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

RESPONSE TO THE UNITED STATES' SUPPLEMENTAL BRIEF

INTRODUCTION

The Government insists that the unqualified "shall pay" mandate in Section 1342 of the Affordable Care Act ("ACA") does not actually mean what it says; that it means, at most, "shall pay *subject to the availability of appropriations*," and that the only available appropriation was what it collected in "payments in" from insurers. Stripped of the Government's patchwork "context," the fundamental premise of the Government's case is that Congress did not enact what this Court has already held it did: a *money-mandating* statute.[1]

To the contrary, Health Options has demonstrated that: (1) Section 1342 mandates that the Government pay insurers that made health insurance available on the exchanges in the form of Qualified Health Plans ("QHPs") "if" the insurer realized higher-than-budgeted costs above certain thresholds; (2) Health Options is one such insurer (a "QHP issuer") to which payment is due; (3) the Government's liability does not depend on there also being a separate appropriation (and, in any event, a separate appropriation did exist); and (4) subsequent appropriations acts curtailing the ability of the U.S. Department of Health and Human Services ("HHS") to remit the required payments did not alter the Government's liability.

This Court may and should enter judgment for Health Options on the question of the Government's liability under Section 1342.

ARGUMENT

I. THE GOVERNMENT MISCONSTRUES CONGRESSIONAL POWER.

As Health Options has demonstrated, when (i) *Congress* mandates the payment of money under certain conditions and does not qualify that mandate (by, for example, limiting the

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[1] *See* Order 2, ECF No. 30 (ruling that Health Options "has presented a claim for payment ***under a statute that mandates the payment of money***" and rejecting "***the notion that the statute does not mandate the payment of money on a yearly basis***") (emphases added).

mandate to "the availability of appropriations"), and (ii) those conditions are met, the Government is liable for payment irrespective of whether funds have been appropriated. The Government objects; it would have this Court read into the text of Section 1342 language that is not there, transforming the unambiguous "shall pay" mandate into a more limited "shall pay *subject to the availability of appropriations*" mandate. It gets there by faulty logic: because Congress did not simultaneously authorize a separate appropriation or insert language authorizing HHS to incur obligations "in advance of appropriations," it must have intended Section 1342 disbursements to be "subject to the availability of appropriations." *See* U.S.'s Supplemental Br. ("U.S. Supp. Br.") 3-5, ECF No. 31. The logic does not hold up for the reasons Health Options has already set forth. *See* Pl.'s Supp. Br. 6-7, ECF No. 32. Simply put, the Government's position fails to credit Congress with both the ability to mean what it says and the authority to be bound by what it says.

The Government finds no support in the case authorities on which it relies. Its featured case, *Prairie County, Montana v. United States*, addressed a statute that, unlike Section 1342, ***expressly*** made the Government's obligation "subject to the availability of appropriations." *Compare* U.S. Supp. Br. 3-4, 7 *with* 782 F.3d 685, 687-88 (Fed. Cir. 2015) (concluding that "the plain language" of the statute "limits the government's liability . . . to the amount appropriated by Congress."). The Government has failed to state any plausible basis for this Court reading into Section 1342 a "budget neutral" limitation that Congress itself declined to impose. The Government's position is peculiar because Section 1342's RCP is "based on" the Medicare Part

D RCP, which is universally acknowledged as *not* budget neutral. Tellingly, even HHS—*outside of litigation*—agrees Section 1342 was not intended to be budget neutral.[2]

The Government's reliance on *OPM v. Richmond* is even more peculiar because that case actually makes Health Options' point and undermines the Government's own. There, the Supreme Court counseled that "[a] law that identifies the source of funds is not to be confused with the conditions prescribed for their payment. Rather, funds may be paid out only on the basis of a judgment based on ***a substantive right to compensation based on the express terms of a specific statute.*"** *OPM v. Richmond*, 496 U.S. 414, 432 (1990) (emphasis added). What the Government refuses to acknowledge is that Section 1342 is just such an express, substantive right to compensation.[3] The Federal Circuit has expressly rejected any requirement that Health Options also dictate how that legal obligation should be paid. *See* Pl.'s Supp. Br. 4-5.

The Government also stumbles by insisting that Congress may obligate the United States only through agency action and not directly. It insists, for example, that because Congress expressly granted HHS in Medicare Part D "budget authority in advance of appropriations," which "expressly made risk corridors payments an obligation of the government," but did not use the same language in Section 1342, it must have intended Section 1342 to be budget neutral. U.S. Supp. Br. 4. But Congress can exercise its power of the purse *either* by mandating money

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[2] *See* Pl.'s Mot. Summ. J. 11, 12 n.12, ECF No. 9. The Government would also have this Court ignore the fact that the RCP was created to serve as a risk-sharing program *between* insurers *and the United States*. *Compare* U.S. Supp. Br. 3 ("The ACA created a self-funded risk corridors program to distribute gains and losses between insurers that under- and over-estimated premiums.") *with* Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. 17,220, 17,220 (March 23, 2012) (noting that the RCP "serves to protect against uncertainty in rate setting by qualified health plans ***sharing risk in losses and gains with the Federal government***." (emphasis added)).

[3] The Supreme Court and Federal Circuit have held that a claimant need only establish a substantive source of law mandating payment. *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983); *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (*en banc*).

directly (as it did in Section 1342) *or* by authorizing agencies to incur obligations (as it did in Medicare Part D).[4] Indeed, the ADA exceptions on which the Government places so much weight expressly recognize that Congress is the ultimate repository of appropriations power. Pl.'s Supp. Br. 8 (citing 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).[5]

The Constitution gives Congress the power to make laws and implicate the public fisc. The Government argues that money-mandating statutory text cannot legally bind the United States absent an appropriation because the Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Supp. Br. 3 (quoting U.S. Const. art. I, § 9, cl. 7). But a statutory liability (*i.e.*, the obligation to pay) exists independent of whatever appropriation is created to pay the liability. Courts have long recognized this fact:

> That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted [sic.] with the safekeeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.
>
> ***This court***, established for the sole purpose of investigating claims against the government, ***does not deal with questions of appropriations, but with the legal liabilities incurred by the United States*** under contracts, express or implied, ***the***

[4] The Appropriations Clause protects *Congress's power* against agencies, which are *not* the keepers of the purse and can only implicate the public fisc as circumscribed *by Congress* in the Anti-deficiency Act ("ADA"). The Government's efforts to wield the Appropriations Clause to limit the very power it protects is unavailing because it "is ***exclusively a direction to the officers of the Treasury***." *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) (emphasis added).

[5] The Government inexplicably continues to focus on only the "in advance of appropriations" ADA exception and ignore the "authorized by law" exception. Pl.'s Supp. Br. 7-8.

> ***laws of Congress***, or the regulations of the executive departments. (Rev. Stat., § 1059.) That ***such liabilities may be created where there is no appropriation of money to meet them*** is recognized in section 3732 of the Revised Statutes.

Collins, 15 Ct. Cl. at 35 (emphases added); *accord* Pl.'s Supp. Br. 3-11.

The Government adds that Health Options "cannot identify an existing appropriation or demonstrate that Congress authorized by law HHS to incur an obligation to make risk corridors payments in excess of collections." U.S. Supp. Br. 5 n.2. This gets it completely backward: if Congress intended payments out to be subject to an appropriation or payments in, surely it would have said so. In at least four other sections of the ACA, Congress inserted "subject to the availability of appropriations" language. 42 U.S.C. §§ 280k(a), 300hh-31(a), 293k-2(e), 1397m-1(b)(2)(A). Congress expressly omitted such language from Section 1342. It is the Government that has failed to articulate any plausible reason why Section 1342 should be read to say something it plainly does not say. Put simply:

- This is what Section 1342 actually says: "shall pay"
- This is what the Government wants Section 1342 to say: "shall pay *subject to the availability of appropriations*"
- In the alternative, the Government asks the Court to conclude that "shall pay" *means the same thing as* "shall pay subject to the availability of appropriations."

Because the case authorities and GAO Redbook make it clear that an appropriation is not necessary in order for Congress to create an obligation, and because Section 1342 mandates payment without limiting the Government's obligation to the availability of appropriations, the Government's argument should be soundly rejected.[6]

[6] 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*** (Continued...)

II. THE GOVERNMENT'S CLAIM THAT THE SPENDING LAWS ABROGATED SECTION 1342 IS WITHOUT MERIT.

The Government asserts two theories to support its view that the Spending Laws abrogated the Government's payment obligation set forth in Section 1342. On the one hand, the Government claims that the Spending Laws "amended" Section 1342, *i.e.*, changed it. On the other hand, the Government asserts that the Spending Laws "confirmed" that the statute would operate as "originally designed." These arguments contradict each other, and both are indisputably wrong.

A. The Spending Laws Did Not "Amend" Section 1342.

Congress is presumed *not* to repeal a statutory obligation via an appropriations statute. *TVA v. Hill*, 437 U.S. 153, 190 (1978); *United States v. Will*, 449 U.S. 200, 221-22 (1980). "The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest." *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 749 (Ct. Cl. 1966); *accord District of Columbia v. United States*, 67 Fed. Cl. 292, 335 (2005). Absent such a clear manifestation, the statutory obligation remains, may be vindicated in this Court, and any resulting judgment satisfied through the Judgment Fund. *See infra* Part III. In *Gibney v. United States*, 114 Ct. Cl. 38 (1949), the Court of Claims directly addressed whether appropriations language indistinguishable from that at issue here altered the payment obligation created by a preexisting statute.[7] The appropriations language there provided: "None of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided" in two statutes not at issue in the case. *Id.* at 48-49.

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unquestionably available. *See* Pl.'s Supp. Br. 17-18 (citing *Moda Health Plan, Inc. v. United States*, No. CIV 16-649C, 2017 WL 527588, at *16 (Fed. Cl. Feb. 9, 2017)).

[7] *Mercier v. United States*, 786 F.3d 971, 980 (Fed. Cir. 2015) (Court of Claims decisions are binding in the CFC and can only be overruled by an *en banc* decision of the Federal Circuit).

Gibney held that a preexisting statutory obligation to pay overtime was ***not*** affected by this appropriations language, because "a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation." *Id.* at 50-51. The Court further observed that it "know[s] of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation." *Id.* at 53.

Every case the Government relies on involves appropriations act language that clearly overrode the underlying statutory obligation. *See United States v. Dickerson*, 310 U.S. 554, 556-57 (1940) (the preexisting statutory obligation "is hereby suspended"; "no part of ***any appropriation*** contained in this or ***any other Act*** for the fiscal year . . . shall be available for the payment . . . ***notwithstanding the applicable provisions of***" the statute) (emphases added); *Will*, 449 U.S. at 205-08 (involving four consecutive appropriations bills) ("[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used" to meet the statutory obligation; the preexisting statutory obligation that "***shall not take effect;***" "No part of the funds appropriated for the fiscal year ending September 30, 1979, by this ***Act or any other Act*** may be used to pay . . ." the statutory obligation; "funds available for payment . . . shall not be used to" meet the statutory obligation) (emphasis added); *Republic Airlines, Inc. v. U.S. Dep't of Transp.*, 849 F.2d 1315, 1317 (10th Cir. 1988) (capping payments for the preexisting statutory obligation "***notwithstanding any other provision of law,***" and expressly directing the Government that to "the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board [under the preexisting statutory obligation] ***shall be reduced by a percentage which is the same for all air carriers receiving such compensation***") (emphasis added); *Mitchell*, 109 U.S. at

150 (the language in the subsequent appropriations act revealed that Congress' "purpose" was "to suspend the law" that appropriated the higher, $400 salary).

The Government's remaining cases are inapposite. In *Highland Falls-Fort Montgomery Central School District v. United States*, the substantive statute qualified its "shall" pay language with a detailed allocation scheme if appropriations were insufficient and the later appropriations statute "earmarked" the *precise* amounts to be paid, demonstrating an intent to repeal. 48 F.3d 1166, 1168-69 (Fed. Cir. 1995) (quoting 20 U.S.C. §§ 237(a), 240(c)). *Star-Glo Associates, LP v. United States* involved a substantive statute that expressly imposed a cap on expenditures. 414 F.3d 1349, 1354-55 (Fed. Cir. 2005) (quoting P.L. No. 106-387, 810(e) (2000)).

This Court should reject the Government's misapplication of controlling precedent to obscure its inability to establish a "clearly manifest" intent to repeal its statutory obligation. "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." *Moda*, 2017 WL 527588, at *18 (citing *Gibney*, 114 Ct. Cl. at 51). The Government's strained arguments evince the very end-run *Gibney* decried.[8] Accordingly, there is no basis for this Court to conclude that the Spending Laws amended or repealed the RCP.

B. The Spending Laws Did Not "Confirm" That the Statute Would Operate As "Originally Designed."

Congress repeatedly sought (and failed) to amend the ACA and the RCP to make it budget neutral in 2014-2015. The Government's assertion that the 2015 and 2016 Spending

[8] The Government claim that the Spending Laws "were passed *before* any obligation for HHS to pay risk corridors payments could have arisen," U.S. Supp. Br. 2, is wrong. Black letter fiscal law distinguishes between when an obligation arises (and is chargeable against an appropriation) and when that obligation is due or payable. *See* Pl.'s Supp. Br. 17-18.

Laws "confirmed" that Congress intended the RCP to be budget neutral when it enacted the ACA in 2010 is illogical. First, it contradicts the Government's *other* position, that Congress "amended" Section 1342 via the Spending Laws. More importantly, this theory runs counter to decades of Supreme Court precedent. Post-enactment events are irrelevant to congressional intent, particularly when the action occurs years after the statute was enacted. *See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82 (1947) ("We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932."). As the Supreme Court has admonished, "post-enactment legislative history is not only oxymoronic but inherently entitled to little weight." Pl.'s Reply in Supp. of Mot. Summ. J. 20 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) (internal quotations omitted)); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) ("[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (quotation omitted)). This is particularly true here, where the Spending Laws were enacted nearly ***five years after*** the ACA, by a different Congress controlled by a different party. *Cf. NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents.").

III. THE GOVERNMENT MISUNDERSTANDS THE ROLE OF THE JUDGMENT FUND.

In contending that the Judgment Fund "is not a back-up source of appropriations, nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury," U.S. Supp. Br. 13, the Government takes aim at a strawman. There is no disagreement on this point. The Judgment Fund is irrelevant to the

question of the Government's *liability* because—as noted above—Congress commanded "shall pay" in Section 1342 and identifying an appropriation is irrelevant to that liability.

The Government inveighs heavily against Judge Wheeler's reliance on the Judgment Fund in *Moda* "to supply the necessary appropriation in the absence of an annual appropriation by Congress for risk corridors payments." U.S. Supp. Br. 14. But here again the Government goes off the rails by pointing to the counterfactual notion that there must be an annual appropriation in order for there to be a liability on which this Court may render judgment. Not so. Where liability stems from an unqualified money-mandating statute, the existence of an appropriation is only relevant ***after*** this Court enters judgment against the United States. In that event, the political branches of Government—not the Court of Federal Claims—must determine how to pay the judgment, an action that requires an appropriation. That appropriation can either be specific to the judgment in question, or it can come out of the Judgment Fund—a permanent appropriation that was created specifically for the purpose of paying judgments for which there was no other appropriation. *See* 31 U.S.C. §1304(a)(1); *Slattery*, 635 F.3d at 1303. Either way, it is not the concern of this Court when considering whether to render judgment in the first instance on the Government's liability. *See* Pl.'s Supp. Br. 18-20. That was Judge Wheeler's point in *Moda* and it is unquestionably correct as a matter of law. *Accord Collins*, 15 Ct. Cl. at 35 ("The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made[.] . . . The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.").

CONCLUSION

Health Options has established its entitlement to RCP payments pursuant to Section 1342 of the ACA. This Court should enter judgment for Health Options.

Dated: April 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, a copy of the foregoing Plaintiff's Response to the United States' Supplemental Brief 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: April 10, 2017

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