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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
I. The Decision Below Cannot Be Reconciled With This Court's Precedents 2
   A. Congress Did Not Clearly Eliminate the Government's Obligations Under §1342 2
   B. The Government's Alternative Theory That §1342 Created No Obligations is Meritless and Only Underscores the Need for Review 9
II. The Question Presented Is Exceptionally Important 11
CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Belknap v. United States,
150 U.S. 588 (1893)... 7, 10

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018).. 3

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008)... 10

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996).. 9

N.Y. Airways, Inc. v. United States,
369 F.2d 743 (Ct. Cl. 1966).................................... 10

Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,
470 U.S. 451 (1985).. 9

Posadas v. Nat'l City Bank,
296 U.S. 497 (1936).. 2

Salazar v. Ramah Navajo Chapter,
567 U.S. 182 (2012).. 5

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978).. 3

United States v. Dickerson,
310 U.S. 554 (1940).. 5

United States v. Kwai Fun Wong,
135 S. Ct. 1625 (2015).. 6

United States v. Langston,
118 U.S. 389 (1886)....................................... 3, 6, 10

United States v. Vulte,
233 U.S. 509 (1914)... 10

United States v. Will,
449 U.S. 200 (1980).. 5

Statutes

42 U.S.C. §18062 9

REPLY BRIEF

The government never denies the obvious importance of the decision below, which not only validates a $12 billion bait-and-switch, but also undermines political accountability by allowing the government to promise boldly and renege obscurely. Instead, the government insists that the Federal Circuit correctly concluded that the government can abrogate its clear statutory commitments that induced massive reliance through oblique appropriations riders, obscure correspondence with the GAO, and ambiguous legislative history. That position contradicts more than a century of precedent, basic rules of statutory construction, and common sense.

The government's alternative argument raises the stakes even higher by suggesting that Congress can never undertake a binding commitment to make future payments. No matter how clear the promise to pay, and no matter how much the government needs a clear promise to induce private-sector reliance, the government suggests that the Anti-Deficiency Act makes such promises illusory. Every judge on the panel rejected that argument, and with good reason. Not only was the promise to make payments under §1342 unambiguous, but that argument would save the government $12 billion here at the cost of sacrificing the government's long-term interest in making enforceable statutory promises.

As numerous amici have attested, these issues are enormously consequential. The government acknowledges that providing unprecedented

insurance on the new exchanges was a risky enterprise, and that risk corridor payments were designed to induce insurers to provide coverage despite those risks. But in the government's view, the real risk was relying on the government to keep its word. No matter how clearly the government promises to make future payments, those promises either are entirely illusory or can be vitiated by ambiguous legislative history. That cannot be the law. If Congress possesses the power to induce massive reliance only to shirk its obligation to pay, it must at least be accountable to the voters for its bait-and-switch. By allowing the government to promise boldly and renege obscurely, the decision below establishes a rule too dangerous to stand.

I. The Decision Below Cannot Be Reconciled With This Court's Precedents.

The government makes no pretense of denying the importance of the decision below, but rather simply tries to defend it on its merits. To state the obvious, the government's agreement with a decision that saves it $12 billion is neither surprising nor a reason to deny review of an immensely consequential decision that, if left standing, will govern every claim against the federal government. In all events, the government's arguments fall flat.

A. Congress Did Not Clearly Eliminate the Government's Obligations Under §1342.

1. The government acknowledges both the "cardinal rule … that repeals by implication are not favored," *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936), and that parties asserting an implied repeal bear "the heavy burden of showing 'a clearly

expressed congressional intention,'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Those principles "appl[y] with even *greater* force" when the law alleged to do the repealing is an appropriations measure. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). Thus, this Court has held for more than a century that if Congress wishes to repeal a substantive law through an appropriations measure, it must do so clearly and textually, using "words that expressly, or by clear implication, modif[y] or repeal[] the previous law." *United States v. Langston*, 118 U.S. 389, 394 (1886).

Despite paying lip service to these principles, the government (like the majority below) ultimately contends that some of the most obscure legislative history imaginable suffices to repeal a clear statutory promise. The government cannot point to any "express words of repeal" in the appropriations riders here. *Id.* By their plain language, each simply limits the use of funds appropriated by that specific annual appropriations act, providing that "[n]one of the funds made available *by this Act*" should be used for payments under §1342. Pet.App.12 (emphasis added). The riders say nothing about repealing, revising, or suspending the substantive obligation §1342 created. To the contrary, the riders take that substantive obligation as a given. As Judge Wallach put it, the riders "do not address *whether the obligation remains payable*," but "at most, only address *from whence the funds to pay the obligation may come*." Pet.App.76. That is presumably why the government could assure insurers, in the immediate wake of the first of these identically worded riders, that the payment obligation for 2014 remained intact

and would be satisfied by subsequent collections and other sources. *See* Opp.9 (acknowledging some of these statements).

Unable to identify any statutory text to support its implied-repeal argument, the government resorts to reliance on "legislative context and history." Opp.20. The government is forced to use that capacious term because its lead item—correspondence between congressional offices and the GAO—does not even rise to the level of legislative history. The government invokes the back-and-forth between two offices and the GAO no fewer than a dozen times (while quoting the text of the riders themselves only once), but it is entirely unclear how this exchange, which is not cross-referenced in the statutory text or even the "real" legislative history, could possibly supply a clear intent to repeal. Indeed, only the most intrepid of insurers, and no mere reader of the Statutes at Large, would even be aware of this exchange.

The government fares no better by invoking a two-sentence snippet from a 700-page statement by Representative Rogers accompanying one, but only one, of the three riders. That statement is entirely consistent with the rider simply limiting one funding source to pay an undisturbed obligation, Pet.25, and its exact meaning is not free from doubt. *See* Opp.17-18 & n.4. Such imprecision is to be expected in legislative history, which does not undergo the same rigorous scrutiny as statutory text. That is why legislative history, even when far more clear, neither has the force of law nor can supply the "intention of Congress *as expressed in the statutes*" that is

necessary to repeal a prior law. *United States v. Will*, 449 U.S. 200, 222 (1980) (emphasis added).

The government seeks solace in this Court's reliance on legislative history when determining whether appropriations measures worked implied repeals in decisions issued in 1940 and 1980. Opp.20. Of course, the invocation of legislative history in those decisions was a sign of the times. This Court, for decades, has consistently eschewed reliance on such materials when interpreting statutes, and especially when looking for the kind of clear statement of legislative intent necessary to work an implied repeal. *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012). To the extent both the Federal Circuit and the government are relying on an antiquated approach to statutory construction in this important context, that is just one more reason to grant plenary review.

That said, legislative history played only a supporting role in *Will* and *Dickerson*, as the appropriations measures in those cases expressly prohibited the use of *any* funds to pay the obligations at issue. Opp.21-22; *see Will*, 449 U.S. at 205-06 (restricting funds "in this or any other Act"); *United States v. Dickerson*, 310 U.S. 554, 556-57 (1940) (same). The government suggests that Congress could not have used comparable language here because it meant to allow pro-rata payments out to the extent of payments in. Opp.22. But Congress could have unambiguously accomplished that result quite clearly and quite easily—say, by declaring that "no appropriation *in this or any other Act* shall be

used for risk corridor payments *that exceed* payments collected under §1342."

In all events, "even assuming legislative history alone could provide a clear statement (which we doubt), none does so here." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). Indeed, the most telling item of legislative history here is the fact that, both before *and after* passing the first rider, Congress repeatedly *considered and rejected* bills that would have expressly repealed the substantive payment obligation imposed by §1342 and limited payments out under the risk corridors program to payments in. *See* Pet.49-51, 80-81. The government cannot plausibly claim that Congress unambiguously repealed an obligation through an oblique appropriations rider when Congress considered and rejected bills that would have accomplished that result clearly and expressly both before *and after* passing that rider. That presumably explains why the government simply ignores that "highly probative" evidence. Pet.App.51.

2. The government is thus left with the claim that Congress can eliminate a statutory obligation that has already induced reliance just by appropriating less than the amount necessary to fulfill that obligation. But that claim, which amounts to the astonishing proposition that an express congressional promise to pay is voidable up and until the point Congress decides to appropriate funds sufficient to pay, is squarely foreclosed by, *inter alia*, *Langston*. *See* 118 U.S. at 394; Pet.27. The government claims that *Belknap* limits *Langston*, but *Belknap* specifically reaffirms that a "mere failure to

appropriate" is "not, in and of itself alone, sufficient to repeal [a] prior act." *Belknap v. United States*, 150 U.S. 588, 594 (1893).

Moreover, the government conveniently ignores the fact that its position here has far more extreme consequences than in any of the cases it invokes. In *Will*, *Dickerson*, and *Belknap*, the government was still honoring its basic promise to pay a salary, albeit without a cost-of-living adjustment, a bonus, or an increase. Here, by contrast, the government insists that it can pay insurers pennies on the dollar, even though there can be no serious dispute that the government unilaterally increased the insurers' costs after rates were set and insurers relied on the promise of risk corridor protections both in agreeing to offer policies on the exchanges and in pricing those policies. Given that the success of the exchanges depended on inducing participation, and that the government benefited directly from lower premiums in the form of paying less in tax subsidies, the notion that the government can frustrate all those reliance interests simply by failing to appropriate the funds necessary to honor its obligations cannot be the law.

3. The government has no persuasive answer to the retroactivity and other constitutional concerns identified in the petition. *See* Pet.22-23, 30. The government suggests there is no real retroactivity problem here because neither insurers nor Congress could know the precise amount of the payments for 2014 until 2015. But that ignores that, for the risk corridor system to work as intended, the government had to induce reliance and participation decisions back in 2013 with the explicit promise that downside

risks would be cushioned with risk corridor payments pursuant to a specified formula. Thus, while the question of how to pay for the statutory obligation might not have been "material" to the government until 2015, Opp.16, the fact that payments would be forthcoming, without regard to the unpredictable amount of payments in, was highly material to insurers back in 2013. HHS knew as much, which is why it assured the industry both before and after it unilaterally changed the risk pool that risk corridor payments would be made in full without regard to the amount of payments in. Pet.App.7-9.

The government responds that even if it is retroactively impairing rights, "Congress's intent to foreclose payments out in excess of payments in for the duration of the risk-corridors program is unambiguous." Opp.23. That claim is belied by the government's concession that not even HHS understood the riders to have that effect, but instead assured insurers that they would be paid from subsequent collections or other sources. Opp.9.

The government's response to petitioners' breach-of-contract claims is no more persuasive. Its unilateral declaration that §1342 "did not create a contract," Opp.31, ignores the "mutual commitments" that the government and the insurers participating in the exchanges made, under which the government promised to share the acknowledged risks presented by the population purchasing coverage through its new exchanges to induce insurers to participate in those exchanges. Pet.App.59; *see* Pet.6-9, 30-31. Those mutual commitments, in combination with the "unambiguously mandatory" language of §1342,

Pet.App.16, easily provide the necessary "clear indication that the legislature intend[ed] to bind itself contractually." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). And the government has no response to the absurd consequences of its theory, which give Congress less authority to bind the government than any random contracting officer.

B. The Government's Alternative Theory That §1342 Created No Obligations is Meritless and Only Underscores the Need for Review.

Not content to argue that it can revoke a clear statutory promise to pay via ambiguous directions about the source of funds, the government goes a step further and attempts to resuscitate an argument that every member of the panel rejected: that §1342 never imposed any obligation on the government in the first place. Opp.25-27. That attempt goes nowhere. To begin with, this Court need not consider alternative grounds for affirmance that are outside the scope of the question presented, especially when they would arguably entitle the government to broader relief. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Moreover, the government's arguments are meritless. The plain language of §1342 provides that the government "*shall* pay" insurers the amount it owes under the terms of the statutory formula. 42 U.S.C. §18062(b) (emphasis added). That "unambiguously mandatory" language unequivocally imposes a binding obligation on the government to make the required payments. Pet.App.16; *see* Pet.App.20; *Fed. Express Corp. v.*

Holowecki, 552 U.S. 389, 400 (2008) ("Congress' use of the term 'shall' indicates an intent to impose discretionless obligations.").

The government asserts that §1342 could not impose any binding obligation unless and until Congress appropriated funds to cover that obligation. Opp.14, 25-30. That position flatly contradicts decades of precedent—most obviously *Langston*, which specifically held that insufficient appropriations did not invalidate the government's statutory payment obligation. 118 U.S. at 394; *see United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *Belknap*, 150 U.S. at 594; *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 810 (Ct. Cl. 1966); Pet.App.18-20. And the government's observation that the ACA itself did not appropriate funds for risk corridor payments even though it appropriated other funds is unavailing. The obvious explanation for the difference is that the other provisions required immediate payments, while as the government itself emphasizes, the risk corridor payments could not be finally calculated, let alone paid out, until 2015. Opp.23.

The Anti-Deficiency Act is likewise "of no moment." Pet.App.20. That statute "simply constrains government officials"; it does not "somehow defeat the obligations of the government." Pet.App.19; *see, e.g.*, *Langston*, 118 U.S. at 394; *N.Y. Airways*, 369 F.2d at 810. *Contra* Opp.29-30.

Moreover, the implications of the government's view of that Act only underscore the need for plenary review. The government's position is that any congressional promise to make future payments, no

matter how clear, is essentially voidable if future appropriators do not see fit to honor the obligation. That is a remarkable proposition that does not even serve the government's own long-term interests. Congress often needs to make enforceable promises to induce private parties to take actions that serve the government's interests. If the Anti-Deficiency Act renders all those promises illusory, or at least voidable by any future Congress that does not view honoring the promise as an appropriation priority, then Congress will not be able to induce necessary reliance.

This is a case in point. Congress passed a statute that provided a clear promise of future payments based on a statutory formula, and countless insurers took costly steps that allowed the exchanges to flourish and, by keeping premiums low, reduced the government's outlays for tax subsidies. According to the government, the insurers should have read that clear promise as in fact giving Congress a voidable option to fund the payments years after costly reliance if but only if doing so made sense to a future Congress. If insurers had read the statute in that way, no rational insurer would ever have relied on that illusory promise, and the government would have been the worse off.

II. The Question Presented Is Exceptionally Important.

To its credit, the government never disputes the critical importance of this case. It does not try to minimize the $12 billion impact of the decision below on the insurers who took the government at its word, responded to its incentives precisely as the

government intended, and then suffered enormous losses because of the government's bait-and-switch. *See* Pet.32-33. Nor does the government dispute that unilateral policy changes by HHS increased insurers' costs after rates had been set, or that the government's refusal to honor its obligations has driven numerous insurance providers off the exchanges or out of business entirely, "impact[ing] the cost of health care insurance for virtually all Americans." Pet.App.84; *see* State Amici Br.3-4; NAIC Amicus Br.13-16. The "national impact of these health insurance cases" plainly justifies this Court's attention. Pet.App.66.

More important, the government does not deny the wider ramifications of this case. As numerous amici have attested, by allowing the government to renege on its commitments at will, even after inducing massive reliance by private parties, the decision below dramatically "undermines the reliability of dealings with the government," and seriously threatens its ability to partner effectively with private entities in the future. Pet.App.59-60; *see, e.g.*, Chamber of Commerce Amicus Br.6-8.

Still worse, by allowing the government to promise boldly and renege obscurely, the decision below destroys political accountability. Pet.35-37. If Congress really has the power to make a clear promise to pay and then renege on that promise after costly reliance by refusing to appropriate funds, then the only constraint on that dangerous power is accountability to the electorate for failing to honor its promises. But the decision below eviscerates even that modest constraint by divining an implied repeal

from GAO correspondence and ambiguous legislative history. That cannot be the law, but it will be the law that governs all who interact with the federal government unless this Court grants review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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