IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,	)	
	)	
Plaintiff,	)	**No. 16-967C**
	)	
v.	)	
	)	**Judge Bruggink**
THE UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Under the Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. When Congress enacted section 1342 of the Affordable Care Act ("ACA") in 2010, it intended that risk corridors payments be limited to collections and did not appropriate funds for risk corridors payments. And in 2014, well before any payments were due, Congress expressly restricted the funding available for the Department of Health and Human Services ("HHS") to make risk corridors payments to the amount of risk corridors collections. Congress's intent is clear: risk corridors payments may not exceed collections. The case should be dismissed.

With regard to the Court's jurisdiction, the Tucker Act waives sovereign immunity only for claims for "presently due" damages. The payments sought by Maine Community Health Options ("Maine CHO") are not "presently due." Section 1342 imposes no time limit by which HHS must make payments for the years at issue, and because calculated payments exceeded collections in the 2015 and 2016 payment cycles, the Spending Laws did not permit HHS to pay out more than a *pro rata* amount to each issuer. Thus, HHS followed its established administrative framework for addressing that circumstance, making payments to the extent of its budget authority in each annual payment cycle, with final payment not due until the end of the program. Congress has essentially blessed that framework by acknowledging, in the legislative history to the 2015 Spending Law, that risk corridors payments will be made to the extent of collections "over the three year period risk corridors are in effect." Because additional payments are not yet due under HHS's framework, Maine CHO has no claim for "presently due money damages" as it must for the Court to exercise jurisdiction under the Tucker Act. In addition, prudential principles require dismissal of the case because judicial review before the administrative process has run its course

would be both premature and disruptive of the authority delegated to HHS to "establish and administer" the risk corridors program. 42 U.S.C. § 18062(a).

If the Court does not dismiss the case for lack of jurisdiction or on prudential grounds, the Court must uphold HHS's *pro rata* distribution of risk corridors payments and dismiss Maine CHO's Complaint on the merits because Congress's constitutional exercise of its power of the purse has limited the United States' liability under section 1342 to the extent of risk corridors collections. "[T]he straightforward and explicit command of the Appropriations Clause [is that] no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quotation omitted). Here, Congress specifically reserved its power of the purse under section 1342 by withholding the critical budgetary language to obligate the United States in advance of an appropriation. And by creating a program with only "payments in" and "payments out," Congress demonstrated its understanding and intent, consistent with the contemporaneous budget scoring provided by the Congressional Budget Office ("CBO"), that the program would be self-funded.

To the extent congressional intent could be deemed unclear when section 1342 was originally enacted, Congress removed any ambiguity in 2014 when it enacted spending legislation that affirmatively prevented HHS from making payments in excess of collections. A long line of Supreme Court and Court of Appeals cases recognizes that Congress is free to use the appropriations process to limit the scope of payment obligations in previously enacted substantive legislation. *See, e.g.*, *United States v. Will*, 449 U.S. 200 (1980). When congressional intent to do so is unequivocal and clear, as it is here, binding precedent and the "last in time rule" of statutory interpretation require that it be given effect. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

Ignoring Congress's exclusive power of the purse and the primacy of congressional intent as reflected in the Spending Laws, Maine CHO appeals to misguided comparisons to Medicare Part D, statements of HHS, and the policy objectives it believes underlie section 1342. These arguments miss the point: it was Congress that imposed budget neutrality on the risk corridors program by capping funding to the amount of risk corridors collections. HHS's framework merely allows it to conform with the applicable budgetary constraint while paying out the maximum amount possible toward the calculated amounts. Because congressional intent is clear and Maine CHO agrees that Congress did not delegate "multi-billion dollar decisions affecting the public treasury" to HHS, Pl.'s Reply at 26, Maine CHO's claims must be dismissed. Indeed, it is firmly established that the statements of an executive agency cannot obligate the government for the payment of funds that Congress has neither appropriated nor authorized through the budgetary process. *Richmond*, 496 U.S. at 432. In due regard for that maxim, HHS's statements have consistently acknowledged that its obligation to make payments is "subject to appropriations"—a qualifier that cannot be questioned given the Appropriations Clause of the Constitution but that, in any event, Maine CHO appears to disregard.

In sum, section 1342 requires only that HHS collect "payments in" and those funds are the only funds specified to make "payments out"; section 1342 says nothing about any other source of funding for the program, and it does not—and could not—require a future Congress to supply those funds. And to the extent there was any ambiguity about the program's self-funding structure as enacted, Congress removed that ambiguity by enacting Spending Laws that specifically foreclose HHS's ability to make payments in excess of collections and express Congress's intent that the program be budget neutral. Because it is not the Court's role to second-guess that clear congressional will, Maine CHO's Complaint should be dismissed.

ARGUMENT

I. The Court Lacks Jurisdiction, and Prudential Principles Require Dismissal, Because Final Payment Is Not Yet Due and HHS Is Still Making Payments through Its Administrative Framework

A. The Court Lacks Jurisdiction Because Final Payment Is Not Presently Due

1. The Tucker Act Waives Sovereign Immunity Only for Presently Due Claims

Initially Maine CHO recognized that a presently due claim for money damages is a prerequisite to jurisdiction under the Tucker Act. Pl.'s Mot. at 19-20. The Court should reject Maine CHO's attempt to change its position. *See* Pl.'s Reply at 5-6. The Supreme Court in *United States v. King*, 395 U.S. 1, 3 (1969), construed the Tucker Act's waiver of sovereign immunity to apply solely to "presently due" claims for money damages. This construction has been repeatedly reaffirmed by the Federal Circuit. "The jurisdiction of the Court of Federal Claims under the Tucker Act is 'limited to actual, *presently due* money damages from the United States.'" *Todd v. United States*, 386 F.3d 1091, 1093–94 (Fed. Cir. 2004) (emphasis added) (quoting *United States v. Testan,* 424 U.S. 392, 398 (1976)); *see also Overall Roofing & Constr. Inc. v. United States*, 929 F.2d 687, 689 (Fed. Cir. 1991) ("the word 'claim' [under the Tucker Act] carries with it the historical limitation that it must assert a right to *presently due* money.") (citing *King*, 395 U.S. at 3; emphasis added). "The basic rule that the Supreme Court announced in *King* is still in effect and has not been changed by subsequent legislation." *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998).

Urging otherwise, Maine CHO relies largely on the recent decisions of two other judges of this Court in *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016), and *Health Republic Insurance Co. v. United States*, No. 16-259C, 2017 WL 83818 (Fed. Cl. Jan. 10, 2017). In *Land of Lincoln*, Judge

Lettow reasoned that the "presently due" requirement applies to contract claims but does not apply where a plaintiff asserts a claim based on a money-mandating statute. 129 Fed. Cl. at 97-98. The United States disagrees with that reasoning because the two Supreme Court cases establishing the "presently due" requirement involved money-mandating statutes. *King* involved a claim for a tax refund under section 7422 of the Internal Revenue Code, 395 U.S. at 2, which this Court has found to be a "money-mandating source." *Gregoline v. United States*, 99 Fed. Cl. 161, 166 (2011); *see also Dumont v. United States,* 85 Fed. Cl. 425, 427-28 (2009) (Lettow, J.) (same). Similarly, *Testan* involved claims under the Back Pay Act, 424 U.S. at 406, which is also a money-mandating statute. *See also Lee v. United States*, 127 Fed. Cl. 734, 740 (2016) (Lettow, J.) (concluding that although the Back Pay Act is "money-mandating," dismissal for lack of jurisdiction was required where the "plaintiff has no claim for 'presently due' money"). Moreover, the *King* formulation of "presently due" is implicit in the requirement under *United States v. Mitchell*, 463 U.S. 206, 217 (1983), that money damages be actually "sustained" in order to support jurisdiction under the Tucker Act. Thus, the United States respectfully submits that the "presently due" requirement applies to claims brought under section 1342, just as it does for any money-mandating statute.

In *Health Republic*, Judge Sweeney conducted the jurisdictional inquiry differently than Judge Lettow. Judge Sweeney distinguished *King* because the plaintiff in that case "could not recover the money damages he sought without first obtaining a declaratory judgment, a type of equitable relief that the Court of Claims could not provide." 2017 WL 83818, at *11. To the extent Judge Sweeney's analysis suggests that the rule in *King* only requires that a plaintiff seek damages rather than equitable relief, it fails to give effect to the express language of the Supreme Court (the damages sought must be "presently due"). Moreover, the plaintiff in *King* had sought a money judgment. In sum, so long as the three-year framework is a permissible implementation

of section 1342, final payment is not yet due, and there has been no breach of any statutory duty to give rise to any damages. *See Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 179-80 (2009) (jurisdiction was lacking where government was current on its periodic payments and further payments were not presently due). By way of analogy, it cannot be disputed that if section 1342 itself provided that payments would be made over the course of the three-year program, any attempt to seek final payment before the end of that time period would fail the Supreme Court's "presently due" requirement. That conclusion follows equally where HHS has reasonably exercised its delegated authority to create such a framework.

Nor does the "presently due" inquiry require the Court to undertake a merits analysis, as Maine CHO contends, Pl.'s Reply at 3, 5. Rather, the Court need only determine whether HHS has reasonably interpreted section 1342 and the Spending Laws to permit a series of partial payments over multiple years where payments exceed collections in a single year. Answering that question does not necessitate resolution of how much is due at the conclusion of the program or whether Maine CHO can ever collect the full amounts calculated under the statute; it merely requires the Court to decide whether Congress has required HHS to make payment in a single annual lump sum amount such that final payment for each year at issue is "presently due."

Other than *Land of Lincoln* and *Health Republic*, Maine CHO has not cited a single case in which, under the rules and terms of a money-mandating authority at issue, payments were not yet due for *any participant*, yet the court nevertheless exercised jurisdiction. Instead, Maine CHO now seeks to backtrack from its original concession that "Tucker Act jurisdiction is . . . 'limited to actual, presently due money damages from the United States,'" Pl.'s Mot. at 19-20, by suggesting that a "presently due" payment is not a requirement of jurisdiction. *See* Pl.'s Reply at 5 (arguing that it need only identify a statute or regulation that is "money-mandating as to the class of which

plaintiff claims to be a member.”). In so doing, Maine CHO relies on cases either concerning the standard for identifying a money-mandating source of law (not at issue here) or in which eligibility for payment under a money-mandating authority was disputed, but, assuming such eligibility, there was no dispute that the payment was due.[1] None of these cases discuss, much less abrogate, the “presently due” requirement, nor could they do so given that the Supreme Court has interpreted the Tucker Act to include such a requirement. *King*, 395 U.S. at 3. Maine CHO must show that its claims are presently due.

2. The Payments Maine CHO Seeks Are Not Presently Due

The amounts at issue—final payments for benefit years 2014 and 2015—are not presently due. As set forth in the United States’ Motion, section 1342 does not set payment deadlines, much less annual ones. Rather, Congress granted HHS the discretion to “establish and administer” the risk corridors program, including an appropriate payment schedule. 42 U.S.C. § 18062(a). HHS exercised that discretion by establishing a three-year framework in which it pays what it can each year based upon the amount of “payments in,” and where those payments fall short of the calculated amount of “payments out” for a benefit year, HHS makes additional payments from “payments in” for subsequent program years. Because that framework reasonably fills a gap left in the statute regarding the timing of payment—and, in fact, allows HHS to pay the maximum

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[1] Maine CHO quotes from the Federal Circuit’s decision in *Kanemoto v. Reno*, 41 F.3d 641, 647 (Fed. Cir. 1994), in which the court stated that “[t]here is no requirement in the Tucker Act that there must be a finding that money is due before the Court of Federal Claims can exercise its jurisdiction.” Pl.’s Reply at 5. *Kanemoto* concerned only the question of the proper forum (as between the Court of Federal Claims and the district court) for a plaintiff challenging an agency determination that she was ineligible for restitution under a federal statute. There was no dispute that if the claimant were eligible for payment as she claimed, the payment was due. In any event, if the Federal Circuit’s statement in *Kanemoto* is to be read in the way Maine CHO contends, the statement is directly contradicted by *King* and the Circuit’s more recent pronouncements affirming the “presently due” requirement as an independent element of jurisdiction. *See, e.g.*, *Todd*, 386 F.3d at 1095; *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000).

amount possible to issuers within the budgetary constraints established by Congress—the Court must defer to the framework and dismiss the case.

Maine CHO's arguments otherwise are inconsistent with basic principles of administrative law. As a threshold matter, Maine CHO conflates deference regarding *when* final payment for each benefit year is due (a question squarely within HHS's administrative expertise) with the distinct question of *whether* HHS is obligated to make up a shortfall in collections. Pl.'s Reply at 26-34. The United States is not seeking deference regarding whether Congress intended the program to be self-funded because it agrees with Maine CHO that Congress did not delegate that decision to HHS. Pl.'s Reply at 26. Rather, Congress reserved that question to itself by declining to appropriate funds for the program other than risk corridors collections and enacting annual Spending Laws that restrict HHS's budget authority for the program. Congress did, however, explicitly delegate to the agency the authority to "establish and administer" the risk corridors program, 42 U.S.C. § 18062(a), within the budgetary parameters it set. That delegated authority manifestly includes the establishment of a framework for the method and timing of payments when the agency's budget authority does not permit it to pay the amounts calculated annually in a single lump sum. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) ("[T]he agency is in a unique—and authoritative—position to . . . allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.").

Arguing against deference, Maine CHO first argues that the statute is unambiguous because it "mandated that the Government '*shall pay*.'" Pl.'s Reply at 27. Not only is that statement inaccurate, it is irrelevant to the question of timing. Section 1342 does not speak to the timing of HHS's payments, and, contrary to Maine CHO's suggestion, Pl.'s Reply at 27, neither does 45

C.F.R. § 153.510. Therefore, it was well within HHS's delegated authority to establish the three-year framework as a method of "administering" the program. *See Higashi v. United States*, 225 F.3d 1343, 1347 (Fed. Cir. 2000) ("This court defers to an agency's interpretation of a statute it administers when the statute leaves to the agency 'the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,' and the agency's interpretation is not arbitrary or capricious and does not contravene clearly discernible legislative intent.") (internal citations omitted); *Wilson v. United States*, 917 F.2d 529, 535-36 (Fed. Cir. 1990) ("when a statute is silent or ambiguous with respect to the specific issue, the administrative agency's interpretation, if reasonable, is to be followed by the court") (internal citation omitted).

Next, Maine CHO argues that the three-year framework does not warrant deference because it was not published in the Code of Federal Regulations and is therefore "informal." Pl.'s Reply at 27. But it is well established that an agency's rules "need not be published in the Code of Federal Regulations to be entitled to deference." *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1337 (Fed. Cir. 2008) (citing cases). And the three-year framework *was* subject to notice and comment and addressed in rulemaking documents published in the Federal Register, *Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond*, Final Rule, 79 Fed. Reg. 30,240, 30,259-61 (May 27, 2014); *Land of Lincoln*, 129 Fed. Cl. at 92-93, 106. In any event, the timing of payments was not required to be subject to notice and comment. 5 U.S.C. § 553(b)(3)(A) (exempting from notice and comment requirements "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice"). In fact, the Supreme Court has emphasized that courts should not "dictat[e] to the agency the methods, procedures, and time dimension" of its tasks because such review "clearly runs the risk of propelling the court into the domain which Congress has set aside *exclusively* for

the administrative agency." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 544-45 (1978) (emphasis added; citations and quotation omitted); *see also Exxon Corp. v. Phillips Petrol. Co.*, 265 F.3d 1249, 1253 (Fed. Cir. 2001) (in "recognition of the agency's familiarity with the problems associated with the agency's mission," judicial "deference is owed to the agency's choice of its procedures to implement its assignment"). Such deference is especially appropriate where, as here, the text of the statute "indicat[es] that Congress meant to delegate to the agency the authority to make determinations" regarding program administration. *Cathedral Candle Co. v. U.S. ITC*, 400 F.3d 1352, 1361 (Fed. Cir. 2005).

Maine CHO also suggests that deference to HHS's payment framework is not warranted because HHS sought "to *flip-flop* on policies that may have engendered serious reliance interests." Pl.'s Reply at 31 (quotation omitted). But again, Maine CHO confuses the issues. The policy on which it accuses HHS of "flip-flopping" is the budget neutrality policy *Congress* imposed.[2] Maine CHO presents no basis for the Court to second-guess the legislative judgments of Congress on appropriations matters squarely within its constitutional spending authority. The policy relevant for jurisdictional purposes, however—and the one on which the United States seeks deference to the agency—is the timing of payments established by the three-year payment framework. This framework—adopted by HHS nearly three years ago—is HHS's procedural mechanism for

[2] Although HHS informed issuers beginning in March 2014 that it would endeavor to carry out the program in a budget neutral manner and might make "adjustments" to the program to carry out that goal, it also consistently stated that regardless of the balance of payments and receipts, it would make full payments "subject to the availability of appropriations." HHS has never "flip-flopped" on that point. Indeed, Maine CHO concedes that HHS has been clear about its "inten[tion] to make 'full payment' to QHP issuers" to the extent of its ability. Pl.'s Reply at 35. Nor does Maine CHO challenge any discretionary action by HHS to implement budget neutrality. Rather, Maine CHO complains of HHS's *inability* to make payment because of budget neutrality constraints imposed by Congress. Pl.'s Reply at 32 (characterizing budget neutrality as a policy that was "foisted upon HHS by Congress").

administering the program within the budget neutrality constraint set by Congress. It is not only a reasonable exercise of HHS's gap filling authority, it is consistent with the approach endorsed by the Federal Circuit for minimizing conflict between an authorizing statute and a subsequent spending law. *See, e.g.*, *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (affirming agency's *pro rata* payments under money-mandating statute where "DOE's approach gave effect to both the provisions of the Act and the appropriations laws."); *Cathedral Candle Co.*, 400 F.3d at 1368 (different legislative enactments should be implemented "in a way that best resolves any possible conflict between them").

Maine CHO also relies on statements in the Federal Register in which HHS discussed, but expressly declined to propose or adopt, annual payment deadlines for itself. Pl.'s Reply at 33 (citing 77 Fed. Reg. 17,238-39); *but see* 77 Fed. Reg. 17,220, 17,238 (Mar. 23, 2012) (noting that the agency "did not propose [payment] deadlines in the proposed rule"); 76 Fed. Reg. 41,929, 41,943 (July 15, 2011) ("we are not proposing deadlines at this time"). Deadlines that were never actually proposed, much less adopted, do not constitute a "position" and cannot, as a matter of law, have "engendered serious reliance interests," as Maine CHO claims. Pl.'s Reply at 31 (quotation omitted).

Finally, Maine CHO suggests that the three-year framework is invalid because HHS's failure to make full payment on an annual basis would undermine the congressional policy objectives. Pl.'s Reply at 3, 10-12. That suggestion is manifestly wrong because Congress itself prevented HHS from making full payment on an annual basis. Furthermore, Congress essentially blessed HHS's approach to the timing of payments by contemplating that HHS could achieve budget neutrality, not necessarily on a year-by-year basis, but "over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). By contrast, Maine

CHO's position that full payments must be made annually is not only devoid of textual support, it ignores the Spending Laws and would require HHS to violate the Anti-deficiency Act ("ADA"). *See* 31 U.S.C. § 1341(a)(1) (prohibiting agencies from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation[.]"). HHS has no authority to do so merely because Maine CHO believes full annual payments would better meet the objectives of section 1342. *See Land of Lincoln*, 129 Fed. Cl. at 107.

Because section 1342 does not require—and, in light of the shortfall in collections, the Spending Laws do not permit—full payment on an annual basis, HHS's three year framework must be allowed to run its course. Final payments are not yet due under that framework; accordingly, the Court should dismiss this case for lack of a presently due payment obligation.[3]

B. Maine CHO's Claims Should Also Be Dismissed on Prudential Grounds

Maine CHO's claims also should be dismissed on prudential grounds because HHS is still making payments under its administrative framework, and therefore, the claims are not ripe. As explained in the United States' motion, the issues are not "fit" for judicial decision because Congress may yet alter the funding scheme for the program's final year, HHS may collect enough to pay Maine CHO in full, or both. Furthermore, because it is nearly certain that Maine CHO will receive additional payments on its claims through the administrative process (in fact, HHS has made additional payments since the inception of this case), the amount at issue will continue to be a moving target until the program concludes. Thus, additional factual and legal development

[3] Maine CHO's suggestion that the three-year framework is a "convenient litigating position," Pl.'s Reply at 35, is manifestly wrong. The three-year framework pre-dates this lawsuit by more than two years, but even if that were not the case, relying on budgetary restrictions imposed by Congress is not a litigating position; it is the proper course to maintain conformity with the law. *See Land of Lincoln*, 129 Fed. Cl. at 106.

would "significantly advance" the Court's ability to deal with the issues presented. *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 812 (2003) (citation omitted); *see also Tex. Bio- & Agro-Def. Consortium v. United States*, 87 Fed. Cl. 798, 804 (2009) ("A claim is not ripe where it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide*, 473 U.S. 568, 581 (1985))).

Furthermore, Maine CHO identifies no legally cognizable hardship that would result from deferring review until conclusion of the risk corridors program, instead arguing that "[t]he Government's unpaid balance of $22,950,776.02 alone establishes hardship." Pl.'s Reply at 7. The mere assertion of a monetary claim does not establish hardship. Rather, "[t]o meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail *more than possible financial loss*." *Verizon Cal. Inc. v. Peevey*, 413 F.3d 1069, 1075 (9th Cir. 2005) (citation and quotation omitted) (emphasis added). Maine CHO has not even attempted to establish a non-financial, "direct and immediate" hardship that would result from deferring review for a modest time until HHS's administrative process concludes. Indeed, Maine CHO continues to operate on the Maine exchange and its CEO recently announced that it is "in a better financial position going into 2017 than it was going into 2016, and it has sufficient capital and enough surplus to accommodate members." Lindsey Tice, *CEO: Maine health insurance co-op doing better than a year ago*, BDN Maine (Jan. 12, 2017). *See* https://www.healthinsurance.org/maine-state-health-insurance-exchange/; http://bangordailynews.com/2017/01/12/news/state/ceo-maine-health-insurance-co-op-doing-better-than-a-year-ago/. Accordingly, Maine CHO demonstrates neither "fitness" for judicial decision nor "hardship."

Finally, undertaking judicial review prior to the conclusion of the three-year program could disrupt HHS's framework for administering payments and inject yet further uncertainty into the program. Thus, prudential principles counsel dismissal because the administrative process has not yet run its course.

II. On the Merits, the Case Must Be Dismissed Because Maine CHO Has No Right to Payment in Excess of Collections

If the Court declines to dismiss the case on jurisdictional or prudential grounds, it must dismiss the Complaint under Rule 12(b)(6) for failure to state a claim. As explained in the United States' Motion, when Congress enacted section 1342 in 2010, it planned the risk corridors program to be self-funding, as shown by its decision to structure section 1342 as a self-enclosed scheme of "payments in" and "payments out," without either an appropriation or authorization of additional funding. Congress later foreclosed any ambiguity about that intention (if any existed) when it enacted the 2015 and 2016 Spending Laws restricting HHS's budget authority for risk corridors payments to the amount of risk corridors collections. Congress's intent is clear: the risk corridors program must be budget neutral. Accordingly, the Court must dismiss the Complaint because Congress's constitutional exercise of its power of the purse limits the United States' liability under section 1342 to the extent of collections and Maine CHO has, therefore, received all it is owed.

A. Congress Intended the Risk Corridors Program To Be Self-Funded

Obligations on the Treasury of the United States arising under a statute require two independent but equally critical elements: (1) authorization of a particular expenditure, and (2) an appropriation to make that expenditure. *See Andrus v. Sierra Club*, 442 U.S. 347, 361 & n.18 (1979) ("appropriations . . . have the limited and specific purpose of providing funds for authorized programs") (quotation omitted). "[A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities." Kate Stith, *Congress'*

Power of the Purse, 97 Yale L.J. 1343, 1356 (1988). Thus, a claimant seeking to enforce a money-mandating statute or regulation generally "must identify not just a command to make [payment] but an appropriation of . . . money that . . . may [be] use[d] for that purpose." *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005). "A direction to pay without a designation of the source of funds is not an appropriation." GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2–24 (4th ed. 2016) (*GAO Redbook*), http://www.gao.gov/assets/680/675709.pdf; *see also id.* at 2-2 ("A regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority."). The naked enactment of substantive legislation—even one with mandatory language—is insufficient to express congressional intent to commit public funds.

Congress knows how to appropriate and authorize appropriations when it wants to. When Congress enacted the ACA, it appropriated and authorized the appropriation of funds for dozens of other programs.[4] In contrast, in section 1342, Congress merely directed HHS to "establish and administer" a risk corridors program with only "payments in" and "payments out." Nothing in the ACA requires, or even contemplates, that HHS will make up a shortfall in collections with appropriated funds. *Land of Lincoln*, 129 Fed. Cl. at 104-05 ("Congress . . . provided appropriations or authorizations of funds for other programs within the Act, but it never has done so for the risk-corridors program.") (citations omitted).

[4] For examples of provisions appropriating funds, *see, e.g.*, 42 U.S.C. §§ 18001(g)(1), 18031(a)(1), 18042(g), 18043(c), 18121(b). For examples of provisions authorizing the appropriation of funds, *see, e.g.*, Pub. L. No. 111-148, §§ 1002, 2705(f), 2706(e), 3013(c), 3015(e), 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b), 124 Stat. 119, 325 (2010).

"Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Land of Lincoln*, 129 Fed. Cl. at 104-05 (quoting *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012)). That presumption is doubly warranted here because, in March 2010, while Congress was considering the bill that eventually became the ACA, the CBO provided Congress with an estimate of how the Act would affect future government spending and revenue, and CBO omitted any budgetary estimate for the risk corridors program. "Congress explicitly relied upon the CBO's findings when enacting the Affordable Care Act." *Land of Lincoln*, 129 Fed. Cl. at 104 & n.21 (citing ACA section 1563). Thus, the CBO report confirms what Congress understood and intended when it enacted section 1342 without a provision for appropriations: "payments out" would be funded solely with "payments in."[5]

Congress's decision not to provide for any other source of funding also marks a distinct contrast with the risk corridors program under Medicare Part D, under which Congress expressly authorized appropriations and obligated the government "in advance of appropriations." *See* 42 U.S.C. § 1395w-115(a)(2) (conferring "budget authority in advance of appropriations Acts and represent[ing] the obligation of the Secretary to provide for the payment of amounts provided under this section"); *id.* at § 1395w-116(c)(3) (authorizing appropriations).[6] "When Congress

[5] Maine CHO relies on a different CBO report prepared in February of 2014 to support its argument that the program is not budget neutral. Pl.'s Reply at 19-20. But as Judge Lettow properly concluded, "[f]or purposes of determining the congressional intent underpinning Section 1342, the CBO's March 2010 estimate is the only pertinent report because that is what Congress relied upon in passing the Act." *Land of Lincoln*, 129 Fed. Cl. at 105 (citations omitted).

[6] Congress used similar language of obligation in at least one other section of the ACA. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Title II, Subtitle I § 2707(e)(1)(B), 124 Stat. 326 (Mar. 23, 2010), *available at* https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf ("Budget Authority.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the

omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." *Land of Lincoln*, 129 Fed. Cl. at 105 (quoting *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002)). Thus, by deviating from language used elsewhere in the ACA and under the Medicare Part D statute, Congress expressed its intent that section 1342 would be a self-enclosed program of "payments in" and "payments out."

Maine CHO's argument otherwise rests largely on the "shall pay" language in the payment methodology subsection. But section 1342 does not "mandate[] that the Government '*shall pay*'" as Maine CHO would have it. Pl.'s Reply at 27. Rather, it provides that HHS "shall establish and administer a program" of risk corridors, under which payments and charges are calculated using a specified payment scheme. 42 U.S.C. § 18062(a), (b). Moreover, Congress only required that HHS provide for "payments out" "under the program," and Congress never provided funding for that program except to the extent of collections, or "payments in." *Id.* § 18062(b). In so providing, Congress retained its power to control funding for the program, and Congress did not mention, let alone establish, any source of funding other than collections. Thus, the words "shall pay" in subsection (b) "must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). That scheme includes the 2010 CBO report on which Congress expressly relied, the constitutional requirement for an appropriation, and Congress's decision not to appropriate or authorize additional funds for the program. Congress did not mandate that HHS "shall pay" when "payments out" exceed "payments in" "under the program."

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payment of the amounts appropriated under that subparagraph."). Again, Congress used no such language in section 1342.

Maine CHO also appeals to policy arguments and comparisons to the Medicare Part D program. With respect to Medicare Part D, as Judge Lettow noted, while "the two programs share many similarities, they are not identical" and specifically, "the Medicare Program explicitly provides for authorization of appropriations" whereas section 1342 does not. *Land of Lincoln*, 129 Fed. Cl. at 105. Thus, "the Medicare Program is not helpful to [Maine CHO's] argument." *See id.* Maine CHO's policy arguments also are unavailing. They operate from the mistaken premise that Congress intended to unqualifiedly insure against, rather than merely mitigate, pricing uncertainty, and they give short shrift to the overriding fiscal objectives of the enacting Congress. *See, e.g.*, Patient Protection and Affordable Care Act § 1563, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010) ("Sense of the Senate Promoting Fiscal Responsibility" (relying on CBO report)).[7] Maine CHO's one-sided appeals to the "broad purposes" of legislation should be rejected as "ignor[ing] the complexity of the problems Congress is called upon to address and the dynamics of legislative action" where "the final language of the legislation may reflect hard-fought compromises." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986); *see also Land of Lincoln*, 129 Fed. Cl. at 107 ("Policy considerations cannot override our interpretation of the text and structure of a statute, except to the extent that they may help to show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it.") (quoting *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004)); *Sharp v. United States*, 80 Fed. Cl. 422, 433 (2008) ("it is entirely reasonable to assume a scenario in which various factions within Congress, each of which had

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[7] Indeed, just one month before the ACA was enacted, Congress passed the Statutory Pay-As-You-Go Act of 2010 "to enforce a rule of budget neutrality on new revenue and direct spending legislation." Pub. L. No. 111-139 (Feb. 12, 2010).

different policy goals, were motivated to—and did—compromise in order to pass the [Act], which gave each group a portion of what it sought.”).

Finally, a budget neutral interpretation of the statute does not, as Maine CHO argues, “conflate[] budget authority (the ability to pay) with liability (obligation to pay).” Pl.’s Reply at 18. Rather, it gives proper weight to Congress’s constitutional power of the purse in discerning congressional intent regarding the scope of the obligation it enacted. Maine CHO, by contrast, invites the Court to presume from congressional silence that Congress intended to expose the government to billions of dollars in uncapped liability without ever mentioning how that liability would be paid, much less authorizing or appropriating funding. Because that presumption is at odds with the basic structure of section 1342, congressional understanding of the budgetary impact of the program at the time of enactment, and fundamental principles of appropriations law, the Court should reject it. Section 1342 does not obligate HHS to make payments in excess of collections.

B. Congress Restricted Risk Corridors Payments with the Intent that the Risk Corridors Program Be Budget Neutral While the Spending Laws Are in Effect

Regardless of how the Court interprets section 1342 as originally enacted, in the absence of either a permanent appropriation or a statement of intent to obligate the government in advance of an appropriation, it is clear, at a minimum, that Congress retained its authority to control spending on the risk corridors program through the annual appropriations process. Congress exercised that authority in the annual Spending Laws by capping HHS’s ability to make payments in excess of collections, thereby requiring the risk corridors program be budget neutral for the years those laws are in effect. The Spending Laws confirm what is implicit in the structure of section 1342: risk corridors payments are funded solely from collections.

Maine CHO does not seriously contest that the intent of the Spending Laws is to ensure that the risk corridors program will be budget neutral for the years those laws are in effect.[8] Rather, it contends that Congress could not achieve that result without expressly amending section 1342. That is simply wrong. First, the funding restriction imposed in the Spending Laws is perfectly consistent with an interpretation of section 1342 as budget neutral; thus, Congress did not need to "amend" the law, but was free to clarify its intent through a straight-forward exercise of its appropriations power. Maine CHO resists this conclusion by arguing that the Spending Laws "would have been completely unnecessary had Congress thought . . . that the [risk corridors] program as enacted was budget neutral." Pl.'s Reply at 22. That suggestion ignores the history that led to the enactment of the Spending Laws riders. It was perfectly reasonable for Congress to clarify its intent in light of the GAO's September 2014 opinion that HHS's Program Management fund could be used to make risk corridors payments. *See* GAO, B-325630 at 4 (Sept. 30, 2014); http://gao.gov/assets/670/666299.pdf.

Likewise, Maine CHO's contention that the Spending Laws could not have made section 1342 budget neutral because "they would have failed in Congress," Pl.'s Reply at 22, ignores reality: the Spending Laws passed, and in that process, Congress explained their purpose was to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74 at 12 (June 25, 2015); https://www.congress.gov/114/crpt/srpt74/CRPT-114srpt74.pdf. Maine CHO's insistence that

[8] As explained in the United States' Motion, Congress's unmistakable intent regarding budget neutrality is conveyed in the course of events leading up to the enactment of the 2015 and 2016 Spending Laws, the prohibition in the Spending Laws on the use of certain funds for risk corridors payments, and the Explanatory Statement and committee reports.

this straightforward expression of congressional intent should not be given effect merely because other bills pertaining to budget neutrality were introduced but not enacted is groundless. Indeed, if that logic were applied to section 1342, it would mean that a court could not give effect to the risk corridors program because, prior to enacting the ACA, Congress considered but did not pass other legislation containing a risk corridors program. *See, e.g.*, Small Business Health Options Program Act of 2009, H.R. 2360, 111th Cong. § 3018(a) (2009) ("Application of Risk Corridors"), https://www.congress.gov/111/bills/hr2360/BILLS-111hr2360ih.pdf; Affordable Health Choices Act, S. 1679, 111th Cong. § 3106(c)(3) (2009) ("Risk corridor payments"), https://www.congress.gov/111/bills/s1679/BILLS-111s1679pcs.pdf; America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 2214 (2009) ("Establishment of risk corridors for plans in individual and small group markets"), https://www.congress.gov/111/bills/s1796/BILLS-111s1796pcs.pdf. Such reasoning would be absurd, and for that reason, the Supreme Court has squarely held that legislation that Congress "considered, but did not enact . . . lacks persuasive significance because severally equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change*." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (emphasis added; quotation omitted); *see also* Def.'s Mot. at 35 n.20.

Moreover, Maine CHO still has not identified a single possible purpose motivating the enactment of the Spending Law riders other than to ensure the program is budget neutral. In Maine CHO's view, the Spending Laws merely transfer responsibility for payment from HHS to this Court, and congressional intent embodied in the Spending Laws must be ignored. That view cannot be squared with existing law. *See Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987) ("courts cannot set aside legislation because it is inconsistent with prior legislation. . . .

Congress may repeal, amend or ignore any statute it has enacted.") (citing *Manigault v. Springs*, 199 U.S. 473, 487 (1905)). "The intention of Congress must govern in the construction of . . . conflicting provisions." *Belknap v. United States*, 24 Ct. Cl. 433, 441-42 (1889), *aff'd*, 150 U.S. 588 (1893) (holding that "Congress persistently determined each year to fix the compensation of Indian agents by annual appropriations" and thus "the claimant has received all he is entitled to").

Here, not only is congressional intent clear, but by affirmatively preventing HHS from making payments in excess of collections, Congress also created a "positive repugnancy" with Maine CHO's interpretation of the statute. This is sufficient to supersede any contrary language in section 1342. *See Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002) ("Congress may amend . . . a statute by means of an appropriations bill" either through a clear indication of that intent or through a "positive repugnancy" with the prior statute); *Belknap*, 24 Ct. Cl. at 441-42. Whether conceptualized as a "clarification," "suspension," or "modification" of section 1342, congressional intent as embodied in the Spending Laws must govern.

These principles are so firmly established that when the Federal Circuit confronted an analogous situation in *Highland Falls*, the Court concluded that school districts were only entitled to a *pro rata* payment of amounts otherwise required under the substantive law. 48 F.3d at 1171. In fact, in *Highland Falls*, the enabling legislation contemplated that the plaintiff would be paid at 100 percent *notwithstanding subsequent appropriations laws*. Nevertheless, the Federal Circuit held that the agency properly pro-rated the plaintiff's payment because Congress, in earmarked appropriations, had clearly expressed its intent to appropriate a lesser amount. *Id.* at 1170 ("We conclude that Congress has directly spoken to this question and that DOE, in following the approach it did, gave effect to the unambiguously expressed intent of Congress.") (citation and quotation omitted). That holding controls this case.

Maine CHO attempts to distinguish *Highland Falls* and other cases relied upon in the United States' opening brief on the basis that they purportedly involved "appropriations language that 'clearly manifested' an intent to amend the underlying law." Pl.'s Reply at 23. But the language in *Highland Falls* was far less clear than the riders here: it simply provided an earmarked amount to make the payments at issue. Nevertheless, the Federal Circuit concluded that, in exercising its appropriations power, "Congress had directly spoken" to how much the plaintiff was entitled to receive. In any event, to the extent there are differences between the language in the cited cases and the language in the Spending Laws, those differences merely reflect the different legislative backdrop of each case; they do not undermine the clarity of Congress's intent here. In this case, Congress did not intend to prohibit risk corridors payments entirely, and therefore, it did not use the language used in *United States v. Dickerson,* 310 U.S. 554 (1940), or the different and unique language used in *Will* and the other cited cases. Instead, as explained in the 2015 Explanatory Statement and 2016 Senate Committee Report, Congress intended only to limit risk corridors payments to the extent of collections. By targeting the prohibition at monies from the Centers for Medicare & Medicaid Services ("CMS") Trust Funds and monies transferred to the CMS Program Management appropriation from other accounts, Congress responded to the GAO opinion while ensuring that monies deposited into the account from risk corridors collections would still be available for risk corridors payments.

Finally, *Gibney v. United States*, 114 Ct. Cl. 38 (1949), is not "squarely on point." Pl.'s Reply at 22. In that case, the court merely applied the plain language of the subsequently enacted law, which incorporated the prior law by reference. In *dicta*, the court opined that "a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation." 114 Ct. Cl. at 50-51. To the extent Maine CHO takes this

statement, on which the court did not rely in reaching its ultimate holding, to suggest that Congress cannot modify a prior statutory law through an appropriations act, that is a misreading of *Gibney* and is refuted by *Dickerson*, *Mitchell*, and *Will*. The *Gibney* court also noted that the appropriation provision at issue was only in effect for one year, that congressional intent could not be discerned solely from one senator's floor statement, and that the provision's sponsor acknowledged the following year that the limitation was based on a mistaken assumption about the scope of the prior law. *Id.* at 53-54. In contrast, Congress's intention that the Spending Laws riders ensure the budget neutrality of the risk corridors program is unequivocally set forth in the 2015 Explanatory Statement and the 2016 Senate Committee Report. Indeed, the 2015 Spending Law provides that the Explanatory Statement "shall have the same effect . . . as if it were a joint explanatory statement of a committee of conference." 128 Stat. 2130, 2132. Thus, *Gibney* is inapposite.

In short, this case does not concern a "mere failure of Congress to appropriate funds," *Greenlee Cnty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007), a repeal by implication, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978), or an attempt to limit an existing contractual obligation, *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748-49 (Ct. Cl. 1966). Instead, Congress, for the only fiscal years in which risk corridors payments could be made, enacted appropriations laws limiting the source of funds to make those payments. Maine CHO has not cited any authority that would permit the Court to ignore the intent embodied in Congress's exercise of its Constitutional authority over the public fisc, and there is none. Accordingly, the Court should dismiss this case because Maine CHO has received all it is owed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Maine CHO's Complaint, deny Maine CHO's motion for summary judgment, and enter judgment for the United States.

Dated: February 6, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2017, I electronically filed the foregoing UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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