No. 20-1200

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The Government's brief in opposition to this petition rests entirely on its brief in opposition in No. 20-1162, which concerns different plaintiffs challenging the same underlying Federal Circuit decisions. That opposition fails to justify the Federal Circuit's application of the mitigation doctrine—in clear conflict with *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020)—in a manner that would allow the Government never to pay amounts that the ACA states that the Government "shall make." On this point, petitioner Common Ground Healthcare Cooperative ("Common Ground") concurs with the arguments of petitioners in No. 20-1162.

The Government ignores entirely a distinct and additional argument that Common Ground makes in the instant petition showing that the conflict with *Maine Community* warrants review: the claim here is for specific relief. *See* Pet. 12-19. In particular, *Maine Community* describes the claim as one to "collect payment" of "specific sums already calculated." 140 S. Ct. at 1331. That is exactly what Common Ground seeks here, and that is specific relief. The Government does not dispute that the remedy here is specific relief, and that specific relief is not subject to mitigation. Given the Government's failure to dispute this dispositive issue, certiorari is warranted in this case with enormous consequences for the healthcare system and for countless other statutory payment requirements.

For this and other reasons, the Court should reject the Government's suggestion (BIO 2) that, if the petition in No. 20-1162 is granted, the instant petition should be held pending resolution of No. 20-1162. Common Ground represents an opt-in class of 101 plaintiffs, as compared to the two individual plaintiffs

in No. 20-1162. The Common Ground class, which filed the first and largest Tucker Act case in the nation challenging the failure to make cost-sharing reduction payments, thus has a far greater interest in this litigation than do the plaintiffs in No. 20-1162. Moreover, the petitioners in No. 20-1162 do not press the specific-relief issue, and thus, if Common Ground's petition is held, that substantial, dispositive issue may remain outstanding. The proper course to avoid inefficient, piecemeal decisions is therefore to grant both petitions and consolidate them for briefing and argument, so that this Court can consider at the same time all of the issues concerning the same underlying Federal Circuit opinions.

Independent of the specific-relief issue, the Federal Circuit's decision warrants this Court's review because it applies common-law mitigation to reduce payments that the Government "shall make," in conflict with *Maine Community* and other precedents. The Government argues that *Maine Community* did not address mitigation, but it did address whether the statutory payment obligation could be reduced. This Court held that, absent any statutory indication to the contrary, no such reduction is permissible. Here, there is no statutory indication of an intent to allow reduction based on mitigation. The Government suggests that contract-law principles generally are incorporated into statutory payment provisions, but the Government disregards the many circuit court opinions to the contrary. The Government also relies on *Barnes v. Gorman*, 536 U.S. 181 (2002), but ignores that *Barnes* stated that not all contract-law doctrines apply to statutory payment requirements. The doctrine *Barnes* did apply—barring punitive damages—simply reinforced that the payment could not go beyond what the statute required. *Barnes* does not remotely suggest

that contract-law principles can *change* what the statute requires. And that is exactly what is happening here: An unequivocal statutory mandate to pay set amounts has become a nullity, which is the exact proposition that this Court rejected in *Maine Community*.

Similarly, the Government errs in asserting that the mitigation doctrine applies to an absolute promise to pay. The Government again disregards this Court's precedent and the many circuit opinions that conflict with the Federal Circuit's lone view that mitigation applies in this context. The Government also disregards the consequences of its argument: massive uncertainty for parties considering working with the Government based on *ex post* justifications not permitted by the plain text of a statutory scheme.

Finally, the Government's arguments about the purported benefits of not making CSR payments confirms the importance of the issue and the need for this Court's review. The Government asserts that, due to silver-loading, CSR non-payment will end up costing the Government $194 billion *more* in other outlays over a decade, and that this increase is worthwhile because more people will be insured under the ACA. But whether or not the impact of the ruling below would be beneficial on balance, it conflicts with the express mandate of the ACA. Simply put, the Government has radically altered the ACA by defying its plain language because the Government prefers the consequences of that approach. This Court should grant certiorari.

ARGUMENT

I. THE GOVERNMENT FAILS TO CONFRONT THE CONFLICT BETWEEN THE FEDERAL CIRCUIT'S DECISION AND THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS

As Common Ground explained (Pet. 12-26), reducing the payments required by the ACA here based on a nonstatutory mitigation defense conflicts with well-established law interpreting as mandatory any statutory command that the government "shall make" a specified payment. It does so in three ways: (a) the claim is properly considered one for specific relief; (b) the damages are defined by the statute itself; and (c) mitigation does not apply to an absolute obligation to pay. The Government ignores the first point entirely, and its arguments on the second and third (raised in response to the petition in No. 20-1162) do not confront numerous precedents on point.

A. The Government Ignores That The Decision Below Conflicts With Precedents Establishing That Statutory Payment Requirements Give Rise To Claims For Specific Relief

The Government fails to respond at all to Common Ground's argument (Pet. 12-16) that the ACA creates both a right to the money at issue and a Tucker Act remedy for specific relief in the form of that same money. Where a plaintiff "is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses . . . suffered by virtue of the withholding of these funds," "the nature of the relief sought" is "specific relief, not relief in the form of damages." *Bowen v. Massachusetts*, 487 U.S.

879, 901 (1988) (quotation marks omitted). That is exactly the situation here: Common Ground seeks the funds to which it is statutorily entitled, which is specific relief.

As Common Ground explained (Pet. 8-9, 12-19), Common Ground raised this issue below, the Federal Circuit decided it, the issue is dispositive in this case, and the Federal Circuit's decision on this issue conflicts with *Maine Community*, *Bowen*, and the decisions of several circuit courts. The Government disputes none of these points, and the Government's refusal to defend the Federal Circuit's decision on this issue alone establishes the need for this Court's review given the undisputed importance of this case and the broader legal consequences for statutes requiring Government payments.

Moreover, while the Government addresses (No. 20-1162 BIO 21-23) *Maine Community*, the Government ignores the language in *Maine Community* relevant to the specific-relief issue. In particular, *Maine Community* held that the "remedy" for failure to pay amounts required by the ACA was "specific sums already calculated." 140 S. Ct. at 1331. It also held that the action was one to "collect payment." *Id.* A claim to "collect payment" of "specific sums already calculated"—in *Maine Community*, as here—is not a claim for compensation for the effects of a failure to pay. It is a claim for specific relief: payment by the Government of what it was and still is required to pay. The directive that the Government "shall make periodic and timely payments" of set amounts, 42 U.S.C. § 18071(c)(3)(A), means what it says: the Government "shall make" those payments—and Common Ground can bring a claim to require that those payments be made.

Thus, the specific-relief issue is a substantial one that warrants this Court's review. Because the petitioners in No. 20-1162 do not press this issue, it would be counterproductive to hold the instant petition for resolution of No. 20-1162, thereby potentially leaving open a dispositive issue to which the Government provides no response. Instead, the proper approach is to consolidate this petition with No. 20-1162 and grant both, so that the Court can resolve all of the legal issues presented here at the same time. The propriety of consolidation is especially clear here because, as discussed *supra* at 1-2, Common Ground represents a class that has a combined interest in this litigation that far exceeds the interests of the two individual plaintiffs in No. 20-1162.

B. The Government Disregards The Precedents Establishing That The Statute Rather Than Background Contract Law Defines The Remedy For Failure To Pay

The Government fails to provide support for the Federal Circuit's conclusion that background contract-law principles of mitigation apply to a statutory obligation to pay a set amount. As Common Ground explained (Pet. 23), several circuits have held explicitly that contract-law principles do not apply to statutory payment obligations. *See Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1194 (10th Cir. 2017); *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014); *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 406, 409 (4th Cir. 1985). The Government ignores these cases entirely and fails to dispel their conflict with the decision below.

In addition, the Government ignores the key language in *Maine Community* holding that the remedy for failure to pay is full payment. As this Court held: "a partial payment" does not "satisfy the Government's whole obligation," and the Government cannot "lessen its obligation" absent "any indication" in the statute that it can do so. 140 S. Ct. at 1321 (quotation marks omitted). The Government does not suggest that there is any such indication here—nor could the Government, given the unequivocal "shall make" language of section 1402.

Instead, the Government argues (No. 20-1162 BIO 22) that *Maine Community* did not address offset based on mitigation. That is true, but *Maine Community* held that the Government cannot reduce its obligation based on various circumstances, including the "balance of payments and receipts." 140 S. Ct. at 1321 n.6 (quotation marks omitted). Such impermissible reduction of its obligation is exactly what the Government seeks to do here.

The Government likewise errs in arguing (No. 20-1162 BIO 19-20) that *Maine Community* addressed only the Government's "duty" and that the statute here provides no "direction concerning remedies." *Maine Community* held that the ACA provides not only a right of action for "specific sums already calculated, past due," but also provides "that remedy." 140 S. Ct. at 1331. The same is true of section 1402, which contains language materially identical to the section 1342 language at issue in *Maine Community*. *See* Pet. 11.

More fundamentally, the Government fails to confront the simple and critical point that the statute defines the remedy, and mitigation is inconsistent with the statute. The supposed mitigation is based on

refundable tax credits, but those credits are required in addition to and in a separate statutory provision (26 U.S.C. § 36B) from the required CSR reimbursements (42 U.S.C. § 18071(c)(3)(A)). The ACA states that the Government "shall make" CSR payments *and* "shall" allow premium tax credits. Importing contract-law mitigation principles would mean that the Government only needs to do the latter. But background principles of contract law not mentioned in a statute cannot implicitly repeal part of that statute. And there is nothing in the ACA suggesting that premium tax credits affect CSR payments, let alone that an increase in the former reduces the latter. Rather, Congress defined the set amounts for CSR payments without any reference to premium tax credits. *See* 42 U.S.C. § 18071(c)(3)(A). Thus, the remedy here is just as clear as it was in *Maine Community*: full payments of "specific sums already calculated." 140 S. Ct. at 1331.

The cases cited by the Government (No. 20-1162 BIO 17-18) fail to support the Federal Circuit's holding. The Government relies on *Barnes v. Gorman*, 536 U.S. 181 (2002), and Court of Federal Claims back pay cases, asserting (No. 20-1162 BIO 20) that petitioners do not address them. But Common Ground *did* address them (Pet. 21-22). As Common Ground explained, *Barnes* was "careful not to imply that *all* contract-law rules apply to Spending Clause legislation," 536 U.S. at 186, and applied them only in denying punitive damages for a statutory violation. The issue in *Barnes* concerned only whether a remedy could go *beyond* what the statute required to be paid, not whether contract law could imply a limitation on a remedy seeking only the payment that the statute requires. Moreover, the back pay cases are limited to the unique situation of military back pay and disclaim

that they are applying general mitigation principles. Pet. 20-21 n.2 (citing *Craft v. United States*, 589 F.2d 1057, 1068 (Ct. Cl. 1978)). For the Back Pay Act that the Government cites (No. 20-1162 BIO 12) and many other statutes, Congress expressly allowed for reduction of damages based on mitigation. *See, e.g.*, 5 U.S.C. § 5596(b)(1); 42 U.S.C. § 2000e-5(g)(1). Congress included no such provision here, and there is no precedent in support of inserting such a provision by judicial fiat.

C. The Government Disregards The Precedents Establishing That Mitigation Does Not Apply To An Unrestricted Payment Obligation

The Government once again does not address the precedents from this Court and several circuits holding that the principle of mitigation does not reduce damages for breach of an absolute obligation to pay. *See* Pet. 24-25 (citing *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867); *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 560 (7th Cir. 1985); *McBride v. Mkt. St. Mortg.*, 381 F. App'x 758, 773 n.21 (10th Cir. 2010); *Rice's Lucky Clover Honey, LLC v. Hawley*, 700 F. App'x 852, 863 (10th Cir. 2017); *Branch Banking & Tr. Co. v. Lichty Bros. Constr.*, 488 F. App'x 430, 434 (11th Cir. 2012); *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1113-14 (8th Cir. 2002)). And the Government does not dispute that it has an absolute obligation to pay under the plain text of section 1402. These cases are therefore directly on point.

The Government argues (No. 20-1162 BIO 25) that insurers have a "freestanding obligation" to reduce cost sharing regardless of whether the Government makes CSR payments, but this argument is irrelevant. The Government equally has a statutory obligation to

make CSR payments. The question is whether if (as the Government contends) CSR payments are treated in the nature of a contract, mitigation applies to the remedy for failure to pay. The circuits uniformly hold that the answer is "no." The Federal Circuit's outlier opinion to the contrary warrants this Court's review.[1]

Finally, to the extent that the Government suggests (No. 20-1162 BIO 25) that the petitioners in No. 20-1162 did not raise this issue in precisely this way in the Federal Circuit, that only further supports granting the petition here rather than holding it for No. 20-1162. Common Ground did raise this issue in precisely these terms in the Federal Circuit. *See* No. 2019-1633 (Fed. Cir.), Dkt. 64 at 21-22; No. 20-1286 (Fed. Cir.), Dkt. 18 at 13-14. And the Government concedes (BIO 4) that Common Ground preserved all arguments when it and the Government agreed to entry of judgment in the Federal Circuit. Thus, to the extent there is any concern about preservation in No. 20-1162, there is none here.

II. THE GOVERNMENT DOES NOT DISPUTE, AND ITS ARGUMENTS CONFIRM, THE EXTRAORDINARY IMPORTANCE OF THIS CASE

The Government does not dispute the importance of the legal issues here, given the countless statutes involving government payments, the outsized role of the Federal Circuit as the appeals court for the Court

[1] Moreover, contrary to the Government's suggestion (No. 20-1162 BIO 26), there is no sense in which Plaintiffs have "stopp[ed] performance." Rather, they have reduced cost sharing as the statute requires, and there is no allegation or evidence to the contrary.

of Federal Claims, and the troubling consequences of a rule whereby the Government is incentivized to forgo payment of the amount required by statute.

The Government's recitation of the facts only confirms the importance of this case to the Nation's healthcare system. The Government sets forth (No. 20-1162 BIO 5) the enormous effects of its refusal to make CSR payments: "federal payments to insurers would increase by $194 billion over a decade." According to the Government (*id.* 5-6), this extra $194 billion in federal outlays would be a good thing because it could make certain insurance plans more affordable, and thus more people could be insured in the ACA marketplace. However, the Government provides no analysis of whether or to what extent silver-loading would decrease and this supposed benefit would go away if the Government simply made CSR payments as the statute requires. The Government also recognizes (*id.* 6-7) that some silver-plan enrollees who are not eligible for premium tax credits may be worse off under this CSR non-payment regime.

Most important, regardless of whether the Government considers a CSR non-payment system good or bad on balance, the bottom line is that this is not the system that Congress approved in the ACA. Congress stated that the Government "shall make" CSR payments, not that it can refuse to make those payments and instead pay $194 billion more through a different mechanism. This Court should decide whether the Government can make this monumental change in conflict with the plain text of the ACA.

CONCLUSION

The Court should grant the petition for certiorari and consolidate it for briefing and argument with the petition for certiorari in No. 20-1162.

Respectfully submitted,

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