No. 25-1050

In the Supreme Court of the United States

THE OPERATING ENGINEERS TRUST FUND OF WASHINGTON, D.C., ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional provisions

Statutes

Other authorities

REPLY BRIEF FOR THE PETITIONERS

The government's brief in opposition only confirms the urgent need for this Court's review. As the petition explains (Pet. 25–30), the decision below is both wrong and dangerous because it provides a roadmap for Congress and states or local governments to circumvent the protections of the Takings Clause by dividing their confiscatory actions into two laws rather than one. The government nowhere disputes that fundamental point and, indeed, embraces it.

In the Patient Protection and Affordable Care Act (ACA), Congress required group health plans to contribute billions of dollars to fund a reinsurance scheme that exclusively benefitted commercial health insurers, not group health plans. Echoing the decision below, the government contends (Br. 10) that the ACA itself "simply required petitioners to make monetary contributions" to the reinsurance scheme, "without requiring that the contributions be made with any particular identified funds." But when Congress enacted the ACA, other federal laws already ensured that self-funded group health plans like the petitioners could pay only by using trust assets. Congress thus left them no choice but to hand over trust assets.

Those trust assets had accumulated over time through the paycheck contributions of hard-working Americans. Both federal law and background principles of trust law required that the assets be used exclusively to pay for the medical care of the trust beneficiaries: employees and their families. Group health plans provide an important way for employers, especially small employers, to provide healthcare benefits. But the trust requirements that Congress imposed on them also make them vulnerable to the kind of abuse that occurred here. The trust assets will

always be sitting there, ripe for the taking for any future legislator's pet project—a convenient piggy bank of someone else's money.

The government observes (Br. 15) that Congress has not attempted the same gambit in the 16 years since the enactment of the ACA. But the Federal Circuit issued its decision blessing what occurred here only last year. And because the Federal Circuit has exclusive appellate jurisdiction over takings claims against the United States, review by this Court is all that stands in the way of similar future efforts to pay for public programs by raiding private trust funds. The petition should be granted, and the decision below reversed.

I. The government's attempt to defend the decision below only confirms the Federal Circuit's errors.

A. Like the Federal Circuit, the government pays no heed to background principles of trust law. The government therefore does not dispute, or even acknowledge, that the very concept of a trust is premised on the existence of traditional property interests. A trust is simply a division of legal and equitable interests in specific property. Pet. 14–15.

Nor does the government dispute that the group health plans at issue here were required to and did operate as trusts. The relevant ACA provisions apply only to group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). Pet. 5. ERISA, in turn, provides that the assets of a group health plan must "be held in trust," 29 U.S.C. § 1103(a), for the "exclusive purposes of providing benefits to participants

in the plan and their beneficiaries" or for plan administration, *id.* § 1103(c)(1).[1]

The two petitioners are a type of group health plan established in collective bargaining under the Labor Management Relations Act of 1947 (Taft-Hartley). Pet. 9. And Taft-Hartley, which the government ignores, further confirms that plans like these must hold their assets in "trust … for the sole and exclusive benefit of the employees" covered by the plans "and their families." 29 U.S.C. § 186(c)(5). In short, the starting point for any evaluation of the plans' takings claims must be that they have a property interest in the assets they are required by law to hold in trust.

B. Congress took those property interests when it required self-funded group health plans to contribute to the ACA's reinsurance scheme. Pet. 16–22.

1. The government concedes (Br. 8) that "money can be a form of private property that the government orders to be paid for public use." The government therefore abandons a central plank of the decision below—namely, the Federal Circuit's conclusion that "one simply cannot have a cognizable property interest in money itself." Pet. App. 12a. That conclusion is wrong and inconsistent with this Court's precedent. Pet. 21. If the government confiscates a worker's paycheck, or the cash in his wallet, the seizure is a straightforward "tak[ing]" of "private property." U.S. Const. amend. V; *cf. Brown v. Legal Found. of Wash.*, 538 U.S. 216, 250 (2003) (Scalia, J., dissenting) (paycheck example).

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[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this reply brief.

The government's truism (Br. 8) that "money is fungible," *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), does nothing to salvage the decision below. This Court has repeatedly made clear that the Takings Clause applies "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013) (citing *Brown*, 538 U.S. at 235). And two of the Court's leading cases in this area involved moneys held in trust—specifically, state efforts to confiscate the interest earned on client funds held in trust by lawyers. *See* Pet. 18 (discussing the IOLTA cases).[2]

The Federal Circuit should have treated those cases as controlling. In the ACA, Congress mandated reinsurance payments linked to the group health plans' "specific, identifiable property interest[s]" in the assets they hold in trust. *Koontz*, 570 U.S. at 614.

2. The government nonetheless insists (Br. 10) that this case involves merely an "ordinary liability to pay money" because the ACA did not expressly require group health plans to make the required reinsurance contributions "with any particular identified funds." That is precisely the logic that makes the decision below dangerous and that cries out for further review.

Accepting the government's position would blow a massive loophole into the fabric of the Fifth Amendment. Any sound understanding of the Takings Clause must

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[2] As *Koontz* confirms, when the government demands the payment of funds linked to an identifiable property interest, "a *per se* takings approach is the proper mode of analysis." 570 U.S. at 614; *see Brown*, 538 U.S. at 235. The government's discussion (Br. 13) of regulatory takings is therefore beside the point.

consider not only the payments commanded by a legislature in its most recent law but also other requirements the legislature has already imposed. Here, ERISA and Taft-Hartley already required that the assets of self-funded group health plans be held in trust for the benefit of covered employees and their families. *See* Pet. 19–20; *supra* 2–3. Congress left self-funded plans with no choice but to hand over privately owned trust assets for public purposes—triggering the Takings Clause.

The government observes (Br. 11) that ERISA "contains various exceptions to the trust requirement," but it neglects to mention that no exception applies here. The main exceptions pertain to *insured* ERISA plans, which purchase insurance from third parties to cover the costs of paying benefits. The insurance contracts that such plans purchase need not be held in trust, nor must plan assets held by the insurer. 29 U.S.C. § 1103(b)(1)–(2). But petitioners are *self*-insured plans, also called self-funded plans. Rather than purchase insurance from a third party, they assume the financial risk of paying for care for their members. Pet. 8 n.2, 9–10. Self-funded plans must comply with ERISA's trust requirements, which are designed to ensure that the assets set aside by the plans to pay for benefits are held in trust by prudent fiduciaries for that exclusive purpose.[3]

This case does not involve any fully insured ERISA plans because those plans were treated very differently in the reinsurance scheme. Pet. 11 n.4. Fully insured group health plans were not required to make any reinsurance contributions. 79 Fed. Reg. 13744, 13834 (Mar. 11, 2014).

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[3] The other trust exceptions are similarly inapplicable. They pertain to, among other things, individual retirement accounts, annuity contracts, and agency exemptions. 29 U.S.C. § 1103(b)(3)–(6).

For fully insured plans, their *insurers* had to make the reinsurance contributions, but those insurers could also potentially benefit from the reinsurance program. *See id.* (requiring payments from "health insurance issuer[s]" and "self-insured group health plan[s]"). That was not enough for the commercial insurance industry, which lobbied hard to require contributions from self-insured plans as well—even though such plans were ineligible for any reinsurance payments. Pet. 7.

The government is likewise wrong (Br. 11) to rely on the fact that Congress roped self-funded plans into the scheme by requiring payments from "third party administrators on behalf of group health plans." 42 U.S.C. § 18061(b)(1)(A). The administrators functioned merely as conduits for the plans, as both the statutory text ("on behalf of group health plans") and the implementing rules make clear. *Id.*; *see* 77 Fed. Reg. 73118, 73152 (Dec. 7, 2012) (emphasizing that the "plan is liable" for the payments, although an administrator "may be utilized to transfer [the] reinsurance contributions … at th[e] plan's discretion").

The government fares no better with its suggestion (Br. 11) that the plans could have theoretically borrowed money to satisfy their reinsurance obligations under the ACA. Self-funded group health plans have no assets with which to secure a loan except trust property, and the proceeds of any such hypothetical loan would presumably also be "assets of the plan" held in trust. 29 U.S.C. § 1103(a). Congress could not take those privately owned trust assets either, without paying just compensation.

3. As the petition explains (Pet. 22–23), recognizing that a taking occurred here would not call into question the government's authority to impose reasonable user fees and taxes. "[T]axes and user fees are not takings,"

Koontz, 570 U.S. at 615, but the reinsurance contributions mandated by the ACA do not fall within either category.

With respect to taxes, the government argued in related litigation that the reinsurance payments were *not* taxes. Pet. 23 n.5. The government makes no attempt to argue otherwise in its brief in opposition.

With respect to user fees, this Court has held the government may charge reasonable fees to users of government services as "reimbursement of the cost of [the] services." *Sperry Corp.*, 493 U.S. at 63. But these payments cannot be viewed as user fees because the reinsurance program was designed so that group health plans could *not* use it. *See* 42 U.S.C. § 18061(b)(1)(B) (authorizing payments only to "health insurance issuers," not plans). Congress required group health plans to pay into the program but prohibited them from benefiting from it. That is "what differentiates" this scheme from "legitimate" user fees. Br. in Opp. 12.

The government acknowledged below that group health plans "received no direct benefit from the" reinsurance program, and it never sought to defend the plans' payments as user fees. D. Ct. Doc. 126, at 9 (May 15, 2023); *see, e.g.*, Gov't C.A. Br. 22–23 (May 13, 2024) (arguing that whether group health plans "received some benefit … is irrelevant").

For the first time in seven years of litigation, the government now tries to defend the reinsurance scheme on the alternative theory that group health plans could be required to pay into a "government program from which [they] 'benefit[ed] directly.'" Br. in Opp. 12 (alterations added) (quoting *Sperry Corp.*, 493 U.S. at 63). The government did not press that argument below, the Federal Circuit did not consider it, and this Court ordinarily would not do so in the first instance. *See, e.g.*,

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38–39 (1989). In any event, the government's fallback argument is wrong and does not diminish the error of the decision below or the need for further review.

According to the government (Br. 12), group health plans "were required to contribute to the [reinsurance program] because that program was a necessary element of ACA reforms designed in part to lower the costs for those plans." The government's theory appears to be that the reinsurance program was designed to facilitate the ACA's reforms to the individual-insurance market; those reforms were in turn designed to result in fewer "unreimbursed health costs" for hospitals and other providers; and reducing such costs can in turn "lower[] the costs for … group health plans." Br. in Opp. 5; *see* 78 Fed. Reg. 15410, 15519 (Mar. 11, 2013).

The circuitous chain of cost reductions posited by the government was not a "benefit[]" or "service[]" that the ACA conferred "specifically" on group health plans. *Massachusetts v. United States*, 435 U.S. 444, 462 (1978) (plurality op.). The government is merely describing the overall cost-reduction goals of the ACA, not any specific program or benefit for which group health plans in particular could be charged user fees. The ACA's overall cost-reduction reforms bear no resemblance to the facilities and services for which the government charged user fees in *Sperry Corp.*, 493 U.S. at 57–58, 64, or the aviation services provided to plane owners in *Massachusetts*, 435 U.S. at 447–50.

C. The ACA's reinsurance scheme violated the takings clause even though the text of the ACA did not refer to the petitioners' trusts by name. As a result of ERISA and Taft-Hartley, the plans' contributions could come from nowhere else. *See supra* 4–6. And the government cannot

evade its obligations under the Takings Clause by the contrivance of dividing its confiscatory actions into two laws rather than one. Pet. 24–25.

The petition devoted an entire section to explaining why accepting the logic of the decision below would create an enormous and untenable loophole in takings law. The government has no response. To the contrary, the government embraces (Br. 10) the Federal Circuit's flawed reasoning, and the government will no doubt deploy that same reasoning in the future whenever Congress next sees fit to dip into group health plan trust funds to finance some new scheme. A legislature must not be allowed to accomplish in two steps what the Constitution would forbid in one.

The government faults (Br. 11) the petition for not citing any authority for the proposition that Congress was "presumably aware" of the trust requirements in ERISA and Taft-Hartley when enacting the ACA. *See* Pet. 25. This Court "assume[s] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In any event, whether members of Congress in fact knew about ERISA and Taft-Hartley is irrelevant because the government's liability does not depend on any showing of knowledge. For *per se* takings, the Court applies a "simple" rule: "The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021).

II. The question presented warrants review.

This case presents an important question of federal constitutional law that impacts the millions of Americans covered by self-funded group health plans and their families. Pet. 27–28. The government does not identify any vehicle problems. The takings question is squarely presented and deserves further review.

The government contends (Br. 14) that certiorari is unwarranted in the absence of any circuit conflict. But the question presented is "[w]hether the ACA's requirement that group health plans contribute billions of dollars to subsidize reinsurance for third parties was a taking of the plans' private property." Pet. i. That question falls within the Federal Circuit's exclusive nationwide appellate jurisdiction for takings claims against the United States. 28 U.S.C. § 1295(a)(2)–(3); *see* Pet. 25–26. Other courts may well "confront takings claims involving obligations to pay money" (Br. in Opp. 14), but never in the specific context of the ACA and the billions of dollars in trust assets that Congress snatched from group health plans.

The need for further review is at least as urgent here as it was in *Maine Community Health Options v. United States*, 590 U.S. 296 (2020), which was a split-less dispute arising from the Federal Circuit about one of the ACA's other risk-stabilization programs. *See id.* at 305–07; Pet. 26–27. The government likewise asserted in that case that the lack of any conflict in the lower courts was a reason to deny review, *see* Br. in Opp. 13, *Maine Community*, *supra* (No. 18-1023), but this Court evidently disagreed.

The government now argues (Br. 14–15) that *Maine Community* was different because it involved a question about Tucker Act jurisdiction. But the Court also granted review of the merits of the challengers' claims, which were on all fours for certiorari purposes with the takings claims in this case—important national questions about the operation of the ACA's risk-stabilization programs. *See Maine Community*, 590 U.S. at 307. And, if anything, the lack of any antecedent jurisdictional question here makes this case a superior vehicle by comparison. Pet. 27.

Finally, the government is wrong to downplay (Br. 15) the practical significance of the question presented. True,

each individual group health plan was required to contribute a relatively modest amount per covered life—$63 per covered life in 2014, for example. Pet. 9. But in the aggregate, the government took upwards of $10 billion in trust assets from group health plans. *Id.* Taking $10 billion in private property is not "negligible." Br. in Opp. 15. The government's observation (Br. 15) that the property Congress took from the petitioners "represented less than 1% of their income" is also misleading because the plans' "income" in that metric is what employees contributed to the plan, not money the plan was somehow earning from investments. And every dollar that Congress takes from the trust assets of a self-funded group health plan is a dollar that was otherwise set aside for the exclusive purpose of paying for healthcare for employees and their families.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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