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 COMPANY, AN ILLINOIS NONPROFIT MUTUAL INSURANCE CORPORATION, *Petitioner*,

v.

UNITED STATES, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* ECONOMISTS IN SUPPORT OF PETITIONERS

STEPHEN A. SWEDLOW
Counsel of Record
ANDREW H. SCHAPIRO
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 North Wacker Drive, Suite 2700
Chicago, IL 60606
(312) 705-7400
stephenswedlow@quinnemanuel.com

Counsel for Amici Curiae

September 6, 2019

291069

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.....1

ARGUMENT 3

I. Private Firms Make Decisions by Assessing the Costs and Benefits of Their Actions.....3

II. One of the Government's Primary Tools for Achieving Policy Objectives is to Influence Firm Behavior Through the Use of Financial Incentives.....4

III. The Government Undermines its Ability to Use Financial Incentives to Achieve Policy Objectives by, After the Fact, Not Paying the Amounts it Promised 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Moda Health Plan, Inc. v. United States, 892 F.3d 1311 (Fed. Cir. 2018).....2

Moda Health Plan, Inc. v. United States, 908 F.3d 738 (Fed. Cir. 2018).....8

Rules and Regulations

Sup. Ct. R. 37.....1

Additional Authorities

Jeffrey Clemens, *Regulatory Redistribution in the Market for Health Insurance*, 7(2) AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS. 109-134 (2015) 2

John F. Cogan, *et al.*, *The effect of Medicare coverage for the disabled on the market for private insurance*, 29(3) J. HEALTH ECON. 418-25 (2010) 2

Scott Harrington, *Risk Corridors and Budget Neutrality,* HEALTH AFFAIRS, (May 14, 2014) https://www.healthaffairs.org/do/10.1377/hblog20140514.038975/full/. 6

Timothy J. Layton, *et al.*, *Risk Corridors and Reinsurance in Health Insurance Marketplaces*, 2(1) AM. J. HEALTH ECON. 66-95 (2016) 6

Daniel W. Sacks, *et al.*, *How Do Insurance Firms Respond to Financial Risk Sharing Regulations? Evidence from the Affordable Care Act,* NBER Working Paper w24129 (July 2019).....7

U.S. DEP'T OF ENERGY, *Electric Vehicles: Tax Credits and Other Incentives,* https://www.energy.gov/eere/electricvehicles/electric-vehicles-tax-credits-and-other-incentives 5

U.S. DEP'T OF JUSTICE, *The False Claims Act: A Primer,* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.....5

U.S. DEP'T OF THE TREASURY, *Federal Excise Tax Increase and Related Provisions,* https://www.ttb.gov/main_pages/schip-summary.shtml 5

U.S. ENVTL. PROT. AGENCY, *Economic Incentives,* https://www.epa.gov/environmental-economics/economic-incentives#permit 5

INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished economists and professors of health policy, economics, and management.[2] They occupy prominent positions at preeminent universities and institutions, and are widely recognized as academic experts in health policy and, in particular, the study of regulated health insurance markets. They have no personal stake in the outcome of this case, but have an interest in assisting this Court in understanding the problems that allowing the decision below to stand would create for the government's future ability to incentivize private actors to achieve policy objectives.

SUMMARY OF ARGUMENT

Regardless of one's views of the Affordable Care Act ("ACA") and the many reforms it brought to the healthcare industry, the government clearly sought through the statute to create new health insurance markets and to incentivize private firms to provide coverage to consumers within those markets. The use of incentives to influence the behavior of private firms and individuals is one of the government's most powerful tools for achieving policy objectives. The government influences behavior through the use of incentives in a wide variety of markets and for a wide variety of purposes, such as encouraging farmers to

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

[2] A list of *amici curiae* is attached as Appendix A.

plant certain types of crops, convincing young men and women to join the military, and, as here, encouraging businesses to participate in markets. The ways in which the government creates the incentives for such private action vary, but they include (among others) risk mitigation programs and financial subsidies.[3]

The key to the government's ability to incentivize private actors to achieve the goals of policymakers, however, is the ability of those actors to rely on the government's promises. If, as the decision below permits, the government can use financial incentives to induce private parties to enter and/or more fully participate in a market, but then turn around and not make the payments it promised, the government's ability to influence the behavior of private actors in the same and even different markets in the future will be diminished. As Judge Newman explained succinctly in dissent below, "the government's ability to benefit from participation of private enterprise depends on the government's reputation as a fair partner" but the majority's decision "undermines the reliability of dealings with the government." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1340 (Fed. Cir. 2018) (Newman, J., dissenting).

---

[3] For example, expansions of publicly financed insurance for low-income, high-cost adults can alleviate problems of adverse selection in private insurance markets by removing high risk consumers from the insurance pool. Jeffrey Clemens, *Regulatory Redistribution in the Market for Health Insurance*, 7(2) American Economic Journal: Applied Economics. 109-134 (2015) and John F. Cogan, R. Glenn Hubbard and Daniel P. Kessler, *The effect of Medicare coverage for the disabled on the market for private insurance*, 29(3) J. Health Econ. 418-25 (2010).

To ensure the government's ability to promote and preserve well-functioning markets, it is thus critical that it make good on payments promised in situations like the ACA's risk corridor program, lest it significantly compromise its ability to influence the behavior of firms. This is not only a highly important issue, but also a non-partisan one, as ensuring the credibility of governmental promises bolsters the ability of policymakers across the board to impact markets and related behavior of various stakeholders.

ARGUMENT

I. Private Firms Make Decisions by Assessing the Costs and Benefits of Their Actions

Private firms make decisions by assessing the benefits and costs of potential alternatives, generally choosing the course of action which maximizes their economic value. That value depends on anticipated amounts and timing of future cash flows (revenues and expenditures). Very importantly, economic value also depends on the degree of risk (uncertainty) associated with future cash flows and the costs incurred in managing risk. This is especially relevant for insurance firms, which receive an upfront payment, usually referred to as a premium, in exchange for covering a consumer's future health care expenditures for a given period of time. Insurance firms facing greater uncertainty in claim costs require greater amounts of capital to back their promises to pay future claims, raising capital costs and increasing premiums needed to provide coverage.

II. One of the Government's Primary Tools for Achieving Policy Objectives is to Influence Firm Behavior Through the Use of Financial Incentives

From an economic perspective, two of the key functions of government are to set the rules that allow markets to work and to intervene when markets do not function well. While policy makers and economists may disagree over the merits of particular policies or whether government intervention is desirable in particular situations, there is broad consensus that an essential economic role of government is to influence the behavior of private parties when market outcomes are likely to be inefficient. For decades, the government has used private citizens' rational self-interest to help spur action to achieve its policy objectives. For example, there is a long history of the government using subsidies, price supports, and crop insurance to support various types of agricultural production. These programs shape private action by both reducing the risks and increasing the benefits associated with such production. Other examples of the numerous ways that the government has created incentives for private actors, include, among many others, the deductibility of mortgage interest to encourage people to purchase homes; the use of emission reduction credits and cap-and-trade programs to promote more environmentally-friendly technologies; federal excise taxes on tobacco products to reduce smoking; federal tax credits to promote the adoption of electric vehicles; and financial awards to relators (*i.e.*, "whistleblowers") in successful False Claims Act

cases.[4] In each of these cases, the government uses financial incentives to influence the behavior of individuals or firms by altering the benefits and costs of alternatives.

The government's use of these types of mechanisms is particularly well established and important in the context of health insurance markets. The incentive at issue in this case – the risk corridors program – was designed to accomplish a straightforward and significant goal: to encourage insurers to participate in the new health insurance marketplaces by offering insurance products to a new population with highly uncertain prospects. The program did so by reducing the chance that prospective qualified health plan ("QHP") issuers would suffer outsized losses from participating in the ACA's newly expanded individual health insurance markets when the health characteristics and utilization of enrollees (and, thus, the issuers' risk

---

[4] *See* U.S. ENVTL. PROT. AGENCY, *Economic Incentives,* https://www.epa.gov/environmental-economics/economic-incentives#permit (EPA cap and trade/credits); U.S. DEP'T OF THE TREASURY, *Federal Excise Tax Increase and Related Provisions,* https://www.ttb.gov/main_pages/schip-summary.shtml (federal excise tax); U.S. DEP'T OF ENERGY, *Electric Vehicles: Tax Credits and Other Incentives,* https://www.energy.gov/eere/electricvehicles/electric-vehicles-tax-credits-and-other-incentives (electric vehicle tax credits); U.S. DEP'T OF JUSTICE, *The False Claims Act: A Primer,* https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (False Claims Act relator financial awards).

profile) were still largely unknown.[5] The lack of information on previously uninsured enrollees' likely use of health care made it exceptionally difficult for insurers to determine the level of premiums necessary to cover the costs of health care used by potential enrollees. Significantly, the program also constrained profits in those early years, so that insurers which happened to enroll people who were healthier than predicted would not receive windfalls. In other words, the program reduced the risk to insurers of entering the new market by reducing the likelihood of both excessive losses and profits due to unanticipated levels of medical costs.[6] This program had precedent in the context of the Medicare Part D prescription drug program, in which the government created similar incentives over a decade ago to encourage private firms to participate in a newly created market for subsidized insurance for prescription drugs for aged and disabled beneficiaries.

By reducing the risk of participating in a newly created market, the government encouraged firms to enter a new market characterized by considerable uncertainty in the risk profile of potential enrollees (and, thus, profitability). The risk corridors program was only one of a variety of financial incentives created by the ACA intended to influence the behavior

---

[5] *See* Scott Harrington, *Risk Corridors and Budget Neutrality*, HEALTH AFFAIRS (May 14, 2014), https://www.healthaffairs.org/do/10.1377/hblog20140514.038975/full/.

[6] Using simulation analysis, Layton et al. (2016) demonstrate how risk corridors reduce the risk facing an insurer. Timothy J. Layton, *et al.*, *Risk Corridors and Reinsurance in Health Insurance Marketplaces*, 2(1) Am. J. Health Econ. 66-95 (2016).

of both firms and individuals. Other incentives included reinsurance, risk adjustment, premium and cost-sharing subsidies, and the individual mandate. Taken together, these policies created a complex set of financial incentives for insurers to navigate as they evaluated the desirability of participating in the new market. While at the time insurers chose whether to participate in the exchanges and set their premiums it was unclear whether any given policy would have either its intended effects or even create unintended negative consequences, it is indisputable that, when making these decisions, insurers had every reason to take into account how each of these policies would likely affect demand for their products and their risk pool. Research demonstrates that insurers did respond to the incentives created by the risk corridor program in particular when setting premiums.[7]

III. The Government Undermines its Ability to Use Financial Incentives to Achieve Policy Objectives by, After the Fact, Not Paying the Amounts it Promised

The government's ability to create incentives for private economic action hinges on expectations that the government will stand behind any financial promises it makes to the actors whose behavior it wishes to affect. This is particularly important when financial incentives are paid out only *after* the private actor has committed to behaving in the way the

---

[7] Daniel W. Sacks, Khoa Vu, Tsan-Yao Huang and Pinar Karaca-Mandic, *How Do Insurance Firms Respond to Financial Risk Sharing Regulations? Evidence from the Affordable Care Act,* NBER Working Paper w24129 (July 2019), https://www.nber.org/papers/w24129.pdf (last visited Aug. 28, 2019).

government prefers. In that situation, the private actor takes actions and commits resources based on how the incentives promised by the government affect the benefits and costs of those actions. If the government fails to honor those commitments, it has induced the private actor to commit to a course of action based on inaccurate information.

If the government proves itself to be an unreliable counterparty, it creates a clear disincentive in the future for private actors to modify their behavior based on government assurances. Put differently, if the government's promises to pay are unreliable and subject to "bait and switch" behavior—and private actors have limited ability to compel compliance with those promises, such as through litigation like this—then the government's ability to achieve policy objectives through incentivizing private action will be substantially undermined.

This issue is not specific to the Affordable Care Act; it affects the more general ability of the government to incentivize private actors. As Judge Wallach recognized in his dissent to the denial of the petition for rehearing *en banc*, "[t]he majority's holding casts doubt on the Government's continued reliability as a business partner in *all* sectors." *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 747 (Fed. Cir. 2018) (Wallach, J., dissenting) (emphasis added). If, as the decision below held, the government can legally avoid its payment obligations to private actors after it has already incentivized their market participation through promises to make payments contingent upon particular outcomes, then it will severely compromise its ability to use these types of incentives to achieve policy objectives in the future. Such a result would remove one of the most powerful

tools the government has to affect the nature and direction of the economy.

CONCLUSION

For the reasons discussed above, in order to preserve a sound system for governments to use financial incentives to influence the actions of private parties – particularly as it involves economic decisions, the Court should reverse the judgment of the court of appeals, to make clear that the government should not be permitted to disavow promises on which private parties relied.

Respectfully submitted,

STEPHEN A. SWEDLOW
Counsel of Record
ANDREW H. SCHAPIRO
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 North Wacker Drive
Suite 2700
Chicago, IL 60606
(312) 705-7400
stephenswedlow@
quinnemanuel.com

Counsel for Amici Curiae

September 6, 2019

APPENDIX

Appendix A

M. Kate Bundorf, Associate Professor of Health Research and Policy, Stanford University School of Medicine

Scott Harrington, Alan B. Miller Professor of Health Care Management, The Wharton School, University of Pennsylvania

Michael Chernew, Leonard D. Schaeffer Professor of Health Care Policy, Harvard Medical School

Jeffrey Clemens, Associate Professor of Economics, University of California San Diego

Leemore S. Dafny, Bruce V. Rauner Professor of Business Administration, Harvard Business School and Harvard Kennedy School of Government

Darius Lakdawalla, Qunitiles Professor of Pharmaceutical Development and Regulatory Innovation, University of Southern California

Thomas G. McGuire, Professor of Health Economics, Department of Health Care Policy, Harvard Medical School

Mark V. Pauly, Bendheim Professor of Health Care Management and of Business Economics and Public Policy, The Wharton School, University of Pennsylvania

Kosali Simon, Herman Wells Professor, School of Public and Environmental Affairs, Indiana University