No. 18-1028

In the
Supreme Court of the United States

MODA HEALTH PLAN, INC.,
Petitioner,
v.
UNITED STATES,
Respondent.

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,
Petitioner,
v.
UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The decision below embraces the remarkable proposition that Congress may quietly renege on clear statutory promises after inducing private parties to perform simply by cutting off one funding source to fulfill its obligation. The government understandably waits until page 43 of its brief to try to defend that counterintuitive and countertextual holding. But the government's alternative argument, which has been rejected by every judge to consider it, would make congressional promises to pay entirely illusory. Under the government's view, no matter how clearly Congress promises that it "shall pay" sums certain, the government need not pay a penny unless and until a later Congress appropriates funds to fulfill the promise. Never mind that the whole point of the risk corridors program was to induce insurers to offer policies on the exchanges despite uncertainties about the costs of insuring the previously uninsured. Never mind that the program would not have worked if the government made clear that actual payments depended on the whims of future Congresses. Never mind that the program in fact induced reliance that saved the government billions of dollars in reduced tax subsidies. In the government's view, it could avoid any responsibility to make any payment, including even for amounts covered by other insurers' "payments in" under §1342, simply by declining to appropriate funds.

The government's alternative argument is a non-starter. It is inconsistent with §1342's plain text, which features an unambiguous "shall pay" direction and omits any limiting language like "subject to

appropriations." The government's suggestion that every congressional promise to pay is subject to an implicit subject-to-appropriations caveat because of the Anti-Deficiency Act misreads that Act (which constrains executive officials, not Congress) and would render countless express caveats throughout the U.S. Code (including in other ACA provisions) superfluous. Moreover, the government's late-breaking insistence on a separate provision authorizing damages actions is misplaced given that §1342 specifies the formula for the amounts the government "shall pay." The government's view undermines its long-term interests as well-illustrated by its claim that it is "inherently unreasonable" to take Congress at its word. U.S.Br.40-41.

When the government finally gets around to defending the decision below, it has nothing to say about the text of the appropriations riders, which by their terms simply limit one source of funding. Instead, it repeats the dubious claim that petitioners should have looked to GAO correspondence, rather than the statutory text, to divine the meaning of the appropriations riders. The canon against implied repeals, the presumption against retroactivity, and the plain text all point in the same direction here: Congress' restriction on the use of specific funds to satisfy an obligation does not make the obligation go away. No other rule comports with due process, basic fairness, or government accountability. It is doubtful that the government could pull a $12 billion bait-and-switch even if it tried to do so expressly. But the government's insistence that it can boldly promise that it "shall pay" and then renege through indirection and GAO correspondence cannot stand.

I. The Federal Circuit's Implied Repeal Holding Defies Plain Text And Precedent.

In the decision below, the Federal Circuit rejected the government's claim that §1342 imposed no obligation in the first place, but nonetheless held that Congress impliedly repealed the government's "shall pay" obligations when it restricted one source of funds to fulfill them. The government's belated and half-hearted effort to defend that reasoning is unavailing.

1. The government never disputes the centuries-old presumption that a statute cannot be read to accomplish a "repeal by implication" unless that conclusion is "necessary and unavoidable." *Harford v. United States*, 12 U.S. (8 Cranch) 109, 109-10 (1814) (Story, J.); *accord, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Nor does it dispute that this principle applies with *greater* force when the claimed repeal of substantive legislation "rests solely on an Appropriations Act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978); *see also In re Aiken Cty.*, 725 F.3d 255, 260 (D.C. Cir. 2013) (Kavanaugh, J.) ("[C]ourts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated.").

These undisputed principles are fatal to the government's argument. The appropriations riders here contain no language that "expressly, or by clear implication, modified or repealed" §1342. *United States v. Langston*, 118 U.S. 389, 394 (1886). Instead, they simply provide that "[n]one of the funds made available *by this Act*" from specific sources may be used for payments under §1342. Pub. L. No. 113-235,

§227, 128 Stat. 2130, 2491 (2014) (emphasis added); *accord* Pub. L. No. 114-113, §225, 129 Stat. 2242, 2624 (2015); Pub. L. No. 115-31, §223, 131 Stat. 135, 543 (2017). That text means exactly—and only—what it says: HHS may not use the specified funds to make payments out. It says nothing about whether *other* funds may be used to satisfy the government's payment obligations, let alone anything about making those obligations disappear or capping them at the level of payments in. Particularly when contrasted with the explicit language of Congress' repeated *unsuccessful* efforts to revise or repeal §1342, or even with the broader and more definitive appropriations measures in *United States v. Dickerson*, 310 U.S. 554 (1940), and *United States v. Will*, 449 U.S. 200 (1980), the plain language and limited reach of the riders ought to be the end of the matter.

Like the Federal Circuit, the government responds to plain text with "context and history." U.S.Br.47. The government is forced to use that capacious phrase because its centerpiece—the back and forth between two legislative offices and the GAO—does not even rise to the level of legislative history. That correspondence is not cross-referenced in the text or even in the "real" legislative history, so a mere reader of the Statutes at Large would not be aware of its existence. The government backs up the GAO correspondence with two sentences from a 700-page explanatory statement by one member of Congress that accompanied only one of the three annual riders.

The government attempts to normalize its effort to conjure an implied repeal from these extraordinary

materials by suggesting that this Court consulted similar materials in *Dickerson* and *Will*. But those decisions relied primarily on broader text foreclosing the use of any and all government funds and employed far more conventional legislative history in a supporting role. In all events, the Court's resort to legislative history in 1940 and 1980 was a sign of the times. In more recent decisions, this Court has steadfastly resisted efforts to let legislative history do the work that only text can perform, especially in the context of implied repeals. *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012).

The government's effort to repeal statutory text that complied with bicameralism and presentment via "context and history" that complied with neither thus suffers two fundamental flaws. First, it is foreclosed by precedents that demand clarity and disfavor implied repeals. Second, it imposes wholly impracticable burdens on the governed. It is already a lot to ask the governed to keep tabs on the Statutes at Large to ensure that Congress has not reneged on earlier promises. The notion that they must wade through 700-page explanatory statements and identify and review GAO correspondence to divine their fate is plainly untenable, especially when those materials at best would indicate only what a handful of Members thought they were accomplishing, as opposed to what the President signed into law.

2. Another difficulty with the government's detour into "context and history" is that the most revealing legislative history (and the only history reflecting the views of more than a handful of legislators) makes plain that when Congress actually contemplated an

express repeal or revision of §1342, the votes were not there. The government acknowledges those repeated and unsuccessful efforts but suggests that there is little to be learned from congressional inaction. But the failed efforts provide a model of the kind of explicit language that is necessary to effectuate a repeal and missing from the riders. *See, e.g.*, Obamacare Taxpayer Bailout Protection Act, S. 2214, §2, 113th Cong. (2014) (proposing to amend §1342 to provide that "the Secretary shall ensure that payments out and payments in … are provided for in amounts that the Secretary determines are necessary to reduce to zero the cost … to the Federal Government of carrying out the program"); Taxpayer Bailout Protection Act, S. 359, §2, 114th Cong. (2015) (same); Taxpayer Bailout Protection Act, H.R. 724, §2, 114th Cong. (2015) (same). Equally important, whatever the role of unsuccessful legislation in other contexts, Congress' contemporaneous failure to enact a politically accountable express repeal should make the already-heavy presumption against implied repeals insurmountable.

The government attempts to blunt the force of those contemporaneous failures by suggesting that "Congress accomplished [its] objective by other means," *i.e.*, via the implied repeals. U.S.Br.48. Even setting aside the question-begging nature of that contention, the government has the timeline all wrong. Congress rejected the express repeal legislation each year *before* it enacted each appropriations rider. That chronology makes perfect sense if (as their texts reveal) the riders accomplished substantially *less* than the rejected express repeal legislation would, but it makes no sense if (as the

government claims) the unsuccessful express repeal legislation and the successful appropriations riders accomplished the exact same thing despite their different texts and vote tallies.

3. The government has no meaningful response to the reality that this Court has *never* sanctioned an effort to use an appropriations rider to *retroactively* repeal an obligation after Congress has already induced private party performance. Claiming that petitioners' rights never vested (U.S.Br.52) is again question-begging and ignores the distinct unfairness in purporting to change the terms of the bargain *after* one party has performed in full to the other's benefit. It is one thing to prospectively repeal a re-enlistment bonus and quite another to vitiate a promise to pay after the private party has performed (and reduced the government's tax-subsidy outlays in the process). Both implicate the presumption against implied repeals, but the latter implicates retroactivity and due process concerns to boot.

The government insists that "insurers could not have had any entitlement to 'payments out'" when they first agreed to perform because those payments "could not even be calculated until the conclusion of" each calendar year. U.S.Br.52. That confuses *how much* insurers would be paid for *whether* they would be paid if they suffered losses. It also ignores the whole point of the risk corridors program. The point of §1342 was not to guarantee any predetermined dollar amount of government payment. Instead, §1342 was designed to address the uncertainty insurers faced in pricing insurance for individuals who were previously excluded from the healthcare market.

The program addressed that uncertainty by assuring insurers that the government would cover a specified portion of losses if and when they were incurred.[1] If that promise could be revoked without consequence even after losses were incurred, then the program could never work as intended. Indeed, despite its remarkable suggestion that reliance on the government was "inherently unreasonable," U.S.Br.40-41, the government never denies that it intended to induce reliance through its "shall pay" promise or that the resulting reliance saved it billions.

4. The government faults petitioners for mixing the language of contracts and statutes, but there is no support for the notion that Congress is the one government actor that cannot make a binding commitment. Assuming that Congress did just that with §1342's "shall pay" language, *see infra*, then interpreting the appropriations riders to vitiate the commitment post-performance cannot be without consequence. The original statutory commitment is most logically enforced through an action to enforce §1342's statutory promise. But principles of both statutory construction and government contracting reinforce the notion that the government must keep its word, lest short-term budget pressures destroy the government's long-term interest in being a reliable partner. *See, e.g.*, *Ramah*, 567 U.S. at 191. Thus, the government's actions here—making a clear promise

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[1] The government likens the risk corridors program to two other ACA programs, reinsurance and risk adjustment. But those programs had different purposes (that could be served by pooling risks among insurers, rather than compensating for actual losses) and very different statutory language.

designed to induce action that directly benefitted the government in the form of reduced tax subsidies and then belatedly refusing to uphold its end of the bargain—constituted a breach of contract as well. *See* Pet.Br.50-53; *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985).[2]

The government responds by observing that "[t]his Court has found an intent to contract whe[re] a statute provides for the execution of a written contract on behalf of the government or speaks of a contract with the government." U.S.Br.53. That confuses what is sufficient with what is necessary. When Congress makes a clear promise that is designed to induce reliance, the government has to pay for the performance it induced whether it labels the bargain a contract or not. The government identifies no case (from this Court or any other) holding that express references to contracts are necessary.

Instead, the government invokes two cases addressing the validity of state statutes that expressly vitiated earlier state statutes that promised certain pension benefits or tax breaks. *See* U.S.Br.54-55 (discussing *Dodge v. Board of Educ.*, 302 U.S. 74

[2] The government suggests (U.S.Br.56) that petitioners "abandoned" any claim that HHS entered into separate contracts to make payments out. But HHS' many statements confirming its obligation to make payments out in full are salient not because they created a contract separate and apart from §1342, but because they reinforce what is clear on the statute's face: HHS was obligated to "remit payments as required under [§]1342" "[r]egardless of the balance of payments and receipts." HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013).

(1937), and *Wisconsin & Michigan Railway Co. v. Powers*, 191 U.S. 379 (1903)). Those cases involving state statutes and express repeals essentially distinguish themselves. Neither case suggests that the states could have escaped their commitments by simply declining to fund them. Both exhibited a reluctance to provide a federal constitutional remedy when states had accountably changed their laws.

This case is fundamentally different. The government's obligation under §1342 to make payments out in full has never been expressly vitiated. That is why the government attributed 2015 and 2016 "payments in" to the government's still-unmet obligation to make "payments out" for 2014. *See* Pet.Br.18 n.4. And that is why the government sought appropriations even as late as the FY2019 cycle to discharge its unmet obligations under §1342 for coverage years 2014-2016. *See* Pet.Br.45 n.7. And while considerations of federalism may counsel restraint in creating a federal constitutional remedy when state governments expressly change course, this Court has not hesitated to enforce statutory and contractual promises to vindicate the federal government's long-term interests even when the political branches have yielded to short-term constraints. *See Langston*, 118 U.S. at 394; *Ramah*, 567 U.S. at 190-91; *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005). In the end, it is debatable whether the better framework for holding the government accountable for its reliance-inducing promises is statutory or contractual, but the government's effort to divide and conquer and render government contracting principles irrelevant when

the reliance-inducing promise comes directly from Congress cannot succeed.

II. Section 1342's Unambiguous "Shall Pay" Language Obligates The Government To Make Payments Out In Full.

Unable to buttress the Federal Circuit's strained implied-repeal holding, the government devotes the bulk of its brief to an argument every court below rejected—namely, that §1342 never created a payment obligation in the first place. Here too, the government does not ground its argument in statutory text. It does not claim, for instance, that the language of §1342 is insufficiently mandatory—likely because the phrase "shall pay" is about as clear a command as Congress can make. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) ("Congress' use of the term 'shall' indicates an intent to impose discretionless obligations."). Similarly, it no longer argues that §1342 itself, apart from the later appropriations riders, should be interpreted to obligate the government to make payments out only to the extent of payments in—presumably because the text contains nothing like a "to-the-extent" limitation and every court to consider that argument has rejected it.[3]

Instead, the government makes the even more extreme argument that §1342 did not obligate it to make *any* payments out and that those who read

[3] *See, e.g.*, Pet.App.16, 20, 183; *Molina Healthcare of Cal., Inc. v. United States*, 133 Fed. Cl. 14, 31-32 (2017); *Me. Cmty. Health Options v. United States*, 133 Fed. Cl. 1, 7 (2017); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 97, 103-04 (2016).

§1342 and its "shall pay" language should have understood that Congress had complete discretion to appropriate funds to make payments out or to decline to do so. The only reason certain insurers received "payments in" is because Congress appropriated those funds by leaving undisturbed recurring appropriations language authorizing HHS to expend collected "user fees." In the government's view, §1342 and its "shall pay" language standing alone without a wholly discretionary subsequent appropriation was merely aspirational.

While the text of §1342 does not even hint at the notion that "shall pay" means "may pay if future Congresses feel like it," the government invokes a completely separate statute, namely, the Anti-Deficiency Act. Neither HHS nor its lawyers ever relied on the Act to interpret §1342 in this way before this case reached this Court. Nor is the Act cross-referenced in §1342. And if a dogged reader nonetheless managed to find it in a separate volume of the Code, she would find no language restricting *Congress* or its ability to make binding promises to pay. It is no surprise, then, that the government's new argument contradicts 135 years of precedent and the bedrock proposition that the governed should be able to discern the content of the laws from the U.S. Code rather than via non-existent cross-references or unwritten rules that favor the government.

1. The Anti-Deficiency Act provides that "[a]n officer or employee of the United States Government … may not … make or authorize an expenditure … exceeding an amount available in an appropriation … for the expenditure." 31 U.S.C. §1341(a)(1)(A). By its

plain terms, the Act says nothing about whether *Congress* can create binding and enforceable government obligations without simultaneously funding them. Instead, it merely "constrains" the ability of "government officials" to make or authorize payments without an appropriation. Pet.App.19.

Consistent with that understanding, in its 150 years of existence, no court has interpreted the Act as rendering clear statutory promises to pay illusory. In fact, this Court has squarely "rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government." Pet.App.19 (citing *Ramah*, 567 U.S. at 197). The government tries to dismiss *Ramah* as limited to contractual obligations. U.S.Br.36. But even setting aside the problem that it never explains why *contractual* obligations would not also need to be "read together with the Anti-Deficiency Act" under its theory, U.S.Br.22, the clear import of *Ramah* is that the Act does not restrict the rights of private parties or override *any* government obligations, whether statutory or contractual. Indeed, since the Anti-Deficiency Act binds officials and employees—including contracting officers—but not Congress as a body, the Act's inability to make contractual obligations disappear would seem to apply *a fortiori* to statutory obligations. *See Ramah*, 567 U.S. at 197 (citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), for the proposition that "insufficiency" of an appropriation "does not pay the Government's debts, nor cancel its obligations").

Ramah hardly broke new ground in that respect. Well over a century of precedent and practice confirm

that the Anti-Deficiency Act does not override statutory payment obligations. *United States v. Langston*, 118 U.S. 389 (1886)—decided just two years after the Act was first enacted—is instructive. The statute there provided that a foreign minister's salary would be $7,500, yet Congress appropriated only $5,000. Notwithstanding the appropriations shortfall and the newly enacted Anti-Deficiency Act, the Court concluded that the statute created an "entitlement" that could not be "abrogated or suspended by [the] subsequent enactments which merely appropriated a less amount," absent "words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394.

The government tries to distinguish *Langston* on the basis of the remedy, arguing that because *Langston* pre-dated the Judgment Fund, the judgment the Court affirmed "was merely declaratory." U.S.Br.30. But under the government's theory, the Court should have reversed not affirmed that judgment, as Langston would have had no entitlement to payment whatsoever independent of subsequent appropriations. Moreover, while the Judgment Fund may obviate the need for a private-relief bill and avoid the prospect of an untidy separation-of-powers stalemate if Congress refused to appropriate funds to satisfy an adverse judgment, it hardly assists the government's theory or distinguishes *Langston*. To the contrary, the Fund's existence underscores that the government's obligations and debts are not canceled by the failure to satisfy them through the ordinary appropriations process, and the Fund's permanent appropriation means that the Anti-

Deficiency Act is not implicated in making a payment to satisfy an adverse judgment.

2. Between the bookends of *Langston* and *Ramah*, countless cases from this Court and the Federal Circuit have found a government payment obligation based on mandatory statutory language, regardless of whether the statute appropriated funds to fulfill it. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 216-18 (1983); *United States v. Will*, 449 U.S. 200, 221-23 (1980); *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *Belknap v. United States*, 150 U.S. 588, 595 (1893); *Slattery v. United States*, 635 F.3d 1298, 1315-16 (Fed. Cir. 2011); *Greenlee Cty. v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007). Even the cases that go the government's way—for example, by finding an implied repeal—would have been decided differently under the government's theory. Why bother to look for an implied repeal of statutory obligations in cases like *Will* and *Dickerson* if the original obligation is illusory unless and until future appropriations legislation provides for payment? And why look for sufficiently mandatory payment language in cases like *Mitchell* if even "shall pay" language amounts to a wholly voidable promise?

The government fares no better with the lower court cases it tries to distinguish, U.S.Br.33, as none even mentions the Anti-Deficiency Act, and all would have been analyzed differently under the government's argument. *Highland Falls Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), at least mentions the Anti-Deficiency Act, but it does not lend the government any support. *See* U.S.Br.26. That case

involved a statute that *expressly* stated that payments would be made only to the extent Congress appropriated funding, and provided instructions for allocating funds should Congress appropriate less than the full amount needed. The question before the court was whether Congress overrode that allocation scheme through a later appropriations measure that expressly directed that the limited funds be paid in a different manner. The court answered in the affirmative, both because it had "great difficulty imagining a more direct statement of congressional intent," and because that result avoided any tension with the Anti-Deficiency Act. *Highland Falls*, 48 F.3d at 1170. The case thus has little, if anything, to do with what it takes to establish a statutory payment obligation, and certainly does not embrace the extreme position that no such obligation can exist unless and until Congress appropriates funds to satisfy it.

3. The government emphasizes a couple of statutes that "expressly authorize[] the expenditure of funds in advance of ordinary appropriations"; for example, the Medicare Part D risk corridors program provides that the statute "constitutes budget authority in advance of appropriations." U.S.Br.22. According to the government, "[i]t follows" that a statute *without* that language does not create an obligation at all. U.S.Br.22. That is a *non sequitur*. All that "follows" from such language is that by providing budget authority in advance Congress need not provide any additional appropriations in the future. That hardly means that if Congress declines to appropriate funds in advance, there is no obligation to fund in the future.

The government draws the wrong lesson from the fact that Congress modeled §1342 after the Part D risk corridors program. There are multiple plausible explanations for the absence of future budget authority language in §1342 as the statutes have numerous textual differences. Not only does that Part D program lack the explicit "shall pay" language of §1342, but the budget authority for Part D was not specific to its risk corridors program but includes direct subsidy programs (with no analog in §1342) that necessarily require annual funding. *See* 42 U.S.C. §1395w-115(d)(3). Accordingly, Congress had a distinct need to appropriate money every year, so providing budget authority in advance made sense. Section 1342, by contrast, would not require separate appropriations in years in which payments in exceeded payments out. But nothing in §1342 indicated that the payments-out obligations simply disappeared in years when they exceeded payments in. If they did, then §1342 would work nothing like the Part D program on which it was modeled. Put differently, that Congress had Part D and its mandatory payments in mind as a model for §1342 is further evidence that it did not enact the illusory promises the government envisions.

The government has no answer to the problem that its Anti-Deficiency Act argument would render superfluous numerous provisions, both within and outside the ACA, that expressly make payment obligations "subject to the availability of appropriations." U.S.Br.27; *see, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("courts must give effect, if possible, to every clause and word of a statute"). The government suggests that this Court

has suspended the operation of the canon against superfluity when it comes to the ACA. U.S.Br.28. That is an overstatement and irrelevant. The government's position would render numerous statutory provisions, including but by no means limited to contemporaneously enacted ACA provisions, superfluous.

More fundamentally, the government never really disputes that if §1342 had included a "subject to the availability of appropriations" caveat expressly rather than silently, then the statute could not have accomplished its objectives. The whole point of the provision was to encourage health insurers to participate in the exchanges despite uncertainties about the risk pool and whether they would incur significant losses. If the payments designed to eliminate those uncertainties were themselves uncertain and entirely dependent on the predilections of future Congresses, then the program would not have achieved its purposes. Trading uncertainties over the risk pool for uncertainties about future appropriations would gain insurers nothing. The only way the statute could achieve its objectives is if it meant what it said, *i.e.,* that the government "shall pay" based on the statutory formula if insurers incurred significant losses. This Court should not allow the government to smuggle in implicit limitations on the statute that would have destroyed the program if they were made explicit.

One final flaw with the government's argument is its heads-we-win-tails-you-lose character. Everyone agrees that §1342(b)(2)'s "shall pay" direction to insurers to make "payments in" is fully obligatory;

indeed, the government characterizes this as a "regulatory requirement[]." U.S.Br.55. There is nothing illusory or voidable about it. Yet according to the government, the very same language in §1342(b)(1) is entirely dependent on future appropriations because of unstated background principles about how the government funds its obligations. That you-must-we-might approach to identical language does violence to principles of statutory interpretation. It also expects too much from the governed and too little from the government. It puts the burden on the governed to master the subtleties of the government funding process and to go beyond the text of the U.S. Code and read in limitations that are not there ("subject to the availability of appropriations") and draw inferences from missing language about future budget authority. At the same time, it excuses the government from honoring its clear promises. In virtually every other context, when someone makes a clear promise to pay, the details of how the necessary funds will materialize is the promisor's problem. There is no reason for a different rule here, or for treating a congressional promise to pay as the least enforceable promise in the land.

4. The government alternatively argues that even if §1342 "imposed a duty that the government failed to fulfill," the Tucker Act would still require petitioners to show separately that §1342 "'mandat[es] compensation for damages sustained as a result of a breach.'" U.S.Br.15 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009)). The government never raised that argument in the Federal Circuit or in its brief in opposition, and with good reason as the

argument is entirely wrong. To be sure, the plaintiff must make that kind of separate showing in a case like *Navajo Nation*, where the government breached a duty of trust, not a promise to make payments of sums certain according to a statutory formula. But "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 (1988) (Scalia, J., dissenting).

The government protests that Justice Scalia expressed that view in dissent in *Bowen*. But as he noted without contradiction, *id.*, the majority did not quarrel with the proposition that "'shall pay' language in statutes" is typically "self-enforcing," *id.* at 905 n.42 (majority op.), and in fact suggested that claims for damages could have been brought in the Court of Claims, *id.* at 910 n.48. It just concluded that the particular claim there—namely, a suit seeking review of HHS decisions disallowing reimbursement for state Medicaid program costs—was one that Congress intended to be brought under the APA, as the relief sought was reversal of the disallowance decision, not compensation for the government's failure to make reimbursements. *Id.* at 893.

That might be relevant if petitioners were here seeking judicial review of the Secretary's failure to promulgate risk corridors regulations, or perhaps if there were a dispute about the formula for calculating "payments out."[4] But none of that is at issue;

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[4] The government notes in passing that the "shall pay" directions in §1342(b) describe the program that the Secretary

petitioners have never sought anything more than recovery of the mandatory payments required by the statutory formula. The government does not identify a single case refusing to allow a plaintiff to seek payment under that kind of money-mandating statute on the theory that Congress failed to create a separate damages remedy in anticipation that the government would disregard the mandate. That is likely because, as *Langston* recognized more than a century ago, there is nothing "extraordinary," U.S.Br.34, about the notion that when Congress mandates the payment of funds, those to whom the funds were promised may seek recovery if the government fails to pay them.

III. Allowing The Government To Evade Its Obligations Under §1342 Would Have Untenable Consequences.

The government's position is legally untenable, but it is even worse as a practical matter. The government's lax approach to implied repeals would allow GAO correspondence and explanatory statements to undo promises made via plain text, bicameralism, and presentment. Its alternative argument would go further and make any government promise to pay, no matter how emphatic, illusory

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"shall establish" as per §1342(a). But every part of the risk corridors program, from the Secretary's obligation to establish it, to the insurers' obligation to make payments in, to the "shall pay" direction concerning payments out, is mandatory. If the Secretary defaulted on the obligation to establish the program, the proper remedy might lie in the APA. But given that the Secretary has established the program and acknowledged the obligations but has not paid, the proper remedy lies in the courts below, without regard to whether Congress established a separate damages action.

unless accompanied by promises of future budget authority (which, in the government's view, presumably could be repealed impliedly or explicitly without consequence). Under that view, even "payments out" to the extent of "payments in" depended entirely on future appropriations. These positions may appear to serve the government's short-term interests, but as with similar short-sighted government positions this Court has confronted and rejected, they would make future private-public partnerships "more cumbersome and expensive for the Government" and damage "the long-term fiscal interests of the United States." *Ramah*, 567 U.S. at 191-92. Indeed, they would prevent the government from accomplishing all manner of important objectives that depend on inducing private parties to rely on enforceable government promises. As Alexander Hamilton observed in Federalist 62, "no great improvement or laudable enterprise can go forward" if those who rely on the government fall "victim to an inconstant government."

It is telling that the government never denies that the risk corridors program was designed to induce reliance or that it could not have accomplished its objectives if insurance companies understood that the government's "shall pay" obligation was illusory and entirely dependent on future Congresses' appropriations decisions. Nor does the government dispute that its unilateral policy shifts made after initial premiums were set shifted the risk pool in ways that all but guaranteed that most insurers would incur losses. To all this, the government offers no response, except to say that participating in the exchanges presented "business opportunities" with

corresponding "business risks." U.S.Br.5. But insurers were under no obligation to participate in the exchanges, and the "business risks" of doing so might well have kept most of them on the sidelines or caused them to set higher premiums to cover uncertain risks. Neither prospect was acceptable to the government, especially because higher premiums would translate into greater tax subsidies. This is just one instance among many where the government's long-term interests depend critically on making enforceable promises.

The government's position would put congressional promises in the same category as contracts by minors and individuals with diminished capacity. Congressional promises to pay for performance, no matter how clear or critical to a program's success, would be voidable at the government's option. The government can abide by the deals it likes and simply fail to appropriate funds to satisfy obligations that proved too costly. The common law treated contracts with minors as voidable to discourage contracting with minors. *See, e.g.*, 43 C.J.S. *Infants* §180 (1978). The government's position would inevitably have the same effect—it would discourage anyone from partnering with the government or taking the government at its word. That regime may be salutary for minors, but it would be disastrous for a government that depends on cooperative agreements with the private sector to accomplish a wide range of important government objectives.

Finally, the government complains that petitioners offer no plausible interpretation of the

appropriations riders other than limiting payments out to payments in. But unfortunately there is an all too plausible alternative explanation: Some members of a later Congress with a different political composition did not want to foot the bill for clear promises that had been made by an earlier Congress and that were then made more costly by the executive's unilateral policy shifts. After the executive branch offered rosy scenarios to Congress that the risk corridors program might prove budget-neutral (while simultaneously assuring insurers they would be paid in full), some members of Congress effectively told the executive to clean up its own mess. Whatever else one can say about that dynamic, private parties who relied on clear congressional promises cannot be left holding the bag without creating terrible incentives for government accountability and governance. Allowing the government to promise boldly and renege obscurely and unaccountably is a recipe for disaster. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Federal Circuit.

Respectfully submitted,

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