking the two, there is no automatic switch whereby premium tax credits replace absent CSR payments. Rather, that would occur only if silver-plan premiums increased in sufficient amounts as a result of the absence of CSR payments. However, as the Government concedes (No. 20-1432 Cross-Pet. 10), that did *not* occur for unmade CSR payments in 2017 because premiums had already been set for that year. The Government suggests (*id.* 20) that Congress would not have anticipated this scenario, but this misses the point: the Government did not anticipate *any* scenario where CSR payments were not made because it made those payments mandatory. Moreover, even for 2018, while the Government notes (*id.* 5) that "nearly all" States agreed to raise premiums, not all did, meaning Plaintiffs in some States did not receive greater premium tax credits that supposedly would offset the loss of CSR payments.

In addition, the premium increases largely occurred *before* the Government's refusal to make CSR payments. *See* Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026*, at 33-34 (March 2016), available at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-healthinsuranceba selineonecol.pdf. The Government asserts (No. 20-1432 Cross-Pet. 9 n.3) that the two plaintiffs in No. 20-1432 increased premiums in anticipation of losing CSR payments, but the Government provides no such evidence

for the 101 Plaintiffs in this case.[2] And the Federal Circuit explicitly left open this question, "remand[ing] to the Claims Court for a determination of the amount of premium increases (and resultant premium tax credits) attributable to the government's failure to make cost-sharing reduction payments." No. 20-1200 Pet. App. 75a.

In sum, regardless of which side would succeed on remand about the impact of CSR non-payment on premium tax credits, there was nothing inevitable about premium tax credits increasing because of and in amounts greater than or equal to unmade CSR payments. When considering damages, the Federal Circuit considered the potential impact of CSR non-payment not because it was inevitable, but because the court determined that Plaintiffs had the burden to disprove the supposed effect of CSR non-payment and deemed acceptable an attenuated chain of causation from (i) the federal government not making CSR payments to (ii) state regulators approving greater premiums for silver plans to (iii) the federal government granting increases in premium tax credits that (iv) might be in amounts greater than the lost CSR payments.

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[2] In any event, the Government's own evidence is that the premium increase is due to many factors in combination, not just the failure to pay CSRs. *See* Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 2 (May 23, 2018), available at https://go.usa.gov/xdBQa ("In 2018, the average premium for a benchmark plan . . . is about 34 percent higher than it was in 2017. By CBO and JCT's estimates, in addition to rising health care costs per person, the increase was caused by three primary factors: First, insurers are no longer reimbursed for the costs of [CSRs] . . . ; second, a larger percentage of the population lives in areas with only one insurer in the marketplace; and third, some insurers expected less enforcement of the individual mandate . . . .").

No. 20-1200 Pet. App. 72a, 76a-77a. Regardless of whether this was the correct analysis of mitigation (and it was not), there is no plausible basis to impute to Congress any intent to obviate mandatory CSR payments based on such a speculative, extended, and uncertain link to supposedly offsetting premium tax credits. Accordingly, there is no reason to believe that Congress made such an assumption and incorporated it into the statute. That is especially true given the lack of any statutory language to support it. Indeed, the Government's approach would mean that Plaintiffs have no remedy for unmade CSR payments *regardless* of whether they caused an increase in premium tax credits. *See Sanford Health Plan v. United States*, 969 F.3d 1370, 1383 (Fed. Cir. 2020) ("The government's conclusion would mean that the background body of law making the Tucker Act applicable to section 18071(c)(3) is displaced even for situations in which, as in the present two cases, the premium tax credit mechanism does not in fact make up for losses from section 18071(c)(3)'s violation.'"). It therefore would turn Congress's "shall make" language into a mere suggestion. This approach was rejected in *Maine Community*, and thus, the liability issue is not worthy of this Court's review.

II. A GRANT OF CERTIORARI TO ADDRESS THE FEDERAL CIRCUIT'S HOLDING ON DAMAGES WILL NOT MAKE THE HOLDING ON LIABILITY WORTHY OF REVIEW

The Government does not argue that the Federal Circuit's liability decision by itself warrants a grant of certiorari. Instead, the Government argues (No. 20-1432 Cross-Pet. 15) that, "[i]f the court of appeals' damages holding were set aside, its liability holding would be called into doubt," and would therefore

warrant this Court's review. This is implausible, however, as the amount of damages does not affect whether the Government is liable in the first place.

As discussed above, the existence of a cause of action and remedy comes from the text of section 1402 and the reasoning of *Maine Community*. Nothing about this reasoning depends on how a damages remedy is calculated. And the Federal Circuit's holding too was based on the "shall make" language giving rise to a Tucker Act claim based on the Court's holding in *Maine Community* for materially identical language in section 1342 of the ACA. *See Sanford*, 969 F.3d at 1379-82.

The Government points (No. 20-1432 Cross-Pet. 15) to one paragraph in *Sanford* where the Federal Circuit notes that damages law alleviates the Government's concern about so-called "double recoveries." However, as the Government seems to recognize, this was an *additional* basis for the decision beyond the text and *Maine Community*. *See* No. 20-1432 Cross-Pet. 17 ("The court of appeals in *Sanford* also believed that its liability conclusion was compelled by this Court's decision in *Maine Community*."). The Federal Circuit did not remotely suggest that if there was no reduction based on mitigation, then Plaintiffs would have no cause of action.

Regardless, the Government's argument about double recoveries rests on the premise that Plaintiffs cannot be permitted both CSR payments and increased premium tax credits. But if Plaintiffs prevail on the damages issue, then that will be because the statute entitles them to the full amount of CSR payments regardless of the size of premium tax credits or any supposedly offsetting effect those credits might have. And if Plaintiffs are entitled to that amount by statute,

then the existence of premium tax credits is irrelevant to liability. There is no scenario where premium tax credits should be assumed to deny liability entirely—even where there is no increase in premium tax credits or an increase that falls far short of a supposed offset.

Finally, the Government errs in arguing (No. 20-1432 Cross-Pet. 14-15) for certiorari on the premise that, if the damages holding is set aside, the liability decision would have "greater practical significance." The Government's concern about a supposed windfall to insurers ignores that there are other limitations in place to protect against that outcome. *See* No. 20-1200 Pet. 27 n.3. In any event, any practical importance of the issue cannot by itself suffice for certiorari where, as here, the legal argument conflicts with this Court's precedent from only one year ago.

CONCLUSION

The Government's conditional cross-petition should be denied.

Respectfully submitted,

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