IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

SUPPLEMENTAL BRIEF
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION TO DISMISS

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INTRODUCTION

The Court specified two questions for supplemental briefing: (1) What is the effect of a subsequent congressional bar to using appropriated funds to meet a previously created statutory payment obligation with regard to any right to seek judicial enforcement of that obligation?; and (2) Does the Judgment Fund preserve the right of recourse under the Tucker Act?

The answer to the Court's first question is that, with respect to the Risk Corridors Program ("RCP") created by Section 1342 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18062, Congress's later appropriations acts did *not* abrogate Health Options' right to seek relief in this Court for RCP payments due. First, the Government's liability under Section 1342 is absolute and, by Congress's design, does not depend on the existence of a dedicated appropriation to fund that liability. Second, a right that is not contingent on a dedicated appropriation in the first instance cannot be limited by a subsequent restriction on an agency's appropriation. Third, the appropriations "restrictions" in question, by their own terms, did not alter the underlying legal obligation of the Government—at most, those restrictions altered the source of payment. The Government's liability for its Section 1342 obligation remained undisturbed.

The answer to the Court's second question is equally clear. The 2015 and 2016 Spending Laws did *not* abrogate this Court's Tucker Act jurisdiction to enter a judgment for Health Options, and the Judgment Fund is available to satisfy it. The Department of Justice made *precisely* this argument in another ACA case, arguing in federal court that: (i) under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government; (ii) successful plaintiffs can receive the amount to which they are entitled from

Congress's permanent appropriation, the Judgment Fund; and (iii) the mere absence of a specific appropriation is not a defense to recovery from that Fund.[1]

ARGUMENT

Section 1342(b) states unambiguously that if an insurer that made a Qualified Health Plan ("QHP") available on the exchanges realized higher-than-budgeted costs above certain thresholds relative to its budgeted costs, the Government "shall pay" to that insurer a statutorily defined amount of money. This formula is a "risk corridor"—its purpose is to *mitigate* (not eliminate) the insurers' losses due to higher-than-expected costs. Risk corridors also "flow" in the opposite direction: insurers that realized lower-than-budgeted costs were statutorily required to pay the Government. There is no requirement that "payments out" be limited to "payments in," or vice versa. In other words, Section 1342 is not budget neutral. Indeed, Section 1342 was expressly "based on" the Medicare Part D RCP, which at all times was unquestionably understood to *not* be budget neutral. *See* Pl.'s Mot. Summ. J. at 7, 22, 24-25, ECF No. 9 ("Pl.'s Br.").

When it came time to make payments, however, although the Government was perfectly amenable to collecting full "payments in" from the insurers as dictated by Section 1342 (including over $2 million from Health Options), it refused to hold up its end of the bargain to make full "payments out." Health Options filed this lawsuit to collect money the Government is mandated to pay it for 2014 and 2015 under Section 1342.

[1] Def.'s Mem. in Supp. of Mot. Summ. J. at 20, *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016) (No. 1:14-cv-01967-RMC) (citing *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191-92 (2012)), *appeal held in abeyance*, No. 16-5202, 2016 WL 8292200 (D.C. Cir. Dec. 5, 2016).

I. THE 2015 AND 2016 SPENDING LAWS HAD NO EFFECT ON HEALTH OPTIONS' RIGHT TO SEEK RELIEF IN THIS COURT FOR THE RISK CORRIDORS PAYMENTS IT IS OWED BY THE GOVERNMENT.

The 2015 and 2016 Spending Laws had no effect on the Government's obligation to make payments out under Section 1342. Indeed, they could not have, because Congress mandated the Government's liability under Section 1342 without regard to appropriations. Under our Constitution, there is no question that Congress could fashion the law in this manner, and that its having done so is in perfect harmony with black letter appropriations law.

A. The Government's Liability Does Not Depend on There Also Being a Dedicated Appropriation to Fund the Liability.

The Government's liability for full and annual RCP payments does not turn on whether Congress specifically appropriated funds for the U.S. Department of Health and Human Services ("HHS") to make RCP payments. The Government erroneously conflates two distinct concepts: (1) Congress's creation of a legal "obligation" to pay in the first instance (which Section 1342 does); and (2) the fiscal mechanics of the Government later fulfilling that obligation.

1. Congress May Create an Obligation Irrespective of the Existence of an Appropriation to Fund It.

The Tucker Act grants this Court jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or *any Act of Congress* or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1) (emphasis added). Where Congress through "some other source of law" mandates that the Government make payment to the claimant, this Court has jurisdiction to hear the lawsuit and render judgment. *See United States v. Mitchell*, 463 U.S. 206, 216-17 (1983).

Section 1342 is unequivocally money-mandating because, *inter alia*, it dictates that the Government "shall pay" RCP payments. And, in fact, this Court has already held as much. *See* Order at 2, ECF No. 30 ("Plaintiff has presented a claim for payment under a statute that

mandates a payment of money to participating insurance providers should their costs exceed a target amount."); *see also Moda Health Plan, Inc. v. United States*, No. CIV 16-649C, 2017 WL 527588, at **10-11 (Fed. Cl. Feb. 9, 2017). Accordingly, Health Options may obtain a judgment for the RCP payments that the Government has failed to make under the money-mandating Section 1342. *See Mitchell*, 463 U.S. at 218; *Price v. Panetta*, 674 F.3d 1335, 1338-39 (Fed. Cir. 2012); *District of Columbia v. United States*, 67 Fed. Cl. 292, 302-05 (2005).

It is not relevant to the question of the Government's liability—and to this Court's ability to render a judgment on that liability—whether, when, and how Congress appropriates the required funds to satisfy the Government's legal obligation. There is, importantly, no requirement for Congress to create a specific appropriation. *See, e.g., United States v. Langston*, 118 U.S. 389, 391-94 (1886) (finding the Government liable for statutory promise of payment in absence of a specific appropriation).

The Federal Circuit's seminal decision in *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011) (*en banc*), is instructive. *Slattery* addressed whether the Government could be sued under the Tucker Act for breaches committed by a Government entity that was not funded by appropriations ("NAFI"). The Government argued that because a NAFI is not funded by appropriations, this Court lacks jurisdiction to adjudicate claims for a NAFI breach. After canvassing a long line of cases, the Federal Circuit abrogated its own contrary precedent[2] and held that the Tucker Act's broad grant of jurisdiction for any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . ."[3] was not limited to the subset of instances

[2] *See Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966), *abrogated by Slattery*, 635 F.3d 1298.
[3] 28 U.S.C. § 1491(a)(1).

where a specific appropriation could be identified. *Id.* at 1321. It held, "the jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid." *Id.* Critically, the Court ruled that any resulting judgment—despite the lack of appropriations involved in creating the original obligation—could be satisfied by the Judgment Fund. *See id*. at 1317 (Judgment Fund's purpose "was to avoid the need for specific appropriations to pay [Court of Claims] judgments.").

Slattery's holding applies with equal force here, even though it specifically addressed jurisdiction over a claim for breach of a NAFI contract, because the Tucker Act draws no distinction among constitutional, statutory, or contract claims against the Government (*i.e.*, it does not matter whether the "other source of law" giving rise to the Government's liability is the Constitution, a statute, or a contract). And while the Government has framed this as a "merits" issue, forcing RCP plaintiffs to identify a specific appropriation as a predicate condition to stating a Section 1342 claim amounts to the type of second "jurisdictional" test *Slattery* rejected. *See id*. at 1316 (reasoning that Tucker Act jurisdiction is determined by identification of a money-mandating source of law and there is no need to identify a specific appropriation for what would amount to a "second waiver" of sovereign immunity (citing *Mitchell*, 463 U.S. at 218)).

The Government's argument, if believed, would render the money-mandating aspect of Section 1342 meaningless. A statute is money-mandating if it compels payment to an individual or group when the requirements of the statute are met, an inquiry that focuses on whether the Government has discretion to refuse to make payment. *See ARRA Energy Co. v. United States*, 97 Fed. Cl. 12, 19-21 (2011). In *ARRA*, the Court expressly found the statutory provision at issue to be money-mandating because that statute says that the Government "*shall*" provide grants under certain circumstances. *Id.* at 22 ("[S]ection 1603 is money mandating because it

compels the payment of money by the government when the requirements of the statute are met."); *see also Fisher v. United States*, 402 F.3d 1167, 1174-75 (Fed. Cir. 2005) ("[S]tatute is money-mandating because *when the requirements of the statute are met—i.e.*, when the Secretary determines that a service member is unfit for duty because of a physical disability, and that disability is permanent and stable and is not the result of the member's intentional misconduct or willful neglect—the member *is entitled to compensation*.") (emphasis added); *Doe v. United States*, 463 F.3d 1314, 1324-25 (Fed. Cir. 2006); *e.g.*, *Sanders v. United States*, 594 F.2d 804, 809-13, 820 (Ct. Cl. 1979) (*en banc*) (judgment entered where plaintiff demonstrated he performed and stated a claim under a money-mandating statute), *superseded by statute on other grounds*, 10 U.S.C. § 628.

2. In Section 1342, Congress Did Not Limit the United States' RCP Payment Obligation to the Availability of an Appropriation.

Congress stated in Section 1342 that CMS "shall pay" QHP issuers—an unambiguous command to pay where the statutory triggers were met. Congress also *omitted* from Section 1342 its typical words of limitation on an agency's budget authority to condition the "shall pay" command, such as "subject to appropriations" or "subject to the availability of appropriations." *See Prairie Cty., Mont. v. United States*, 113 Fed. Cl. 194, 199 (2013), *aff'd*, 782 F.3d 685 (Fed. Cir. 2015) ("[T]he language 'subject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose.") (quoting *Greenlee Cty, Ariz. v. United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007)). The omission of these words of limitation in Section 1342 is all the more instructive when the Court considers that Congress chose to include this terminology *in at least four other sections* of the ACA. *See, e.g.*, 42 U.S.C. § 280k(a) ("The Secretary . . . shall, *subject to the availability of*

appropriations, establish a 5-year national, public education campaign . . . ." (emphasis added)). Had Congress intended Section 1342's obligation to be similarly limited, it would have said so.

Nor did Congress expressly condition "payments out" on "payments in." *See Moda*, 2017 WL 527588, at **15-17. Accordingly, the *only* limitation on Health Options' right to a judgment is its ability to demonstrate that it performed as a QHP issuer on the exchanges and qualifies for RCP payments under the Section 1342 formula (as echoed in CMS's implementing regulation). *See Fisher*, 402 F.3d at 1176. The Government does not dispute that Health Options performed.

3. Health Options' Right to Payment Under Section 1342 Is Not Dependent on Congress Authorizing a Specific Appropriation for HHS to Pay It.

In prior argument, the Government has asked this Court to focus on HHS's authority to obligate the United States. To this end, the Government relies on the absence from Section 1342 of certain language found in Medicare Part D relating to an agency's "budget authority in advance of appropriations" as proof that Congress did not intend to give HHS equivalent authority to obligate the United States under Section 1342. *See* Def.'s Mot. Dismiss and Opp. to Pl.'s Mot. Summ. J. ("Def.'s Opp.") at 32, ECF No. 22 (citing 42 U.S.C. § 1395w-115(a)(2)); Tr. of Oral Arg. ("Oral Arg.") at 48-49, ECF No. 29 (making Part D argument). But the "in advance of appropriations" language has nothing to do with *Congress's own power* to obligate the United States, as it did in Section 1342. The Government thus conflates (1) Congress's unequivocal ability to obligate the United States (which it did with the words "shall pay"), and (2) an agency's authority to incur obligations *on behalf of* the United States. Precisely because Congress has "the power of the purse," it can mandate payment irrespective of whatever additional authority it vests in an agency to obligate the Government on its own.

It is for this reason that the Government's invocation of the Anti-deficiency Act ("ADA") for the proposition that HHS may not incur obligations without advance budget authority or a dedicated appropriation is completely off the mark. *See* Def.'s Reply Mot. Dismiss ("Def.'s Reply") at 12, ECF No. 26 (citing 31 U.S.C. § 1341(a)(1)). The ADA imposes fiscal restraints on agencies; *it does not apply to Congress*. Indeed, that statute itself makes clear (as it must) that its prohibitions on agency authority to incur obligations on the Government's behalf fall away where "authorized by law," *i.e.*, where Congress says otherwise. *See* 31 U.S.C. § 1341(a); *accord* II GAO, Principles of Fed. Appropriations Law ["GAO Redbook"], at 6-91 (3d ed. 2006) ("Congress may expressly state that an agency may obligate in excess of the amounts appropriated, or it may implicitly authorize an agency to do so *by virtue of a law that necessarily requires such obligations*.") (emphasis added), *available at* https://www.gao.gov/legal/red-book/overview.

There is no question Congress can obligate the United States by substantive legislation to pay money. *See Mitchell*, 463 U.S. at 218. That is precisely what Congress did in Section 1342. It exercised its power to create a statutory obligation of the United States. That is all that is needed for this Court to take jurisdiction under the Tucker Act and render a judgment. *Slattery*, discussed above, flatly rejects the position that the United States can only be found liable for financial obligations to the extent the subject agency carrying out the business of the United States has been funded by an appropriation to pay the obligation. The debts of the United States are the debts of the United States, not merely the debts of the responsible agency. It makes no difference for purposes of this Court's interpretation of Section 1342 whether HHS itself was authorized to incur obligations on behalf of the United States in advance of appropriations; it matters only whether *Congress* bound the United States to certain obligations when QHP issuers

performed and, under the terms of Section 1342, qualified for payments by virtue of experiencing sufficient higher-than-expected costs on the exchanges.

Furthermore, to the extent that HHS's budget authority under Section 1342 is relevant to the inquiry, the Government has misstated it. In arguing that the ADA constrained HHS from incurring Section 1342 obligations, the Government has relied on the ADA provision that prohibits an agency from making or authorizing an expenditure or obligation "exceeding an amount available in an appropriation or fund for the expenditure or obligation." Def.'s Reply at 12 (citing 31 U.S.C. § 1341(a)(1)(A)). The Government is relying on the wrong ADA section. That section stands for the unexceptional proposition that where Congress has specifically capped the amount that can be spent on a program, the agency cannot exceed that cap. A case cited by the Government at oral argument, *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), makes just this point. *See* Oral Arg. at 102. *Star-Glo* involved a claim for payments to Florida citrus growers for damaged trees, but only up to a program cap of $58 million. As the Federal Circuit noted: "If the statute imposes a cap, payments in excess of the cap would violate the Anti-deficiency Act." *Star-Glo*, 414 F.3d at 1354 (citing 31 U.S.C. § 1341(a)(1)(A) (2000)). The same scenario existed in two other cases cited by the Government: *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995), and *Prairie Cty., Mont.*, 113 Fed. Cl. 194. *See* Def.'s Opp. at 37, 39, 40, 42; Def.'s Reply at 22-23. But these cases are irrelevant.

The ADA provision relied upon by the Government and the cases applying it are inapposite because nothing in Section 1342 imposes a cap on RCP payments. That is the point: the "shall pay" mandate in Section 1342 is unconditional. *See, e.g.*, *Moda*, 2017 WL 527588, at *15 ("Section 1342 simply directs the Secretary of HHS to make full 'payments out.' Therefore,

full payments out he must make."). Rather, the appropriate ADA provision to consider in determining how, if at all, HHS is constrained by the ADA, is the one that prohibits an agency from involving the Government "in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). This ADA exception unequivocally recognizes that while Congress, through the ADA, restrains agency spending, it remains empowered to exercise its power directly by creating obligations "authorized by law." *Accord* II GAO Redbook at 6-91.

Medicare Part D is one example of a law authorizing the agency to obligate the Government without an appropriation (granting budget authority "in advance of appropriations"). Section 1342—a money-mandating statute—is another.

Where Congress directs by statute that payment be made in a particular circumstance, and leaves no discretion with the administering federal agency if the plaintiff can demonstrate that certain requirements have been met, the statute is money-mandating. *See Price*, 674 F.3d at 1339; *Fisher*, 402 F.3d at 1174-75; *see also Mitchell*, 463 U.S. at 218 (recognizing Tucker Act jurisdiction over "claims founded upon statutes or regulations that create substantive rights to money damages"). Because this Court has already found that Section 1342 is money-mandating, the ADA is irrelevant. But to the extent that the ADA is instructive in any capacity, its "authorized by law" exception expressly contemplates payment by agencies under precisely the present circumstances. *See* 31 U.S.C. § 1341(a)(1)(B); *Moda*, 2017 WL 527588, at *15 (rejecting Government's argument that the lack of express budget authority "in advance of appropriations" as found in Medicare Part D was determinative, pointing out that "[t]he stronger payment language in Section 1342 obligates the Secretary to make payments and removes his discretion, *so a further payment directive to the Secretary is unnecessary*") (emphasis added).

Not surprisingly, this is consistent with what HHS understood Section 1342 to require, as demonstrated by its many public statements about its payment obligations under Section 1342. Even after it announced in spring 2014 that it would try to administer the RCP in a budget-neutral manner, HHS repeatedly acknowledged that *full payment* remained due to QHP issuers. *See, e.g.*, Exchange and Insurance Market Standards for 2015 and Beyond ("Exchange Establishment Rule"), 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (emphasis added) ("HHS recognizes that the Affordable Care Act requires the Secretary to make ***full payments*** to issuers . . ."). That acknowledgment would be repeated numerous times over the next two-and-a-half years. *See* Pl.'s Br. at 12 n.12.[4]

B. An Obligation That Does Not Depend on an Appropriation Cannot Be Affected by a Limitation on Appropriations.

Where the Government's liability does not depend on a specific appropriation, a later Congress's restriction on *HHS's ability* to make RCP payments is legally irrelevant. With respect to payments due to insurers under Section 1342, Congress's later actions did not abridge the obligation *of the United States*, nor could they have. At most, they affected only the source of payment. The Government's liability exists independently of HHS's own budget authority to make the payments due and continues to exist, undisturbed, as an obligation of the United States, a point that HHS itself (as noted above) has acknowledged on multiple occasions.

[4] That HHS has been acknowledging the Government's RCP obligations and recording them as requiring full payment shows that it understood its Section 1342 and Medicare Part D authorities to be functionally equivalent. While HHS's actions do not create the obligation (Section 1342 does), they certainly "evidence[] the obligation." II GAO Redbook at 7-8; *see also id.* at 7-43 (non-discretionary expenditures "*imposed by law*" should be recorded as "obligations").

C. By Their Own Terms, the 2015 and 2016 Spending Laws Did Not Modify the Government's Obligation Under Section 1342.

As addressed at length in Health Options' earlier briefs,[5] the 2015 and 2016 Spending Laws by their own terms did not modify Section 1342 or the liability of the United States. They merely implicated the Government's funding source for those obligations. The Government would have this Court treat the appropriations laws as substantive law, but that is a very tall hurdle for the Government to clear, and it comes nowhere close in this case.

Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," the statutory instructions included in them are presumed *not* to impact substantive law. *TVA v. Hill*, 437 U.S. 153, 190 (1978).[6] As Health Options has noted, Congress has repeatedly declined to repeal or modify the ACA as a whole or the RCP specifically. *See* Pl.'s Br. at 11, 22, 33. It is fundamental to the separation of powers that if Congress does not have the President's support or sufficient votes to override a veto, it cannot pass new legislation. The 113th Congress, which passed the 2015 Spending Law, considered and rejected two pieces of proposed legislation to amend the ACA to limit or eliminate RCP payments. *See* Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014) (seeking to amend the RCP to "ensur[e] budget neutrality."); Obamacare Taxpayer Bailout Prevention Act, S. 1726, 113th Cong. (2013) (seeking to eliminate the RCP). During the 2016 budget process, Congress considered and rejected an amendment expressly indicating that "Effective January 1, 2016, the Secretary shall not collect fees and shall not make payments under [the RCP]." 161 Cong. Rec. S8420-21 (daily ed. Dec. 3, 2015) (statement of Sen. McConnell). Senator Patty Murray spoke

[5] *See* Pl.'s Br. at 32-38; Pl.'s Reply Mot. Summ. J. and Opp. Mot. Dismiss at 20-23, ECF 23.
[6] While Congress may prospectively amend preexisting substantive statutory obligations, it must do so "expressly or by clear implication." *Prairie Cty.*, 782 F.3d at 689 (citations omitted). "This rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980).

against the amendment, raising a point of order to strike the proposed amendment, because RCP "is a vital program to make sure premiums are affordable and stable for our working families. Repealing it would result in increased premiums, more uninsured, and less competition in the market." *Id.* at S8354. Congress also considered and rejected more narrow legislation that would have required the RCP to be administered on a budget-neutral basis. *See, e.g.*, S. Rep. No. 114-74, 12 (June 25, 2015); *id.* at 121, 126. Not one of these measures became law.

To interpret the 2015 and 2016 Spending Laws to have accomplished what Congress chose not to do through substantive legislation would contravene applicable case law and render our constitutional system of checks and balances a nullity. This is why it "has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing the substantive law (expressly or by clear implication), does not in and of itself defeat a Government obligation created by statute." *Greenlee Cty.*, 487 F.3d at 877 (citing *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)); *see United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) ("Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end . . . ." (citations omitted)).

Binding precedent illustrates this basic point. In *Langston*, the diplomatic representative to Haiti sued when Congress failed to appropriate sufficient funds to pay his statutorily set salary. 118 U.S. at 390. The original statute stated "[t]he representative at Ha[i]ti shall be entitled to a salary of $7,500 a year" but a subsequent appropriation set the salary "for the service of the fiscal year ending June 30, 1883, out of any money in the treasury, not otherwise

appropriated, for the objects therein expressed" at $5,000. *Id.* at 390-91. The Supreme Court emphasized the importance of clear language repealing or amending a statute. For example, it distinguished the appropriation language at issue from one that clearly indicated an intent to repeal previously set salaries by explicitly establishing a new compensation system to replace the prior one. *Id*. at 392-93. The Court reasoned that the appropriation at issue did not contain "any language to the effect that such sum shall be 'in full compensation' for those years" or other provisions "from which it might be inferred that congress intended to repeal the act." *Id.* at 393.

Similarly, in *New York Airways*, the Court of Claims held that Congress's appropriation deliberately underfunding subsidy payments under the Federal Aviation Act (pursuant to which helicopter companies had already rendered services) did not amend the original statute. 369 F.2d at 744-45. It further held that the original statute empowered the implementing agency to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of an appropriation. *Id*.; *see also Gibney v. United States*, 114 Ct. Cl. 38, 49-50 (1949) ("There is nothing in the wording of the [appropriations] proviso . . . which would warrant a conclusion that it was intended to effect the repeal of the [original] codified provisions of the act . . . .").

The Court in *Moda* stressed that funding restrictions generally do not amend or repeal substantive law and repeals by implication are not favored. 2017 WL 527588, at *18 (citing *N.Y. Airways*, 369 F.2d at 749; *Langston*, 118 U.S. at 393). "Repealing an obligation of the United States is a serious matter, and burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate." *Id.* (*citing Gibney*, 114 Ct. Cl. at 51); *accord N.Y. Airways*, 369 F.2d at 749 (stating an unmistakable intent to repeal or amend the substantive law must be "clearly manifest"). Judge Wheeler conducted an in-depth analysis of the parties' cited cases (the same cases raised

here). He focused on six cases in particular, in four of which the court refused to find that a later appropriation law repealed or amended a prior substantive law,[7] and in two of which the court found that it did so.[8] The distinction: Congress broadly curtailing spending for a program from appropriations "contained in this or any other Act" or funds "appropriated in this Act or any other Act" (effecting a substantive amendment) and Congress targeting only a specific funding source (limiting spending but not amending law). *See Moda*, 2017 WL 527588, at **20-22.

Judge Wheeler concluded that because the language in the 2015 and 2016 Spending Laws limited only the use of funds appropriated to *one specific account* and did not expand the limitation to other sources of funds using Congress's typical language to do so, those acts were comparable to the subsequent appropriations at issue in the line of cases finding that Congress did not intend to amend substantive law. *See id.* at **18-21. Moreover, he found that the legislative history of the Spending Laws confirmed that Congress understood them to prohibit RCP payments from a specific account. *Id.* at *21. Because "the limitation in this case singles out a specific use for a specific account" and does not "bar any appropriated funds from being used for a given purpose," the Court found that the words did not "clearly manifest" an intent to repeal or amend.[9] *Id.* at *20.

The Federal Circuit's "money-mandating statute" jurisprudence makes plain (as discussed above) that a plaintiff is entitled to full payment under the terms of the statute if it is within the class of entities to which the statute applies and can show, as a factual matter, that the

[7] *Moda*, 2017 WL 527588, at **18-19 (citing *Langston*, 118 U.S. at 394; *Gibney*, 114 Ct. Cl. at 50; *N.Y. Airways*, 369 F.2d at 815, 818; *District of Columbia*, 67 Fed. Cl. at 335).
[8] *Id.* at **19-20 (citing *United States v. Dickerson*, 310 U.S. 554, 561-62 (1940); *Will*, 449 U.S. at 208 (1980)).
[9] Indeed, the Court noted that precisely that language was used elsewhere in the 2015 Spending Law but was *absent* from the provision governing RCP payments. *See Moda*, 2017 WL 527588, at *21 (citations omitted).

statutory or regulatory requirements for payment have been satisfied (as the undisputed facts demonstrate Health Options has). *See, e.g.*, *Sanders*, 594 F.2d at 809-13. Here, Health Options undisputedly performed on the exchanges in 2014 and 2015 and is entitled to payment under Section 1342 and its implementing regulations. HHS even concedes the amounts owed.

The Department of Justice's position that the 2015 and 2016 Spending Laws nevertheless denied Health Options its right to payment ignores binding precedent that appropriations cannot amend substantive law (especially *retroactively*) absent a clearly manifest intent to do so, and raises serious concerns about the Government's power to abridge vested rights. *See* Pl.'s Br. at 36 n.26. Congress did not enact the 2015 Spending Law (curtailing CMS's authority to fund 2014 RCP obligations) until December 16, 2014, by which point Health Options had nearly completed performance for the 2014 plan year and committed to benefit year 2015. Likewise, Congress did not enact the 2016 Spending Law (curtailing CMS's authority to fund 2015 RCP obligations) until December 18, 2015, by which point Health Options had nearly completed performance for the 2015 plan year and had already committed to benefit year 2016. Depriving Health Options of its right to RCP payments, after it had provided insurance under a statutory scheme in which such payments had been guaranteed "'would impair rights a party possessed when [it] acted . . .'" and impose new rules on a transaction already completed. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994)). Such retroactive application of statutes is "disfavored," and thus "it has become 'a rule of general application' that 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Fernandez-Vargas*, 548 U.S. at 37 (quotation omitted). The Spending Laws evince no such language or necessary implication. *See Moda*, 2017 WL 527588, at *26 ("After all, 'to say to Moda, "the joke is on

you. You shouldn't have trusted us," is hardly worthy of our great government.'") (modifications omitted) (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

D. In Any Event, Appropriations Were Available for CMS to Incur RCP Obligations.

Although Section 1342 directly obligated the United States to make full RCP payments where the statutory conditions were satisfied by QHP issuers without regard to a dedicated appropriation, this Court may observe, as Judge Wheeler did in *Moda*, that appropriations were in fact available. For FY 2014, the first year in which the exchanges were operational and the RCP was in effect, GAO opined that two sources of funding for RCP payments were available: (1) the 2014 CMS Program Management (PM) appropriation, and (2) "payments in" from profitable plans. *Moda*, 2017 WL 527588, at *16; Hon. Jeff Sessions, Hon. Fred Upton, B-325630 (Comp. Gen.), 2014 WL 4825237, at *3 (Sept. 30, 2014). The CMS PM appropriation for FY 2014 included CMS's "other responsibilities" through September 30, 2014, includ[ing] the risk corridors program." 2014 WL 4825237, at *3.

Any argument by the Government that payments were not due until the following fiscal year and that, therefore, CMS's FY 2014 PM appropriation is irrelevant to the formation of an obligation, misconstrues black letter appropriations law. The availability of funds "relates to [an Agency's] authority to obligate the appropriation"—which occurred in FY 2014 when QHP issuers submitted their rates and opted to participate in the exchanges in the forthcoming year—and does not relate to whether that obligation is due or payable in current or subsequent fiscal years. I GAO Redbook at 5-3 - 5-4 (3d ed. 2004) (emphasis added); *see also* II GAO Redbook at 7-4 - 7-5. It is beyond cavil that an "expired appropriation remains available for 5 years for the purpose of paying obligations incurred prior to the account's expiration and adjusting obligations that were previously unrecorded or under recorded." I GAO Redbook at 1-37 (emphasis added).

A legal "obligation arises when the definite commitment is made, even though the actual payment may not take place until a future fiscal year . . . . [T]he term 'obligation' includes both matured and unmatured commitments . . . . An unmatured commitment is a liability which is not yet payable but for which a definite commitment nevertheless exists." II GAO Redbook at 7-4 - 7-5 (emphasis added). Thus, it is beyond dispute that there were in fact appropriations available for HHS to obligate the United States in FY 2014, notwithstanding that HHS would not pay the RCP obligations until the following fiscal year. *See id.*; *Moda*, 2017 WL 527588, at *17 n.13.

The same logic applies to FY 2015. As Judge Wheeler noted, appropriations were available for HHS to form 2015 RCP obligations (notwithstanding that payment would occur the following fiscal year) because Congress passed three continuing resolutions in the first several months of FY 2015 (covering October 2014)—before Congress passed the 2015 Spending Law (in December 2014) that first restricted sources of RCP payments. These continuing resolutions allocated roughly $750 million in unrestricted funds to the CMS PM appropriation. *Moda*, 2017 WL 527588, at *17 n.13. Since unrestricted funds were available in October 2014, when Health Options' participation in the exchanges during benefit year 2015 was fixed and irrevocable, there can be no legitimate argument that HHS lacked funds to form RCP obligations for FY 2015.

II. HEALTH OPTIONS' RIGHT TO OBTAIN JUDGMENT UNDER THE TUCKER ACT AND COLLECT JUDGMENT FROM THE JUDGMENT FUND IS CLEAR.

The Federal Circuit has stated in unequivocal terms: "The purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims." *Slattery*, 635 F.3d at 1317. The Judgment Fund is a continuing appropriation available to "pay final judgments" when, *inter alia*, "*payment is not otherwise provided for*." *See* 31 U.S.C. § 1304(a). Thus, the Government's repeated reference to the Constitution's Article I prohibition on withdrawing money from the Treasury absent an appropriation falls flat: the

Judgment Fund *is an appropriation*. The province of this Court is to grant (or deny) judgments; it is ultimately up to the political branches to determine how a plaintiff gets its judgment paid. *See Gibney*, 114 Ct. Cl. at 52 ("The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them.").

In *Slattery*, the Federal Circuit made it clear that (1) Tucker Act jurisdiction does not depend on Congress having funded a liability; and (2) the Judgment Fund is available specifically for the purpose of satisfying judgments that have not otherwise been appropriated for. *See Slattery*, 635 F.3d at 1317. These complementary principles are by now well established. *See, e.g.*, *N.Y. Airways*, 369 F.2d at 748 ("The failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in [this Court]."); *Gibney*, 114 Ct. Cl. at 52 ("Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether . . . Congress appropriated an insufficient amount . . . or nothing at all, are questions . . . which do not enter into the consideration of a case in the courts."); *Moda*, 2017 WL 527588, at *22 ("The Judgment Fund pays plaintiffs who prevail against the Government in this Court, and it constitutes a separate Congressional appropriation.").

While in *this* Court the Government will maintain its argument to the contrary, the Court should take note that this will reflect a stunning flip-flop from the position it took recently in a *different* federal court. In an ACA case in the District Court for the District of Columbia, the Government acknowledged unequivocally that the absence of a specific appropriation is no defense to payment from the Judgment Fund:

> Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. If the plaintiff is successful, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund, 31 U.S.C. § 1304(a). ***The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund***.

Def.'s Mem. in Supp. of Mot. Summ. J. at 20, *Burwell*, 185 F. Supp. 3d 165 (No. 1:14-cv-01967-RMC) (citing *Mitchell*, 463 U.S. at 216; *Salazar*, 132 S. Ct. at 2191-92) (emphasis added).

CONCLUSION

For the reasons stated herein, and in Health Options' earlier briefs, the Court should find that Health Options is entitled to a judgment under Section 1342 of the ACA; that Congress did not abrogate that right in the 2015 and 2016 Spending Laws; and that this Court's Tucker Act jurisdiction over this lawsuit remains in place; and that Health Options may seek to collect any judgment rendered by this Court from the Judgment Fund.

Dated: March 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, a copy of the foregoing "Supplemental Brief in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion to Dismiss" was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

Dated: March 31, 2017

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