

No. 20-1200

In the Supreme Court of the United States

COMMON GROUND HEALTHCARE COOPERATIVE,
ON BEHALF OF ITSELF AND ALL OTHERS
SIMILARLY SITUATED, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
*Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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Petitioner seeks review (Pet. 10-31) of the court of appeals' judgment applying to this case its previous holding in *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020), petition and conditional cross-petition for cert. pending, No. 20-1162 (filed Feb. 19, 2021), and No. 20-1432 (filed Apr. 9, 2021), that an insurer bringing suit for money damages against the United States under the Tucker Act, 28 U.S.C. 1491, for certain subsidies provided for under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, must have its damages offset to account for the insurer's own successful mitigation efforts. As we explain in our brief in opposition to the pending petition for a writ of certiorari to review the court of appeals' decision in *Community Health Choice*, the court's holding in that case is correct

and does not warrant further review. 20-1162 Br. in Opp. 15-29. Because the proper disposition of the petition for a writ of certiorari in this case may be affected by the disposition of the petition in No. 20-1162, however, the petition in this case should be held pending disposition of the petition in that case, and then disposed of as the Court determines to be appropriate.

1. Section 1402 of the ACA requires insurers to reduce cost sharing (such as deductibles and copayments) for certain individuals who purchase “silver” plans through an ACA Exchange. 124 Stat. 220 (42 U.S.C. 18071). “[I]n order to reduce the premiums,” 42 U.S.C. 18082(a)(3), the ACA also directs the government to make advance payments to insurers equal to the value of such cost-sharing reductions (CSR payments), 42 U.S.C. 18082(c)(3).

In October 2017, the government ceased making CSR payments to insurers after determining that it lacked any appropriation to pay them. Pet. App. 11a-12a. For 2018 and subsequent years, many insurers offset the absence of CSR payments by increasing their silver-plan premiums. *Id.* at 12a-14a. By operation of the ACA’s formula, increasing silver-plan premiums also resulted in a substantial increase in premium tax credits that the government pays to insurers on behalf of lower-income individuals. See *ibid.*; 26 U.S.C. 36B(b)(2)(B).

2. a. Petitioner is an insurer that offers health plans on Wisconsin’s ACA Exchange. Pet. App. 16a. It brought this action, on behalf of itself and a class of other similarly situated insurers, against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, alleging (as relevant) that the government is liable on an ongoing basis for the full value of CSR payments not made and seeking money damages for the years 2017 and 2018. Pet. App. 16a-17a.

The court certified a class, *id.* at 17a, and subsequently granted summary judgment to the class, *id.* at 18a-36a.

b. The government appealed. At the government's request, however, the court of appeals stayed further proceedings in the appeal in this case pending its disposition of several other pending, previously argued cases that involve claims for unpaid CSR payments and that present the same issues. C.A. Doc. 12 (Jan. 28, 2020).

The court of appeals subsequently decided those other pending cases in two opinions issued the same day, captioned as *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020), and *Community Health Choice*, *supra*. In *Sanford*, the court of appeals held that the government was liable to insurers for unpaid CSR payments and that insurers could enforce that liability in Tucker Act suits. 969 F.3d at 1373-1383. In *Community Health Choice*, however, the court held that insurers' damages must be offset to account for the additional premium tax credits that they received for 2018, as a "direct result" of increasing their silver-plan premiums. 970 F.3d at 1377; see *id.* at 1372-1381.

The court of appeals in *Community Health Choice* explained that, under this Court's and its own precedent, where a statute like Section 1402 imposes an obligation but "does not provide its own remedies," courts look to traditional contract-law principles to determine the scope of an appropriate damages remedy. 970 F.3d 1374. Among those principles, the court of appeals observed, is the well-settled rule that, where a plaintiff mitigates its own damages, "there must be a reduction in damages equal to the amount of benefit that resulted from the mitigation efforts that the non-breaching party in fact undertook." *Id.* at 1376; see *id.* at 1374-1377.

Applying that rule, the court of appeals in *Community Health Choice* determined that the plaintiffs had “mitigated the effects of the government’s breach by applying for increased premiums and, as a result, received additional premium tax credits in 2018 as a direct result of the government’s nonpayment of [CSR] reimbursements.” 970 F.3d at 1377. The court concluded that the plaintiffs’ damages had to be reduced accordingly. *Id.* at 1377-1379. It remanded to the trial court to determine the amount of the offset. *Id.* at 1379-1381.

c. Following the court of appeals’ decisions in *Sanford* and *Community Health Choice*, petitioner moved unopposed to lift the stay in this appeal and for entry of judgment “consistent with *Community Health Choice*.” Pet. App. 1a-2a. The court granted the motion and entered judgment accordingly, acknowledging that the parties had each reserved their rights to challenge the substance of the court’s decision. *Id.* at 1a-2a & n.*. The court denied petitioner’s petition for rehearing. *Id.* at 37a-38a.

3. Petitioner seeks review (Pet. 2-4, 10-31) of the court of appeals’ judgment applying its holding in *Community Health Choice* with respect to mitigation of damages to the claims in this case. For the reasons set forth in our brief in opposition to the petition for a writ of certiorari seeking review of the court’s decision in *Community Health Choice* (No. 20-1162), the court’s decision in that case is correct and does not warrant further review. See 20-1162 Br. in Opp. 15-29. The court in *Community Health Choice* properly applied settled precedent and traditional tenets of contract law in determining that an insurer that in fact mitigated its damages for unpaid CSR payments must have its damages award offset accordingly. See *id.* at 16-20. Petitioner’s contentions (Pet. 3-4, 10-26) that the court of appeals’ determination conflicts

with this Court's precedent and with traditional mitigation principles lack merit. See 20-1162 Br. in Opp. 21-29.¹

Because the petition for a writ of certiorari in this case, however, seeks review of the same question and in effect challenges the same holding of the court of appeals as the pending petition in No. 20-1162, the Court's disposition of that petition may affect the appropriate disposition of the petition here. The petition in this case should therefore be held pending the disposition of the petition for a writ of certiorari in No. 20-1162, and then disposed of as appropriate.²

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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¹ As we explain in our conditional cross-petition for a writ of certiorari to review the court of appeals' decision in *Community Health Choice* (No. 20-1432), if the Court were to grant review of the court of appeals' damages holding in that case (No. 20-1162), it should also grant review of the court of appeals' antecedent holding—applying its decision in *Sanford, supra*—that the government can be liable for unpaid CSR payments in a Tucker Act suit seeking money damages. See 20-1432 Conditional Cross-Pet. 13-21. Alternatively, we explain (*id.* at 21-22), the Court should hold the conditional cross-petition in No. 20-1432 pending the Court's decision on the merits in No. 20-1162. The court's liability ruling in *Sanford* expressly relied in part on its damages determination in *Community Health Choice*. *Id.* at 13, 15-16. Although the liability ruling does not independently warrant review, if the court's damages ruling were set aside, its liability ruling would then be called into doubt and take on greater practical significance, and it would warrant review. *Id.* at 16-21. For the same reasons, the government is submitting today a conditional cross-petition for a writ of certiorari seeking the same relief in this case.

² The government waives any further response to the petition for a writ of certiorari in this case unless this Court requests otherwise.