No. 18-1023

IN THE

Supreme Court of the United States

MAINE COMMUNITY HEALTH OPTIONS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY FOR PETITIONER

STEPHEN J. MCBRADY
Counsel of Record
CLIFTON S. ELGARTEN
DANIEL W. WOLFF
A. XAVIER BAKER
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
smcbrady@crowell.com
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes, and Regulations

Comptroller General Opinions

Federal Register

Miscellaneous

As shown in Maine Community Health Options' opening brief (1) Section 1342 created a statutory payment obligation; and (2) nothing in the subsequent appropriation riders repealed or revised that obligation. Under the plain language of the relevant statutory provisions, the judgment should be reversed.

Significantly, the Government has now abandoned its argument that Section 1342, as enacted, was budget neutral, with the appropriation riders purportedly intended to reflect that understanding. The Government's two remaining theories—that Section 1342 did not create any payment obligation at all, and that the riders, rather than implementing Section 1342, were intended to repeal and amend Section 1342—are inconsistent with the text of the statutes as written; inconsistent with basic appropriation law; and inconsistent with bedrock canons of statutory interpretation.

I. SECTION 1342 CREATED A MANDATORY PAYMENT OBLIGATION ENFORCEABLE BY TUCKER ACT SUIT.

Section 1342 of the Affordable Care Act, 42 U.S.C. §18062, required ACA-insurers to pay the government under one set of defined circumstances, and required the government to pay under another. The government's payment obligation, like insurers', was stated in mandatory and definite terms ("shall pay"), placing it squarely within the framework of "money-mandating" statutes enforceable under the Tucker Act, 28 U.S.C. §1491(a). The Federal Circuit panel unanimously and properly concluded that, as enacted, Section 1342 obligated the government to pay insurers the full amount due under Section 1342's statutory formula. This holding is consistent with the view expressed by the Department of Health and Human Services (HHS) throughout the risk corridors program, namely, that while HHS could not make the full payments required by Section 1342 absent an appropriation, the full amount owed to any insurer under the Section 1342 formula remained an obligation of the United States. HHS made this point again and again—in 2014, 2015, and 2016.

The Government nonetheless asserts in this Court that the *apparent* command to pay under Section 1342 was illusory because all federal statutory payment obligations are contingent on Congress appropriating money to meet the obligation, or granting an agency budgetary authority in advance of appropriations. See Gov't Br. 21-22. As recast by the Government, the "shall pay" commands of Section 1342 were more in the nature of "You must pay your end, and perform as requested, but if you suffer the losses in which we said we will share, we will decide later whether and how much we want to pay." Or, more bluntly, for insurers "shall" means "shall"; for the Government, "shall" means "may." The Government portrays this apparent bait and switch as just another "business risk" that insurers should have considered before participating in a government program.

Notwithstanding the Government's assertion that the ACA insurers' reliance on Section 1342 was "inherently unreasonable," Gov't Br. 40, it is clear that HHS, in administering the program according to established federal accounting principles, did not perceive the novel business risk that the Government now says was always present. Neither did the unanimous Federal Circuit panel, which found no support at all for the Government's position that Section 1342, as enacted, was anything other than a statutory obligation of the government. And neither did hundreds of insurers that relied on Section 1342 in providing insurance meeting the ACA's terms, including dozens forced into liquidation after the government failed to pay.

Indeed, the Government still offers no case law supporting the proposition that a statutory obligation—an obligation created by Congress—is unenforceable unless supported by an appropriation, or advance budgetary authority. Instead, the Government rests its theory on the Appropriations Clause, Art. I, §9, Cl. 7, and the Anti-Deficiency Act, 31 U.S.C. §1341(a)(1).

Unfortunately for the Government's theory, Congress created the statutory payment obligation at issue here and neither the Appropriations Clause nor the Anti-Deficiency Act operates as a restriction on Congress, which retains the power of the purse. Indeed, the Government persistently confuses the question whether the government has a statutory obligation to pay with the distinct question whether money has been appropriated to meet the obligation. These have always been separate questions. No agency or Executive Branch official can pay out money that has not been appropriated, and that principle has never been in dispute. But the question whether Congress has created a statutory obligation or authorized an Executive Branch official or agency to create an obligation is distinct from whether Congress has given money to the agency to pay the obligation.

It "has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt …." *Moda Health Plan, Inc.* v. *United States*, 892 F.3d 1311, 1321 (Fed. Cir. 2018); see *e.g.*, *United States* v. *Langston*, 118 U.S. 389, 394 (1886) (statutory payment obligation is binding despite insufficient appropriation). Neither the Appropriations Clause nor the Anti-Deficiency Act limits the authority of *Congress*, by statute, to create obligations binding on the government. Those provisions constrain the ability of *Executive Branch officials* to create obligations, or to disburse funds that have not been appropriated.

The Government's invocation of "budget authority" is similarly misplaced. As the Federal Circuit explained, "[b]udget authority is not *necessary* to create an obligation of the government." *Moda* at 1322 (emphasis in original). Budget authority addresses what is necessary when Congress seeks to authorize *Executive Branch officials* to create government obligations. *Id*. No budgetary authority was necessary here because "the obligation is created by the statute itself, not by the agency." *Id*. As the Federal Circuit observed, the government offers "no authority for its contention that a statutory obligation cannot exist absent budget authority." *Id*. If adopted, the Government's novel theories in this case would upend longstanding principles of appropriations law.

A. The Appropriations Clause *expressly* prohibits *Executive Branch officials* from paying money from the Treasury without an appropriation by Congress, and it *impliedly* bars *Executive Branch officials* from creating payment obligations not authorized by Congress. See *OPM* v. *Richmond*, 496 U.S. 414, 428-30 (1990). But neither the express nor the implied prohibition poses a bar to a Tucker Act suit, giving rise to a judgment payable from the Judgment Fund, where, as here, that judgment is "based on a substantive right to compensation based on the express terms of a specific statute." *Id*. at 432 (citing *United States* v. *Testan*, 424 U.S. 392 (1976)).

The Anti-Deficiency Act, for its part, bars Executive Branch officials from themselves obligating the government to pay money, by contract or otherwise, absent congressional authorization to do so. And, of course, agencies cannot disburse funds that Congress has not appropriated for them to disburse.

The important point is that neither provision restricts *Congress's* ability to create obligations that bind the government, or to empower agencies to do so. Where a duly-enacted statute creates a non-discretionary payment obligation, failing to provide an agency with funds to meet the obligation will prevent the agency from making payments. But it will not eliminate the obligation itself. This is not new or novel law.

"The officers of the Treasury have no authority to pay ... until an appropriation therefor has been made. But the liability of the United States to pay exists independently of the appropriation, and may be enforced by proceedings in this court." *Strong* v. *United States*, 60 Ct. Cl. 627, 630 (1925). *Strong*'s summary nearly one hundred years ago was simply a reiteration of principles stated decades earlier in *Ferris:* An appropriation *per se* [or lack thereof] "merely imposes limitations upon the Government's own agents," but its "insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892).

More recently, relying on *Ferris*, this Court applied these basic appropriation principles under the current iteration of the Anti-Deficiency Act. See *Salazar* v. *Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012). "Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's 'valid obligations will remain enforceable in the courts.'" *Id*. (quoting GAO, Principles of Federal Appropriations Law at 6-17 (2d ed. 1992). See also GAO, A Glossary of Terms Used in the Federal Budget Process 13 (5th ed. 2005) ("[B]ecause the entitlement is created by operation of law, if Congress does not appropriate the money necessary to fund the payments, eligible recipients may have legal recourse").

In sum, the purse strings belong to Congress. But where Congress has created a valid obligation (or an agency does so at Congress's direction), the lack of an appropriation cannot defeat the statutory "rights of other parties" to obtain judgment on that obligation in a court of proper jurisdiction, here, the Court of Federal Claims under the Tucker Act. See *Ferris*, 27 Ct. Cl. at 546.[1]

These principles are routinely applied by agencies that have not been granted an appropriation to cover required payments. A non-discretionary statutory direction to pay (or to enter into a contract that requires payment) is an obligation "authorized by law" for purposes of the Anti-Deficiency Act, 31 U.S.C. §1341(a)(1)(B) (agency cannot involve the government in an obligation "unless authorized by law"). See GAO, Principles of Federal Appropriations Law at 6-91, 6-92 (3d ed. 2006) ("GAO Redbook") ("If a statutory increase is mandatory and does not vest discretion in an administrative office to determine the amount ... the obligation is deemed 'authorized by law' for Antideficiency Act purposes.").[2] Therefore, while the agency cannot pay if funds have not been appropriated, the agency must nonetheless recognize and record the statutorily-mandated obligation as it arises. See *In re Dep't of Educ.*, B-

---

[1] See generally *Slattery* v. *United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc) (explaining why Tucker Act jurisdiction is not dependent on appropriations).

[2] See *In re Dep't of Educ.*, B-219161, 65 Comp. Gen. 4, 9 (1985) ("The prohibitions contained in the Antideficiency Act are directed at discretionary obligations entered into by administrative officers …. [M]andatory obligations … fall into the category of obligations authorized by, or perhaps even mandated by, law."); *In re Hon. Lewis*, B-287619, 2001 WL 761741, at *7 (Comp. Gen. Jul. 5, 2001) (non-discretionary obligations fall within the ADA's "unless authorized by law" exception).

219161, 65 Comp. Gen. 4, 7-8, 10 (1985) (explaining the duty to record as an obligation the full amount owed as mandatory subsidy payments, arising by application of law, though the agency had not been given an appropriation to meet the obligation). That is, of course, precisely how HHS treated the Section 1342 obligations here when Congress declined to appropriate the full amount due insurers under Section 1342.

Much of the Government's argument rests on a bare assertion that "budgetary authority in advance of appropriations" was necessary here. That argument is without merit for two reasons. First, as the Federal Circuit observed, advance budgetary authority is the means by which Congress authorizes *an agency* to create government obligations. Here, Section 1342's payment obligation was not created by HHS, but by statute, so HHS needed no obligating authority. The Government's brief muddles this critical point.

Second, even if the Government were correct that advance budgetary authority were required, it would not change the result here. A statute clearly directing (not merely allowing) an agency to create an obligation has long been treated as a grant of authority in advance of appropriations, and is "deemed 'authorized by law' for Antideficiency Act purposes." GAO Redbook at 6-91, 6-92. "Congress may expressly state that an agency may obligate in excess of the amounts appropriated, *or it may implicitly authorize an agency to do so by virtue of a law that necessarily requires such obligations*." *Id.* at 6-91 (emphasis added). No other rule would make sense. If an agency is *directed* by Congress to take action—to enter into a contract, or to make certain payments—the agency must do so, and the associated obligations must be recorded as such. See *id*. at 6-91, 6-92; *Dep't of Educ*., 65 Comp. Gen. at 7-10; *In re Hon. Lewis*, B-287619, 2001 WL 761741, at *7 (Comp. Gen. Jul. 5, 2001).

To avoid the lack of support for its theory, the Government argues that *Ramah* is limited to contract cases. But that argument conflicts with both the language of the Anti-Deficiency Act, and established practice. See GAO Redbook at 6-91 ("The 'authorized by law' exception in 31 U.S.C. §1341(a) applies to noncontractual obligations as well as to contracts. The basic approach is the same."). In fact, cases involving contracts tend to be the harder ones. They often involve questions about the extent to which Executive Branch officials were granted authority to obligate the government. Statutory cases like this are more straightforward because the creation of the obligation is directly attributable to Congress, not to a discretionary agency action.

In *Ramah*, the agency's contracting authority contained "subject to the availability of appropriations" language conditioning authority on subsequent appropriations. The Court considered that language against the general rule that where the government enters into an authorized contract, the contract is enforceable by its terms, notwithstanding that the agency exhausted the funds available to meet its obligations. The Court held that the contract at issue there could be enforced by its terms. *Ramah*'s holding did not mean, of course, that the agency could hand over dollars that had not been appropriated. But the underlying obligation remained enforceable in court, notwithstanding the absence of an appropriation to the agency to support it. That underlying principle controls here: While the absence of an appropriation may prevent an agency from meeting an obligation, the obligation itself remains enforceable in the Court of Federal Claims.

In light of these basic appropriation principles, HHS itself saw nothing mysterious in how to proceed: HHS's *own* ability to make Section 1342 payments was dependent on Congress appropriating funds for that purpose, and HHS stated that it would seek such appropriations as necessary. See Opening Br. 10-13, 16-17. But, as HHS repeatedly confirmed, before and after the appropriation riders, the full amount required to be paid to insurers by Section 1342 was an obligation of the government and would be recorded as such.[3] *Id*.

---

[3] See, *e.g.*, HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers."); see Opening Br. 8 n.3: 2014 Payment Memo ("HHS is recording those amounts that remain unpaid … as [a] fiscal year 2015 obligation of the United States Government for which full payment is required."); 2015 Payment Memo ("[T]he Affordable Care Act requires the Secretary to make full payments to issuers" and HHS will "record payments due as an obligation of the United States Government for which full payment is required.").

The Department of Justice itself explained all this to the Court of Federal Claims earlier in the case, quoting HHS's September 9, 2016 guidance document:[4]

> As we have said previously, in the event of a shortfall for the 2016 benefit year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments. HHS recognizes that the Affordable Care Act requires the Secretary to make full payment to issuers. HHS will record risk corridor payments due as an obligation of the United States Government for which full payment is required.[5]

Having laid out these principles in its own brief earlier in this case—and whether or not the Government now disagrees with them—it is remarkable that the Government will not even acknowledge the point, and somehow try to refute it. Instead, the Government proceeds on the pretense that these basic principles of appropriation law are beyond its imagination.

---

[4] The Government did assert that as a matter of agency discretion, HHS could defer payment until a final accounting at the conclusion of the program. See Opening Br. 16-17.

[5] See Opening Br. 17 (quoting the Government's motion to dismiss).

In sum, if Congress appropriated funds to HHS to cover Section 1342 obligations, then HHS could have made the full payments due under Section 1342. But if Congress wanted to put insurers to their proof, then insurers' recourse to enforce the obligation was under the Tucker Act, with any resulting judgment payable from the Judgment Fund.

B. When Congress intends to condition government obligations on subsequent appropriations, Congress says so, by statute. Words communicating that intent are readily available, and frequently used. Congress often states that a particular program or payment obligation is "subject to the availability of appropriations," or something similar. See *Prairie Cty*. v. *United States*, 113 Fed. Cl. 194, 199 (2013), aff'd, 782 F.3d 685 (Fed. Cir. 2015) ("the language 'subject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose") (citing *Greenlee Cty*. v. *United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007)). See, *e.g.*, *Ramah*, 567 U.S. at 188-89 (noting payments "subject to the availability of appropriations" under the statute at issue); *Highland Falls-Fort Montgomery Cent. Sch. Dist.* v. *United States*, 48 F.3d 1166, 1168 (Fed. Cir. 1995), cert. denied, 516 U.S. 820 (1995) (involving a statute that explicitly recognized that "Congress may choose to appropriate less money … than is required to fund those entitlements fully," and specifying the deficiency should be allocated.).

Congress repeatedly used "subject to appropriations" language elsewhere in the ACA. See, *e.g.*, 42 U.S.C. §280k(a) ("The Secretary … shall, subject to the availability of appropriations …."); *id.* §293k-2(e), §1397m-1(b)(2)(A). Yet all such "subject to appropriations" language, commonly used by Congress, would never be necessary, and would be rendered surplusage throughout the statute books, if, as the Government now contends, all government statutory obligations are contingent on whether Congress decides to appropriate money to meet the obligation.

The Government first dismisses the canon against surplusage as weak, but that argument does not fit this case, where the language being cited reflects common congressional practice. The Government then contrives a surplusage argument of its own as a counter-weight. See Gov't Br. 22, 23, 25, 28. The Government notes that the Medicare Part D's risk-corridor program includes a specific grant of budget authority "in advance of ordinary appropriations legislation." Gov't Br. 22; see 42 U.S.C. §1395w-115(a)(2). It then argues that by granting explicit advance budgetary authority to HHS under 42 U.S.C. §1395w-115(a)(2), but not under Section 1342, "Congress thus ensured that Section 1342 would not, standing alone, cause payments under the ACA's risk-corridors program to be an obligation of the federal government." Gov't Br. 23. Finally, the Government concludes that "Maine Community's position would render such language redundant," and would cause Medicare Part D's language to violate the "canon against superfluity." Gov't Br. 28.

Not so. There is a reason why explicit budget authority in advance of appropriations was appropriate for the Medicare Part D risk-corridor program (and other Medicare Part D programs), but is not necessary under Section 1342 of the ACA. In contrast with Section 1342 of the ACA, which sets forth a mandatory statutory payment obligation, Medicare Part D operates through contracts entered into between the agency and the insurer, 42 U.S.C. §1395w-112(b), and directs that the Secretary "shall provide" for the payments, 42 U.S.C. §1395w-115(a)(2). Therefore, it was appropriate, under the Anti-Deficiency Act, to grant the Secretary the authority to make binding commitments for the government.

Section 1342 of the ACA is structured differently. The payment obligation under Section 1342 is not based on individual contracts entered into by the Secretary. Instead, as the Federal Circuit pointed out, the obligation to pay under Section 1342 is set forth in a non-discretionary "money-mandating" statute of the kind that must be recognized by the agency as creating government obligations. Those obligations are enforceable in the Court of Federal Claims even if, as happened here, Congress fails to appropriate funds to HHS allowing HHS to make the payments.[6]

---

[6] Given that Medicare Part D's risk corridor program is not budget neutral, Section 1342 could not be "based on" that (continued…)

With a passing "see also" citation, the Government acknowledges a different provision of the ACA that further undermines its theory. See Gov't Br. 22, citing ACA § 2707(e)(1)(B), 124 Stat. 327 (42 U.S.C. §1396a note). The cited section grants budgetary authority in advance of appropriations, and then caps that authority by a dollar amount. The grant of advance budget authority is again appropriate there because the section authorizes *the Secretary* to obligate the government to pay for certain demonstration projects by choosing and allocating among States. Because the Secretary makes the commitments, it was appropriate to provide the Secretary with authority to enter into arrangements that would bind the government.

Far from supporting the Government's suggestion that Congress tosses around budgetary provisos at random, the various illustrations of record on the use of such provisos actually reflect the opposite: Congress, and legislative counsel assisting Congress, know the law and ordinarily choose words carefully when addressing budgetary matters. While Congress sometimes makes mistakes, nothing suggests that Section 1342 does not mean what it says. When Congress wishes payment obligations to be contingent on future appropriations, it knows the words to create that contingency. It did not use such words in Section

---

(continued)
program, as Section 1342 requires, if its payment framework was capped at payments in, or limited by discretionary appropriations.

1342. And using the words "subject to appropriations" simply cannot mean the same thing as *not using* those words.

C. The Government addresses the case law contradicting its position only in passing. In its opening brief, Health Options cited cases of this Court and many others of the Claims Court, presenting issues about Congress's failure to appropriate funds to pay salaries or bonuses or other obligations set forth in statutes. The recurring question was whether the lack of an appropriation, or a subsequent statute providing for payments in different terms than the original obligation, negated the payment obligation in the earlier statute. See Opening Br. 28, 36-37, 49-52. The Government notes that it prevailed in some of those cases. But the Government is missing the forest for the trees. There would have been no reason to wrestle with the questions presented in any of those cases if, as the Government now argues, the statutory obligation to pay had always been "contingent" on Congress's subsequent appropriation of funds for those payments.

Most strange is the Government's discussion of *Langston*. In *Langston*, this Court held that failure to appropriate money to meet a statutory obligation to pay a certain official did not negate the payment obligation. 118 U.S. at 394 ("[A]ccording to the settled rules of interpretation, a statute fixing [an amount], without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount … for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law.").

The Government tries to distinguish *Langston* by noting that it was decided before the creation of the Judgment Fund. On that basis, it asserts that the Court's ruling was "merely declaratory absent an appropriation." Gov't Br. 30.

But that is exactly the point. This Court confirmed the statutory obligation to pay in the absence of a sufficient appropriation to support the payment. Executive Branch officials could not make the full payment, of course. Still, the question remained for this Court to determine whether the payment obligation was created and owed. That question was distinct from whether Congress appropriated money to meet the obligation. That is the same inquiry here. That Congress created the Judgment Fund after *Langston* does not alter this Court's precedent that statutory obligations may be created, and remain due, in the absence of sufficient appropriations.

The Government also cites the Federal Circuit's 2018 decision in *Highland Falls*. That case approved an agency's effort to "harmonize" the Anti-Deficiency Act with the substantive statute when Congress failed to appropriate sufficient funds to administer a particular program at its maximum level.

Nothing in *Highlands Falls* is inconsistent with enforcement of Section 1342 by its terms. An agency must always "harmonize" its own actions with the Anti-Deficiency Act because an agency cannot disburse funds it does not have. In this case, HHS readily "harmonized" its own actions with the Anti-Deficiency Act: It did not attempt to disburse funds that it did not have.

The question here does not involve the agency's action but rather the underlying statutory obligation to the insurers. The underlying statute at issue in *Highland Falls* explicitly conditioned the obligation on future appropriations. 48 F.3d at 1168. No one disputes that Congress can condition an obligation upon subsequent appropriations. All it needs to do is say so. It did not say so here.

II. THE GOVERNMENT'S BELATED TUCKER ACT ARGUMENT MISAPPLIES BASIC TUCKER ACT PRINCIPLES

The Government entangles its Anti-Deficiency Act theory with an assertion on an analytically separate point, that Section 1342 is not the type of money-mandating statute upon which a Tucker Act claim for damages can be founded. See Gov't Br. 29-34. The first and sufficient response to that assertion is that it is forfeit because the Government did not raise this issue below.

In any event, there is no doubt that the statutory obligation created here was enforceable by Tucker Act suit: When a statute mandates payment of money by the federal government, and the money is not paid, the Tucker Act provides for jurisdiction in the Court of Federal Claims and the government's sovereign immunity is waived. *United States* v. *Mitchell*, 463 U.S. 206, 212-19 (1983). To find a cause of action, plaintiff must identify a "substantive right enforceable against the United States for money damages." *Id.* at 216; see *Testan,* 424 U.S. at 400 (1976) (entitlement to damages depends upon whether a federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained").

In *Mitchell*, no statute expressly required the payment of money, making that case more difficult. *Mitchell* derived a right to compensation from statutes imposing fiduciary duties on the government, and the general rule that damages flow from breach of such duties. (Notably, *Mitchell* did not engage in any separate inquiry whether an appropriation supported the obligation it found.) But as *Mitchell* itself recognized, a statute that is explicitly money-mandating ordinarily provides the substantive right to compensation. *Mitchell*, 463 U.S. at 217-18; see also *OPM*, 496 U.S. at 432 (referring to "a substantive right to compensation based on the express terms of a specific statute"). And as the Federal Circuit has observed, "shall pay" is a classic formulation used by Congress to provide that a statute will be money-mandating. *Greenlee Cty*. v. *United States*, 487 F.3d 871, 876-77 (Fed. Cir. 2007), cert. denied, 552 U.S. 1142 (2008).

There are exceptions. Justice Scalia summed it up three decades ago:

> [A] statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount.

Bowen v. *Massachusetts*, 487 U.S. 879, 923-24 (1988) (Scalia, J., dissenting).

Thus, as explained in Health Options' opening brief, even where a statute is money-mandating, there are some situations where the Federal Circuit or this Court has held that Tucker Act suit is not available, typically where Congress has established an alternative remedial scheme.[7] *E.g.*, *United States* v. *Bormes*, 568 U.S. 6, 13-14 (2012) (alternative remedy precludes Tucker Act suit); see Opening Br. 26 n.10.

The Government says that Justice Scalia's *Bowen* summary was wrong because, after all, it was in dissent. Gov't Br. 31. The Government explains that *Bowen* involved payments to a State for Medicaid services. Although the statute said that HHS "shall pay" certain sums, the Court found that the State had properly proceeded in the district court under the Administrative Procedure Act, 5 U.S.C. §701 *et seq*. The Court having so found, the Government argues (at 32) that footnote 42 of *Bowen* reveals the Court's skepticism that a Tucker Act suit would also have been available.

Footnote 42 does not reject the dissent's succinct statement of the law, but rather applies it, focusing on "indications" why Tucker Act suit was not available there. The State's claim there involved policy issues governing the parties' prospective relationship. The relief sought was injunctive and declaratory—facially outside Tucker Act authority, which is limited to damages. Moreover, traditional Tucker Act suits—like the instant case—involve statutes fairly interpreted as

---

[7] See *Alpine PCS, Inc.* v. *United States*, 878 F.3d 1086, 1092-93 (Fed. Cir. 2018) (collecting cases where alternative remedies preclude suit).

mandating compensation (here, risk sharing) for "past injuries or labors," rather than prospective determinations of standards "to subsidize future state expenditures" as in *Bowen*.

Equally important, the Government's recitation of footnote 42 omits this Court's decisive statement that it was precisely because of the availability of an APA remedy that the Court was skeptical about a Tucker Act remedy: "It seems likely that while Congress intended 'shall pay' language in statutes such as the Back Pay Act to be self-enforcing—*i.e.*, to create both a right and a remedy—it intended similar language in § 1396b(a) of the Medicaid Act to provide merely a right, knowing that the APA provided for review of this sort of agency action." *Bowen*, 487 U.S. at 906 n.42.

The Government does not suggest that Health Options' case could have been brought under the APA. And it offers no reason why Congress would enact a law with a clear "shall pay" obligation, yet would deny insurers any remedy at all when the government declines to pay.

Indeed, except simply to assert that a failure to appropriate funds for a "subsidy" is itself an indication that no cause of action was intended (Gov't Br. 33), the Government makes no effort to persuade the Court that this is not a proper Tucker Act suit. But given the long history of Tucker Act jurisdiction over cases in which Congress has failed to appropriate funds, the failure to appropriate funds to an agency is no indication at all that a suit for damages will not be available under the Tucker Act. Indeed, Section 1342 involves a mandatory payment obligation stated in definite terms. It involves no policy judgments of the type reviewable under the APA (as in *Bowen*), or an alternative remedial scheme (as in *Bormes*). Payments were due only after performance of actions the government sought to induce, and only after insurers performed and actually suffered the losses in which the government promised to share. In short, this case is squarely within the Tucker Act wheelhouse of the Court of Federal Claims.

The Government also cites *United States* v. *Navajo Nation*, 556 U.S. 287 (2009), where the Court found no enforceable claim. But that case could not be more different from this one. The Court focused on whether any statute "impos[ed] a money-mandating duty on the Secretary … to allow for the enforcement of that duty through the Indian Tucker Act." *Id*. at 300. In sharp contrast with Section 1342, no statute at issue in *Navajo Nation* even arguably imposed a duty on the Secretary to pay money. *Id* at 299-300. Only slightly more difficult was whether the statutes gave rise to a trust relationship, which could give rise to a cause of action for breach of fiduciary duty. The Court found no statutory basis for inferring a trust relationship either. *Id*. at 301-02. *Navajo Nation* offers no basis for rejecting Section 1342 as precisely the type of money-mandating statute that has long given rise to a proper Tucker Act claim.

III. THE APPROPRIATION RIDERS DID NOT REPEAL OR AMEND THE SECTION 1342 OBLIGATION TO PAY.

The Government's argument that the appropriation riders repealed or amended the

Section 1342 formula for payments is equally unavailing. Those riders dealt only with the yearly appropriation of funds, and by limiting the appropriation, constrained HHS's ability to make payments. But those riders did not purport to address, let alone change, the underlying Section 1342 obligation itself.

Neither the plain language nor the structure of the riders seeks to override the existing "shall pay" directive set forth in Section 1342, or the formula prescribing the extent of such payments. Indeed, the Government's basic argument is an odd one, structurally: Each rider addressed the use of funds being appropriated in a single year; it did not even address the obligations created in a single year. Thus, later appropriations could have been used to pay what remained unpaid from prior years. Indeed, there is no argument that the riders extinguished the obligations. To the contrary, HHS used payments in from insurers in 2015 and 2016 to meet the government's still-outstanding 2014 Section 1342 payment obligation.

The Government does show from "context" that the appropriation riders limited the funds available to HHS to make Section 1342 payments, appropriating to HHS only the "payments in" for that purpose.[8] But that limitation on the ability of

[8] The Government says this Court has frequently cited legislative history or context to construe appropriation acts said to repeal prior acts. But as demonstrated in Health Options' Opening Brief (at 48-52), recourse to confirmatory legislative history was always premised on a finding that at (continued…)

HHS to make payments limits what HHS can do. A failure to appropriate funds to allow an agency to make payments does not eclipse the underlying payment obligation created by statute.

The Government asks what else could have been meant by a failure to appropriate money to make the payments, except to eliminate the underlying statutory obligation. The answer, as Health Options explained in its Opening Brief (at 56), is that Congress meant what the riders said—to limit the money for HHS to make payments, without addressing the underlying obligation at all.

As to Congress's reasons for doing so, the potential reasons are many. See Opening Br. 56-57. The important point, however, is that if Congress wished to change the underlying Section 1342 formula in any way—to make the program budget neutral, or to condition future (or even past) Section 1342 obligations on the extent of appropriations to support those obligations—it knew how to do so. The English language offered plenty of words that would have allowed Congress to express such intentions, and enact them into law. There was no such enactment. Simply put: The fact that Congress did *not* use text that amended or repealed Section 1342, cannot have the same meaning as if Congress *had* used text amending or repealing Section 1342.

(continued)
least one instance of the subsequent enactments was facially inconsistent with the statute creating the payment obligation.

Neither the statutory text, nor the legislative "context" plausibly sustains the heavy burden of demonstrating implied repeal.

Neither can the statutory words nor context overcome the canon against construing statutes to have retroactive effect. The Government says that there is no retroactivity here because "insurers had no vested rights to future subsidies." Gov't Br. 52. But that is hardly descriptive of the claims in this case. Here, insurers did what the government asked: committing to provide insurance, providing insurance, and suffering the losses in which the government had promised to share a part. Each insurer did so before Congress enacted the riders at issue. Indeed, each insurer committed to pay the government—as Health Options did—in connection with these programs. That commitment was itself sufficient to "vest" the government's counter-commitment, and if not, it was certainly "vested" by insurers' provision of the requested services. It is hard to imagine that if, after providing the required services, it turned out that an insurer owed the government money (as Health Options did—and paid—in benefit year 2014), the Government would regard an insurer's belated attempt to revoke its commitment as anything but after-the-fact.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

STEPHEN J. MCBRADY
Counsel of Record
CLIFTON S. ELGARTEN
DANIEL W. WOLFF
A. XAVIER BAKER
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
smcbrady@crowell.com

Counsel for Petitioner

November 19, 2019