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

In The
Supreme Court of the United States

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

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

LAND OF LINCOLN MUTUAL
HEALTH INSURANCE CO.,
Petitioner,
v.
UNITED STATES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION FOR COMMUNITY AFFILIATED PLANS IN SUPPORT OF PETITIONERS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Association for Community Affiliated Plans (ACAP) is a national trade association representing community-based not-for-profit health plans, many of whom participate in health insurance marketplaces pursuant to the Affordable Care Act. Collectively, ACAP's 66 Medicaid, Medicare, and ACA Marketplace plans serve more than 20 million enrollees in 29 states. Many enrollees are among the nation's poorest and sickest people, who lack access to other health insurance. In contrast to many other insurers, ACAP member health plans primarily participate in the low-margin Medicaid market and do not participate in the higher-margin large group employer market.

ACAP's members are owed hundreds of millions under the risk corridors program. These unpaid debts will have severe impacts on community-based health insurers and their insureds.

ACAP files this brief to inform the Court of the harm that the decision below would wreak on smaller insurers that operate outside of the District of Columbia's halls of power. Most obviously, the ruling below would turn the risk corridors program into an enormous cautionary tale about why the business community cannot trust the United States government to make good on its statutory commitments. Sadly, that

[1] All parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* itself provided any monetary contribution intended to fund the preparation or submission of this brief.

lesson would hit Main Street harder than Wall Street. ACAP's members are smaller than other insurance carriers and rely more on the ACA marketplaces as their profit centers. As a result, they are less able to gamble on uncertain government promises of payment for marketplace plans. In addition, the ruling below starkly illustrates the disadvantages that smaller businesses face when courts rely on obscure snippets of legislative history about later-enacted appropriations bills to re-write existing statutory obligations.

To avoid perpetuating these problems, the Court should reverse the judgment below and clarify that statutory payment commitments mean what they say.

SUMMARY OF THE ARGUMENT

Petitioners' briefs explain how, when it comes to payments from the federal coffers, the Federal Circuit has licensed Congress to "promise boldly [and] renege obscurely". (Moda Br. 2.) Worse yet, it has licensed Congress to renege obscurely *after* an entire industry has entered a new line of business, relying on an assurance that, in return for insurers' entering the marketplace, the government would share the risk of loss in the ACA's early years.

The burden of this massive government bait and switch falls particularly hard on small community-based insurers. The Federal Circuit's mode of analysis was to infer "what . . . could Congress have intended?" from obscure quasi-legislative history. That especially disadvantages small businesses—who have few ways to guess what Congress intended beyond reading the plain words of the statutes that Congress passes. Thus, the Court of Appeals' abandonment of the traditional presumption against implied repeal—especially repeal by way of appropriations riders—systematically biases outcomes against Main-Street interests.

Two factors in this case make the problem even worse. First, the implied repeal that the panel found here was retroactive in nature—it took away the right to payment after an entire industry had relied on it and taken expensive, burdensome actions to qualify for the payments. That too will have an especially heavy impact on smaller businesses; if dealing with the government brings with it a significant hazard of non-payment, many smaller concerns will find it not worth such a risk.

Second, the government's apparent new position would compound the problem. Contradicting more than a century of appropriations jurisprudence, the government now maintains that it *never* has a legal obligation to pay money until it appropriates the money, no matter how clear the underlying obligation is written. As a result, even an unambiguous statutory command that the government "shall pay" money means nothing—unless businesses can persuade Congress to additionally appropriate enough money to make the promised payments. Smaller firms lack the capacity to access and persuade legislators in this way.

ARGUMENT

I. The Risk Corridors Program Was Critical To Incentivizing Insurer Participation On ACA Marketplaces.

For small insurers especially, Congress' statutory commitment to make risk corridors payments was crucial to participation in the ACA marketplaces. As Petitioners' briefs detail, the risk corridors program offered a backstop against potential losses through the government's commitment to share in the risk of pricing uncertainty during the first three years of the marketplaces. (*E.g.*, Moda Br. 3-8.)

This was particularly critical to ACAP members, which do not sell group insurance to employers but instead typically operate only in the low-margin markets for Medicaid plans. This gave them experience in offering cost-effective health coverage to limited-income people—exactly the profile the government wanted for Marketplace insurers—but it also made them vulnerable to fluctuations in their revenue streams. Under normal circumstances, most of these insurers would not have been interested in expanding into the individual health-insurance market. But the risk corridors program made the difference. And small insurers like ACAP's members often were able to offer the lowest rates in their individual marketplaces.[2]

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[2] *See* Hempstead & Seirup, *Medicaid MCOs In The Individual Market*, Health Affairs Blog (Aug. 30, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180823.490433/full/

Developments following the ACA's enactment made the program even more indispensable. The executive branch's last-minute "keep your plan" initiative excused many healthy individuals from migrating to the marketplaces—leading to smaller, sicker marketplace risk pools than insurers had expected. (*E.g.*, Moda Br. 11-12.) Throughout 2014, this phenomenon greatly increased insurers' losses and the government's risk corridors obligations.

Only after those losses had been incurred did Congress limit the funding sources available to cover the government's risk corridors obligations. (*Id.* 12-14.) The result has been havoc in the insurance industry and drastically reduced insurer participation on the exchanges. (*Id.* 18-19.)

II. Allowing Quasi-Legislative History To Repeal Spending Obligations Would Systematically Bias The Law Against Smaller Parties.

The approach adopted by the Federal Circuit would depart from multiple long-settled principles of statutory interpretation. It would cast aside the long-settled presumption against implied repeals as well as the even stricter presumption against implied repeals in appropriations laws.

There is strong policy support for these presumptions. Appropriations measures are massive documents that must be passed on a regular basis; it would be "absurd" if Members of Congress had "to review exhaustively the background of every authorization before voting on an appropriation," to make sure it does not implicitly change preexisting law. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). It would be even more absurd to force them (or the President) to threaten a government shutdown as the only recourse for stopping such implicit changes. Moreover, as Judge Newman recognized in this case, "clever legislators" should not be able to do "an end-run around the substantive debates that a repeal might precipitate" by "burying a repeal in a standard appropriations bill". App-47 (quoting App-132); *cf. Hill*, 437 U.S. at 191 ("We venture to suggest that the House Committee . . . would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports."). Nor should the courts, or the American people at large, be forced to guess what changes to our laws should be inferred from voluminous appropriations bills. The long-settled presumption against implied repeals in appropriations measures avoids these problems.

These settled principles should have led to the outcome that the panel rejected: the appropriation was not enough to pay the "unambiguously mandatory" statutory obligation but did not repeal it. For one thing, this Court's precedent requires that any inference of a repeal be based on the text of the appropriation act, not mere legislative history. And the rider's text in no way suggests an intent to repeal the statutory obligation.

For another thing, even if considering legislative history was warranted here, the sparse quasi-legislative history cited by the Federal Circuit could not have overcome the presumption against implied repeal through appropriations measures. This Court, and various members of it, have repeatedly observed that even meaningful legislative history cannot override substantive canons of statutory interpretation, such as the clear-statement requirement for waivers of sovereign immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012). Justice Scalia "kn[e]w of no precedent for the proposition that legislative history can satisfy" *any* "clear-statement requirement imposed by this Court's opinions." *Gonzalez v. Thaler*, 565 U.S. 134, 164-65 (2012) (Scalia, J., dissenting). And the Chief Justice has observed that "[i]f the rule of lenity means anything, it is that an individual should not go to jail for failing to . . . comb through obscure legislative history." *United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., concurring). Small businesses that have agreed to participate in a government program in reliance on a statutory promise of payment should receive no worse treatment.

Other parties and commentators have explained how using legislative history to interpret statutes is unreliable (since the history is almost always vague and conflicting), is in tension with the Constitution (since Congress can make law only by passing statutes, not by forming intentions), and is potentially incoherent (because a multi-member body cannot have intentions as an individual can). All those concerns apply here. But this case sharply illustrates a more practical defect in overreliance on legislative history: it systematically biases the process of statutory interpretation in favor of large sophisticated litigants like the government, and against smaller litigants like ACAP's members.

More than half a century ago, Justice Jackson warned that the courts must not try to determine "what Congress probably had in mind" by "put[ting] ourselves in the place of a majority of Congressmen and act[ing] according to the impression we think this [legislative] history should have made on them." *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring). Unfortunately, the Federal Circuit here embarked on that "weird endeavor", *ibid.*—it reviewed correspondence from two Congressional offices and a snippet of an "explanatory statement," and then asked "[w]hat else could Congress have intended?" App-27.

If this method of interpreting appropriations legislation becomes the law, it would systematically tilt the playing field against smaller litigants, who are less able to parse millions of lines of legislative history trying to psychoanalyze Congress. Again, Justice Jackson explained why:

> Laws are intended for all of our people to live by. . . . Here is a controversy which affects every little merchant in many States. [But] the materials of legislative history are not available to the lawyer who can[not] afford . . . the cost of repeatedly examining the

> whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring).

Indeed, it "takes enormous effort" to research all the "committee reports, conference reports, records of committee hearings, floor statements, Presidential signing statements, and all previous legislation or documents of any nature to which any of the foregoing refer." Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L.Rev. 41, 68 (1995). "[T]he executive branch and some larger private organizations may keep [such] a close watch on Congress," but almost no one else has "the resources to follow a statute's 'negotiation' [that] closely." *Ibid.* Some recent commentators have argued that electronic access to legislative history has eliminated this disadvantage, but that is badly mistaken: it "ignore[s] the problems of identifying the relevant documents and of wading through their unindexed vastness." Parrillo, *Leviathan and Interpretive Revolution*, 123 Yale L.J. 266, 388 (2013).

As a result, the more obscure and esoteric a piece of legislative history is, the more judicial willingness to consider it favors the wealthiest and most powerful litigants, such as the government. "[T]he asymmetrical incentives" in this respect "are quite dramatic," Sinclair, *Statutory Reasoning*, 46 Drake L.Rev. 299, 338 (1997), and "this disparity can skew the law systematically in favor of" the largest, savviest litigants. Desai, *Heterogeneity, Legislative History, and the Costs of Litigation*, 2013 Wis. L.Rev. Online 15, 18 (2013).

That is doubly true for the correspondence between the GAO and certain Congressional offices in this case, which is not even part of the record of the appropriations bill's progress through Congress. It is no fair inference to assume that even Members of Congress would be aware of such materials when voting on legislation. It is especially unfair to expect every party dealing with the government to track every letter sent to or from every Senator and Representative, on the off-chance that one of them will implicitly cancel a statutory right to payment. Nor should a party be expected to look for non-existent agency regulations that are fleetingly referenced in the legislative history. But that is what the approach advocated by the Federal Circuit and the government would require.

Moreover, even if a party could track legislative history at this level of detail, it would be hard pressed to decipher it reliably. In this case, even federal judges disagreed about the legal effect of the rider. If, as the panel said, the goal is to survey the mass of legislative history and decide "What else could Congress have intended?" then the answer will be best known to those who have access to Congress—that is, the executive branch and a small number of D.C. law firms. Others will be left to speculate.

This case is again an excellent example. Someone monitoring Congress' activity would have known that, before and after the appropriations riders at issue here, Congress declined to enact permanent legislation that would have required the risk corridors to be budget-neutral. App-80-81; Moda Br. 15-16. That would indicate that Congress did *not* intend to repeal the payment obligation. Nothing in the riders indicated otherwise. Although the panel below stated that "the appropriations riders directly responded to GAO's identification of only two sources of funding for the program", App-32, in fact it "point[ed] to no statement in the legislative history suggesting that the rider was enacted in response to the GAO's report." App-48 (Newman, J., dissenting). Without that paper trail, perhaps the connection could be discernible to some lawyers and judges who work inside the Beltway. To the rest of the country, however, it would be invisible.

In short, smaller litigants cannot possibly comb through the legislative history in the way the panel below contemplated. Nor can busy judges reasonably be expected to do so in every statutory-interpretation case that comes before them. That is precisely why the courts have presumed that appropriations measures do not implicitly change preexisting law. The result of any contrary approach would be unseemly and inappropriate: the courts would hear about the finest details of legislative history only when those details favor the government, or a small number of other large litigants. That would confirm Justice Jackson's fear that "judicial reliance on legislative history made litigation more of an 'insider's game,' privileging the bureaucratic state and the few law firms able to approach that level of administrative capacity." Parrillo, *supra*, at 285.

III. Other Features Of This Case Magnify The Disproportionate Impact On Small Businesses.

To make matters worse, the alleged repeal in this case is retroactive, and now the government apparently seeks to justify it through an unprecedented reading of the Anti-Deficiency Act. Both factors would magnify the disproportionate impact on small businesses.

On retroactivity, as Petitioner Moda states, "[a]llowing the government to rescind prior commitments designed to spur costly private undertakings after they have already induced billions of dollars in reliance is constitutionally dubious in the extreme." (Moda Br. 48.) Such a result would also place small businesses at a greater competitive disadvantage to bigger competitors, who can take large risks that small businesses cannot.

The same is true of the sweeping overreading of the Anti-Deficiency Act that the government proposed in opposition to certiorari. According to the government's apparent position, a statutory command to pay money never obligates the United States, except to the extent that Congress separately appropriates funds for it. This would transform statutory "shall pay" language from a binding obligation to a lobbying invitation. Again, such a rule advantages big businesses over small ones.

Under established legal principles, when a statute says the United States "shall pay" money, it means what it says: the United States owes the money unless the statute states that the obligation is contingent on an appropriation. Now, the government would like to imply a new unspoken condition: when a statute says the United States "shall pay" money, the United States does not owe the money unless and until there is a specific appropriation to cover it. This upends long-standing precedent. *E.g.*, *United States v. Langston*, 118 U.S. 389, 394 (1886). In schoolyard terms, the government is arguing for a rule under which no one should take the United States' payment promises at face value because, through the Anti-Deficiency Act, the government has its fingers permanently crossed behind its back.

CONCLUSION

If the decision below stands, then no business can trust a statutory mandate for government payment. In particular, smaller businesses will be pushed to regard dealing with the government as too uncertain a venture to risk. Congress' ability to incentivize private behavior will be severely eroded. So will an important part of the national community's faith in our government.

The judgment should be reversed.

Respectfully submitted,

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