2017-2154

In the
United States Court of Appeals for the Federal Circuit

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims,
Case No. 16-651 (Griggsby, J.)

REPLY BRIEF FOR APPELLANT

LAWRENCE S. SHER
REED SMITH LLP
1301 K Street, NW, Suite 1000
Washington, D.C. 20005
(202) 414-9200

JAMES C. MARTIN
COLIN E. WRABLEY
KYLE R. BAHR
CONOR M. SHAFFER
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131

Attorneys for Appellant Blue Cross and Blue Shield of North Carolina

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PRELIMINARY STATEMENT

In reliance on the Government's promises, BCBSNC agreed to participate in the risk-corridors program to further Congress's mission, through the Affordable Care Act (ACA), of expanding affordable health care nationwide. To that end, BCBSNC made affordable coverage available for thousands of previously uninsured Americans, assured by the Government that it would help mitigate the risk of losses to BCBSNC beyond prescribed amounts during the ACA's three-year risk-corridors program. Refusing to honor its promises, the Government maintains that it has no responsibility, by statute or contract, to live up to its end of the bargain. Controlling law, however, provides otherwise and this Court should so hold.

Notably, in urging affirmance, the Government barely mentions the trial court's decision. And it offers only a fainthearted defense of the trial court's core finding that the risk-corridors payments the Government owes to BCBSNC are not yet due, ultimately agreeing that that issue will be mooted in 2018.[1]

Unable to defend the trial court's reasoning or holding, the Government presses its own novel arguments on BCBSNC's statutory claim. But these arguments rest on three fundamentally flawed premises: ***first***, that the ACA's risk-

[1] *See* Government Brief (Gov't.Br.) 51; Appellant BCBSNC's Opening Brief (AOB) 28 n.12.

corridors provision, § 1342, implicitly limits "payments out" to BCBSNC to "payments in" from profitable insurers; ***second***, that the Government cannot be ordered to make "payments out" because § 1342 did not appropriate money to make those payments; and ***third***, that even if § 1342 included an appropriation, a later Congress impliedly repealed the Government's payment obligation through appropriations riders. None of these arguments has merit.

For starters, the Government's interpretation improperly (i) ignores § 1342's "shall pay" language and the notable absence of any text—***present*** in other ACA provisions—limiting "shall pay" to available appropriations; (ii) suggests a link between "payments in" and "payments out" that is nowhere to be found in the statutory text; and (iii) fails, even remotely, to align with the purpose of the ACA and § 1342. In the end, the Government's interpretation rests not on law or fact, but on empty rhetoric about a supposed bailout of insurers and unsubstantiated threats of "uncapped" payments—none of which is accurate, and all of which is irrelevant to this Court's interpretive task.

As for its "no liability without appropriation" defense, the Government ignores long-binding precedent holding that the absence of an appropriation does not limit the Government's statutory obligations or the U.S. Court of Federal Claims' power to enforce them. At the same time, the Government cannot point to even one case adopting its position or dismissing a Tucker Act claim due to the

absence of an appropriation in the obligating money-mandating statute. Its "implied repeal by appropriation riders" argument is marked by the same avoidance strategy—evading (i) the test for analyzing whether a later appropriations act is "irreconcilable" with an existing statute; (ii) the strong presumption against implied repeals through appropriation acts, especially when they raise due process and retroactivity concerns; and (iii) settled precedent that rejects treating similar appropriations acts as impliedly repealing the Government's existing statutory obligations.

The Government's efforts to avoid its implied-in-fact contractual obligations are equally flawed. With no supporting authority, it claims that HHS's 2014 statements reflecting the agency's about-face intent to administer the risk-corridors program in a budget-neutral manner defeat any showing that the Government earlier intended to contract with BCBSNC. Such an unfettered agency power to dissolve the Government's duly-made contracts does not exist. And after ignoring (and thus conceding) BCBSNC's showing that the Government ratified its implied-in-fact contract with BCBSNC, the Government argues that HHS had no implied authority to enter any contracts to make risk-corridors payments—despite the agency's broad authority under § 1342 to "establish and administer" the risk-corridors program and make risk-corridors payments. None of these arguments

withstand scrutiny, particularly under the governing Rule 12(b)(6) standards. The controlling law thus compels reversal.

ARGUMENT

I. The Court Should Reverse The Dismissal Of BCBSNC's Statutory Claim And Find That The Government Is Liable For The Full Amount Of Payments Due To BCBSNC Under § 1342.

The Government's argument on its lack of responsibility to make risk-corridors payments starts with an improper redrafting of § 1342 and ends with misdirection on controlling appropriations law. Its unsustainable contentions should be rejected at every turn.

A. The Government's Attempt To Rewrite § 1342 Must Fail.

As BCBSNC explained in its opening brief, § 1342's "shall pay" directive allows for no Government discretion—in contrast with other ACA provisions stating that the Government "may" take certain actions. AOB29-30. Congress also did not limit in any fashion § 1342's mandatory obligation, such as by making payment "subject to the availability of appropriations," and the provision nowhere reflects an intent to administer the risk-corridors program in a budget-neutral manner. *Id.*30-31.

These omissions are particularly on-point because elsewhere in the ACA, Congress expressly limited payments to appropriations, or explicitly classified programs as budget-neutral—including in § 1341, another "3Rs" provision, which directs that "collected" payments are used "to make reinsurance payments…."

*Id.*8,31-32. HHS's regulations further reinforce BCBSNC's construction—and undermine the Government's—because they expressly provide that the reinsurance and risk-adjustment programs are budget-neutral, but say no such thing about risk-corridors. *Id.*8-11,33-35.

The Government wants this Court to ignore the actual text and these critical omissions. It claims that Congress "conspicuously omitted from section 1342 any language making risk-corridors payments an obligation of the government." Gov't.Br.18. But Congress plainly used "shall" to impose on the Government "an obligation impervious to…discretion[,]" *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998), and the Government offers no reason why "shall pay" should instead be deemed surplusage, which would run afoul of the settled "presumption that each word Congress uses is there for a reason[.]" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (citation omitted).

At the same time, the Government ignores: (i) the other ACA provisions explicitly providing for budget-neutrality or appropriated-funds limitations, using language notably absent in § 1342; (ii) HHS's 3Rs regulations and its repeated statements before 2014 that the risk-corridors program is ***not*** budget-neutral; and (iii) fundamental principles of statutory construction, all of which establish the Government's unqualified payment obligation. The Government similarly ignores

BCBSNC's argument that the purpose of § 1342 and the ACA support the same mandatory-payment obligation, and offers no purpose-based defense for its own contrary interpretation.

The Government continues to insist—with no textual support—that Congress intended "payments out" to be funded by, but limited to, "payments in." Gov't.Br.17. Yet § 1342 cannot be interpreted this way. Its neighbor, § 1341, has language similar to the Government's invented construction, so Congress could have used the same phrasing in § 1342 had it intended to link the two types of payments. But it did not. Absent evidence to the contrary, Congress's choice is presumed to be intentional and to convey different meanings. AOB32. Far from providing any contrary evidence, the Government offers nothing at all.

In fact, the Government repeatedly asserts that "section 1342 did ***not*** appropriate ***any*** funds for risk-corridors payments"—apparently not even "payments in" from profitable insurers. Gov't.Br.24 (emphasis added). This squarely contradicts the Government's claim that the Congress that enacted the ACA and § 1342 intended risk-corridors "payments in" to fund "payments out."

Further underscoring the bankruptcy of its textual argument, the Government cites the budget estimate of the ACA prepared by the Congressional Budget Office (CBO), which said nothing about risk-corridors. Gov't.Br.19. That silence, the Government claims, means the CBO thought the risk-corridors

program would be budget-neutral. *Id.* This speculation is unsupported by the record as well.

First, under the RCFC 12(b)(6) standard, all reasonable inferences are drawn in BCBSNC's favor, not the Government's. AOB20. Second, Congress relied on the CBO's scoring of the ACA as a whole, not its scoring (or lack thereof) of the risk-corridors program specifically. ACA § 1563(a). Third, "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009). Fourth, the Government ignores the CBO's express statement that "risk corridor collections…will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit." CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014).

Although conceding that § 1342 is "money-mandating," the Government contends that it does not actually impose a mandatory payment obligation because a statute being money-mandating does not mean the claimant prevails on the merits. Gov't.Br.34-35. But BCBSNC never asserted that "money-mandating" automatically equals "liability." And a finding that a statute is money-mandating cannot simply be ignored when determining whether it obligates the Government. Here, § 1342's plain text, properly construed, renders the provision money-mandating ***and*** imposes a full-payment obligation without regard to appropriations.

This is straight statutory construction, not, as the Government erroneously asserts, an improper effort to smuggle jurisdictional inquiries into the merits, or vice versa. *Id.*

Contrary to the Government's contention (Gov't.Br.34-35), this Court's decisions in *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871 (Fed. Cir. 2007), and *Prairie Cnty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015), support BCBSNC's position. In both cases, this Court found a statute to be money-mandating, but rejected the plaintiffs' claims on their merits. The reason: the statutes in those cases—demonstrably ***unlike*** § 1342—explicitly limited the Government's payment obligation to available appropriations, which foreclosed the plaintiffs' claims on their merits when this Court found all appropriations already had been expended.

Finally, with no basis in the record, the Government spins a self-serving "Congressional intent" narrative, claiming that the Act "does not require the taxpayers to indemnify unprofitable insurers for their losses" or "obligat[e] the government to use taxpayer dollars to make potentially massive, uncapped payments to" insurers. Gov't.Br.1,17. These political talking points lack any factual or legal basis. This is not a case about bailing out the insurance industry by using taxpayer dollars to make unlimited payments. It is about the enforceability of Government promises—promises that are, in fact, capped by a specific statutory

formula to mitigate losses. Those promises furthered the Government's goal of expanding affordable health care and they have been broken by the Government. The Government's empty rhetoric cannot relieve it of the obligation it expressly shouldered.

B. The Government's "No Liability Without Appropriation" Defense Is Refuted By Nearly 140 Years Of Settled Jurisprudence.

The Government alternately claims that because § 1342 includes no specific appropriation to make risk-corridors payments, it imposes no enforceable payment obligation on the Government. Gov't.Br.21-23. As BCBSNC's opening brief makes clear, however, this argument—which contradicts the Government's position in similar pending litigation[2]—is meritless too. AOB35-41.

Indeed, as this Court's own precedents clearly provide, "'[i]t has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.'" *Prairie Cnty.*, 782 F.3d at 689 (quoting *Greenlee Cnty.*, 487 F.3d at 877); *see also Collins v. United States*, 15 Ct. Cl. 22, 34-35 (1879) ("Congress…may by law create [a money-mandating] liability," which "exists independently of the appropriation, and may be enforced by proceedings in this court"); *Molina*

[2] Confronted with this fact (AOB37n.14), the Government's responsive brief says nothing.

Healthcare of Calif., Inc. v. United States, 133 Fed. Cl. 14, 37 (2017) (same). Thus, absent express language of the type "commonly used" by Congress "to restrict the government's liability to the amounts appropriated"—for example, "subject to the availability of appropriations"—a statutory payment obligation is "enforceable in the" U.S. Court of Federal Claims. *Greenlee Cnty.*, 487 F.3d at 877-78. So it is here.

Yet the Government stealthily ignores each of these precedential holdings. It also fails to cite a single case adopting its "no liability without appropriation" theory, or rejecting a Tucker Act claim simply because the underlying money-mandating statute did not appropriate money.

Rather, the Government asserts that *Prairie County* ***supports*** its position that Congress did not make risk-corridors payments a Government obligation. Gov't.Br.35 (characterizing *Prairie County* as "explaining that 'if Congress had intended to obligate the government to make full…payments, it could have used different statutory language' stating that 'sums shall be made available to the Secretary [] for obligation or expenditure'") (quoting *Prairie Cnty.*, 782 F.3d at 691). But this characterization of *Prairie County* is wrong. The Court there was not saying that affirmative language such as "sums shall be made available" is required to establish an obligation—such an assertion would directly ***contradict*** the Court's clear holding that if a money-mandating statute does not "reflect[]

congressional intent to limit the government's liability for [statutory] payments," then the statute "imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress." 782 F.3d at 690. This is the precise scenario in this case.

As a fallback, the Government invokes the Constitution's Appropriations Clause and federal statutes implementing its limitation on the Executive Branch's disbursement of U.S. Treasury funds. Gov't.Br.27-30. Yet neither the Appropriations Clause, nor its implementing statutes, provide any support for the Government's "no liability without appropriation" theory. To be sure, as the Government argues (Gov't.Br.27-30), the Clause prohibits an ***agency*** from paying money out of the Treasury "'unless it has been appropriated by an act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted).[3] But this is just a "restriction upon the disbursing authority of the Executive department[,]" *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), ***not*** a "bar to recovery in a case" giving rise "to compensation from the Judgment Fund," such as a case like this one under the Tucker Act. *Salazar v. Ramah*

[3] The Government's selective quotation of *Richmond* (Gov't.Br.25-26) is inapposite. *Richmond* involved an estoppel claim, not, as here, a money-damages claim. 496 U.S. at 428. And, contrary to the Government's contention, BCBSNC plainly is not arguing—as respondent did in *Richmond*—that a federal agency's mere "advice" obligates the Government to make risk-corridors payments. *Id.* at 417-18.

Navajo Chapter, 567 U.S. 182, 198 n.9 (2012); *see also Collins*, 15 Ct. Cl. at 35 (same). Accordingly, "[a]lthough the agency itself cannot disburse funds beyond those appropriated to it, the Government's 'valid obligations will remain enforceable in the courts.'" *Ramah Navajo*, 567 U.S. at 191 (quoting 2 GAO, Principles of Federal Appropriations Law 6-17 (2d ed. 1992)).

Given these authorities, the Government unsurprisingly cites no case holding that the Appropriations Clause or its implementing statutes bar the Court of Federal Claims from finding the Government liable for money damages under an Act of Congress—*Collins* and its progeny hold otherwise. Nor does (or can) the Government dispute that Congress has appropriated—in the Judgment Fund—the funds to pay those damages. *See Richmond*, 496 U.S. at 430-31 ("Congress has, of course, made a general appropriation of funds to pay judgments against the United States rendered under its various authorizations for suits against the Government, such as the Tucker Act."); *Slattery v. United States*, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (*en banc*) (same). In fact, "funds may be paid out" of the Judgment Fund to satisfy a judgment arising from "a substantive right to compensation based on the express terms of a specific statute" (*Richmond*, 496 U.S. at 432; *see also Ramah Navajo*, 567 U.S. at 198 n.9 (same))—the very right established here.[4]

[4] The Government attacks Judge Wheeler's decision in *Molina*, 133 Fed. Cl. 14, claiming Judge Wheeler erroneously regarded the Judgment Fund as a "third

Because no appropriation is necessary to create an enforceable statutory payment obligation, there is no force to the Government's contention that, since Congress included appropriations in other ACA provisions and the Medicare Part D provision on which § 1342 is "based," the absence of an appropriation in § 1342 should be construed to limit the Government's liability. Gov't.Br.18-19.[5] Application of the negative-implication principle is foreclosed here because the substantive law does not require an appropriation to create an obligation, and § 1342 unambiguously creates a mandatory payment obligation. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (holding that "[t]he force of any negative implication" from a statute's disparate use of language "depends on context" and "background" legal principles); *Figueroa v. Sec'y of Health and Human Servs.*,

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option" for risk-corridors payments. Gov't.Br.26. That is simply not true. What Judge Wheeler actually said—consistent with *Ramah Navajo* and *Richmond*—is that the Fund is a "third option…to make good on the Government's obligations" under the statute, which in context plainly refers to the Government's duty to draw monies from the Fund to satisfy a judgment against it under a money-mandating statute in a Tucker Act case like this one. *Molina*, 133 Fed. Cl. at 35. He went on to correctly acknowledge that while HHS could not use the "Fund to make risk corridor payments" itself, that is beside the point because "the question before this Court is whether the Government is statutorily obligated to make full annual risk corridor payments, not whether money has been appropriated to make those payments." *Id.* (citing *Collins*, 15 Ct. Cl. at 35).

[5] At the same time, the Government ignores the fact that under its selective reading, § 1342 and the Part D risk-corridors provision, 42 U.S.C. § 1395w-115(e)(3), would have directly contrary meanings, which would in turn improperly read § 1342's "shall be based on" mandate right out of the statute. AOB40-41.

715 F.3d 1314, 1322-23 (Fed. Cir. 2013) (rejecting negative implication from statute's omission based on "highly relevant" "background" legal "presumption").

The dispositive inquiry instead is whether § 1342 "reflects congressional intent to limit the government's liability for…payments" or "imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress." *Prairie Cnty.*, 782 F.3d at 690. When it enacted § 1342, Congress clearly did not intend to limit the Government's liability for risk-corridors payments—else it would have done so—and § 1342 therefore "imposes a statutory obligation to pay the full amounts." *Id.*

C. The Government's "Implied Repeal By Appropriation Rider" Contention Ignores—And Cannot Meet—The Controlling Implied Repeal Test.

Lacking any statutory-construction support for its reading of § 1342, the Government puts most of its eggs into the appropriations-riders basket. It argues that the riders, enacted years after the ACA and § 1342, "explicitly barred HHS from using other funds" and appropriated only the use of "payments in" to pay insurers, which allegedly, once exhausted, "capped" the Government's liability. Gov't.Br.21 (quoting *Maine Cmty. Health Options v. United States*, 133 Fed. Cl. 1, 13 (2017)). But the Government's argument not only fails to account for controlling precedent and Congress's repeated (but failed) efforts to amend § 1342 to make it budget-neutral, it also mischaracterizes the riders and ignores the strict

presumption against reading appropriation laws as impliedly repealing previously enacted statutes.

1. The Government must concede that Congress tried, but failed, to expressly amend and repeal § 1342.

The Government has no answer for why Congress repeatedly tried to amend § 1342 to make it budget-neutral or eliminate the provision—and the Government's attendant obligations—altogether if, as the Government now claims, the riders previously had accomplished that same result. AOB43-44&n.16. That is powerful evidence that upon enacting the riders, Congress did not believe they had the specific capping effect the Government now ascribes to them. *Id.* (citing cases).

2. The Government misstates the plain text of the riders.

In any event, the riders plainly do not cut off ***all*** funding sources for risk-corridors payments except for "payments in," as the Government's selective use of ellipses might imply. Gov't.Br.22. Rather, the riders expressly bar only the use of ***one*** source of funds: transfers into CMS's "Program Management" account. *See, e.g.*, Pub. L. 113-235, § 227, 128 Stat. 2491 (Dec. 16, 2014).[6] This is underscored by other provisions in the spending bills that, unlike the risk-corridors riders, broadly prohibit the use of "funds made available by this Act or any other Act" to

[6] The Government wrongly says "there is no dispute that Congress" limited "payments out" to amounts collected. Gov't.Br.36. It ***is*** disputed. AOB41-49.

make various payments. *See Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 461 (2017). These provisions "confirm that Congress knows how to limit" the Government's payment obligation through appropriations "when it so desires." *Marx*, 568 U.S. at 384 (citation omitted). And because "Section 1342 clearly requires the Government to make full annual risk corridor payments, Congress cannot repeal this commitment by foreclosing the use of CMS Program Management funds alone." *Molina*, 133 Fed. Cl. at 41.

3. The Government ignores the controlling presumption against implied repeals and cannot overcome it.

The Government further contends that the riders "capped" the Government's liability at payments collected. Gov't.Br.36. Yet nowhere does the Government assert that the riders ***explicitly*** repealed § 1342. The Government's argument, then, is that by cutting off one funding source—transfers into the CMS "Program Management" account—Congress ***impliedly*** repealed § 1342's money-mandating "shall pay" obligation in its entirety, except for "payments in." The Government ignores, however, its heavy burden: the strong presumption that appropriations acts do not impliedly repeal existing laws. *See, e.g.*, *TVA v. Hill*, 437 U.S. 153, 190 (1978). That barrier is even higher here, where repeal would raise serious constitutional concerns. AOB49-51.

Under these standards, the Government cannot even colorably show an implied repeal. That explains why the Government never mentions, much less

tries to distinguish, two of the binding precedents discussed in BCBSNC's opening brief—*United States v. Langston*, 118 U.S. 389 (1886), and *Gibney v. United States*, 114 Ct. Cl. 38 (1949)—which apply on all fours and foreclose the Government's argument. AOB44-46.

Unable to avoid the outcome that *Langston* and *Gibney* compel, the Government instead advances a standard it purports to find in *United States v. Vulte*, 233 U.S. 509 (1914)—that an appropriations law "caps" statutory payment obligations "where Congress indicates…'a broader purpose' beyond 'something more than the mere omission to appropriate a sufficient sum….'" Gov't.Br.29 (quoting *Vulte*, 233 U.S. at 515). But the standard *Vulte* actually establishes—aligned with *TVA v. Hill*—is that "appropriation bills" do not repeal existing statutes unless the intent to do so "'is expressed in *the most clear and positive terms*, and where the language admits of no other reasonable interpretation.'" *Vulte*, 233 U.S. at 514-15 (emphasis added and citation omitted). And *Vulte* expressly ***affirms*** *Langston*, which squarely supports BCBSNC's position here. 233 U.S. at 515; *see also Greenlee Cnty.*, 487 F.3d at 877 (recognizing *Vulte–Langston* agreement). The Government omits all of this from its discussion of *Vulte*, but that does not make it go away.

4. The Government's favored cases do not support its argument.

Rather than address all of the binding precedents and principles relied upon by BCBSNC, the Government just skips to its favored decisions: *Will*, *Dickerson*, *Mitchell*, *Highland Falls*, and *Maine*. Gov't.Br.21-34. As BCBSNC demonstrated in its opening brief, however, these cases are distinguishable and provide no support to conclude that the appropriations riders impliedly repealed § 1342's mandatory full-payment obligation. AOB46-49. The Government does not respond to BCBSNC's analysis of *Will*, *Dickerson*, or *Mitchell*, electing instead to focus only on *Highland Falls* and *Maine*, neither of which supports the Government's arguments.

To start with, *Highland Falls* is far afield from the facts and circumstances here. AOB48-49. The appropriations acts there contained ***earmarks*** for specific-dollar-amount payments that Congress allotted in the spending bills, leaving the Court with "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). The Government does not—because it cannot—point to any similar earmarks in the risk-corridors riders. The only "instructions" that Congress provided in the risk-corridors riders are that funds transferred into the CMS "Program Management" account cannot be used for risk-corridors payments.

This is very different than the *Highland Falls* specific earmarks. *See also Molina*, 133 Fed. Cl. at 39 (highlighting this distinction).

That difference is all the more material because unlike § 1342—which the Government does not dispute is a "money-mandating" statute—the underlying statute in *Highland Falls* was ***not*** money-mandating—as the Government itself argued in that case. *See Highland Falls*, 48 F.3d at 1167 (noting trial court's finding "that Highland Falls's entitlement to funds under the [Impact Aid] Act was not mandatory and that [Highland Falls] therefore did not have a monetary claim against the government"); Br. of U.S., *Highland Falls*, No. 94-5087, 1994 WL 16182294, at *7 (Fed. Cir. June 7, 1994) (arguing that the Government's motion to dismiss had "demonstrated that the Impact Aid program is not a mandatory spending program"). Indeed, the overall scheme of that statute conferred broad discretion on the Secretary of Education to determine eligibility for funds based on a series of statutory criteria. *Highland Falls*, 48 F.3d at 1168-69. Section 1342, by contrast, gives no such discretion to HHS, but mandates full risk-corridors payments, as HHS acknowledged for years following the ACA's enactment. AOB8-9,11,14.

For its part, *Maine* is fundamentally flawed from the start because the court elected not to even determine the scope of § 1342's payment obligation, and ignored the "cardinal rule" that a later statute only impliedly repeals an earlier one

where the two are "irreconcilable." *Molina*, 133 Fed. Cl. at 41; *TVA*, 437 U.S. at 190. Judge Wheeler criticized the *Maine* court's approach, observing that "the Court cannot properly resolve the second issue"—whether there is an implied repeal—"without resolving the first"—what obligation § 1342 imposes—because "[w]hether Section 1342 did initially commit the Government to make full annual risk corridor payments affects the legal test for determining whether Congress later vitiated that obligation." *Id*. at 41. Simply put, "[t]here can be no room for inference when dealing with whether the Government will honor its statutory commitments." *Id*.

Maine also wrongly credits the Government's claim, addressed *supra*, that the CBO's silence on risk-corridors in its March 2010 scoring somehow indicated Congress's intent. *See Maine*, 133 Fed. Cl. at 13. It furthermore relied on this Court's decision in *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (*see Maine*, 133 Fed. Cl. at 11), but that case—which the Government abandons in its brief here—did not involve a claimed implied-repeal-by-appropriation. In fact, *Star-Glo* ***supports*** BCBSNC's position because the underlying statute in that case expressly capped the Government's obligation at $58 million, unlike § 1342 and the riders here. 414 F.3d at 1354-55.

5. The Government's cited "legislative history" cannot provide a "cap" missing from the riders' text.

To support its theory that the risk-corridors riders "capped" the Government's liability to "payments in[,]" the Government repeatedly relies on the House Appropriations Committee Chairman's statement that "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." Gov't.Br.2,10,15,22. But this is not a genuine piece of "legislative" history[7] and it cannot accomplish what the riders' text plainly does not: create a cap on § 1342's money-mandating obligation to make full risk-corridors payments. *See Star-Glo*, 414 F.3d at 1355 ("[I]t is inappropriate to rely upon legislative history to establish the existence of a statutory cap that is not contained in the text of the statute itself.") (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005)); *accord Molina*, 133 Fed. Cl. at 39-40.

[7] The Government suggests that this statement reveals ***Congress's*** intent to limit risk-corridors payments. Gov't.Br.2,10,15. This statement, however, describes ***HHS's*** risk-corridors regulation, not Congress's intent. And it does so without any mention of HHS's pre-2014 statements that the risk-corridors program was not budget-neutral.

6. The Government fails to rebut the presumption against retroactivity triggered by its reading of the riders.

The Government also dismisses the retroactive effect of its reading of the riders, claiming that because § 1342 did not impose a full-payment obligation, the riders did not affect BCBSNC's rights. Gov't.Br.24-25. As demonstrated above, however, § 1342 ***did*** impose such a "shall pay" duty on the Government. Thus, construing the riders to repeal BCBSNC's statutory right to full payment does implicate due process and retroactivity concerns—particularly since the Government advocates here for an implied repeal. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) ("Th[e] long-established canon" against implied repeals "carries special weight when an implied repeal or amendment might raise constitutional questions"); AOB49-51.

The Government asserts—without justification—that the presumption against retroactivity is overcome because "Congress clearly intended to limit payments to the amounts collected." Gov't.Br.25. Where? Nothing close to such "clear[] inten[t]" can be found here, and certainly not the explicit form required to rebut the heightened version of the anti-retroactivity presumption that applies. *See St. Martin*, 451 U.S. at 788.

Undeterred, the Government makes the sweeping claim that "Congress is free to 'upset[] otherwise settled expectations' in a statutory program." Gov't.Br.25n.5 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16

(1976)). That is an inaccurate statement of controlling law. The Government ignores what *Usery* actually said: "that legislation readjusting rights and burdens is not unlawful ***solely*** because it upsets otherwise settled expectations[,]" but it still "must meet the test of due process…." 428 U.S. at 16, 17 (citations omitted; emphasis added). Controlling precedent clearly provides that the "stability of investment and confidence in the constitutional system…are secured by due process restrictions against severe retroactive legislation." *See Eastern Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

There can be little doubt that the riders, as the Government construes them, upend the very "stability of investment" Congress intended when it enacted the ACA and § 1342. The Government does not, and cannot (under governing Rule 12(b)(6) standards), dispute that in reliance on § 1342 and the Government's full-payment promise, BCBSNC signed on as a QHP; developed and offered ACA plans; nearly completed its QHP performance for CY 2014; and committed to performing in CY 2015. AOB10,12. The Government's interpretation thus should be rejected.

II. The Court Should Reverse The Dismissal Of BCBSNC's Implied-In-Fact Contract Claim And Find That The Government Is Liable For The Full Amount Of Payments Due To BCBSNC Under § 1342.

The Government argues that BCBSNC failed to plead a viable implied-in-fact contract claim because, in its view, § 1342 does not expressly "create or speak of" a contract, and HHS lacked authority to contract to make payments greater than what Congress appropriated. Gov't.Br.38-49.[8] Neither argument has merit.

A. BCBSNC Has Adequately Pled Mutual Intent To Contract Under *Radium Mines* And *N.Y. Airways*.

As BCBSNC's opening brief establishes, and Judge Wheeler found in *Moda* and *Molina*, § 1342 and HHS's implementing regulations are promissory in nature and demonstrate the Government's intent to contract. AOB53-56 (citing *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957)); *see also Moda*, 130 Fed. Cl. at 463-64 (finding intent under *Radium Mines* and *N.Y. Airways*); *Molina*, 133 Fed. Cl. at 42-45 (reaffirming *Moda*). BCBSNC's opening brief further shows that under controlling precedent, the circumstances surrounding § 1342's enactment and HHS's regulations reinforce the Government's intent to contract. AOB52,55-56 (citing *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996); *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986)).

[8] The Government does not dispute that BCBSNC adequately pled the implied-in-fact contract element of consideration. AOB56-58.

The Government again pays scant attention to these binding precedents. It claims that *Radium Mines* and *N.Y. Airways* are distinguishable because the regulation/statute in those cases specifically referred to contracts. Gov't.Br.39-40. But neither case pinned its holding on such an express reference to "contract." Rather, the "key" was "that the regulations at issue were promissory in nature[,]" *Baker v. United States*, 50 Fed. Cl. 483, 490 (2001)), which can be true whether or not the word "contract" is specifically referenced. *See Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739-40 (1982) (acknowledging the line of cases, expressly including *Radium Mines* and *N.Y. Airways*, "where contracts were inferred from regulations promising payment") *Molina*, 133 Fed. Cl. at 43; *Moda*, 130 Fed. Cl. at 464. Indeed, requiring an express reference to a "contract" would undermine the very ***implied-in-fact*** nature of the claim.

Despite the clear holdings in *Hercules* and *Prudential Insurance*—and without discussing them—the Government contends that statutory or regulatory text is the *only* source for discerning the parties' intent. Gov't.Br.37-38. It rests this claim principally on *Brooks v. Dunlop Mfg.*, 702 F.3d 624 (Fed. Cir. 2012), which rejected a Government contract with a *qui tam* relator based on a statute entitling the relator to part of any recovery in litigation. Far from mandating a strict focus on the statutory or regulatory text or a specific textual reference to a contract, however, *Brooks* expressly considered "whether the circumstances

surrounding the statute's passage manifested any intent by Congress to bind itself contractually." *Id.* at 631. And, unlike BCBSNC here, the plaintiff in *Brooks* failed to point to "any other evidence" suggesting an intent to contract. *Id.*[9]

Unable to find support for its position in the trial court's ruling, the Government again attacks Judge Wheeler's reasoning in *Moda* and *Molina*, claiming that it "would transform myriad statutory programs into contractual undertakings." Gov't.Br.39. This is more hyperbole, and ignores that the analysis in those cases is solidly anchored in controlling precedents such as *Hercules*, *Radium Mines* and *N.Y. Airways*. It also rests on a cherry-picked statement from *Moda* that a statute that "create[s] a program that offers specified incentives in return for the voluntary performance of private parties" can establish an implied-in-fact contract. *Moda*, 130 Fed. Cl. at 463. But the Government ignores the reasoning that follows, which explains the criteria *Radium Mines* and *N.Y. Airways* examined in determining mutual intent to contract. *Id.* at 463-64.

The Government also criticizes *Molina*'s reliance on HHS's statements following the ACA's enactment, analogizing it to the "perilous venture" of finding "a contract" based on legislative history. Gov't.Br.40. But there is no bar to

[9] The Court's holding in *Brooks* also was driven primarily by the long history of *qui tam* statutes and precedents rejecting claims that those statutes created vested rights—contractual or otherwise. *See Brooks*, 702 F.3d at 632. No such history or precedent regarding § 1342 and the ACA exists here.

looking at such evidence—here, Government statements and conduct that occurred ***before*** the implied-in-fact contract was formed (AOB8-10)—as part of the "surrounding circumstances" to determine contractual intent. *See Hercules*, 516 U.S. at 424; *see also Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 468-69 (1985) (considering parties' "legitimate expectation" and whether contract would be "inequitable bargain" in light of surrounding circumstances); *N.Y. Airways*, 369 F.2d at 751 (same). The Government cites no case to the contrary.

The Government then proceeds to rely on HHS's statements made ***after*** the parties' formation of a contract. Specifically, it claims that HHS's budget-neutrality statements in March 2014 (and later) show that there was no meeting of the minds. Gov't.Br.45-46. But BCBSNC's implied-in-fact contract with the Government already existed by the time of these 2014 statements, AOB8-10, and the Government can no more avoid its contractual obligations through an agency's post-contract statements than it can create contractual liability through an agency's "promissory" statements. *See Richmond*, 496 U.S. at 431. Otherwise, the Government's "'promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *United States v. Winstar*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) (citation omitted). The law, in any event, is clear: the Government's power "to enter contracts that confer vested rights" carries with

it "the concomitant duty to honor those rights." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

B. BCBSNC Has Adequately Pled That HHS Had Actual And Implied Authority To Enter Risk-Corridors Contracts.

BCBSNC's opening brief established not only that HHS had actual authority under § 1342 to contract with BCBSNC, but that CMS's CEO of the ACA Marketplace, Kevin Counihan, ratified that contract. AOB59.

The Government does not dispute that it can ratify contracts its agents may have lacked authority to enter, and it ignores Mr. Counihan's role and his ratification of the implied-in-fact contract here. The Government's silence is conclusive,[10] so even assuming HHS lacked authority to enter into an implied-in-fact risk-corridors contract with BCBSNC, ratification fills any gap. In any case, HHS ***did*** have authority to contract based on § 1342's directive that HHS "shall establish and administer" the risk-corridors program and "shall pay" what is due under the statutory formula.

Without mentioning this statutory text, the Government asserts that "Congress did not grant HHS authority to enter contracts for risk-corridors payments in advance of, or in excess of, an existing appropriation." Gov't.Br.43.

[10] *See Martinez v. Sessions*, 873 F.3d 655, 660 (9th Cir. 2017) (appellee Government waived argument absent from its brief); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (same).

That just turns a blind eye to the broad sweep of HHS's authority under § 1342, which encompasses what is "generally assumed in the absence of express statutory prohibitions or limitations": the "authority of the executive to use contracts in carrying out authorized programs…." J. Cibinic & R. Nash, *Federal Procurement Law* 5 (3d ed. 1977); *see also H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (authority to contract "is generally implied when such authority is considered to be an integral part of the duties assigned to a [g]overnment employee"); *Moda*, 130 Fed. Cl. at 465 (holding that HHS Secretary had authority to contract). Neither § 1342 nor the ACA limits HHS's "assumed" power to enter into risk-corridors contracts.

The Government separately contends that various federal statutes, which govern agency authority both to contract and spend Treasury funds, stripped HHS's authority to bind the Government for payments in excess of appropriations. Gov't.Br.41-42 (citing 31 U.S.C. § 1301(d) (the Purpose Statute) and 31 U.S.C. § 1341 (the Anti-Deficiency Act (ADA)). There is no escape hatch here either.

For starters, the Government failed to make its Purpose-Statute argument in the trial court and cannot do so for the first time on appeal. *See Bailey v. Dart Container Corp. of Mich.*, 292 F.3d 1360, 1362 (Fed. Cir. 2002) ("appellee can present in this court all arguments…advanced in the trial court in support of the judgment as an appellee"); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 335-36

(3d Cir. 2009) (court may only affirm "on different grounds" if they were raised "before the lower court") (citation omitted).

Additionally, the ADA "do[es] not affect the rights in this court of the citizen honestly contracting with the Government." *Ramah Navajo*, 567 U.S. at 197. The same is true of the Purpose Statute, since settled law confirms that insufficient appropriations do not "cancel [the Government's] obligations, nor defeat the rights of other parties.'" *Martin v. United States*, 130 Fed. Cl. 578, 583 (2017) (citation omitted). A party contracting with the Government is entitled to be made whole—technical violations of the ADA or Purpose Statute notwithstanding.[11]

Beyond this, neither statute applies on its own terms. The ADA—which prohibits a Government employee from "involving" the Government in a "contract to pay money before an appropriation is made ***unless authorized by law***" (emphasis added)—does not apply. The "payment of money" here was authorized by § 1342, thus falling within the "authorized by law" safe harbor of the ADA.

[11] For the same reason, the Government's contention (Gov't.Br.46-48) that HHS lacked authority to obligate the FY 2014 CMS "Program Management" appropriation for risk-corridors payments—even if it were correct—is insupportable because the Government cannot "cancel its [contractual] obligations" or "defeat the rights of" BCBSNC based on the inadequacy of appropriations. *Martin*, 130 Fed. Cl. at 583. Nor is the Government correct about the availability of that appropriation. *See* B-325630 (Comp. Gen.), 2014 WL 4825237, at *3 (Sept. 30, 2014); *Moda*, 130 Fed. Cl. at 456.

Moda, 130 Fed. Cl. at 465; *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 113 n.30 (2016) (same); *N.Y. Airways*, 369 F.2d at 752 (rejecting ADA challenge where statute authorized Government payments).

Similarly, the Purpose Statute—which requires express authorization before the Government can make a "contract for the payment of money in excess of an appropriation"—is inapplicable because when BCBSNC and the Government entered into their implied-in-fact contract in September 2013, that contract did not provide for payment "in excess of an appropriation." Rather, the later Congress did not limit appropriation funding through the risk-corridors riders until December 2014.[12]

III. The Court Should Reverse The Dismissal Of BCBSNC's Takings Claim.

The Government does not dispute that a vested contract right is protected by the Fifth Amendment's Takings Clause or that the Government has interfered with that right here. And as explained, *supra*, BCBSNC has a protectable contract right in the risk-corridors payments the Government has failed to make. Therefore, BCBSNC has adequately pled its takings claim, and this Court should so hold.

[12] The Government's brief does not refute that if BCBSNC's implied-in-fact contract claim is revived, so too should its implied-covenant claim. AOB52n.17.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the trial court's judgment dismissing BCBSNC's complaint and remand for further proceedings.

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Respectfully submitted,

REED SMITH LLP

By: s/ *Lawrence S. Sher*
LAWRENCE S. SHER
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
(202) 414-9200

JAMES C. MARTIN
COLIN E. WRABLEY
KYLE R. BAHR
CONOR M. SHAFFER
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
(412) 288-3131

Attorneys for Appellant Blue Cross and Blue Shield of North Carolina

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. Cir. R. 32(a) because it contains 6,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(1).

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface, Times New Roman, 14-point, using Microsoft Word.

Dated: November 29, 2017 s/ *Lawrence S. Sher*

CERTIFICATE OF SERVICE

I, Lawrence S. Sher, hereby certify that, on November 29, 2017, I electronically filed the foregoing Reply Brief for Appellant with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Lawrence S. Sher*