Nos. 18-1023, 18-1028, 18-1038

In The Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MODA HEALTH PLAN, INC. ET AL.,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, AN ILLINOIS NONPROFIT MUTUAL INSURANCE CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION AND WPS HEALTH PLAN, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Wisconsin Physicians Service Insurance Corporation ("WPS") is a not-for-profit service insurance corporation organized under Wisconsin law. WPS owns and operates WPS Health Plan, Inc. ("WPS Health Plan"). As a not-for-profit entity, WPS reinvests any financial surplus into its mission of making health care easier for the people it serves. In 2018, WPS and WPS Health Plan provided private health insurance coverage to approximately 115,000 people in Wisconsin. WPS Health Plan sold Qualified Health Plans ("QHPs") from 2014 to 2016 on the Federally Facilitated Exchange (the "Exchange") in Wisconsin. During those three years, WPS Health Plan provided health insurance coverage through the Exchange to approximately 13,000, 10,000, and 14,000 people per year, respectively, and suffered significant financial losses each of those years.

WPS is unique in that it is one of a handful of companies in the United States that is both a health insurer in the private sector and a leading administrator of federal government health programs under Medicare, TRICARE, and the U.S. Department of Veterans Affairs. WPS has a long history of being a trusted partner for providing insurance coverage to the people of Wisconsin and for providing crucial administrative

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

services to the federal government as a contractor and subcontractor in furtherance of serving active military, veterans, and seniors with their health care needs.

The Wisconsin Medical Society formed WPS in 1946 to administer Wisconsin's non-profit sickness plan, which provided medical services to soldiers returning from World War II. In 1956, the U.S. Department of Defense named WPS the Wisconsin contractor of "Military Medicare," which is now known as TRICARE. Currently, WPS continues to serve members of the U.S. military and their families through its administration as a subcontractor of TRICARE and U.S. Department of Veterans Affairs programs. Similarly, WPS became the first Medicare claims administrator in Wisconsin when Medicare was implemented in 1966. WPS continues to be an administrative partner today by managing Medicare Part A and Part B health benefits in multiple States as a prime contractor.

As a private health insurer, WPS also has a long history of providing innovative health care solutions for the people of Wisconsin. In 1959, six years before Medicare was enacted, WPS became the first insurer in the Nation to offer medical benefits specifically designed for seniors. After Medicare was implemented, WPS created a Medicare supplement insurance plan to provide coverage to seniors for gaps in Medicare benefits. Since its inception, WPS has evolved by developing a variety of traditional health insurance, managed care, and alternative health care delivery models to offer solutions in response to changing needs in the health care marketplace. Upon implementation of the

Patient Protection and Affordable Care Act ("ACA"), WPS again responded when it entered into agreements with the Centers for Medicare & Medicaid Services ("CMS") to offer QHPs and participate in the ACA Exchange.

As part of its decision to participate in the Exchange, WPS relied on the Risk Corridors program, which mandated the federal government to reimburse insurers for certain financial losses. The Risk Corridors program was a critical component of the ACA because it required the federal government and the insurers offering QHPs to share in the risk of insuring a new pool of policyholders during the first three years of the ACA's implementation (2014-2016). Due to the federal government's unpaid Risk Corridors obligations for 2014, 2015, and 2016, WPS Health Plan suffered unanticipated losses exceeding $28.5 million.

Like many other health insurers, WPS and WPS Health Plan have filed their own lawsuit against the government, seeking repayment of these losses as promised under the Risk Corridors program. *See Wisconsin Physicians Serv. Ins. Corp. et al. v. United States*, No. 1:17-cv-01070-EJD (Ct. Fed. Cl.). This lawsuit has been stayed pending the outcome of these appeals. Accordingly, WPS and WPS Health Plan have a direct and substantial interest in the question before the Court: whether and to what extent Congress can nullify statutory payment obligations through appropriations riders.

SUMMARY OF ARGUMENT

Congress' attempted evasion of statutory payment obligations under the Risk Corridors program was devastating to WPS and the people of Wisconsin. Like many other insurers, WPS evaluated the risks of participating in the ACA Exchange and determined the ACA had sufficient statutory safeguards – including the Risk Corridors program – to mitigate the chances of unacceptable losses. WPS had an existing contractual relationship with CMS as a Medicare Administrative Contractor ("MAC"). Based on that experience, WPS knew CMS to be a reliable payor and partner for services WPS provided as a MAC. In direct contravention of those years of reliable partnership, Congress' appropriations rider retroactively undermined a core safeguard written into the ACA, shifting huge losses to health insurance carriers and causing substantial disruption to the Exchange marketplace. Congress' stealthy actions harmed many in Wisconsin without providing clarity, advance notice, or the opportunity for debate. *See* Glenn Kessler, *Rubio's inaccurate claim that he 'inserted' a provision restricting Obamacare 'bailout' funds*, Wash. Post (Dec. 23, 2015) (stating that the lawmakers and staff involved in inserting the appropriations rider indicated that stealth was essential to their success).[2]

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[2] *Available at* https://www.washingtonpost.com/news/fact-checker/wp/2015/12/23/rubios-inaccurate-claim-that-he-inserted-a-provision-restricting-obamacare-bailout-funds/.

The system-wide harm Congress caused by its actions cannot be overstated. As a relatively small, not-for-profit corporation that invests any financial surplus into its mission of making health care easier for the people it serves, WPS does not have limitless resources to invest in unprofitable operations, nor can it turn to shareholders or other equity resources to raise funds to maintain solvency. Congress' attempt to circumvent the ACA's statutory promise through an appropriations maneuver cost WPS over $28.5 million in three years, a significant sum for a company of WPS's size. The resulting shortfall in liquid assets contributed to the need for WPS to transfer tens of millions of dollars to WPS Health Plan in order to meet the financial reserve requirements imposed by Wisconsin's insurance regulator and was a driving factor in WPS's decision to withdraw from the ACA Exchange after the 2016 plan year. Congress' actions to undermine the Risk Corridors program also contributed to rapidly rising insurance premiums in the Exchange market, as well as the need for Wisconsin residents to switch insurance carriers as companies exited and entered the market on a county-by-county basis.

If Congress is permitted to avoid its unambiguous statutory promises on a whim through the appropriations process, the private sector will be forced to treat Congress, and the administrative agencies that manage congressionally created programs, no differently than any other partner which acts similarly. In any dealings with the government on programs that involve congressional appropriations, the private sector

will price for the risk of that increased uncertainty, and that cost will be borne by the American taxpayer. Some companies may not be willing to take the risk at all, depriving government programs of private sector expertise and undermining the competitive procurement processes mandated by federal law. Given the damage already done by Congress in its attempted avoidance by appropriations rider of the ACA's Risk Corridors obligations, and the likely negative consequences upon this Nation if its actions are allowed to stand, this Court should reverse the judgment entered by the lower court.

ARGUMENT

I. Congress' Evasion of Its Unambiguous Statutory Payment Promise Through the Enactment of an Obscure Appropriations Rider Produced Devastating Results in the Health Insurance Market and Specifically for Small Not-for-Profit Health Insurers that Entered the Market in Reliance upon the Promise Made by the Government.

Health insurers are in the business of risk. They calculate that risk based on sound actuarial assumptions that in turn rely on factors such as risk mitigation programs. The ACA presented an uncharted risk territory for insurers and many were hesitant to participate. To persuade health insurers to participate in the Exchanges, Congress stressed there were sufficient risk mitigation guardrails in the form of the Risk

Corridors, Risk Adjustment, and Reinsurance programs to mitigate an insurer's exposure to unreasonable risk.

Health insurers could not have reasonably anticipated that Congress would retroactively undermine the Risk Corridors program, which was based on an unambiguous statutory promise of payment in the event of excess losses and did not factor this remote risk into their actuarial models. As a result, health insurers across the country experienced losses that were much worse than even their most dire estimates, contributing to instability that was devastating for consumers.

A. The Changes to the Risk Corridors Program Caused Significant Harm to WPS and Were a Central Factor in Its Decision to Withdraw from the ACA Exchange.

During its three years of losses under the ACA Exchange, which were magnified by the more than $28.5 million in payments due but not paid under the Risk Corridors program, WPS was forced to make substantial financial contributions to WPS Health Plan to ensure financial stability and keep the company in compliance with the Wisconsin insurance regulator's risk-based capital reserve requirements. The amount WPS lost due to Congress' evisceration of the Risk Corridors program is significant relative to the size of WPS Health Plan. The outstanding Risk Corridors payments due to WPS Health Plan are more than twice

the amount of its current capital surplus. The government's failure to fully pay its obligation negatively impacted the company's performance, offerings, and potential expansion. If the Court reverses the judgment below, payment of this amount to WPS could still make a tremendous difference to WPS's mission and customers going forward.

The federal government had always been a strong, fair, and dependable business partner to WPS. As a long-time government partner and one of the leading health insurers in Wisconsin's individual market before enactment of the ACA, WPS felt an obligation as a mission-driven not-for-profit to both the federal government and the people of Wisconsin to assume the higher, yet partially mitigated, risk of participating in the Exchange. WPS and other insurers expected challenges in this new market but believed the Risk Corridors program, in conjunction with the Risk Adjustment and Reinsurance programs, presented an oar of certainty in otherwise uncharted waters.

During 2014, the initial health plan year under the ACA, thirteen of the seventy-two Wisconsin counties had only one insurer participating in the Exchange, leaving residents of those counties without choice in the Exchange market. *See* Rachel Fehr et al., *Insurer Participation on ACA Marketplaces, 2014-2019*, Kaiser Family Foundation (Nov. 14, 2018).[3] Most of these were northern counties, which are home to

[3] *Available at* https://www.kff.org/health-reform/issue-brief/insurer-participation-on-aca-marketplaces-2014-2019/.

some of the most vulnerable populations in Wisconsin. During the first three years under the ACA, WPS heeded requests from Wisconsin's insurance regulator to remain on the Exchange to bolster competition and consumer choice in those vulnerable northern counties. Staying true to its mission, WPS remained in the Exchange for three years despite substantial losses.

Unfortunately, due to Congress' failure to fulfill the ACA's statutory promise of full Risk Corridors payments, WPS's management determined that the financial losses experienced by WPS through its participation in the Exchange were not sustainable. Given WPS's not-for-profit mission and longstanding commitment of service to the government and the people of Wisconsin, its decision to leave the Exchange at the end of 2016 was difficult. Had the Risk Corridors payments been made as promised, WPS would have been better situated to weather the losses and extend its participation in the Exchange.

B. The Changes to the Risk Corridors Program Harmed Wisconsin Residents Seeking Affordable and Reliable Health Insurance.

Due in significant part to the lack of Risk Corridors payments, WPS – like other insurers – had to account for uncertainty by offering its individual health plan on the Exchange at substantially higher premiums. Year-over-year, WPS Health Plan customers had to

absorb large premium increases. In 2015, WPS Health Plan raised its individual Exchange plan premium by 10% and the premiums rose another 19% for those same customers in 2016. Customers at or above 400% of the federal poverty level, which was as low as $47,080 for an individual in 2015, did not qualify for federal financial assistance under the Advance Premium Tax Credit. These customers felt the full brunt of the premium increases with no help from Congress. In turn, the failure of Congress to fund the Risk Corridors payments landed on the shoulders of consumers purchasing health insurance coverage for themselves and their families.

The instability in the individual Exchange market, caused in part by the lack of Risk Corridors payments, also burdened all Exchange consumers, regardless of tax credit status, by requiring many to switch insurance carriers as companies entered and exited the market on a county-by-county basis. When an insurer exits a market, it forces consumers to change health insurance plans, and they may lose access to their preferred health care provider. Consumers who switch health insurers also must learn the rules of their new plan. Items such as the cost sharing structure, list of covered drugs and services, and prior authorization processes may all be different under a new plan. These matters are confusing for consumers and disruptive to the delivery of and access to quality health care.

II. If Congress Can Evade Unambiguous Statutory Promises Through the Enactment of Subsequent Appropriations Riders, Businesses Will Be Forced to Deal Cautiously with the Government in the Future with any Program that Involves Congressional Appropriations.

The adage "once bitten, twice shy" certainly reverberates in the marketplace after the Risk Corridors debacle and is central to the correct construction of statutory promises made to the federal government's private sector partners. If the judgment below is affirmed, Congress' failure to make good on its statutory commitment under the Risk Corridors program calls into question many other statutory promises of payment that Congress would be equally permitted to revoke via appropriations riders. Going forward, as a matter of sound business practice, the private sector will need to carefully evaluate the worth of statutory programs unless such programs are fully committed to via a formal, fully-executed contract with the government – a cumbersome procurement process not always used by the government.

The private sector requires and deserves a clear understanding of the rules of the game when dealing with the government. If the judgment below is permitted to stand, businesses such as WPS may be much less likely to enter into risk opportunities based on the government's "assurances" that it will mitigate a portion of the risk. While WPS's unfortunate experience with the Risk Corridors program is unrepresentative

of its long history of partnering with the federal government, it is causing WPS, and no doubt other insurers, to proceed more cautiously when evaluating risk-sharing arrangements with the federal government.

For example, the State of Wisconsin is offering a partially federally funded reinsurance pool to insurers to further stabilize the individual insurance market. *See* Wis. Stat. § 601.83 (2018). Unfortunately, the reliability of the federal government dollars tied to this reinsurance pool is being questioned in the market as a direct result of Congress' actions on the Risk Corridors program. Given insurers' experience, they are unable to assume that they will receive the full amounts they have been promised, and this directly affects the actuarial modeling used to estimate cost and pricing. The resultant modeling will lead to higher premiums, ultimately injuring consumers.

If Congress is permitted to make unambiguous statutory promises of payment that it can later undo through the largely opaque appropriations process without clarity, notice, or debate, the entire private sector may be forced to adopt the same skeptical mindset as the health insurance industry. If the private sector determines that it cannot count on unambiguous statutory promises applying to federal programs because they can be effectively rescinded by congressional whim, companies will either calculate price risk into their offerings or simply refuse to participate. This will increase the cost the government pays when seeking private sector services and may deprive it of vital private sector expertise and innovation entirely.

Congress' conduct here has had a substantial negative impact on the future behavior of its business partners and, when applied to insurers across the country, has harmed and will continue to impact millions of Americans. The Court can ameliorate the damage by reversing the judgment below, thereby bolstering the private sector's faith that Congress cannot renege on its statutory payment promises through obscure appropriations riders.

CONCLUSION

For these reasons, and those in Petitioners' briefs, the judgment below should be reversed.

Respectfully submitted,

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