NO. 20-1432

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Cross-Petitioner,
v.
MAINE COMMUNITY HEALTH OPTIONS,
Cross-Respondent.

UNITED STATES OF AMERICA,
Cross-Petitioner,
v.
COMMUNITY HEALTH CHOICE, INC.,
Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Just this past Term, this Court held in *Maine Community Health Options v. United States*, 140 S.Ct. 1308 (2020), that the government was obligated to make the risk corridor payments required by the unambiguous shall-pay command of §1342 of the Patient Protection and Affordable Care Act ("ACA"), and that insurers who performed in full could bring suit in the Court of Federal Claims to recover the amounts that the government "shall pay." In the decision below, the Federal Circuit recognized that under *Maine Community*, the government must make the cost-sharing reduction payments required by the equally unambiguous shall-pay language of §1402 of the ACA, and insurers could sue in the Court of Federal Claims to recover those payments. But it then held, based on a purported "analogy to contract law," that the remedy for the breach of the government's statutory shall-pay obligation is not an order to pay the statutory shall-pay amount, but only a far smaller amount (in the government's view, perhaps even zero) that discounts the specific sums the government promised to pay to account for premium increases and related tax credits prompted by the government's breach. Petitioners in No. 20-1162, cross-respondents here, seek review of that latter holding.

The government has now filed a conditional cross-petition presenting the following question:

Whether, as this Court held in *Maine Community* and the Federal Circuit recognized below, an insurer that has performed in full has a Tucker Act remedy to recover payments that the unambiguous shall-pay language of the ACA explicitly mandates but the government has nevertheless refused to make.

CORPORATE DISCLOSURE STATEMENT

Cross-respondents Maine Community Health Options and Community Health Choice, Inc. have no parent corporations, and no publicly held company owns 10% or more of either cross-respondent's stock.

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INTRODUCTION

Barely a year ago, this Court in *Maine Community* squarely rejected an attempt by the federal government to evade its unambiguous statutory shall-pay obligations under §1342 of the Affordable Care Act. The Court held that where an explicit money-mandating statute requires the government to pay an insurer who has performed in full a specific amount, the failure of Congress to appropriate sufficient funds to fulfill the government's obligations does not make its obligations disappear. Instead, the insurer can sue the government under the Tucker Act in the Court of Federal Claims to recover the statutorily mandated but unpaid amount.

The Federal Circuit panel below correctly recognized that *Maine Community* doomed the government's no-appropriations-no-obligation defense here and compelled the conclusion that insurers can sue the government for unpaid cost-sharing reduction payments owed under the unambiguous and mandatory text of §1402 of the ACA. But the panel then lost the thread and sharply departed from *Maine Community*'s straightforward teachings, relying on a purported "analogy to contract law" to reduce the government's obligations based on a novel "mitigation" theory with no support in either the statutory text or any common-law precedent. That damages holding not only is profoundly flawed, but threatens serious consequences for the American health insurance market and for the government's credibility as a reliable contracting partner. For the reasons explained by the petitioners in No. 20-1162 (cross-respondents here) and numerous amici, this

Court should review and reverse that misguided and dangerous damages holding.

The government's conditional cross-petition, by contrast, asks this Court to review an aspect of the Federal Circuit's decision that *was* faithful to *Maine Community*: its holding that insurers can sue the government under the Tucker Act to recover the unpaid cost-sharing reduction amounts that §1402 unambiguously mandates. There is no reason to grant that request. As the Federal Circuit explained in detail, *Maine Community* makes inescapably clear that petitioners are entitled to bring suit under the Tucker Act, as there is no plausible basis for distinguishing the unambiguous shall-pay mandate of §1402 from the unambiguous shall-pay mandate that supported a Tucker Act suit in *Maine Community*.

Remarkably, the government does not really dispute that the Federal Circuit correctly applied the *Maine Community* framework, or even claim that the court's holding on liability was necessarily wrong. Instead, the government's liability argument is as conditional as its cross-petition: it argues that the Federal Circuit's liability holding would *become* "infirm" *only in the event* its damages holding were reversed. Put differently, if the government really must honor its shall-pay obligation *in full*, then the obligation itself disappears. But nothing in *Maine Community* (or anything else) supports that curious tail-wagging argument. Neither the absence of appropriated funds nor the extent of the government's statutory shall-pay obligations takes the government off the hook when it makes a clear promise to pay for performance and its counterparty performs in full.

Indeed, if this curious theory were viable, it would have applied equally in *Maine Community*. On the contrary, this Court explicitly rejected precisely that kind of results-oriented reasoning. Accordingly, while the government's cross-petition underscores the magnitude and practical import of the Federal Circuit's mistaken damages holding and the need for further review on that issue, it provides no basis for revisiting a liability finding that follows ineluctably from *Maine Community*.

STATEMENT OF THE CASE

A. Factual and Statutory Background

1. The ACA aimed to extend affordable health insurance to millions of uninsured and underinsured Americans. To that end, the ACA established new "health benefit exchanges" on which individuals and small groups could purchase "qualified health plans" from participating insurers. 42 U.S.C. §18031(b)(1). These exchanges are intended to provide uninsured or underinsured individuals with ready access to health insurance plans that will provide them with adequate healthcare coverage at affordable prices.

To ensure adequate coverage, the ACA requires qualified health plans offered on the exchanges to provide a minimum level of "essential health benefits." *See* 42 U.S.C. §18022(b). The ACA defines four level of coverage—bronze, silver, gold, and platinum—based on the percentage of the cost of essential health benefits that the insurer pays under each plan. *Id.* §18022(d)(1); *see* Pet.App.3.[1] Under a bronze plan, the

[1] "Pet." refers to the petition in No. 20-1162. "Pet.App." refers to the petition appendix in No. 20-1162. "U.S.Pet." refers to the

insurer pays 60% of the full actuarial value of the healthcare benefits covered under the plan (and the insured person is responsible for the other 40%); under a silver plan, the insurer pays 70%; under a gold plan, the insurer pays 80%; and under a platinum plan, the insurer pays 90%. 42 U.S.C. §18022(d)(1); *see* Pet.App.3.

2. The ACA includes several provisions designed to reduce the costs of healthcare coverage for individuals buying insurance on the exchanges. This Court already confronted one of those provisions, the risk-corridors payments set forth in §1342 of the ACA, in *Maine Community*. This case involves another, the cost-sharing reduction provision in §1402, codified at 42 U.S.C. §18071. Unlike the temporary risk-corridor payments in §1342, which applied only in the first three years of the exchanges, the cost-sharing provisions of §1402 are a permanent feature of the ACA. Section 1402 seeks to reduce the cost of medical care for eligible insured individuals by reducing their "cost-sharing" payments—out-of-pocket costs such as "deductibles, coinsurance, copayments, or similar charges." *Id.* §18022(c)(3)(A). To that end, §1402 requires insurers to reduce cost-sharing payments for eligible individuals insured under ACA silver plans, and commits the government to reimburse insurers for those reductions. *See id.* §18071.

Specifically, §1402 requires insurers to reduce the cost-sharing payments owed by "eligible insureds," defined as any person whose household income is

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government's conditional cross-petition here, and "U.S.Opp." refers to the government's brief in opposition in No. 20-1162.

between 100% and 400% of the poverty line and who is enrolled in a silver-level qualified health plan. *Id.* §18071(b). The Secretary "shall notify" the insurer of each eligible insured covered by that insurer, at which point the insurer "shall reduce" the cost-sharing obligations for that insured based on the insured's household income level. *Id.* §18071(a), (c). Depending on the insured's income level, those reductions require the insurer to cover up to 94% of the insured's costs (as opposed to 70% for a silver plan without cost-sharing reductions). *Id.* §18071(c)(1)(B), (c)(2).

Critically, while §1402 unambiguously requires insurers to make those reductions, it does not leave the resulting financial burden on the insurers. Instead, §1402 provides in unambiguously mandatory language that the Secretary "shall make periodic and timely payments to the [insurer] equal to the value of the reductions." *Id.* §18071(c)(3)(A). As the government recognizes, that language unambiguously "direct[s] the government to make advance payments to insurers equal to the amount of those mandated cost-sharing reductions (CSR payments)." U.S.Pet.3; *see Sanford Health Plan v. United States*, 969 F.3d 1370, 1373 (Fed. Cir. 2020).

3. The ACA also includes a separate "premium tax credit" provision—§1401, codified at 26 U.S.C. §36B—that aims to lower the premiums that low-income individuals must pay to obtain coverage on the exchanges, by providing a federal subsidy for those premiums in the form of a refundable tax credit. *See* Pet.App.4; *Sanford*, 969 F.3d at 1374.

Section 1401 defines an "applicable taxpayer" eligible for a premium tax credit as any taxpayer

whose household income is between 100% and 400% of the poverty line, the same thresholds used to define an "eligible insured" under §1402. *Compare* 26 U.S.C. §36B(c)(1), *with* 42 U.S.C. §18071(b)(2). But unlike the cost-sharing reductions in §1402, which are available only to persons who purchase silver plans, the premium tax credit is available to any eligible taxpayer who purchases any qualified health plan on an ACA exchange, whether bronze, silver, gold or platinum. *Compare* 26 U.S.C. §36B(c)(1), *with* 42 U.S.C. §18071(b)(1); *see Sanford*, 969 F.3d at 1374-75. The amount of each taxpayer's premium tax credit is set by a statutory formula that depends on (1) the taxpayer's household income and (2) the premiums for the second-lowest-cost silver plan offered on the taxpayer's local ACA exchange, regardless of whether the taxpayer actually enrolls in that plan. 26 U.S.C. §36B(b)(2)(B), (3); *see Sanford*, 969 F.3d at 1375.

The government pays these tax credits directly to insurers, who apply the payments toward the insured's monthly premiums, so that "the amount of the premiums charged by the insurers to the insured is effectively reduced," and the amount the insured pays in premiums is, in fact, reduced. Pet.App.4; *see* 26 U.S.C. §36B(f); 42 U.S.C. §18082(a)(3). The payment formula ensures that an insurer cannot simply pocket the amount of the premium tax credit payments itself by increasing its own premiums an equivalent amount, because, *inter alia*, the payments are keyed to the premiums for the second-lowest-cost silver plan in the market, not what the insurer actually charges. Moreover, while both §1401 and §1402 are tied (in different ways) to silver plans, nothing in either section provides for adjustments in

the amount of §1402 reimbursements to account for §1401 tax credits or vice-versa. There is one final difference between the cost-sharing reimbursements mandated by §1402 and the tax credits authorized by §1401: while the reimbursements at least arguably required annual appropriations, the tax credits were subject to permanent appropriations. *See* Pet.App.7.

4. The first open enrollment period on the exchanges began in October 2013, allowing customers to purchase health coverage for the 2014 calendar year. In January 2014, as soon as coverage was first provided via the exchanges, insurers were obligated to make cost-sharing reductions for eligible insureds, and the government began making its own cost-sharing reduction reimbursement payments to insurers as required by §1402 and its implementing regulations. *See Sanford*, 969 F.3d at 1377. The government likewise provided the requisite premium tax credit payments to the insurers under §1401. The government continued to make those payments for the next three and a half years. *Id.*

In October 2017, however, the Secretary unilaterally "announced that the government would cease payment of cost-sharing reduction reimbursements," asserting (contrary to HHS's position for the previous three and a half years) that it was under no binding obligation to make the payments because Congress had failed to appropriate funds to make them. Pet.App.6; *see Sanford*, 969 F.3d at 1377. That announcement, three-quarters of the way through the 2017 plan year, did nothing to relieve insurers of their obligation under §1402 to continue offering cost-sharing reductions to their eligible silver-

plan customers during the rest of the 2017 plan year or subsequent plan years. Pet.App.6; *see* 42 U.S.C. §18071(a), (c). Instead, it left the insurers with a non-negotiable obligation to provide cost-sharing reductions while the federal government reneged on its statutory obligation to reimburse those costs.

The situation continued in subsequent years, with insurers statutorily obligated to provide cost-sharing reductions and the government refusing to honor its obligation to reimburse those reductions, despite an unambiguous statutory command to do so, on the simple ground that the funds had not been appropriated. Put differently, the insurers continued to perform their statutory obligations in full, while the government's arrears mounted. *See CHC* C.A.Dkt.16 at 13 (admitting to "approximately $433 million in unmade cost-sharing payments during the last quarter of 2017 and approximately $6.7 billion in unmade advance cost-sharing payments during the 2018 calendar year").

In light of the government's failure to meet its unambiguous obligations under §1402, many insurers sought permission from state regulators to increase their premiums for 2018 (and subsequent years)—which some, but not all, states permitted. Pet.App.7-8. In states where regulators approved premium increases, those increases unsurprisingly fell most heavily on silver plans—*i.e.*, the plans for which insurers remained statutorily obligated to provide cost-sharing reductions on an ongoing basis despite the government's refusal to honor its end of the bargain. *Id.*; 42 U.S.C. §18071(b)(1). Those premium increases applied not only to individuals who bought

and paid for their own insurance through an exchange without government assistance, but also to some individuals who were eligible for premium tax credits under §1401. Because those tax credits are calculated based on premiums for the second-lowest-cost silver plan in the market (not each insurer's own premiums), any state-approved increase in an insurer's premiums did not necessarily result in a corresponding increase in the premium tax credit payments it received under §1401. *See supra* p.6. Nevertheless, many insurers did receive some additional payments under §1401 as a result of the state-approved premium increases. Pet.App.7-8.

B. Proceedings Below

1. Cross-respondents Maine Community Health Options and Community Health Choice, Inc. ("CHC") are health insurance providers that sell qualified health plans on ACA exchanges in Maine and Texas, respectively. Pet.App.8. As required by §1402, both cross-respondents provided cost-sharing reductions to eligible insureds on their silver-level plans. Pet.App.9. But while cross-respondents extended their insureds the cost reductions required by §1402, the government has not upheld its end of the bargain. Like all other insurers, cross-respondents have not received a penny in cost-sharing reduction payments from the federal government since October 2017, leaving them saddled with tens of millions of dollars in unreimbursed costs.

Cross-respondents had little choice but to file suit against the United States in the Court of Federal Claims seeking to recover the cost-sharing reduction reimbursements they were owed under §1402.

Pet.App.9. In lengthy and detailed opinions, the Court of Federal Claims (Sweeney, J.) ruled for cross-respondents, holding that the government could not renege on its statutory commitment to reimburse insurers for their cost-sharing reductions after cross-respondents had performed in full, and that cross-respondents had a clear right to sue the government in the Court of Federal Claims for the payments that the government unambiguously owed. Pet.App.60-78, 82-93; 116-48. The court squarely rejected the government's primary argument that it had no obligation to make payments under §1402 unless and until Congress appropriated funds for those payments, explaining that the government's unambiguous statutory commitment in §1402 was not conditioned on future appropriations. Pet.App.60-71; 116-28.

The court likewise rejected the government's convoluted effort to demonstrate that Congress "did not intend to provide a statutory damages remedy for the government's failure to make the cost-sharing reduction payments." Pet.App.66, 123. According to the government, because insurers theoretically could recoup their losses by securing state approval for increases in the premiums they charged all their customers in future years, and could obtain increased premium tax credit payments under §1401 for a subset of those customers, Congress must have affirmatively wanted insurers to raise their premiums in that fashion, rather than sue the government, in the event the government decided to bilk them. Pet.App.66-67, 77-78; 123-24, 134. The court was wholly unpersuaded by that theory, noting that the government could not identify "any statutory

provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligation," or even any evidence in the ACA's legislative history suggesting that Congress intended to force insurers to seek premium increases from state regulators if the government reneged on Congress' promises, let alone that the possibility of such premium increases eliminated other remedies. Pet.App.66, 125. Notably, the government did *not* argue that any increase in payments under §1401 should reduce an insurer's damages under some kind of mitigation theory if insurers *were* entitled to sue; it argued only that insurers should not be able to sue the government *at all* for violating §1402. *See* Pet.App.66, 93 n.23, 123-24, 147 n.25.

Four other cases were brought before the Court of Federal Claims by various insurers seeking to recover unpaid cost-sharing payments under §1402, including a class action involving more than 100 insurers and seeking some $1.5 billion in unpaid 2018 payments. Those four cases were assigned to three different judges (including Judge Sweeney), all of whom issued detailed opinions unanimously agreeing that the government is liable for the full amount of its unmet cost-sharing obligations and that insurers could sue the government for those unpaid amounts in the Court of Federal Claims. *See Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38 (2019) (Sweeney, J.); *Local Initiative Health Auth. for L.A. Cnty. v. United States*, 142 Fed. Cl. 1 (2019) (Wheeler, J.); *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018) (Kaplan, J.); *Mont. Health Co-op v. United States*, 139 Fed. Cl. 213 (2018) (Kaplan, J.).

2. The government appealed in each case. While those appeals were pending, this Court decided *Maine Community*. In *Maine Community*, the Court considered the government's refusal to make statutorily required payments to insurers under the risk corridors program in ACA §1342. In §1342, Congress provided that the Secretary of HHS "shall pay" insurers a portion of any losses above a certain threshold that insurers incurred on the exchanges in their first three years of operation. 140 S.Ct. at 1316. But when those payments came due, the government refused to make them, arguing that it had no obligation to pay because Congress had failed to appropriate the necessary funds and that in any event Congress did not intend to allow insurers to sue for damages to recover those payments. *Id.* at 1319-31.

This Court rejected both arguments. It held that the unambiguous shall-pay language of §1342 "created an obligation neither contingent on nor limited by the availability of appropriations," and that Congress did not repeal that government obligation by failing to appropriate money to pay it. *Id.* at 1319-27. Put simply, "the statute meant what it said: The Government 'shall pay' the sum that §1342 prescribes." *Id.* at 1321.

The Court also held that the insurers could sue the government for that sum in the Court of Federal Claims. *Id.* at 1327-31. By instructing that the government "shall pay" the amount specified by the statutory formula, §1342 "falls comfortably within the class of moneymandating statutes that permit recovery of money damages in the Court of Federal Claims." *Id.* at 1329. Indeed, the Court found the

insurers' suit for "specific sums already calculated, past due, and designed to compensate for completed labors" to be "in the Tucker Act's heartland." *Id.* at 1330-31. Neither the ACA nor the Administrative Procedure Act ("APA") provided any alternative judicial remedy, and thus a Tucker Act remedy was plainly appropriate. Simply put, the statutory shall-pay obligation gave rise to an equally clear shall-pay remedy under the Tucker Act.

3. In light of *Maine Community*, the government abandoned its argument that Congress' failure to appropriate funds eliminated the government's cost-sharing obligations under §1402. However, the government continued to maintain that insurers had no right to sue the government in the Court of Federal Claims for the amounts it had refused to pay. In addition, the government argued for the first time on appeal that cross-respondents had "mitigated" their damages by raising their premiums after the government stopped making cost-sharing payments, and that any additional premium tax credit payments cross-respondents received under §1401 should be deducted from the amount the government owed under §1402—meaning, according to the government, that it owed cross-respondents nothing at all for the 2018 plan year. *CHC* C.A.Dkt.56.

4. The Federal Circuit unanimously rejected the government's liability arguments in *Sanford*, finding those arguments squarely foreclosed by this Court's decision in *Maine Community*. 969 F.3d at 1372-73. As the panel explained, *Maine Community* "makes clear that the cost-sharing-reduction reimbursement provision" of §1402 "imposes an unambiguous

obligation on the government to pay money," and that the resulting mandatory obligation "is enforceable through a damages action in the Court of Federal Claims under the Tucker Act." *Id.*

In the decision below, the same Federal Circuit panel affirmed as to liability but reversed and remanded as to damages. Pet.App.2. As in *Sanford*, the panel agreed with the Court of Federal Claims that §1402 "imposes an unambiguous obligation on the government" to make cost-sharing reduction payments. Pet.App.11; *see Sanford*, 969 F.3d at 1372-73, 1381. It likewise agreed that because §1402 is money-mandating, cross-respondents could enforce that unambiguous obligation by suing the government for damages under the Tucker Act. Pet.App.11; *see Sanford*, 969 F.3d at 1381-83. And it agreed that for 2017—the first year in which the government failed to make those payments—the government owed cross-respondents the full amount Congress had promised but HHS had failed to pay. Pet.App.11-12.

As to the cost-sharing reduction payments the government owed for 2018, however, the panel reached a very different result. Rather than requiring the government to make the full payments Congress mandated, the panel held that the government could reduce the payments it owed for 2018 by claiming "mitigation" based on "an analogy to contract law." Pet.App.12-13. In the panel's view, insurers had "mitigated the effects of the government's breach" by increasing their premiums, which in turn led some insurers to receive "additional premium tax credits" under §1401. Pet.App.23. Accordingly, the panel held that the Court of Federal Claims should have reduced

the amount that the government owed under the unambiguous terms of §1402 by the amount of those additional premium tax credits. Pet.App.29. The panel remanded for the Court of Federal Claims to undertake the "fact-intensive task" of determining "the amount of premium increases (and resultant premium tax credits) attributable to the government's failure to make cost-sharing reduction payments." Pet.App.30.

REASONS FOR DENYING THE CROSS-PETITION

The Federal Circuit's decision below is deeply flawed—but not in the way the government thinks. As cross-respondents have explained in their petition for certiorari in No. 20-1162, the Federal Circuit's damages holding cannot be reconciled with this Court's clear teachings in *Maine Community* that the government must honor its statutory shall-pay obligations, and that the government is liable for the full amount of those obligations if it disregards them. Pet.21-26. The Federal Circuit's contrary holding has no basis in the statutory text or any recognized common-law doctrine and would destroy the government's credibility as a contracting partner. Pet.26-36.

The liability holding that the government challenges in this conditional cross-petition, by contrast, follows directly from *Maine Community* and is one thing that the decision below plainly got right. As the Federal Circuit explained in detail in *Sanford*, that holding—that insurers have a valid Tucker Act remedy in the Court of Federal Claims to recover the unpaid cost-sharing reduction payments that §1402

unambiguously obligates the government to make—is compelled by both statutory text and *Maine Community*. *Maine Community* makes clear that an unambiguous money-mandating statute provides a Tucker Act claim unless either the statute itself or the APA provides an alternative judicial remedy. As the Federal Circuit carefully explained in *Sanford*, §1402 is indisputably money-mandating, and neither it nor the APA provides any alternative judicial remedy to displace the Tucker Act. That should be the end of the matter.

The government notably does not address *any part* of the test this Court set forth in *Maine Community* or contend that either the ACA or APA provides an alternative judicial remedy. Indeed, the government does not even argue that the Federal Circuit necessarily erred in allowing a Tucker Act suit. Its argument is every bit as contingent as its cross-petition: It argues only that *if* this Court were to reverse on damages (and hold that the government must pay the full amounts that §1402 unambiguously requires), then the Federal Circuit's holding that a Tucker Act is available would somehow become "infirm." U.S.Pet.13. In other words, the government thinks that if it really must honor its full shall-pay obligation, then Congress could not have intended to allow a Tucker Act suit at all. That too-big-to-sue argument is the epitome of the "results-oriented reasoning" this Court rejected in *Maine Community*. 140 S.Ct. at 1331 n.14. It also defies common sense: what the Congress that enacted the ACA intended was for insurers to make the mandatory cost reductions and for the government to hold up its end of the bargain. If a later Congress frustrated that intent by

failing to uphold its end of the bargain, then the government's obligation does not disappear and the proper remedy is a Tucker Act action. That is the clear teaching of *Maine Community* and what the Federal Circuit held in *Sanford*.

Instead of that straightforward result, the government claims that, had Congress anticipated that the government would breach its unambiguous §1402 obligations, what Congress *really* would have wanted insurers to do is not to sue to obtain monetary relief (which would incentivize the government to comply with its §1402 obligations) but to instead seek state approval to start charging *everyone* more for insurance, so that they could obtain additional premium tax credits under §1401 for a subset of their customers (and in the process create a permanent work-around that would obviate the need for the government ever to honor its §1402 obligations). The notion that insurers' only remedy for the government's default would be to seek state approval to increase their premiums in ways that would render the expressly mandatory language of §1402 effectively elective would be bizarre enough in any context. That Congress would intend that premium-increasing result in enacting the *Affordable* Care Act "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).

Finally, the government's unabashedly policy-driven arguments are not only legally misplaced but factually unfounded, as there is no prospect of any "double recovery" should this Court hold the government to the full extent of its statutory shall-pay obligation. Accordingly, while the conceded

magnitude of the government's breach underscores the need for this Court to review and reverse the Federal Circuit's erroneous damages holding, it provides no basis to revisit that court's manifestly correct conclusion that insurers can bring Tucker Act suits in the Court of Federal Claims to recover the unpaid cost-sharing reduction payments that §1402 unambiguously requires.

I. The Government's Question Presented Is Squarely Resolved By *Maine Community*.

Maine Community squarely forecloses any argument that insurers cannot sue in the Court of Federal Claims for payments that are explicitly required by the unambiguous money-mandating language of §1402. The government's desire to relitigate that aspect of *Maine Community* hardly justifies granting review on an issue that this Court conclusively resolved just last Term.

1. In *Maine Community*, the government raised the same basic argument it seeks to raise here: that even if the ACA expressly required the government to pay insurers specific amounts defined by statute, the insurers had no right to sue the government to recover those amounts. *See* U.S.Br.18-43, *Maine Cmty. Health Options v. United States*, No.18-1023 (U.S. filed Oct. 21, 2019). This Court flatly rejected that argument, holding that the insurers "properly relied on the Tucker Act to sue for damages in the Court of Federal Claims." *Maine Cmty.*, 140 S.Ct. at 1327. As the Court explained, a statutory provision with unambiguous mandatory language requiring that the government "shall pay" specified amounts creates "both a right and a remedy under the Tucker Act." *Id.*

at 1329. That rule has only "two exceptions": the normal Tucker Act remedy is displaced when (1) the money-mandating statute "contains its own judicial remedies," or (2) the APA provides an alternative avenue for relief. *Id.* (quoting *United States v. Bormes*, 568 U.S. 6, 12 (2012)). Under that straightforward test, the Court had no difficulty concluding that the explicit shall-pay language of §1342 authorized a Tucker Act suit to enforce its mandatory shall-pay obligation, and that neither the ACA nor the APA provided any alternative remedy that would supplant that remedy. *Id.* at 1328-31.

As the Federal Circuit correctly held, *Maine Community* inescapably requires the same result here. The mandatory language used in the two statutes "is indistinguishable." *Sanford*, 969 F.3d at 1381. Section 1342 required that the government "shall pay" the specified risk-corridor amounts; §1402 requires that the government "shall make … payments" equal to the specified cost-sharing reduction amounts. Indeed, if anything, the §1402 shall-pay obligation is even more unambiguously mandatory, because the government has no argument that its payment-out obligation is contingent on the amount of payments-in. Thus, the §1402 shall-pay obligation, no less than the §1342 shall-pay obligation, "'falls comfortably within the class of moneymandating statutes that permit recovery of money damages in the Court of Federal Claims.'" *Id.* (quoting *Maine Cmty.*, 140 S.Ct. at 1329).

Section 1402's unambiguously mandatory shall-pay language "is 'bolstered' here, as it was in *Maine Community*, by the character of the obligation as

'compensating insurers for past conduct.'" *Id.* (brackets omitted) (quoting *Maine Cmty.*, 140 S.Ct. at 1329). The amounts that §1402 ultimately requires the government to pay are *reimbursements* "for actual amounts already expended by insurers to carry out the cost-sharing reductions" that the ACA mandates. *Id.* Section 1402 thus reflects precisely the same kind of "backwards-looking formula to compensate insurers for losses incurred in providing healthcare coverage for the prior year" that this Court found supported a Tucker Act suit in *Maine Community*. 140 S.Ct. at 1329; *see Sanford*, 969 F.3d at 1381.

Just as in *Maine Community*, moreover, neither of the "two exceptions" that could foreclose a Tucker Act suit applies here. *Sanford*, 969 F.3d at 1381; *see Maine Cmty.*, 140 S.Ct. at 1328. The ACA does not contain a separate remedial scheme with "'its own judicial remedies'" for violations of either §1342 or §1402. *Sanford*, 969 F.3d at 1382 (quoting *Maine Cmty.*, 140 S.Ct. at 1329). And the APA likewise does not provide any alternative avenue for relief since, "as in *Maine Community*, the insurers here 'do not ask for prospective, nonmonetary relief to clarify future obligations; they seek specific sums already calculated, past due, and designed to compensate for completed labors.'" *Id.* (quoting *Maine Cmty.*, 140 S.Ct. at 1330-31).

Put simply, there is "no persuasive basis for distinguishing these cases from *Maine Community*." *Id.* at 1373. Here as in *Maine Community*, the government's refusal to honor its shall-pay obligation "is enforceable through a damages action in the Court

of Federal Claims under the Tucker Act." *Id.* at 1372-73; *see Maine Cmty.*, 140 S.Ct. at 1328-31; Pet.App.11.

2. The government nevertheless argues that a different result may be warranted here, at least if this Court rejects the Federal Circuit's misguided mitigation theory. Its argument entirely ignores the governing legal framework that this Court just reaffirmed and is plainly meritless.

Remarkably, the government does not address the straightforward analysis that this Court set out in *Maine Community* for determining whether a statute provides a cause of action under the Tucker Act. *See Sanford*, 969 F.3d at 1378; *Maine Cmty.*, 140 S.Ct. at 1328-31. It does not dispute that the shall-pay text of §1402 imposes an unambiguous money-mandating obligation and is "indistinguishable" from the near-identical shall-pay text in *Maine Community*. *Sanford*, 969 F.3d at 1381; *see Maine Cmty.*, 140 S.Ct. at 1328-29. Nor does it dispute that §1402 is "focus[ed] on compensating insurers for past conduct" and "uses a backwards-looking formula to compensate insurers for losses incurred in providing healthcare coverage for the prior year." *Maine Cmty.*, 140 S.Ct. at 1329; *see Sanford*, 969 F.3d at 1381. Nor does it dispute that neither of the "two exceptions" this Court recognized in *Maine Community* applies here. *Sanford*, 969 F.3d at 1380-82; *see Maine Cmty.*, 140 S.Ct. at 1328-30.

In fact, the government does not even argue that the Federal Circuit actually erred in concluding that the unambiguously mandatory language of §1402 authorizes a Tucker Act suit. Instead, the government offers only a contingent argument that the Federal Circuit's liability holding would somehow *become*

"infirm" *if* its separate damages holding were reversed. That unabashedly results-oriented position makes no sense. There is no precedent for the tail of damages to wag the dog of a Tucker Act remedy in this manner. The test this Court laid out in *Maine Community* for whether an unambiguous money-mandating statute authorizes a Tucker Act suit depends on the language of the statute and whether alternative judicial remedies are available, not on the magnitude of the government's breach or its resulting shall-pay obligations, such that Congress could not have envisioned a remedy for a truly consequential default. 140 S.Ct. at 1327-31. Indeed, it was in the context of the government's failure to make some twelve billion dollars in required payments, that this Court took pains to make explicit in *Maine Community* that its "analysis in Tucker Act cases has never revolved on such results-oriented reasoning." *Id.* at 1331 n.14.

The government nevertheless presses on with its "marked departure from the *Maine Community* analysis," *Sanford*, 969 F.3d at 1382, arguing for a freewheeling and atextual inquiry into whether "Congress intended to allow insurers to recover" under the Tucker Act. U.S.Pet.19. But the question of Congress' intent is answered by the statutory text: When Congress passes an unambiguous shall-pay statute "mandating compensation by the Federal Government," it intends the government to uphold its end of the bargain. When the government does not, and neither the statute itself nor the APA provides an alternative judicial remedy, that statutory shall-pay command authorizes a Tucker Act suit. *Maine Cmty.*, 140 S.Ct. at 1328. Here as in *Maine Community*, no

further nebulous inquiry into what Congress might have intended had it anticipated that the Executive Branch would ignore its commands is either necessary or appropriate.

In any event, the government's intent-based arguments are wholly unpersuasive even on their own terms. To be clear, the government does not suggest that cross-respondents have some alternative *judicial* remedy under the ACA or APA. The government's claim is not that cross-respondents are in the wrong court or have opted for the wrong cause of action. The government's far more extraordinary claim is that Congress silently intended to foreclose any judicial remedy and force defaulted insurers to engage in a convoluted self-help regimen that requires the cooperation of state regulators, increased premiums for a wide range of innocent insureds, and the artificial expansion of tax credits. Specifically, the government contends that Congress must have intended *§1401* to displace the usual Tucker Act remedy for the government's breach of its mandatory obligations under *§1402*, on the theory that "insurers' loss of cost-sharing reduction reimbursements could cause the insurers to secure (from state regulators) permission to raise premiums, and that such higher premiums would lead to higher premium tax credits under [§1401], offsetting the loss of the cost-sharing reduction payment [under §1402]." *Sanford*, 969 F.3d at 1382; *see* U.S.Pet.19 (calling this sequence "the predictable (and predicted) effect of the [government's] failure to make direct CSR payments").

That argument is truly extraordinary. The remedial scheme that the government envisions—that

to remedy the government's default, Congress would want insurers to *raise* some premiums (which is exactly what the *Affordable* Care Act was meant to *prevent*) to a large group of insureds so that a subset would obtain some additional premium tax credits payable to the insureds under §1401—would make Rube Goldberg proud. The notion that this sequence of events is "so self-evident and so reliable" that Congress plainly must have intended it to displace the normal Tucker Act remedy across the board, *Sanford*, 969 F.3d at 1382—even for insurers who *never actually received* any additional premium tax credits—strains credulity.

What is more, the government's proposed just-raise-your-rates remedy wreaks significant collateral damage that Congress could not have intended. Many insurance customers are partly or wholly ineligible for premium tax credits; for them, rate hikes just increase—sometimes dramatically—the amount they have to pay out of pocket for insurance. Moreover, not every insurer's pool of customers is the same; some insurers have a higher proportion of CSR-eligible customers than their competition because they specialize in serving lower-income populations. Perversely, the government's proposed "remedy" would penalize these insurers, who would be forced to raise their rates more than the competition. It is not plausible that Congress intended these outcomes under a law that was meant to incentivize insurers to make health care *more* affordable.

The notion that the insurers' sole remedy for the government's default of its §1402 shall-pay obligations would be to seek state permission to raise premiums

in hopes of collecting additional tax credits under §1401 suffers from an even deeper flaw. Far from remedying the government's §1402 violation, such a "remedial" scheme would lock in the §1402 violation in perpetuity. If the answer to a government default under §1402 is that insurers must seek and obtain permission to raise premiums to artificially generate additional tax credits under §1401, then the government need never come into compliance with §1402. It can continue to default on its §1402 shall-pay obligations in perpetuity confident in the knowledge that insurers and state regulators will understand that they are to seek recompense through inflated §1401 tax credits. This is no hypothetical. The government last made a statutorily required §1402 payment in 2017, and it has announced no plans to come into compliance any time soon. And if its "remedial" argument is correct, it never will. The notion that Congress would intend that the sole remedy for a violation of a clear shall-pay obligation would be to effectively eliminate the need to comply with that obligation in perpetuity blinks reality.

At a bare minimum, if Congress had in fact intended §1401 to serve as a remarkably roundabout and incomplete but nevertheless exclusive remedy for any breach of the government's mandatory obligations under §1402, one would expect Congress to have at least mentioned that fact—and given insurers the opportunity to weigh that unsatisfactory remedy in deciding whether to offer plans with cost-sharing reductions on the ACA exchanges. Instead, as the government apparently concedes, nothing in the statutory text or even the legislative history remotely suggests that Congress intended the premium tax

credits of §1401 to serve as a substitute for the cost-sharing reduction payments of §1402—much less that Congress intended §1401 to displace the normal Tucker Act remedy for any breach of §1402's unambiguous money-mandating obligations. *Sanford*, 969 F.3d at 1382-83; Pet.App.66-67, 77-78; 123-24, 134. The government's suggestion that Congress intended §1401 to serve as "a built-in mechanism by which insurers that do not receive CSR payments can recover their costs of making cost-sharing reductions," U.S.Pet.19, is wholly unsupported and wholly unpersuasive.

Still worse, nothing in the government's intent-based argument actually distinguishes this case from *Maine Community*. Contrary to what the government suggests, *see* U.S.Pet.18, the briefing in that case made clear that the government's failure to make risk-corridor payments *did* "cause[] premiums to increase." U.S.Br.49, *Maine Cmty. Health Options v. United States*, No.18-1023 (U.S. filed Oct. 21, 2019); *see* Pet.Br.59-60, *Moda Health Plan, Inc. v. United States*, No.18-1028 (U.S. filed Aug. 30, 2019); *Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 748 (Fed. Cir. 2018) (Wallach, J., dissenting from denial of rehearing) (explaining that insurers "had to compensate for this uncertainty in payment [from the government's breach of its §1342 obligations] by offering health plans at *higher prices* than before" (emphasis in original)). The fact that the government did not go further and argue that the insurers' real remedy was to purposefully raise premiums even further in hopes of recouping its losses via increased tax credits is simply a testament to the implausibility of the argument, not a demonstration that it could not

have been equally made in the context of the government's shall-pay obligations under §1342.[2]

Notably, even the government is unwilling to endorse the full consequences of its argument. Under the government's "necessarily … categorical" theory, no insurer can *ever* bring suit under the Tucker Act to recover amounts that the government unambiguously owes under §1402—even if that insurer never received any additional (purportedly "offsetting") premium tax credits under §1401. *Sanford*, 969 F.3d at 1376. Yet the government calls it a "closer question" whether §1402 authorizes a Tucker Act suit for unpaid 2017 cost-sharing reductions because of how late in the year it announced its plan to cease making cost-sharing payments. U.S.Pet.20. In other words, the government suggests that §1402 may provide a Tucker Act remedy sometimes, but not always.

That defies common sense. "To give these same words [of §1402] a different meaning for each [year] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). Either the unambiguous money-mandating text of §1402 authorizes a Tucker Act suit, or it does not. The

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[2] The government suggests *Maine Community* was different because insurers set premiums and sold coverage before Congress enacted its appropriations riders each year, raising distinct retroactivity concerns. U.S.Pet.18-19. But so too here: Insurers set premiums and sold coverage each year before Congress decided whether to appropriate funds to meet the government's unambiguous obligations under §1402. *See supra* pp.7-8. Congress' failure to appropriate the necessary funds, after insurers had already sold their plans and provided the required cost-sharing reductions, raises equally significant due process and retroactivity problems.

statute cannot be read to authorize a Tucker Act suit only in cases where the government concedes that compensation is warranted. The government's unwillingness to accept the full consequences of its invented rule confirms that the correct reading is the simple one required by *Maine Community*: Insurers may enforce the unambiguous money-mandating obligation imposed by §1402 by "su[ing] the Government under the Tucker Act to recover on that obligation." *Maine Cmty.*, 140 S.Ct. at 1319.

II. The Government's Remaining Arguments Are Equally Unpersuasive.

Apparently recognizing that there is no persuasive reason for this Court to review the liability issue, the government suggests that the Court should hold its cross-petition and remand for the Federal Circuit to reconsider liability in the event the Court reverses on the damages issue. U.S.Pet.13-14, 22. That proposal is doubly nonsensical.

For one thing, it would make no sense for this Court to resolve the damages question while reserving the possibility of a remand that could render its resolution of that issue moot. If (contrary to fact) there were any serious reason to question the Federal Circuit's resolution of the liability issue, then that issue obviously should be resolved before the Court addresses damages. But the government's proposal makes even less sense given that its no-liability argument is just an even less persuasive variant of its damages argument—as the government itself seemed to recognize when it converted the argument from a liability argument to damages argument on appeal. Thus, if this Court rejects that argument even as a

basis for "mitigating" damages, the Federal Circuit could not plausibly embrace the very same just-rejected argument as a basis for letting the government off the hook entirely.

The government protests that the Federal Circuit's liability holding might be "infirm" if its damages holding were reversed because the former rested "in part" on the latter. U.S.Pet.13; *see* U.S.Pet.14-16. That is a considerable overstatement. The Federal Circuit's 23-page slip opinion in *Sanford* dedicated a full 11 pages of analysis to liability, explaining in detail why the unambiguous money-mandating language of §1402 and the holding of *Maine Community* squarely compelled the conclusion that a Tucker Act suit is available. *See Sanford*, 969 F.3d at 1378-83 (slip op. 13-23). Given the parallels between §1402 and §1342–two mandatory shall-pay obligations in the same statute—the question was neither close nor difficult. The court concluded that lengthy analysis by observing in the penultimate sentence of its opinion that, in its view, damages law could "accommodate[] the practical interaction of the two subsidy mechanisms without departing from the established principles governing Tucker Act coverage of payment-mandating provisions as most recently set forth in Maine Community." *Sanford*, 969 F.3d at 1383 (slip op. 23). That one sentence does not remotely suggest that the court would (let alone should) have ignored all those "established principles" and the clear instructions of *Maine Community* had it realized the correct rule of damages gave it less scope for practical accommodation than it envisioned. Nor would it make any sense for this Court to preserve the option for the Federal Circuit to make such a mistake

on remand. *Maine Community* forecloses the government's misguided Tucker Act argument no matter how this Court decides the damages issue.

The government insists that the Federal Circuit's liability holding would *have* to be revisited to prevent "double recoveries" if its damages holding were reversed. U.S.Pet.16 (quoting *Sanford*, 969 F.3d at 1383); *see* U.S.Pet.20-21. But one of the many reasons the Federal Circuit's damages holding was wrong is because there are no "double recoveries" to avoid. As the Court of Federal Claims correctly explained in rejecting that argument, §1401 and §1402 "are not substitutes for each other." Pet.App.67, 124. They impose separate obligations vis-à-vis different and only partially overlapping groups of insureds, and the fact that the government is meeting one does not excuse its failure to meet the other. Holding the government to its obligations under §1401 thus cannot produce any "unwarranted windfall," whether those obligations increased because the government failed to meet its separate obligations under §1402 or for some other reason. Pet.App.67, 77-78, 123-24, 134. And if the interaction between those two provisions creates the potential for the government's obligations under one to increase if it injures insurers by ignoring its obligations under the other—a dynamic that is hardly unique to those two of the ACA's many interrelated provisions—that is not a "problem" for courts to purport to "fix" through extratextual solutions. In all events, the ACA guards against any risk of insurers receiving windfalls, as other provisions of the Act cap participating insurers' profits and require them to rebate any excess to their insureds. *See* 42 U.S.C. §300gg-18; 45 C.F.R.

§158.210. It is thus not just insurers, but also the insureds—including insureds who faced increased premiums without the aid of tax credits—that the government seeks to avoid making whole.

Finally, the government emphasizes the practical significance of the Federal Circuit's decision, noting the "immense sums" that the government concedes it is required to pay under the unambiguous language of §1402 but has continued to refuse to actually disburse. U.S.Pet.20; *see supra* p.8 (noting the government's obligations of $433 million in unmade cost-sharing payments for 2017 and approximately $6.7 billion for 2018). That is certainly a good reason to grant review and reverse the Federal Circuit's damages holding, which could deprive insurers of most or even all the money Congress promised them. The large sums involved also explain the government's willingness to embrace a bizarre "remedial" argument that would allow it continue to disregard its §1402 shall-pay obligations in perpetuity. But it does not begin to justify review of the government's cross-petition, let alone provide any basis to affirm the government's dubious effort to renege on yet another multi-billion-dollar promise that Congress made to insurers in the ACA without even having to answer for its actions in court.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in No. 20-1162 and deny the government's conditional cross-petition.

Respectfully submitted,

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