No. 2017-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, an Illinois Non-Profit Mutual Insurance Corporation,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims
in case no. 1:16-cv-00744, Judge Charles F. Lettow

BRIEF FOR APPELLEE

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STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. The following cases pending before the Court of Federal Claims are related cases within the meaning of Federal Circuit Rule 47.5(b):

Alliant Health Plans, Inc. v. United States, No. 16-1491C (Braden, J.);

BCBSM, Inc. v. United States, No. 16-1253C (Coster Williams, J.);

Blue Cross and Blue Shield of Alabama v. United States, No. 17-95C (Cambell-Smith, J.);

Blue Cross and Blue Shield of Kanas City v. United States, No. 17-95C (Braden, J.);

Blue Cross and Blue Shield of North Carolina v. United States, No. 16-651C (Griggsby, J.);

Blue Cross and Blue Shield of South Carolina v. United States, No. 16-1501C (Griggsby, J.);

Blue Cross and Blue Shield of Tennessee v. United States, No. 16-651C (Horn, J.);

Blue Cross of Idaho Health Service, Inc. v. United States, No. 16-1384C (Lettow, J.);

Farmer v. United States, No. 17-363C (Campbell-Smith, J.);

First Priority Life Ins. Co. v. United States, No. 16-587C (Wolski, J.);

Health Net, Inc. v. United States, No. 16-1722C (Wolski, J.);

Health Republic Ins. Co. v. United States, No. 16-259C (Sweeney, J.);

HPHC Insurance Co., Inc. v. United States, No. 17-87C (Griggsby, J.);

Maine Cmty. Health Options v. United States, No. 16-967C (Bruggink, J.);

Medica Health Plans v. United States, No. 17-94C (Horn, J.);

Minuteman Health Inc. v. United States, No. 16-1418C (Griggsby, J.);

Moda Health Plan, Inc. v. United States, No. 16-649C (Wheeler, J.);

Molina Healthcare v. United States, No. 17-97C (Wheeler, J.);

Montana Health CO-OP v. United States, No. 16-1427C (Wolski, J.);

Neighborhood Health Plan, Inc. v. United States, No. 16-1659C (Bruggink, J.);

New Mexico Health Connections v. United States, No. 16-1199C (Bruggink, J.);

Sanford Health Plan v. United States, No. 17-357C (Bruggink, J.).

INTRODUCTION

The Patient Protection and Affordable Care Act ("ACA") established Health Benefit Exchanges ("Exchanges"), in which insurance companies could compete for customers and take individually calculated business risks. The Act does not require the taxpayers to indemnify unprofitable insurers for their losses. Instead, the ACA established three premium-stabilization programs, informally known as the "3Rs," under which payment adjustments are made among insurers.

There is no dispute that two of the 3R programs (reinsurance and risk adjustment) are funded solely by the amounts that insurers or plans pay into each program. But here and in twenty-two other pending cases, insurers contend the third program, the risk-corridors program created by section 1342 of the ACA, exposed the government to uncapped liability for insurance-industry losses, based on criteria—the ratio of a plan's allowable costs to its premiums—that are largely dependent upon insurers' business judgment. On this theory, insurers are seeking billions of dollars from the Treasury.

Contrary to the insurers' premise, Congress did not expose the federal fisc to this massive liability. The ACA created a self-funded risk-corridors program to distribute gains and losses between insurers that under- and over-estimated their cost-to-premium ratios. Under the program, the Department of Health and Human Services ("HHS") collects "payments in" from insurers that were profitable and uses those funds to make "payments out" to insurers that were unprofitable. "Payments

in" are the only funding source referenced in the statutory provision, and nothing in the ACA appropriates or authorizes the use of other funds for "payments out."

Congress confirmed that the program is self-funded when it enacted appropriations necessary to authorize the distribution of risk-corridors collections to the industry. Fiscal year 2015 was the first year in which monies could be paid out under the risk-corridors program. (By law, HHS could not make payments before that time because the ACA requires HHS to use a full year's data to calculate payment and collection amounts, and the program did not begin until calendar year 2014.) In the appropriations legislation for fiscal year 2015, Congress allowed HHS to use "payments in"—amounts collected from insurers under the program—as a source of funding for "payments out." At the same time, Congress expressly prohibited HHS from using other funds for such "payments out." That legislation, which Congress subsequently reenacted, guarantees that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). Insurers cannot circumvent Congress's power of the purse by demanding billions of additional dollars from the Treasury.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1). The court concluded that it had jurisdiction over plaintiff's monetary claims, rejected plaintiff's claims on the merits, and entered final judgment on November 10, 2016. Plaintiff filed a notice of appeal on November 15, 2016. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether plaintiff's statutory claim fails as a matter of law because there is no statutory obligation to use taxpayer funds for risk-corridors payments.

2. Whether plaintiff's contract and takings claims are dependent on its meritless statutory claim and also fail on independent grounds.

3. Whether the agency's timing of risk-corridors payments is reasonable and consistent with the statute.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Statutory Background

A. The ACA's Central Provisions

The Affordable Care Act adopted a series of measures designed to expand coverage in the individual health-insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act provides billions of dollars of subsidies each year to help individuals buy insurance. *Id.* at 2489. Second, the Act generally requires each individual to maintain coverage or pay a penalty. *Id.* at 2486. Third, the Act bars

insurers from denying coverage or charging higher premiums based on an individual's health status. *Id.*

The ACA created the Exchanges, virtual marketplaces in each state where individuals and small groups can purchase health coverage. 42 U.S.C. §§ 18031-18041. For consumers, Exchanges are the only forum in which they can purchase coverage with the assistance of federal subsidies. For insurers, Exchanges provide marketplaces to compete for business in a centralized location, and they are the only commercial channel in which insurers can market their plans to the millions of individuals who receive federal subsidies. All plans offered through an Exchange must be Qualified Health Plans ("QHPs"), meaning that they provide "essential health benefits" and comply with other regulatory requirements such as provider-network requirements, benefit-design rules, and cost-sharing limitations. 42 U.S.C. § 18021; 45 C.F.R. pts. 155 and 156.

B. The ACA's Premium-Stabilization Programs (the "3Rs")

The ACA's Exchanges created business opportunities for insurers electing to participate. Like most business opportunities, risk was involved—here, in the form of pricing uncertainty arising from the unknown health status of an expanded risk pool and the fact that insurers could no longer charge higher premiums or deny coverage based on an enrollee's health (*i.e.*, expected cost). In an effort to mitigate the pricing risk and incentives for adverse selection arising from this system, the ACA established three premium-stabilization programs modeled on preexisting programs established

under the Medicare program. Informally known as the "3Rs," these ACA programs began with the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.

The 3R programs distribute risks among insurers and mitigate risk attendant to the new opportunities created by the ACA. Each of the 3R programs is funded by amounts that insurers or plans pay into the program.

The reinsurance program was created by section 1341 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from insurers and self-insured group health plans are used to fund payments to issuers of eligible plans that cover high-cost individuals in the individual market. 42 U.S.C. § 18061.

The risk-adjustment program was created by section 1343 of the ACA. It is a permanent program under which amounts collected from insurers whose plans have healthier-than-average enrollees are used to fund payments to insurers whose plans have sicker-than-average enrollees. 42 U.S.C. § 18063.

The risk-corridors program was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from profitable insurers are used to fund payments to unprofitable insurers. 42 U.S.C. § 18062.

The risk-corridors program is at issue here. The operative provision is paragraph (a) of section 1342, which directed HHS to "establish and administer a

program of risk corridors" under which insurers offering individual and small-group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). The "payment methodology" is set out in paragraph (b) of section 1342. That provision states that if an insurer's "allowable costs" (essentially, claims costs) are less than a "target amount" (premiums minus allowable administrative costs) by more than three percent, the plan shall pay a specified percentage of the difference to HHS. *Id.* § 18062(b)(2).[1] The statute refers to these payments as "payments in." *Id.* Conversely, if an insurer's allowable costs exceed the target amount by more than three percent, the payment-methodology provision states that HHS shall pay a specified percentage of the difference. *Id.* § 18062(b)(1). The statute refers to these payments as "payments out." *Id.* HHS regulations incorporated this payment methodology in substantially similar terms. 45 C.F.R. § 153.510(b)-(c).

Nowhere does the ACA connect "payments out" to an independent source of taxpayer funds. "Payments in" from insurers are the only source of funds referenced in section 1342. By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See infra*,

[1] "Allowable administrative costs" include administrative costs and profit of the QHP, the sum of which is limited to 20% of total premiums collected. 45 C.F.R. § 153.500.

p.19 n.4 (citing examples). Section 1342 neither appropriated funds nor authorized appropriations for risk-corridors payments.

The budget authority for section 1342 contrasts starkly with the preexisting risk-corridors program for Medicare Part D, on which the ACA program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA risk-corridors program "shall be based on" the risk-corridors program under Medicare Part D). The statute that established the Medicare Part D program provides: "This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section." 42 U.S.C. § 1395w-115(a)(2). Congress omitted that language (and any similar language) from section 1342 and thus ensured that this provision would not by itself make risk-corridors payments an obligation of the government.

Consistent with the text and structure of section 1342, the Congressional Budget Office ("CBO") did not attribute any costs to the risk-corridors program when, shortly before the ACA's passage, it estimated the ACA's impact on the federal budget. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate") (omitting risk corridors from the budgetary scoring).[2] Congress specifically referenced that CBO cost estimate in the ACA, in a provision that emphasized the

[2] http://www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf

Act's fiscal responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility").

C. Congress's Appropriations for Risk-Corridors Payments

As discussed above, when Congress enacted the ACA in 2010, it did not appropriate funds or authorize appropriations for risk-corridors payments. And as a practical matter, Congress did not need to address risk-corridors appropriations until fiscal year 2015, because the statute did not allow payments to be made before that time. The risk-corridors program began in the 2014 calendar year, and the first set of payments could not be made before the 2015 calendar year, which corresponded to the 2015 and 2016 fiscal years.

Anticipating the upcoming appropriations process, in early 2014, Members of Congress asked the Government Accountability Office ("GAO") to address potential sources of funds that might be used for risk-corridors payments when such payments came due in 2015. *See Dep't of Health and Human Servs.-Risk Corridors Program*, B-325630, 2014 WL 4825237, at *1 (Comp. Gen. Sept. 30, 2014) ("GAO Op.") (noting requests). The GAO examined HHS's appropriations act for fiscal year 2014 to determine whether its language—if reenacted in subsequent appropriations acts—would allow funds to be used for risk-corridors payments. *See id.* at *2-5.

The GAO identified within the Program Management appropriation for HHS's Centers for Medicare & Medicaid Services ("CMS") two potential sources of funding for risk-corridors payments, if the same language were reenacted for subsequent fiscal

years. *Id.* at *3, *5. First, the GAO explained that the appropriation for "user fees" would, if reenacted for subsequent fiscal years, allow HHS to use "payments in" from insurers to make "payments out" to insurers. *Id.* at *3-4; *see also* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (appropriating "such sums as may be collected from authorized user fees").

Second, the GAO noted that the fiscal year 2014 act appropriated a $3.67 billion lump sum for the management of enumerated programs such as Medicaid and Medicare, as well as for "other responsibilities of" CMS. 2014 WL 4825237, at *3. The GAO concluded that this catch-all language would be broad enough to encompass risk-corridors payments, if it were reenacted by Congress. *Id.* at *3, *5.

Two months later, when Congress passed the appropriations act for fiscal year 2015, Congress reenacted the user-fee language that allowed funds from "payments in" to be used to make risk-corridors payments. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477. But in the same act, Congress expressly prohibited HHS from using other funds for risk-corridors payments. The legislation specified:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. § 227, 128 Stat. at 2491.

In other words, the first time that Congress needed to decide whether to appropriate funds for risk-corridors payments, it enacted legislation that capped those payments at amounts collected from insurers. Congress explained that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014).

The following year, in December 2015, Congress enacted an identical funding limitation in the appropriations act for fiscal year 2016. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 225, 129 Stat. 2242, 2624. Congress subsequently enacted continuing resolutions that retained the same funding limitation, which remains in effect. *See, e.g.,* Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, 130 Stat. 857, 909; Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005-06.

II. HHS's Implementation of the Risk-Corridors Program

HHS regulations require insurers to compile and submit their risk-corridors data for a particular calendar year by July 31 of the following year. 45 C.F.R. § 153.530(d). HHS then applies the statutory formula to calculate collection and payment amounts for the preceding calendar year. *Id.* § 153.530(a)-(c).

In March 2014, HHS informed insurers that it would "implement th[e] program in a budget neutral manner." 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). In April 2014, HHS released guidance explaining that, if the total amount that insurers paid into the risk-corridors program for a particular year proved insufficient to fund

in full the "payments out" calculated under the statutory formula, payments to insurers would be reduced pro rata to the extent of any shortfall. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014) (Appx297-298). The guidance further explained that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the current year. *Id.*

HHS implemented that payment methodology when collections in fact proved insufficient to pay in full amounts calculated under the statutory formula. In November 2015, HHS announced that for 2014 (the program's first year), the total amount that insurers would pay in ($362 million) was $2.5 billion less than the total amount that insurers requested ($2.87 billion). CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015) (Appx310). As a result, HHS indicated that it would at that time make pro-rated payments of 12.6% of the amount requested for 2014. *Id.*

The following year, in November 2016, HHS announced that it would apply the total amount that insurers were expected to pay in for 2015 ($95 million) to outstanding payment requests for 2014. Appx665-677. To date, the total amount of "payments in" for 2014 and 2015 is approximately $8.3 billion less than the total amount calculated as "payments out" for those years. Insurers have not yet submitted their data for 2016, which are due July 31, 2017.

III. Factual Background and Proceedings Below

A. Plaintiff's Allegations

Plaintiff and many other insurers filed Tucker Act suits in the Court of Federal Claims, alleging that the government is obligated to pay insurers the full amount calculated under the formula in section 1342(b)(1), regardless of how much insurers paid into the program under section 1342(b)(2). Collectively, the insurers are seeking billions of dollars for the 2014 and 2015 years. Plaintiff alone seeks more than $75 million for those years. Pl. Br. 13.

The principal claim is statutory. Plaintiff alleges that the language of section 1342 created an obligation on the part of the government to pay out the full amounts calculated under the statutory formula, regardless of the amount that insurers paid in. Appx86-88. Plaintiff further alleges that Congress's express limitations on appropriations for risk-corridors payments do not affect the obligation that section 1342 allegedly created. Appx87.[3]

Plaintiff also alleges contract and takings claims, but those claims are dependent on the statutory claim. In the express-contract claim (Appx88-90), plaintiff alleges that its annual QHP agreements with HHS incorporated the requirements of section 1342. In the implied-in-fact contract claim (Appx90-93), plaintiff alleges that section 1342 and the regulations create contractual obligations. In the implied-

[3] Plaintiff makes the parallel allegations with respect to the substantially identical language of the regulations that implement section 1342.

covenant-of-good-faith-and-fair-dealing claim (Appx93-96), plaintiff alleges that such a covenant is implied in its alleged contracts with the government. And in the Fifth Amendment takings claim (Appx96-98), plaintiff alleges that section 1342 and its alleged contracts with the government gave plaintiff a property interest in risk-corridors payments that was taken by Congress's express limitations on funding.

B. The Trial Court's Decision

After concluding that it had jurisdiction over plaintiff's monetary claims, the trial court rejected the claims on the merits. Appx1-36.

1. The disposition of the statutory claim

The trial court rejected plaintiff's contention that section 1342 of the ACA obligated the government to make "payments out" without regard to the amount of "payments in." Appx21.

Examining the statutory text, the court explained that, although section 1342 states that HHS "shall pay" amounts calculated under the statutory formula, Appx22, "the only statutory source of funding for the risk-corridors program" in that paragraph "refers to '[p]ayments in' from qualified health plans," Appx23 (citing 42 U.S.C. § 18062(b)). The court contrasted the language of section 1342 with other ACA provisions that appropriated or authorized appropriations for various programs. Appx23-24. And the court contrasted section 1342 with the preexisting risk-corridors program in the Medicare Part D statute, which, unlike section 1342, provides "budget authority in advance of appropriations Acts and represents the obligation of the

Secretary to provide for the payment of amounts provided under this section." Appx25 (quoting 42 U.S.C. § 1395w-115(a)(2)).

The court further explained that the cost estimate that the CBO provided to Congress when the ACA was under consideration did not project that the risk-corridors program would adversely affect the federal budget. Appx23. And the court noted that this treatment was significant because Congress explicitly relied on the CBO's findings when it enacted the ACA. *Id.* (citing ACA § 1563).

Summarizing, the court concluded that HHS's implementation of the risk-corridors program "is consistent with the CBO's 2010 report, Congress's decision explicitly to authorize funds for other sections of the Act but not Section 1342, and Congress's choice to omit from Section 1342 the critical appropriation language used in the Medicare program." Appx26. In light of that conclusion, the court found it unnecessary to rely on the appropriations legislation that allowed HHS to use "payments in" as a source of funding for "payments out" but expressly prohibited HHS from using other funds for such payments.

2. The disposition of the contract and takings claims

The trial court dismissed plaintiff's contract and takings claims for failure to state a claim. The court explained that the express-contract claim fails because the QHP agreements on which plaintiff relied do not pertain to risk corridors and instead concern the use of HHS's internet service for transactions on federally-facilitated Exchanges. Appx28-30.

Rejecting the implied-in-fact contract claim, the court explained that "[a]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued." Appx32 (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). The court found nothing in section 1342 or the regulations that provides any express or implicit intent to enter into contracts. *Id.* Alternatively, even assuming that an implied-in-fact contract could be derived from section 1342 and the regulations, the court concluded that plaintiff could not establish a breach because section 1342 and the regulations do not obligate the government to pay in full amounts calculated under the formula, regardless of the total amount that insurers paid in. Appx34.

The court rejected the claim that the government breached an implied covenant of good faith and fair dealing, because that claim was dependent on plaintiff's unsuccessful contract claims. Appx35. The court rejected the takings claim because plaintiff does not have a property interest in the payments it seeks. *Id.*

* * *

After the trial court entered final judgment in this case, four other trial courts issued rulings in risk-corridors cases. In *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (Wheeler, J.), the court granted partial summary judgment on liability for the plaintiff and subsequently entered final judgment. In *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl. Apr. 18, 2017) (Griggsby, J.)

("*BCBSNC* Op."), the court dismissed the complaint on the ground that the agency's three-year payment methodology (discussed in Part III below) is reasonable and consistent with the statute. In *Health Republic Insurance Co. v. United States*, 129 Fed. Cl. 757 (2017) (Sweeney, J.), and *Maine Community Health Options v. United States*, No. 16-967C, 2017 WL 1021837 (Fed. Cl. Mar. 9, 2017) (Bruggink, J.), the courts rejected the government's jurisdictional arguments but did not reach the merits.

SUMMARY OF ARGUMENT

Under the risk-corridors program created by section 1342 of the ACA, HHS collects "payments in" from profitable insurers and uses those funds to make "payments out" to unprofitable insurers. Plaintiff and its amici contend that section 1342 obligates the government to make up shortfalls in collections. On that theory, they seek billions of dollars from the Treasury. The claims have no merit.

I. Contrary to the insurers' premise, the ACA did not obligate the taxpayers to cover insurance-industry losses. The Act's three premium-stabilization programs, including the risk-corridors program, distribute risks among insurers. Each program is self-funded by amounts collected from insurers or plans.

Section 1342 of the ACA neither appropriated funds nor authorized appropriations for risk-corridors payments. And unlike the preexisting Medicare Part D statute on which section 1342 was generally modeled, section 1342 does not include any language that would make risk-corridors payments an obligation of the government without regard to appropriations. When the time came to appropriate

funds for risk-corridors payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make risk-corridors payments. That legislation ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). Insurers cannot circumvent Congress's power of the purse by demanding billions of dollars that Congress did not appropriate.

II. The insurers' contract and takings claims rest on the same incorrect premise as the statutory claim and also fail on independent grounds set forth in the trial court's opinion. Plaintiff and its amici make no attempt to demonstrate error in the trial court's reasoning, which their briefs do not discuss.

III. The insurers' claims also may be premature. Under the agency's three-year payment methodology, HHS has been making annual risk-corridors payments to the extent of its budget authority, while leaving open the possibility of additional payments if permitted by appropriations. That methodology is eminently reasonable. And because the time for making additional payments has not yet elapsed, it is impossible at this juncture to quantify an insurer's claims. We recognize, however, that this timing issue may be intertwined with the merits, and that the practical significance of the timing issue may be overtaken by the passage of time while the litigation is pending. Nonetheless, because the issue may be jurisdictional, we respectfully call the timing question to the attention of the Court.

STANDARD OF REVIEW

The decision below presents issues of law that are subject to de novo review.

ARGUMENT

I. There Is No Statutory Obligation To Use Taxpayer Funds For Risk-Corridors Payments.

A. Section 1342 of the ACA Did Not Appropriate Funds for Risk-Corridors Payments or Create an Obligation to Use Taxpayer Funds for Such Payments.

The risk-corridors program is one of three premium-stabilization programs created by the ACA (together known as the "3Rs"). There is no dispute that the other 3R programs—the reinsurance and risk-adjustment programs created by sections 1341 and 1343 of the ACA, respectively—are funded solely by amounts collected from insurers or plans. *See* Pl. Br. 26-27. Plaintiff and its amici contend that the risk-corridors program created by section 1342 of the ACA uniquely obligates the government to use taxpayer dollars to make up shortfalls in amounts collected from insurers. But the text, structure, history, and purpose of the risk-corridors program demonstrate that the program was to be self-funded.

Section 1342 directed HHS to "establish and administer" a system of payment adjustments among insurers for the 2014, 2015, and 2016 calendar years, 42 U.S.C. § 18062(a), based on a retrospective analysis of insurers' data for a prior full year, *id.* § 18062(b). Insurers that overestimated their premiums relative to costs make "payments in" at specified percentages; insurers that underestimated their premiums

relative to costs receive "payments out" at corresponding percentages. *Id.* The "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id.* § 18062(b)(1), does not refer to any potential funding source other than "payments in," *id.* § 18062(b)(2).

Like the other 3R programs, the risk-corridors program mitigated insurers' risk in the early years of the ACA's implementation. Those potential risks resulted not only from market uncertainties, but also from the insurers' business judgment in pricing and designing the plans that they offered on the Exchanges.

Nothing in the text of section 1342 obligated the government to use taxpayer dollars to make potentially massive, uncapped payments to insurance companies. In dozens of other ACA provisions, Congress appropriated funds or enacted statutory language authorizing the appropriation of funds in the future.[4] In contrast, the only funds referenced in the risk-corridors statute are "payments in" by insurers and "payments out" to insurers. *See* GAO Op., 2014 WL 4825237, at *2 (Sept. 30, 2014) ("Section 1342, by its terms, did not enact an appropriation to make the payments

[4] For examples of ACA provisions appropriating funds, *see* ACA §§ 1101(g)(1), 1311(a)(1), 1322(g), 1323(c). For examples of ACA provisions authorizing the appropriation of funds, *see* ACA §§ 1002, 2705(f), 2706(e), 3013(c), 3015, 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

specified in section 1342(b)(1).”). The risk-corridors statute makes no reference to appropriations whatsoever.

Congress conspicuously omitted from section 1342 any language making risk-corridors payments an obligation of the government, in notable contrast to the preexisting risk-corridors program under Medicare Part D on which the ACA risk-corridors program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA’s risk-corridors program “shall be based on” the risk-corridors program under Medicare Part D); *see also* Pl. Br. 27. The Medicare Part D statute, unlike the ACA risk-corridors provision, expressly made risk-corridors payments an obligation of the government:

> This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section.

42 U.S.C. § 1395w-115(a)(2). Thus, in Medicare Part D, Congress made risk-corridors payments an “obligation” of the government regardless of amounts contributed by insurers. *Id.*

Congress enacted no equivalent language in section 1342 of the ACA, even though, as plaintiff acknowledges, “Congress would have been aware of [the Medicare Part D] payment scheme when it enacted the statute.” Pl. Br. 27-28. This contrast is especially notable because Congress *did* enact equivalent language elsewhere in the ACA. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided: “BUDGET AUTHORITY.—Subparagraph (A) constitutes budget

authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph.").

By omitting from section 1342 the budget language that it used in the preexisting Medicare Part D statute and elsewhere in the ACA, Congress ensured that section 1342 would not by itself make risk-corridors payments an obligation of the government. No payment obligation could arise without further action by Congress.

Consistent with the plain text of section 1342, the budget estimate that the CBO prepared for Congress when the ACA was under consideration indicated that the risk-corridors program would not increase the federal deficit. *See* CBO Cost Estimate, tbl. 2 (omitting the risk-corridors program from the budgetary scoring). When the CBO—which is the legislative branch agency responsible for providing Congress with nonpartisan budget analyses—estimated the budgetary impact of the ACA and identified "budgetary cash flows for direct spending" from the ACA, *id.* at 3, it did not mention risk-corridors payments, reflecting the understanding that the program would be self-funded.

By contrast, the CBO did score the other 3R programs. The CBO explained that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. CBO Cost Estimate, tbl. 2 note a. And the CBO noted that under the reinsurance program, payments were expected to total $20 billion, *id.*, whereas collections were expected to total $25 billion, 42 U.S.C. § 18061(b)(3)(B).

The CBO likewise scored ACA § 2707 which, as indicated above, made payments under a psychiatric demonstration project an obligation of the government. *See* CBO Cost Estimate, tbl. 5 (indicating that section 2707 would increase the federal deficit).

Congress explicitly relied on the CBO Cost Estimate when it enacted the ACA. In an ACA provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563(a)(1). That projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010. And it was predicated on Congress's understanding that risk-corridors payments would not increase the deficit.

B. Congress Later Appropriated Funds Collected From Insurers But Barred HHS From Using Other Funds for Risk-Corridors Payments.

If there were any doubt as to whether Congress had established a self-funded program, it was removed by the legislation that provided appropriations for risk-corridors payments. In those statutes, Congress appropriated the funds that insurers would pay into the risk-corridors program, but expressly barred HHS from using other funds to make risk-corridors payments. Those appropriations acts confirm that section 1342 required "payments out" to be made solely from "payments in." And even if there were a question as to the meaning of section 1342, the appropriations acts definitively capped "payments out" at the total amount of "payments in."

As discussed above, the risk-corridors program began in calendar year 2014. Because section 1342 of the ACA required HHS to use a full year's data to calculate payment amounts, no payments could be made until calendar year 2015, which corresponded to the 2015 and 2016 fiscal years. Congress thus addressed the question of appropriations for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015.

In early 2014, Members of Congress requested from the GAO an analysis of what sources of appropriations might be available when risk-corridors payments came due. *See* GAO Op., 2014 WL 4825237, at *1 (noting requests). In September 2014, the GAO issued an opinion identifying two components of the CMS Program Management appropriation for fiscal year 2014 that, if reenacted in subsequent appropriations acts, could be used to make risk-corridors payments. First, the GAO explained that the appropriation for "user fees" would, if reenacted for fiscal year 2015, allow HHS to use "payments in" from insurers to make "payments out" to insurers. *Id.* at *3-4. Second, the GAO explained that, if reenacted, a lump-sum appropriation to CMS for the management of enumerated programs such as Medicare and Medicaid, as well as for "other responsibilities" of CMS, could be used to make risk-corridors payments. *Id.* at *3. The GAO stressed, however, that these sources

would not be available for risk-corridors payments unless Congress enacted similar language in the appropriations acts for subsequent fiscal years. *Id.* at *5.[5]

Congress did not enact the same appropriations language for fiscal year 2015. Congress reenacted the user-fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477. But Congress added a new provision that expressly barred HHS from using other funds for risk-corridors payments:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. § 227, 128 Stat. 2491. The effect of this appropriations legislation was to ensure that "payments out" would not exceed the total amount of "payments in." The appropriations legislation thus confirmed that the statute would operate as originally designed: the risk-corridors program would be self-funded.

Moreover, even assuming arguendo that section 1342 had made risk-corridors payments an obligation of the government in advance of appropriations, this specific

[5] In addition to requesting an opinion from the GAO, Members of Congress asked HHS to identify potential sources of funding for risk-corridors payments. HHS identified collections from insurers (*i.e.*, the user fees), but, unlike the GAO, HHS did not identify the lump sum as a potential source of funding for risk-corridors payments. Appx423-424; *see also* Appx455-457.

appropriations legislation definitively capped payments at amounts collected and thus superseded any such obligation. There is no doubt that appropriations legislation can amend a preexisting statutory obligation, as long as Congress's intent to do so is clear. In *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940), for example, the Supreme Court held that an appropriations act precluding the use of funds to pay military reenlistment allowances superseded permanent legislation providing that an enlistment allowance shall be paid "to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his discharge." Similarly, in *United States v. Will*, 449 U.S. 200, 224 (1980), the Supreme Court held that an appropriations act providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely." And in *United States v. Mitchell*, 109 U.S. 146, 148 (1883), the Supreme Court held that "by the appropriation acts which cover the period for which the appellee claims compensation, congress expressed its purpose to suspend the operation of [a prior statute fixing salaries] and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum."

This Court's decision in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), is particularly instructive. In contrast to section 1342, the permanent legislation at issue in *Highland Falls*—section 2 of the Impact Aid Act—gave funding recipients an "entitlement" to payment of amounts

calculated under a statutory formula. *See id.* at 1168 (statute provided that school districts "shall be entitled" to payment of such amounts). Moreover, the permanent legislation specified that, in the event of a shortfall in appropriations for various statutory programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2 of the Impact Aid Act. *Id.* Subsequently, however, Congress earmarked certain amounts for entitlements under various sections of the Impact Aid Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id.* at 1169. In light of that clear limit on appropriations, this Court held that the school districts were entitled to only a pro rata share of the amounts calculated under the statutory formula. *Id.* at 1170-71.

Here, as in *Highland Falls*, it is difficult "imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id.* at 1170. Indeed, the appropriations legislation for risk-corridors payments is materially indistinguishable from the appropriations legislation in *Highland Falls*. As in *Highland Falls*, the agency could not (in light of the shortfall in collections) have paid full amounts calculated under the statutory formula without violating the Anti-Deficiency Act, which states that "[a]n officer or employee of the United States Government ... may not ... make or authorize an expenditure ... exceeding an amount available in an appropriation ... for the expenditure." *Id.* at 1171 (quoting 31 U.S.C. § 1341(a)(1)(A)) (this Court's alterations). And in enacting the express restrictions on funding for risk-corridors payments, Congress left no doubt as to its intent, which

was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014).

Plaintiff makes no attempt to distinguish *Highland Falls*, which its brief does not discuss. Plaintiff notes that "the mere failure of Congress to appropriate funds . . . does not in and of itself defeat a Government obligation created by statute." Pl. Br. 39. But that principle is doubly inapplicable here. First, section 1342 did not create a "Government obligation" in advance of appropriations. Instead of creating such an obligation (as Congress did in the Medicare Part D statute and elsewhere in the ACA), section 1342 reserved Congress's full budget authority over risk-corridors payments.

Second, there was no "mere failure" by Congress to appropriate funds for risk-corridors payments. In the only acts that appropriated funds for such payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make "payments out." And as discussed above, the precedents of the Supreme Court and this Court recognize that even where (unlike here) permanent legislation creates a government obligation in advance of appropriations, that obligation can be modified by appropriations legislation of this kind.

C. Neither Plaintiff nor the Trial Court in *Moda* Provided Any Basis to Order That Taxpayer Funds Be Used to Make Up Shortfalls in Collections From Insurers.

1. The ACA did not expose the government to uncapped liability for insurance-industry losses.

Plaintiff and its amici contend that when Congress enacted the ACA's risk-corridors program, Congress exposed the government to uncapped liability for insurance-industry losses, based on criteria—the ratio of a plan's allowable costs to its aggregate premiums—that are largely dependent upon insurers' business judgment. The crux of their argument is that language in section 1342(b) stating that the Secretary "shall pay" amounts calculated under the formula is sufficient to create a binding payment obligation on the government, regardless of appropriations and despite Congress's express funding limitations.

This argument rests on two independent errors. First, the language on which the insurers rely is embedded in the statute's "payment methodology" provision, section 1342(b). *See* 42 U.S.C. § 18062(b). The operative provision is section 1342(a), which directs the Secretary to establish and administer a program of payment adjustments among insurers. *See id.* § 18062(a) ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums."). Thus, the language on which the

insurers rely simply describes the way the Secretary shall administer the program of payment adjustments among QHPs; it is not a freestanding directive to the agency to make payments.

Second, even a freestanding directive to an agency to pay amounts calculated under a statutory formula would not—standing alone—create an obligation on the part of the government to make payments without regard to appropriations. This Court's decision in *Prairie County v. United States*, 782 F.3d 685 (Fed. Cir. 2015), is illustrative. The statute at issue in that case directed an agency to make payments to local governments in accordance with a statutory formula, but this Court rejected the contention that the statute obligated the government to make full payments regardless of appropriations. This Court explained that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language." *Id.* at 691. Specifically, this Court noted that a subsequent amendment to the statute provided that each local government "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." *Id.* But that amendment did not apply to the fiscal years at issue in *Prairie County*, and the government thus had no obligation to make payments in excess of appropriations for those years. *Id.*

The language of "obligation" that this Court discussed in *Prairie County* is comparable to the language of "obligation" that Congress used in the Medicare

Part D statute and elsewhere in the ACA. But Congress omitted that language (or its equivalent) from section 1342. Accordingly, section 1342 did not by itself create a government obligation to make risk-corridors payments. Indeed, the insurers' claim here is even weaker than the claim in *Prairie County*, because the permanent legislation in *Prairie County* authorized appropriations, while limiting the scope of that authorization.[6] By contrast, section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk-corridors payments. *See generally* 2 U.S.C. § 622(2) (defining four types of budget authority, none of which was granted in section 1342).

Neither plaintiff nor the trial court in *Moda* (which ruled for the insurer in an analogous case) provided any reason to disregard the plain text of section 1342, which does not obligate the government to use taxpayer funds to compensate unprofitable insurers. Although plaintiff asserts that section 1342 should be interpreted to track Medicare Part D, *see* Pl. Br. 27-28, plaintiff does not explain how a court could properly do so in light of the crucial differences in the language of the two statutes.

In attempting to distinguish the Medicare Part D statute, the trial court in *Moda* mistakenly stated that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay'

[6] *See Prairie County*, 782 F.3d at 686 (explaining that the permanent legislation provided that "[n]ecessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter," but qualified that authorization by providing that "[a]mounts are available only as provided in appropriation laws").

specific amounts to insurers." 130 Fed. Cl. at 455. Based on that premise, the *Moda* court opined 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." *Id.*

The *Moda* court misunderstood the Medicare Part D statute. The statutory language quoted by the court, which directs the Secretary to "establish a risk corridor" under Medicare Part D, appears in 42 U.S.C. § 1395w-115(e)(3). The immediately preceding paragraph provides that, if risk-corridor costs for a plan are greater than a specified threshold, "the Secretary shall increase the total of the payments made to the sponsor or organization offering the plan" by a specified amount. 42 U.S.C. § 1395w-115(e)(2)(B)(i), (ii). Thus, contrary to the *Moda* court's premise, the Medicare Part D statute directs the Secretary to pay specific amounts to insurers.

In any event, the *Moda* court separately erred in concluding that the "payment language in Section 1342 obligates the Secretary to make payments" in the absence of appropriations. 130 Fed. Cl. at 455. Under the "straightforward and explicit command of the Appropriations Clause," "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). A "direction to pay without a designation of the source of funds is not an appropriation." GAO, *Principles of Federal Appropriations Law* 2–24 (4th ed. 2016

rev.) (*GAO Redbook*).[7] And as discussed above, a direction to pay does not, standing alone, create an obligation of the government. That is why the Medicare Part D statute not only directs the Secretary to make specified payments to insurers, but also provides budget authority to do so and makes such payments an obligation of the government. In section 1342, by contrast, Congress reserved its power of the purse by withholding both (1) an appropriation or authorization of appropriations, and (2) any language that makes risk-corridors payments an obligation of the government without regard to appropriations.

Given the plain text of section 1342, it is unsurprising that the CBO's March 2010 cost estimate indicated that the risk-corridors program would not increase the federal deficit. Plaintiff speculates that the CBO may have assumed, based on historical Medicare Part D data, that the ACA's risk-corridors program would be "revenue-positive," Pl. Br. 33, and plaintiff declares that the "CBO's inaccurate forecasts . . . do not alter the Government's statutory obligation to make risk-corridors payments under § 1342," Pl. Br. 34. But the CBO did not score the risk-corridors program as revenue-positive; it omitted the program from the budgetary scoring. More generally, plaintiff's argument misunderstands the relevance of the CBO's 2010 cost estimate, which is important not for its own sake but because

[7] The *GAO Redbook* is being updated on a chapter-by-chapter basis. Citations are to the 2016 edition unless otherwise indicated.

Congress relied on it in enacting the ACA. By contrast, the post-enactment CBO reports on which plaintiff relies (Pl. Br. 33-34) are legally irrelevant. Indeed, in *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009), this Court declined to rely on a CBO cost estimate because "Congress never ratified the CBO's interpretation, which was completed more than two weeks after Congress took final action on the bill."

Plaintiff's policy arguments are equally unavailing. The ACA's premium-stabilization programs were designed to create a structure that might mitigate insurers' risks, not to eliminate those risks by creating a government guarantee. Indeed, plaintiff concedes that the other 3R programs—reinsurance and risk adjustment—are self-funded. Pl. Br. 26-27. Plaintiff's contention that the risk-corridors program alone creates an uncapped government obligation to indemnify insurers for losses has no grounding in the statutory text and gives short shrift to the ACA's explicit emphasis on fiscal responsibility. ACA § 1563.

Plaintiff's invocation of "Congress's purposes in enacting the program," Pl. Br. 26, also "ignores the complexity of the problems Congress [was] called upon to address." *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Although plaintiff asserts that "[o]nly full risk-corridors payments" would "induce" insurers to sell plans on Exchanges, Pl. Br. 28, the Exchanges created significant business opportunities for insurers, which had an incentive to compete for market share by lowering premiums. *See* Milliman, *Ten Critical Considerations for Health Insurance Plans Evaluating Participation in Public Exchange Markets* (Dec. 2012) (explaining

that "the opportunity to reach a new market by participating in the exchange land grab could be a very quick way to increase the size of an insurer's covered population"). Indeed, a recent article noted "the prevalent strategy of deliberately selling policies below cost in the early years of the program in order to gain market share." Seth Chandler, *Judge's Ruling On 'Risk Corridors' Not Likely To Revitalize ACA*, Forbes, Feb. 13, 2017. A government commitment to indemnify insurers against losses would have exacerbated those incentives, and Congress prudently refrained from committing taxpayer dollars to unprofitable insurers.

2. Contrary to the *Moda* court's understanding, neither the fiscal year 2014 appropriation nor the Judgment Fund was available for risk-corridors payments.

Plaintiff and the *Moda* court also fail to identify any proper basis to disregard Congress's express limitation on funding for risk-corridors payments. As discussed above, HHS's fiscal year 2014 appropriation included a $3.67 billion lump sum for the management of enumerated programs such as Medicare and Medicaid and for "other responsibilities" of CMS. The *Moda* court mistakenly believed that HHS could have used that lump sum to make risk-corridors payments during fiscal year 2014, before Congress's express funding limitation took effect in December 2014. The *Moda* court declared that the "fiscal year 2014 CMS Program Management appropriation" was available but "HHS chose not to use" it. 130 Fed. Cl. at 456.

The terms of the statute foreclose that conclusion. By law, the lump sum in the fiscal year 2014 appropriation expired at the end of that fiscal year (September 30,

2014). *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374.[8] And under the plain terms of section 1342, no risk-corridors payments could have been made until the 2015 calendar year, which corresponds to the 2015 and 2016 fiscal years. Section 1342 requires that "payments in" and "payments out" be calculated using insurers' data from an entire year. *See* 42 U.S.C. § 18062(b). Indeed, an insurer's allowable costs for the year must be reduced by any reinsurance and risk-adjustment payments it receives, and those payments are not made until after the end of the calendar year. *Id.* § 18062(c)(1)(B). Thus, "payments out" for the 2014 benefit year were not an "other responsibility" of CMS in fiscal year 2014. That is why the GAO advised Congress that, for funds to be available for risk-corridors payments, subsequent appropriation acts must include language similar to the language included in the appropriation for fiscal year 2014. 2014 WL 4825237, at *5. Congress did not include similar language in subsequent appropriation acts; Congress appropriated "payments in" but barred HHS from using other funds for risk-corridors payments.

The *Moda* court alternatively reasoned that Congress must have intended to allow insurers to collect full risk-corridors payments from the Judgment Fund, because the appropriations acts did not state that no funds in "this act *or any other act*"

[8] Likewise, the continuing resolutions cited by the *Moda* court (130 Fed. Cl. at 457 n.13) made funds available only until December 2014, when Congress enacted the fiscal year 2015 appropriations act. *See*, *e.g.*, Pub. L. No. 113-164, § 101, 128 Stat. 1867.

are available for risk-corridors payments. 130 Fed. Cl. at 461 (emphasis added). But the "general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement," *Richmond*, 496 U.S. at 432, and it has no bearing on the threshold question of liability. Thus, in *Highland Falls*, this Court rejected a Tucker Act claim for damages from the Judgment Fund, even though Congress had simply capped funds available under an agency's appropriations act without making reference to "any other act." On the *Moda* court's logic, the claimants in *Highland Falls* should have prevailed rather than lost.[9]

In the acts appropriating funds for risk-corridors payments, Congress responded to the analysis in the GAO opinion, which identified only two potential funding sources—"payments in" and the lump-sum appropriation for program management—and did not suggest that risk-corridors payments could be made from the Judgment Fund. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the program management

[9] Plaintiff's reliance (Pl. Br. 23) on this Court's en banc decision in *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011), is likewise misplaced. *Slattery* held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. *Id.* at 1321. But as *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the merits question of liability under a statute. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interest and costs." 31 U.S.C. § 1304(a). Until entry of judgment or execution of a settlement, the Judgment Fund's permanent appropriation is unavailable. *See Slattery*, 635 F.3d at 1317 (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims").

account. Congress thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). As in *Highland Falls*, that "clear congressional mandate" precludes plaintiff's statutory claim. 48 F.3d at 1171.

To the extent that the *Moda* court relied on *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), its reasoning was foreclosed by this Court's decision in *Prairie County*, which held that *Ramah*'s reasoning does not extend to statutory claims. *See Prairie County*, 782 F.3d at 689-90. In holding that "the Government cannot back out of its contractual promise to pay each Tribe's full contract support costs," the Supreme Court relied on "well-established principles of Government contracting law." *Id.* (quoting *Ramah*, 132 S. Ct. at 2188, 2189, 2191). "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). By contrast, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause," *Adams v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004), and the extent of a preexisting statutory obligation may be determined by appropriations, *Highland Falls*, 48 F.3d at 1170-72.[10]

[10] Plaintiff's contract claims fail for reasons discussed in Part II below.

3. The cases on which plaintiff and the *Moda* court relied are inapposite.

This case bears no resemblance to the cases on which plaintiff and the *Moda* court relied. *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), concerned compensation that the government owed to helicopter companies for delivering the U.S. mail. The court held that "the particular wording of the [Federal Aviation] Act empowers the [Civil Aeronautics] Board to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriation." *Id.* at 804. And the court concluded that "in appropriating less than the amounts required to meet subsidy payments set by the Board," Congress "was well-aware that the Government would be legally obligated to pay the carriers whatever subsidies were set by the Board even if the appropriations were deficient," which was "evident in the floor debates during the period from 1961 through 1965." *Id.* at 808.

By contrast, section 1342 did not empower HHS to make or authorize obligations of the government in the absence or deficiency of appropriations. *See GAO Redbook* 2–55 ("Agencies may incur obligations only after Congress grants budget authority."). Moreover, unlike in *New York Airways*, nothing in the legislative history of the risk-corridors appropriations acts suggests that Congress regarded risk-corridors payments as a contractual obligation for which the government is legally obligated. *See also* Part II, *infra*.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is equally far afield. The appropriations act in that case stated that "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* the Federal Employees Pay Act of 1945." *Id.* at 48-49 (emphasis added). Because "the 1945 act expressly state[d] . . . that it should not prevent payments in accordance with the 1931 act," the court concluded that the italicized language allowed the plaintiffs to "be paid according to the 1931 act." *Id.* at 50. Although plaintiff asserts that the provisions restricting funding for risk-corridors payments are "similar to the appropriation provision in *Gibney*," Pl. Br. 41, the risk-corridors provisions do not contain any language comparable to the language on which *Gibney* relied.

Nor does *United States v. Langston*, 118 U.S. 389 (1886), support plaintiff's claim. The substantive statute in *Langston* provided that the representative to Hayti "shall be entitled to a salary of $7,500 a year," and "the sum of $7,500" had in fact "been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883." *Id.* at 390. For two subsequent years, Congress appropriated only $5,000 each for the salaries of various ministers including the minister to Hayti, but Congress omitted from these acts proposed language that would have repealed statutes allowing a larger salary. *Id.* at 391. While cautioning that the case was "not free from difficulty," the Supreme Court concluded that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to

time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years." *Id.* at 394.

Langston may have been a difficult case, but the risk-corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does not make risk-corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston*, Congress did not merely fail to appropriate sufficient funds for risk-corridors payments, but prohibited HHS from using funds other than collections for such payments.[11]

D. The Parties Agree That HHS Is Not Owed Deference on the Appropriations-Law Questions Presented Here.

Plaintiff and its amici argue that HHS is not entitled to deference on the question whether the government has a statutory obligation to make risk-corridors payments in the absence of appropriations. *See*, *e.g.*, Pl. Br. 42-53. The government agrees. As the *Moda* court noted, the government has not claimed that HHS is owed deference on that question. 130 Fed. Cl. at 456. Indeed, the government argued that "[t]his isn't an APA case." Health Republic Amicus Br. 7 (quoting government counsel).

[11] Moreover, until the creation of the Judgment Fund in 1956, most money judgments against the United States required special appropriations from Congress for payment. *Richmond*, 496 U.S. at 424-25. Thus, cases such as *Langston* and *Gibney*, which predate the creation of the Judgment Fund, did not require payment without a congressional appropriation.

The government sought deference only with respect to a limited question regarding the *timing* of risk-corridors payments, discussed in Part III below. The central issue on appeal, though, is not the timing but the *amount* of payments. And in section 1342, Congress reserved its full budget authority over the amount of risk-corridors payments and did not delegate any budget authority to HHS.

E. Plaintiff's Reliance-Based Arguments Fail as a Matter of Law.

For related reasons, plaintiff and its amici do not advance their position by claiming to have relied on HHS statements allegedly promising to make risk-corridors payments without regard to appropriations. Although HHS often explicitly recognized that its ability to make such payments was subject to appropriations,[12] in at least one public statement HHS failed to do so.[13] HHS at various times also stated that the ACA "requires the Secretary to make full payments to issuers," Pl. Br. 11

[12] *See* 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (stating that if collections are insufficient to fund payments, "HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*") (emphasis added); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (same); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx472) (similar).

[13] *See* 78 Fed. Reg. 15,410, 15,493 (Mar. 11, 2013) (stating that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act").

(quoting Appx286, Appx291), and described risk-corridors payments as "an obligation of the U.S. Government," *id.* (quoting Appx306).[14]

Although plaintiff and its amici emphasize these statements, it is well settled that an agency's statements cannot create a payment obligation that Congress did not authorize. In *Richmond*, the Supreme Court expressly rejected the contention that "erroneous oral and written advice given by a Government employee" may "entitle the claimant to a monetary payment not otherwise permitted by law." 496 U.S. at 415-16. The Supreme Court held that "payments of money from the Federal Treasury are limited to those authorized by statute," and it "reverse[d] the contrary holding of" this Court. *Id.* at 416.

The Supreme Court emphasized that a contrary holding could "render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428. "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Id.* That would contravene "the straightforward and explicit command of the Appropriations

[14] *See also* CMS, Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015) (Appx411) (stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligation of the United States Government for which full payment is required"); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx472) (similar).

Clause," which provides that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id.* at 424.

It is thus settled that "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." *GAO Redbook* 2–2. Likewise, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." GAO, *Principles of Federal Appropriations Law* (Vol. II) at 7-8 (3d ed. 2004). The reliance-based arguments made by plaintiff and its amici founder on these bedrock principles.[15]

Thus, plaintiff's reliance-based arguments are legally irrelevant. Moreover, given the agency's repeated recognition of the limits of its budget authority, any reliance would have been unreasonable and selective, at best. Indeed, in light of the Anti-Deficiency Act, any statement that HHS intended to remit payments necessarily presumed the availability of appropriations.

The assertion of reliance is also belied by the insurers' conduct. Although plaintiff asserts that "[o]nly full risk-corridors payments" would "induce" insurers to sell plans on the Exchanges, Pl. Br. 28, plaintiff and many other insurers chose to offer such plans for the 2015 and 2016 calendar years, even after HHS announced in the spring of 2014 that its risk-corridors payments would be capped by the amount

[15] Because the reliance-based arguments fail as a matter of law, there is no reason to conduct "discovery into the reliance interests" alleged. Health Republic Amicus Br. 12.

that insurers paid in. Many insurers continued to offer plans after Congress expressly prohibited HHS from using funds other than "payments in" for risk-corridors payments in December 2014. And many continue to do so today, even though the risk-corridors program ended in 2016.

II. The Contract And Takings Claims Are Dependent On The Meritless Statutory Claim And Also Fail On Independent Grounds.

A. The Contract and Takings Claims Rest on the Same Incorrect Premise as the Statutory Claim.

Plaintiff's contract and takings claims are dependent on its meritless statutory claim and fail on that basis alone. In the express-contract claim (Appx88-90), plaintiff alleges that its annual QHP agreements with HHS incorporated the requirements of section 1342. Even if that were correct, there would be no breach of the agreement, because section 1342 does not obligate the government to use taxpayer funds to make up a shortfall in collections. For the same reason, the implied-in-fact contract claim would fail even assuming that section 1342 and the regulations could be regarded as contractual offers. The takings claim likewise adds nothing to the other claims, because the alleged property interest is based on section 1342 and the alleged contracts. In short, because the statutory claim fails as a matter of law, this Court can affirm the dismissal of the contract and takings claims on that basis alone.

The contract and takings claims also fail on independent grounds discussed below and by the trial court. Plaintiff does not identify any error in the trial court's

reasoning, Appx28-36, which plaintiff's brief does not address, *see* Pl. Br. 53-55. Plaintiff's amici likewise decline to address the trial court's reasoning or to present legal argument in support of the contract and takings claims.

B. The QHP Agreements Are Unrelated To Risk Corridors.

The premise of the express-contract claim is that plaintiff's annual QHP agreements with HHS incorporate the requirements of section 1342. But even a cursory review of the QHP agreements (Appx104-138) shows that they have nothing to do with risk corridors. In a QHP agreement, insurers agree to adhere to privacy and security standards when conducting transactions on the federally-facilitated Exchange. 45 C.F.R. § 155.260(b)(2). As the trial court explained, the "substance of each agreement is contained in the 'Acceptance of Standard Rules of Conduct,' where the qualified health plan issuer agrees to use HHS's internet services in accord with the conduct outlined in the agreement." Appx28.

QHP agreements make no reference to risk corridors, Appx29, and the trial court correctly rejected plaintiff's attempt to read the risk-corridors provisions into those agreements. As the court noted, references to HHS's obligation "to implement systems and processes" must be read in the context of the whole agreements, which concern a QHP's use of HHS's "Data Services Hub Web Services." *Id.*

Nor do the QHP agreements' general references to federal law and regulations incorporate the risk-corridors provisions. Appx30. For a contract to incorporate a document, "the incorporating contract must use language that is *express* and *clear*, so as

to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008) (this Court's emphasis). This Court has repeatedly rejected the contention that general references to regulations suffice to incorporate a particular provision into a contract. *See, e.g., Precision Pine & Timber v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010); *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008); *Smithson v. United States*, 847 F.2d 791, 794-95 (Fed. Cir. 1988).

The trial court correctly rejected plaintiff's assertion that references in the QHP agreements to "[f]ederally-facilitated Exchange user fees" have a connection to risk corridors. Appx30-31. Such fees, which are authorized under section 1311 of the ACA (not section 1342), are monthly fees collected from participating insurers to support an Exchange's functions. 45 C.F.R. § 156.50(c).[16]

More generally, plaintiff's express-contract theory would create an artificial distinction between plans offered on federally-facilitated Exchanges and plans offered

[16] The amicus brief of America's Health Insurance Plans ("AHIP") incorrectly states that HHS was "free to use *any* available user fees for risk corridors payments." AHIP Amicus Br. 25 (emphasis added) As the amicus brief of Blue Cross and Blue Shield of South Carolina ("BCBSSC") correctly explains, "HHS concluded that QHPs' payments made to the government *pursuant to the risk-corridor statute* could be treated as user fees, and under appropriations law would be available to make risk-corridor payments to other issuers." BCBSSC Amicus Br. 12 (emphasis added). The GAO reached the same conclusion. Neither the GAO nor HHS suggested that other user fees would be available for risk-corridors payments.

on state-based Exchanges, because only plans offered on federally-facilitated Exchanges enter into the type of QHP agreements on which plaintiff relies. Appx29 n.26. But as the Supreme Court explained in *King*, "State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes." 135 S. Ct. at 2489. Nothing in the ACA suggests "that they differ in any meaningful way." *Id.* at 2489-90.

Without addressing the trial court's reasoning, plaintiff asserts that the court should not have ruled on the government's motion to dismiss the contract and takings counts for failure to state a claim. Pl. Br. 54. That assertion is inexplicable. The trial court examined the factual allegations in the complaint, including the QHP agreements that plaintiff attached to the complaint, and correctly determined that they failed to state a plausible claim on which relief could be granted. Plaintiff provides no basis to set aside that judgment.

C. No Implied-In-Fact Contract For Risk Corridors Exists.

Plaintiff's contention that it has an implied-in-fact contract for risk-corridors payments is equally meritless. No such contract exists. To allege a binding implied-in-fact contract, plaintiff must allege facts demonstrating "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority' on the part of the government's representative to bind the government." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). Plaintiff's brief

does not address the elements of an implied-in-fact contract claim, nor does it identify any error in the trial court's reasoning (Appx31-35).

1. Section 1342 did not create an implied-in-fact contract.

Plaintiff relegates its defense of the implied-in-fact contract claim to a single footnote in which it seeks to derive a contractual obligation from the language of section 1342 itself. Pl. Br. 54 n.5. For support, plaintiff relies on *United States v. Winstar Corp.*, 518 U.S. 839 (1996), but that case involved express contracts and has no bearing on the implied-in-fact contract claim alleged here.[17]

Plaintiff's attempt to derive a contractual obligation from section 1342 runs afoul of settled legal principles. "The Supreme Court 'has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)). "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but

[17] *See Winstar*, 518 U.S. at 865-66 (stating that "documentation in the Winstar transaction establishes an *express agreement* allowing Winstar to proceed with the merger plan approved by the Bank Board, including the recording of supervisory goodwill as a capital asset for regulatory capital purposes to be amortized over 35 years") (emphasis added); *see also id.* at 864, 867-68 (similar).

to make laws that establish the policy of the state." *Id.* (quoting *Atchison*, 470 U.S. at 466). Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Id.* at 630-31 (quoting *Atchison*, 470 U.S. at 466).

In *Brooks*, for example, this Court rejected the contention that a *qui tam* relator entered into a contract with the United States by filing suit against a third party for false patent marketing. The *qui tam* statute at issue in *Brooks* provided that "[a]ny person may sue for the penalty, in which one-half shall go to the person suing and the other to the use of the United States." 702 F.3d at 631. Rejecting the implied-in-fact contract claim, this Court explained that "[n]othing in this language 'create[s] or speak[s] of a contract' between the United States and a *qui tam* relator." *Id.* (quoting *Atchison*, 470 U.S. at 467).

Similarly, this Court has recognized that federal employees' "entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles." *Schism*, 316 F.3d at 1274. "[A]pplying th[is] doctrine ... courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel." *Id.*; *see also Hanlin v. United States*, 316 F.3d 1325, 1329 (Fed. Cir. 2003) (finding no contract where the

"statute is a directive from the Congress to the [agency], not a promise from the [agency] to" a third party).

These precedents foreclose plaintiff's implied-in-fact contract claim. Nothing in the language of section 1342 "'create[s] or speak[s] of a contract' between the United States and" insurers. *Brooks*, 702 F.3d at 631 (quoting *Atchison*, 470 U.S. at 467). Section 1342 "is a directive from the Congress to the [agency], not a promise from the [agency] to" third parties. *Hanlin*, 316 F.3d at 1329.

Although the *Moda* court ruled that section 1342 creates an implied-in-fact contract between the government and insurers, its reasoning is irreconcilable with the governing precedents discussed above. The *Moda* court declared that a statute binds the government in contract if it "create[s] a program that offers specified incentives in return for the voluntary performance of private parties." 130 Fed. Cl. at 463. That novel test would transform myriad statutory programs into contractual undertakings. Indeed, under the *Moda* court's reasoning, the claimants in *Brooks* and *Hanlin* should have prevailed on their contract claims. The *qui tam* statute in *Brooks* offered a specified incentive (a share of the penalty) in return for a voluntary performance by a private party (bringing a successful suit for false patent marketing). Likewise, in *Hanlin*, the statute and regulations offered a specified incentive (direct payment of attorney's fees) to a private attorney who performed a voluntary undertaking (successfully represented a veteran seeking back-due benefits). Despite the incentives

for private conduct that these statutory schemes created, this Court easily found that they did not create contracts.

The *Moda* court did not discuss this Court's modern precedents, and the older cases on which it relied are inapposite. The regulation at issue in *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957), expressly stated that "[u]pon receipt of an offer," the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance." And in *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966), the court emphasized that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)." Section 1342 has no language comparable to the contractual language on which *Radium Mines* and *New York Airways* relied.

2. HHS did not purport to commit the government contractually for full risk-corridors payments and, in any event, the agency had no authority to do so.

Plaintiff's complaint also alleged that an implied-in-fact contract could be derived from HHS's regulations and its alleged "admissions regarding their obligation to make risk corridor payments." Appx90 ¶ 181. But nothing in the agency's regulations or statements purported to obligate the government contractually for risk-corridors payments.

Moreover, the agency had no statutory authority to obligate the government for payments in excess of appropriations. An implied-in-fact contract cannot arise

without "actual authority" on the part of the government's representative to bind the government. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). "As to 'actual authority,' the Supreme Court has recognized that any private party entering into a contract with the government assumes the risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority." *Id.* (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)). "The oft-quoted observation . . . that 'Men must turn square corners when they deal with the Government,' does not reflect a callous outlook." *Merrill*, 332 U.S. at 385. "It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.*; *accord Richmond*, 496 U.S. at 420 (quoting *Merrill*, 332 U.S. at 385).

"As far as government contracts are concerned," the Anti-Deficiency Act "'bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation.'" *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996)). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, this Court held that promises of free lifetime medical care made by military recruiters did not bind the government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." 316 F.3d at 1284. This Court emphasized that even the

President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id.* at 1288.

The same principles foreclose plaintiff's claim. Section 1342 did not vest HHS with any contracting authority, much less with authority to enter into contracts that would obligate the government to make uncapped risk-corridors payments without regard to appropriations.

D. Plaintiff Has No Property Interest in Risk-Corridors Payments.

In the Fifth Amendment takings claim, plaintiff alleges that it had a property interest in risk-corridors payments that was taken by Congress's enactments limiting appropriations for those payments. The claim fails because plaintiff had no such property interest. Appx35-36.

As shown above, plaintiff has no contractual right to risk-corridors payments. Nor does plaintiff have a statutory right to risk-corridors payments in excess of appropriations. In any event, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause." *Adams v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004) (holding that government employees did not have a property interest in "underpaid overtime compensation under the FLSA"); *see also National Educ. Ass'n—Rhode Island v.*

Retirement Bd. of the Rhode Island Employees' Ret. Sys., 172 F.3d 22, 30 (1st Cir. 1999) (where an expectation of payment is insufficient to constitute an enforceable contract, it does not constitute property under the Takings Clause); *Kizas v. Webster*, 707 F.2d 524, 539-40 (D.C. Cir. 1983) ("A 'legitimate claim of entitlement' to a government benefit does not transform the benefit *itself* into a vested right."). Because plaintiff cannot "demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

III. The Timing Of HHS's Risk-Corridors Payments Is Reasonable And Consistent With The ACA.

The only remaining issue concerns the timing of risk-corridors payments, which implicated the trial court's jurisdiction. In April 2014, HHS released guidance explaining how it would proceed if the total amount that insurers paid into the risk-corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014) (Appx297-298). The guidance explained that payments to insurers would be reduced pro rata to the extent of any shortfall, and that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the program year for which they were collected. *Id.* This methodology is known as the "three-year payment framework."

HHS implemented that three-year payment framework when "payments in" proved insufficient to fund in full the "payments out" calculated under the statutory formula. For the 2014 year, HHS made risk-corridors payments to the extent of its budget authority, that is, it used the funds that insurers paid in for 2014 to make a proportion of the payments calculated for that year. For the 2015 year, HHS used the funds collected from insurers to reduce outstanding payment amounts from 2014. Insurers have not yet submitted their data for the 2016 year, but HHS has indicated that it will use the funds collected for 2016 to reduce outstanding payment amounts from 2014 and 2015, in that order, and to make payments for 2016, to the extent funds are available.

The trial court correctly held that this three-year payment framework is reasonable and consistent with the ACA. Neither section 1342 nor the regulations specify a deadline by which risk-corridors payments must be made. Appx22; *accord* *BCBSNC* Op. 24-28. Moreover, Congress ratified the agency's three-year payment framework when it enacted legislation appropriating funds for risk-corridors payments. Aware of the three-year framework that HHS had announced, Congress appropriated "payments in" but barred HHS from using other funds for risk-corridors payments. The agency's implementation of the three-year framework thus enabled it to make annual payments to the full extent of its budget authority, while leaving open the opportunity for additional payments as the three-year program progressed.

In declaring the three-year payment framework unreasonable, the *Moda* court emphasized that HHS could not refuse to make annual payment of funds that Congress had in fact appropriated for risk-corridors payments. 130 Fed. Cl. at 454. But that is not the question presented. Indeed, as the *Moda* court recognized, HHS never claimed that it could withhold appropriated funds. *Id.*

The narrow timing question presented is whether HHS, while making annual payments to the extent of its budget authority, reasonably left open the possibility of additional payments in future years. It was eminently reasonable for HHS to leave that possibility open. Congress retains its usual prerogative to appropriate additional funds for risk-corridors payments if it so chooses, and HHS indicated that it intended to "work[] with Congress on the necessary funding for outstanding risk corridors payments." CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016) (Appx472).

Because the agency's three-year framework is permissible and the time for making additional payments has not elapsed, it is impossible at this juncture to quantify an insurer's claims. Data from 2016 have not yet been submitted, and it is thus unknown whether and to what extent collections from 2016 will permit HHS to make additional risk-corridors payments for prior years or for 2016. And Congress of course remains free to appropriate additional amounts (beyond collections) for risk-corridors payments.

In light of the uncertain future events that could affect the existence and amount of insurers' claims, the government urged below that the risk-corridors claims

are premature. The four trial courts to address the issue concluded that this timing question presents a merits issue rather than an issue of jurisdiction. Because the insurers allege that section 1342 mandates full annual payments, we recognize that "the jurisdictional inquiry and merits inquiry may blend together under the Tucker Act." *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006). We also appreciate that the practical significance of this timing issue may be overtaken by the passage of time while the litigation is pending. Nonetheless, because the insurers' claims appear premature and the issue may be jurisdictional, we respectfully call the timing question to the attention of the Court.[18]

[18] Although the issue does not have practical significance, the trial court correctly held that it lacked jurisdiction to award declaratory relief with respect to payment amounts for 2016. Plaintiff has no present damages claim for 2016, and its request for declaratory relief thus is not incidental of and collateral to such a claim. Appx17; *accord Health Republic*, 129 Fed. Cl. at 778-79; *BCBSNC* Op. 33.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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APRIL 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Alisa B. Klein
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,969 words, excluding parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b), according to the count of Microsoft Word 2013.

s/Alisa B. Klein
Alisa B. Klein
Counsel for Appellee

STATUTORY ADDENDUM

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Section 1342 of the ACA, 42 U.S.C. § 18062

(a) In general

The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act [42 U.S.C. 1395w-101 et seq.].

(b) Payment methodology

(1) Payments out

The Secretary shall provide under the program established under subsection (a) that if--

(A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and

(B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

(2) Payments in

The Secretary shall provide under the program established under subsection (a) that if--

(A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and

(B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

(c) Definitions

In this section:

(1) Allowable costs

(A) In general

The amount of allowable costs of a plan for any year is an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan.

(B) Reduction for risk adjustment and reinsurance payments

Allowable costs shall reduced by any risk adjustment and reinsurance payments received under section 18061 and 18063 of this title.

(2) Target amount

The target amount of a plan for any year is an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.

Public Law 113–76
113th Congress

An Act

Making consolidated appropriations for the fiscal year ending September 30, 2014, and for other purposes.

Jan. 17, 2014
[H.R. 3547]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2014.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2014".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

SEC. 3. REFERENCES.

1 USC 1 note.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about January 15, 2014 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2014.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2014, new budget authority provided in appropriation Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2014 shall be made by the Director of the Office of Management and Budget in the amount of the excess but not to exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. LAUNCH LIABILITY EXTENSION.

Section 50915(f) of title 51, United States Code, is amended by striking "December 31, 2013" and inserting "December 31, 2016".

DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2014

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014.

TITLE I

AGRICULTURAL PROGRAMS

PRODUCTION, PROCESSING AND MARKETING

OFFICE OF THE SECRETARY

(INCLUDING TRANSFERS OF FUNDS)

For necessary expenses of the Office of the Secretary, $43,778,000, of which not to exceed $5,051,000 shall be available

CENTERS FOR MEDICARE AND MEDICAID SERVICES

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $177,872,985,000, to remain available until expended.

For making, after May 31, 2014, payments to States under title XIX or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the last quarter of fiscal year 2014 for unanticipated costs incurred for the current fiscal year, such sums as may be necessary.

For making payments to States or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the first quarter of fiscal year 2015, $103,472,323,000, to remain available until expended.

Payment under such title XIX may be made for any quarter with respect to a State plan or plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.

PAYMENTS TO HEALTH CARE TRUST FUNDS

For payment to the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as provided under sections 217(g), 1844, and 1860D–16 of the Social Security Act, sections 103(c) and 111(d) of the Social Security Amendments of 1965, section 278(d)(3) of Public Law 97–248, and for administrative expenses incurred pursuant to section 201(g) of the Social Security Act, $255,185,000,000.

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2014 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts

under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act: *Provided further*, That $22,004,000 shall be available for the State high-risk health insurance pool program as authorized by the State High Risk Pool Funding Extension Act of 2006.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $293,588,000, to remain available through September 30, 2015, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $207,636,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $28,122,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $29,708,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $28,122,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided,* That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2014 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation.

ADMINISTRATION FOR CHILDREN AND FAMILIES

PAYMENTS TO STATES FOR CHILD SUPPORT ENFORCEMENT AND FAMILY SUPPORT PROGRAMS

For carrying out, except as otherwise provided under titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, $2,965,245,000, to remain available until expended; and for such purposes for the first quarter of fiscal year 2015, $1,250,000,000, to remain available until expended.

For making, after May 31 of the current fiscal year, payments to States or other non-Federal entities under titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, for the last 3 months of the current fiscal year for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

LOW INCOME HOME ENERGY ASSISTANCE

For making payments under subsections (b) and (d) of section 2602 of the Low Income Home Energy Assistance Act of 1981, $3,424,549,000: *Provided*, That all but $491,000,000 of this amount shall be allocated as though the total appropriation for such payments for fiscal year 2014 was less than $1,975,000,000: *Provided further*, That notwithstanding section 2609A(a), of the amounts appropriated under section 2602(b), not more than $2,988,000 of

TITLE V

GENERAL PROVISIONS

(TRANSFER OF FUNDS)

SEC. 501. The Secretaries of Labor, Health and Human Services, and Education are authorized to transfer unexpended balances of prior appropriations to accounts corresponding to current appropriations provided in this Act. Such transferred balances shall be used for the same purpose, and for the same periods of time, for which they were originally appropriated.

SEC. 502. No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

SEC. 503. (a) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, electronic communication, radio, television, or video presentation designed to support or defeat the enactment of legislation before the Congress or any State or local legislature or legislative body, except in presentation to the Congress or any State or local legislature itself, or designed to support or defeat any proposed or pending regulation, administrative action, or order issued by the executive branch of any State or local government, except in presentation to the executive branch of any State or local government itself.

(b) No part of any appropriation contained in this Act or transferred pursuant to section 4002 of Public Law 111–148 shall be used to pay the salary or expenses of any grant or contract recipient, or agent acting for such recipient, related to any activity designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any State government, State legislature or local legislature or legislative body, other than for normal and recognized executive-legislative relationships or participation by an agency or officer of a State, local or tribal government in policymaking and administrative processes within the executive branch of that government.

(c) The prohibitions in subsections (a) and (b) shall include any activity to advocate or promote any proposed, pending or future Federal, State or local tax increase, or any proposed, pending, or future requirement or restriction on any legal consumer product, including its sale or marketing, including but not limited to the advocacy or promotion of gun control.

SEC. 504. The Secretaries of Labor and Education are authorized to make available not to exceed $28,000 and $20,000, respectively, from funds available for salaries and expenses under titles I and III, respectively, for official reception and representation expenses; the Director of the Federal Mediation and Conciliation Service is authorized to make available for official reception and representation expenses not to exceed $5,000 from the funds available for "Federal Mediation and Conciliation Service, Salaries and Expenses"; and the Chairman of the National Mediation Board

Public Law 113–164
113th Congress

Joint Resolution

Making continuing appropriations for fiscal year 2015, and for other purposes.

Sept. 19, 2014
[H.J. Res. 124]

Continuing Appropriations Resolution, 2015.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2015, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2014 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2014, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2014 (division A of Public Law 113–76).

(2) The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2014 (division B of Public Law 113–76).

(3) The Department of Defense Appropriations Act, 2014 (division C of Public Law 113–76).

(4) The Energy and Water Development and Related Agencies Appropriations Act, 2014 (division D of Public Law 113–76).

(5) The Financial Services and General Government Appropriations Act, 2014 (division E of Public Law 113–76).

(6) The Department of Homeland Security Appropriations Act, 2014 (division F of Public Law 113–76).

(7) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014 (division G of Public Law 113–76).

(8) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2014 (division H of Public Law 113–76).

(9) The Legislative Branch Appropriations Act, 2014 (division I of Public Law 113–76).

(10) The Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2014 (division J of Public Law 113–76).

(11) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2014 (division K of Public Law 113–76).

(12) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2014 (division L of Public Law 113–76).

Rate reduction.

(b) The rate for operations provided by subsection (a) is hereby reduced by 0.0554 percent.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2014 or prior years; (2) the increase in production rates above those sustained with fiscal year 2014 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P–1 line item in a budget activity within an appropriation account and an R–1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2014.

Contracts.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2014.

SEC. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Expiration date.

SEC. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act for fiscal year 2015, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution; (2) the enactment into law of the applicable appropriations Act for fiscal year 2015 without any provision for such project or activity; or (3) December 11, 2014.

SEC. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

SEC. 108. Appropriations made and funds made available by or authority granted pursuant to this joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United

States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds.

SEC. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2015 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this joint resolution that would impinge on final funding prerogatives.

SEC. 110. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

SEC. 111. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2014, and for activities under the Food and Nutrition Act of 2008, activities shall be continued at the rate to maintain program levels under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2014, to be continued through the date specified in section 106(3). Extension.

(b) Notwithstanding section 106, obligations for mandatory payments due on or about the first day of any month that begins after October 2014 but not later than 30 days after the date specified in section 106(3) may continue to be made, and funds shall be available for such payments. Deadline.

SEC. 112. Amounts made available under section 101 for civilian personnel compensation and benefits in each department and agency may be apportioned up to the rate for operations necessary to avoid furloughs within such department or agency, consistent with the applicable appropriations Act for fiscal year 2014, except that such authority provided under this section shall not be used until after the department or agency has taken all necessary actions to reduce or defer non-personnel-related administrative expenses. Furloughs.

SEC. 113. Funds appropriated by this joint resolution may be obligated and expended notwithstanding section 10 of Public Law 91–672 (22 U.S.C. 2412), section 15 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2680), section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (22 U.S.C. 6212), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 3094(a)(1)).

SEC. 114. (a) Each amount incorporated by reference in this joint resolution that was previously designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 or as being for disaster relief pursuant to section 251(b)(2)(D) of such Act is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of such Act or as being for disaster relief pursuant to section 251(b)(2)(D) of such Act, respectively.

(b) The reduction in section 101(b) of this joint resolution shall not apply to—

(1) amounts designated under subsection (a) of this section; or

(2) amounts made available by section 101(a) by reference to the second paragraph under the heading "Social Security Administration—Limitation on Administrative Expenses" in division H of Public Law 113–76.

Applicability.

(c) Section 6 of Public Law 113–76 shall apply to amounts designated in subsection (a) for Overseas Contingency Operations/Global War on Terrorism.

SEC. 115. During the period covered by this joint resolution, discretionary amounts appropriated for fiscal year 2015 that were provided in advance by appropriations Acts shall be available in the amounts provided in such Acts, reduced by the percentage in section 101(b).

SEC. 116. Notwithstanding section 101, amounts are provided for "Department of Agriculture—Domestic Food Programs—Food and Nutrition Service—Commodity Assistance Program" at a rate for operations of $275,701,000, of which $208,682,000 shall be for the Commodity Supplemental Food Program.

SEC. 117. For "Department of Health and Human Services—Food and Drug Administration—Salaries and Expenses", amounts shall be made available by this joint resolution as if "outsourcing facility fees authorized by 21 U.S.C. 379j–62," were included after "21 U.S.C. 381," in the second paragraph under such heading in division A of Public Law 113–76.

SEC. 118. Amounts made available by section 101 for "Department of Commerce—National Oceanic and Atmospheric Administration—Procurement, Acquisition and Construction" may be apportioned up to the rate for operations necessary to maintain the planned launch schedules for the Joint Polar Satellite System and the Geostationary Operational Environmental Satellite system.

SEC. 119. Notwithstanding any other provision of law, except sections 106 and 107 of this joint resolution, for "Department of Defense—Overseas Contingency Operations—Operation and Maintenance—Operation and Maintenance, Army", up to $50,000,000, to be derived by reducing the amount otherwise made available by section 101 for such account, may be used to conduct surface and subsurface clearance of unexploded ordnance at closed training ranges used by the Armed Forces of the United States in Afghanistan: *Provided*, That such funds may only be used if the training ranges are not transferred to the Islamic Republic of Afghanistan for use by its armed forces: *Provided further*, That the authority provided by this section shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense: *Provided further*, That such amount is designated as provided under section 114 for such account.

Afghanistan.

Extension.

Extension.

SEC. 120. The following authorities shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense:

(1) Section 1004 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 10 U.S.C. 374 note).

(2) Section 1215 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 10 U.S.C. 113 note).

(3) Section 127b of title 10, United States Code, notwithstanding subsection (c)(3)(C) of such section.

(4) Subsection (b) of section 572 of the National Defense Authorization Act for Fiscal Year 2006 (20 U.S.C. 7703b(b)), notwithstanding paragraph (4) of such subsection.

SEC. 121. (a) Funds made available by section 101 for "Department of Energy—Energy Programs—Uranium Enrichment Decontamination and Decommissioning Fund" may be apportioned up to the rate for operations necessary to avoid disruption of continuing projects or activities funded in this appropriation.

(b) The Secretary of Energy shall notify the Committees on Appropriations of the House of Representatives and the Senate not later than 3 days after each use of the authority provided in subsection (a). Notification. Deadline.

SEC. 122. (a) Funds made available by section 101 for "Department of Energy—Environmental and Other Defense Activities—Defense Environmental Cleanup" for the Waste Isolation Pilot Plant may be obligated at a rate for operations necessary to assure timely execution of activities necessary to restore and upgrade the repository.

(b) The Secretary of Energy shall notify the Committees on Appropriations of the House of Representatives and the Senate on each use of the spending rate authority provided in this section that exceeds customary apportionment allocations. Notification.

SEC. 123. Notwithstanding any other provision of this joint resolution, except section 106, the District of Columbia may expend local funds under the heading "District of Columbia Funds" for such programs and activities under title IV of H.R. 5016 (113th Congress), as passed by the House of Representatives on July 16, 2014, at the rate set forth under "District of Columbia Funds—Summary of Expenses" as included in the Fiscal Year 2015 Budget Request Act of 2014 (D.C. Act 20–370), as modified as of the date of the enactment of this joint resolution.

SEC. 124. Notwithstanding section 101, amounts are provided for "Office of Special Counsel—Salaries and Expenses" at a rate for operations of $22,939,000.

SEC. 125. The third proviso under the heading "Small Business Administration—Business Loans Program Account" in division E of Public Law 113–76 is amended by striking "$17,500,000,000" and inserting "$18,500,000,000": *Provided*, That amounts made available by section 101 for such proviso under such heading may be apportioned up to the rate for operations necessary to accommodate increased demand for commitments to general business loans under section 7(a) of the Small Business Act: *Provided further*, That this section shall become effective upon enactment of this joint resolution. *Ante*, p. 223. Effective date.

SEC. 126. Sections 1101(a) and 1104(a)(2)(A) of the Internet Tax Freedom Act (title XI of division C of Public Law 105–277; 47 U.S.C. 151 note) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "November 1, 2014". Applicability.

SEC. 127. Section 550(b) of Public Law 109–295 (6 U.S.C. 121 note) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "October 4, 2014". Applicability.

SEC. 128. The authority provided by section 831 of the Homeland Security Act of 2002 (6 U.S.C. 391) shall continue in effect through the date specified in section 106(3) of this joint resolution. Extension.

SEC. 129. (a) Amounts made available by section 101 for the Department of Homeland Security for "U.S. Customs and Border Protection—Salaries and Expenses", "U.S. Customs and Border Protection—Border Security Fencing, Infrastructure, and Technology", "U.S. Customs and Border Protection—Air and Marine Operations", "U.S. Customs and Border Protection—Construction and Facilities Management", and "U.S. Immigration and Customs Enforcement—Salaries and Expenses" shall be obligated at a rate for operations as necessary to respectively—

(1) sustain the staffing levels of U.S. Customs and Border Protection officers and Border Patrol agents in accordance with the provisos under the heading "U.S. Customs and Border Protection—Salaries and Expenses" in division F of Public Law 113–76;

(2) sustain border security and immigration enforcement operations;

(3) sustain necessary Air and Marine operations; and

Compliance.

(4) sustain the staffing levels of U.S. Immigration and Customs Enforcement agents, equivalent to the staffing levels achieved on September 30, 2014, and comply with the fifth proviso under the heading "U.S. Immigration and Customs Enforcement—Salaries and Expenses" in division F of Public Law 113–76.

Notification.

(b) The Secretary of Homeland Security shall notify the Committees on Appropriations of the House of Representatives and the Senate on each use of the authority provided in this section.

Applicability.

SEC. 130. Section 810 of the Federal Lands Recreation Enhancement Act (16 U.S.C. 6809) shall be applied by substituting "on the date that is 1 year after the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015" for "10 years after the date of the enactment of this Act".

Extension.

SEC. 131. (a) The authority provided by subsection (m)(3) of section 8162 of the Department of Defense Appropriations Act, 2000 (40 U.S.C. 8903 note; Public Law 106–79) shall continue in effect through the date specified in section 106(3) of this joint resolution.

(b) For the period covered by this joint resolution, the authority provided by the provisos under the heading "Dwight D. Eisenhower Memorial Commission—Capital Construction" in division E of Public Law 112–74 shall not be in effect.

Extension.

SEC. 132. Activities authorized under part A of title IV and section 1108(b) of the Social Security Act (other than under section 413(h) of such Act) shall continue through the date specified in section 106(3) of this joint resolution, in the manner authorized for fiscal year 2014 (except that the amount appropriated for section 403(b) of such Act shall be $598,000,000, and the requirement to reserve funds provided for in section 403(b)(2) of such Act shall not apply with respect to this section), and out of any money in the Treasury of the United States not otherwise appropriated, there are hereby appropriated such sums as may be necessary for such purpose. Grants and payments may be made pursuant to this authority through the applicable portion of the first quarter of fiscal year 2015 at the pro rata portion of the level provided for such activities through the first quarter of fiscal year 2014.

SEC. 133. Amounts allocated to Head Start grantees from amounts identified in the seventh proviso under the heading "Department of Health and Human Services—Administration for

Children and Families—Children and Families Services Programs" in Public Law 113–76 shall not be included in the calculation of the "base grant" in fiscal year 2015, as such term is used in section 640(a)(7)(A) of the Head Start Act (42 U.S.C. 9835(a)(7)(A)).

Applicability.

SEC. 134. The first proviso under the heading "Department of Health and Human Services—Administration for Children and Families—Low Income Home Energy Assistance" in division H of Public Law 113–76 shall be applied to amounts made available by this joint resolution by substituting "2015" for "2014".

SEC. 135. Amounts provided by this joint resolution for "Department of Health and Human Services—Administration for Children and Families—Refugee and Entrant Assistance" may be apportioned up to the rate for operations necessary to maintain program operations at the level provided in fiscal year 2014.

Ebola virus.

SEC. 136. In addition to the amount otherwise provided by this joint resolution for "Department of Health and Human Services—Office of the Secretary—Public Health and Social Services Emergency Fund", there is appropriated $58,000,000 for an additional amount for fiscal year 2015, to remain available until September 30, 2015, for expenses necessary to support acceleration of countermeasure and product advanced research and development pursuant to section 319L of the Public Health Service Act for addressing Ebola.

Ebola virus. Africa.

SEC. 137. In addition to the amount otherwise provided by this joint resolution for "Department of Health and Human Services—Centers for Disease Control and Prevention—Global Health", there is appropriated $30,000,000 for an additional amount for fiscal year 2015, to remain available until September 30, 2015, for expenses necessary to support the responses of the Centers for Disease Control and Prevention (referred to in this section as the "CDC") to the outbreak of Ebola virus in Africa: *Provided*, That such funds shall be available for transfer by the Director of the CDC to other accounts of the CDC for such support: *Provided further*, That the Director of the CDC shall notify the Committees on Appropriations of the House of Representatives and the Senate not later than 30 days after the date of any transfer under the preceding proviso.

Notification.

SEC. 138. Amounts made available by this joint resolution for "Department of Education—Rehabilitation Services and Disability Research", "Department of Education—Departmental Management—Program Administration", and "Department of Health and Human Services—Administration for Community Living—Aging and Disability Services Programs" may be obligated in the account and budget structure set forth in section 491 of the Workforce Innovation and Opportunity Act (42 U.S.C. 3515e).

Rescission.

SEC. 139. Of the unobligated balance of amounts provided by section 108 of Public Law 111–3, $4,549,000,000 is rescinded.

Applicability.

SEC. 140. Section 113 of division H of Public Law 113–76 shall be applied by substituting the date specified in section 106(3) for "September 30, 2014".

SEC. 141. (a) Notwithstanding section 101, amounts are made available for accounts in title I of division J of Public Law 113–76 at an aggregate rate for operations of $6,558,223,500.

Deadline. Reports.

(b) Not later than 30 days after the date of enactment of this joint resolution, the Secretary of Defense shall submit to the Committees on Appropriations of the House of Representatives and

the Senate a report delineating the allocation of budget authority in subsection (a) by account and project.

SEC. 142. Notwithstanding section 101, amounts are provided for "Department of Veterans Affairs—Departmental Administration—General Operating Expenses, Veterans Benefits Administration" at a rate for operations of $2,524,254,000.

SEC. 143. Notwithstanding section 101, amounts are provided for "Department of Veterans Affairs—Departmental Administration—Office of Inspector General" at a rate for operations of $126,411,000.

Applicability.

SEC. 144. Section 209 of the International Religious Freedom Act of 1998 (22 U.S.C. 6436) shall be applied by substituting the date specified in section 106(3) of this joint resolution for "September 30, 2014".

SEC. 145. Amounts made available by section 101 for "Broadcasting Board of Governors—International Broadcasting Operations", "Bilateral Economic Assistance—Funds Appropriated to the President—Economic Support Fund", "International Security Assistance—Department of State—International Narcotics Control and Law Enforcement", "International Security Assistance—Department of State—Nonproliferation, Anti-terrorism, Demining and Related Programs", and "International Security Assistance—Funds Appropriated to the President—Foreign Military Financing Program" shall be obligated at a rate for operations as necessary to sustain assistance for Ukraine and independent states of the Former Soviet Union and Central and Eastern Europe to counter external, regional aggression and influence.

Applicability.

SEC. 146. Section 7081(4) of division K of Public Law 113–76 shall be applied to amounts made available by this joint resolution by substituting the date specified in section 106(3) of this joint resolution for "September 30, 2014".

Applicability.

SEC. 147. The Export-Import Bank Act of 1945 (12 U.S.C. 635 et seq.) shall be applied through June 30, 2015, by substituting such date for "September 30, 2014" in section 7 of such Act.

SEC. 148. (a) Section 44302(f) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

(b) Section 44303(b) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

(c) Section 44310(a) of title 49, United States Code, is amended by striking "September 30, 2014" and inserting "the date specified in section 106(3) of the Continuing Appropriations Resolution, 2015".

Syria.

SEC. 149. (a) The Secretary of Defense is authorized, in coordination with the Secretary of State, to provide assistance, including training, equipment, supplies, and sustainment, to appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals for the following purposes:

(1) Defending the Syrian people from attacks by the Islamic State of Iraq and the Levant (ISIL), and securing territory controlled by the Syrian opposition.

(2) Protecting the United States, its friends and allies, and the Syrian people from the threats posed by terrorists in Syria.

(3) Promoting the conditions for a negotiated settlement to end the conflict in Syria.

(b) Not later than 15 days prior to providing assistance authorized under subsection (a) to vetted recipients for the first time— Deadline. Reports.

(1) the Secretary of Defense, in coordination with the Secretary of State, shall submit to the appropriate congressional committees and leadership of the House of Representatives and Senate a report, in unclassified form with a classified annex as appropriate, that contains a description of—

(A) the plan for providing such assistance; Plan.

(B) the requirements and process used to determine appropriately vetted recipients; and

(C) the mechanisms and procedures that will be used to monitor and report to the appropriate congressional committees and leadership of the House of Representatives and Senate on unauthorized end-use of provided training and equipment and other violations of relevant law by recipients; and

(2) the President shall submit to the appropriate congressional committees and leadership of the House of Representatives and Senate a report, in unclassified form with a classified annex as appropriate, that contains a description of how such assistance fits within a larger regional strategy.

(c) The plan required in subsection (b)(1) shall include a description of—

(1) the goals and objectives of assistance authorized under subsection (a);

(2) the concept of operations, timelines, and types of training, equipment, and supplies to be provided;

(3) the roles and contributions of partner nations;

(4) the number of United States Armed Forces personnel involved;

(5) any additional military support and sustainment activities; and

(6) any other relevant details.

(d) Not later than 90 days after the Secretary of Defense submits the report required in subsection (b)(1), and every 90 days thereafter, the Secretary of Defense, in coordination with the Secretary of State, shall provide the appropriate congressional committees and leadership of the House of Representatives and the Senate with a progress report. Such progress report shall include a description of— Deadlines. Reports.

(1) any updates to or changes in the plan, strategy, vetting requirements and process, and end-use monitoring mechanisms and procedures, as required in subsection (b)(1);

(2) statistics on green-on-blue attacks and how such attacks are being mitigated;

(3) the groups receiving assistance authorized under subsection (a);

(4) the recruitment, throughput, and retention rates of recipients and equipment;

(5) any misuse or loss of provided training and equipment and how such misuse or loss is being mitigated; and

(6) an assessment of the effectiveness of the assistance authorized under subsection (a) as measured against subsections (b) and (c).

Definitions. Applicability.

(e) For purposes of this section, the following definitions shall apply:

(1) The term "appropriately vetted" means, with respect to elements of the Syrian opposition and other Syrian groups and individuals, at a minimum, assessments of such elements, groups, and individuals for associations with terrorist groups, Shia militias aligned with or supporting the Government of Syria, and groups associated with the Government of Iran. Such groups include, but are not limited to, the Islamic State of Iraq and the Levant (ISIL), Jabhat al Nusrah, Ahrar al Sham, other al-Qaeda related groups, and Hezbollah.

(2) The term "appropriate congressional committees" means—

(A) the Committee on Armed Services, the Committee on Foreign Affairs, the Committee on Appropriations, and the Permanent Select Committee on Intelligence of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Foreign Relations, the Committee on Appropriations, and the Select Committee on Intelligence of the Senate.

(f) The Department of Defense may submit a reprogramming or transfer request to the congressional defense committees for funds made available by section 101(a)(3) of this joint resolution and designated in section 114 of this joint resolution to carry out activities authorized under this section notwithstanding sections 102 and 104 of this joint resolution.

(g) The Secretary of Defense may accept and retain contributions, including assistance in-kind, from foreign governments to carry out activities as authorized by this section which shall be credited to appropriations made available by this joint resolution for the appropriate operation and maintenance accounts, except that any funds so accepted by the Secretary shall not be available for obligation until a reprogramming action is submitted to the congressional defense committees: *Provided*, That amounts made available by this subsection are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985: *Provided further*, That such amounts shall be available only if the President so designates such amounts and transmits such designations to the Congress.

President.

Extension.

(h) The authority provided in this section shall continue in effect through the earlier of the date specified in section 106(3) of this joint resolution or the date of the enactment of an Act authorizing appropriations for fiscal year 2015 for military activities of the Department of Defense.

(i) Nothing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.

(j) Nothing in this section supersedes or alters the continuing obligations of the President to report to Congress pursuant to section 4 of the War Powers Resolution (50 U.S.C. 1543) regarding the use of United States Armed Forces abroad.

This joint resolution may be cited as the "Continuing Appropriations Resolution, 2015".

Approved September 19, 2014.

LEGISLATIVE HISTORY—H.J. Res. 124:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Sept. 16, 17, considered and passed House.
Sept. 18, considered and passed Senate.

○

Public Law 113–202
113th Congress

Joint Resolution

Making further continuing appropriations for fiscal year 2015, and for other purposes.

Dec. 12, 2014
[H.J. Res. 130]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Continuing Appropriations Resolution, 2015 (Public Law 113–164) is amended by striking the date specified in section 106(3) and inserting "December 13, 2014".

Ante, p. 1868.

Approved December 12, 2014.

LEGISLATIVE HISTORY—H.J. Res. 130:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Dec. 11, considered and passed House and Senate.

○

Public Law 113–203
113th Congress

Joint Resolution

Dec. 13, 2014
[H.J. Res. 131]

Making further continuing appropriations for fiscal year 2015, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Continuing Appropriations Resolution, 2015 (Public Law 113–164) is further amended by striking the date specified in section 106(3) and inserting "December 17, 2014".

Ante, p. 2069.

Approved December 13, 2014.

LEGISLATIVE HISTORY—H.J. Res. 131:

CONGRESSIONAL RECORD, Vol. 160 (2014):
Dec. 12, considered and passed House.
Dec. 13, considered and passed Senate.

○

CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT, 2015

Public Law 113–235
113th Congress

An Act

Dec. 16, 2014
[H.R. 83]

Making consolidated appropriations for the fiscal year ending September 30, 2015, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated and Further Continuing Appropriations Act, 2015.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated and Further Continuing Appropriations Act, 2015".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 11, 2014 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through K of this Act as if it were a joint explanatory statement of a committee of conference.

fees, reimbursable and interagency agreements, and the sale of data shall be credited to this appropriation and shall remain available until September 30, 2016.

CENTERS FOR MEDICARE AND MEDICAID SERVICES

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, titles XI and XIX of the Social Security Act, $234,608,916,000, to remain available until expended.

For making, after May 31, 2015, payments to States under title XIX or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the last quarter of fiscal year 2015 for unanticipated costs incurred for the current fiscal year, such sums as may be necessary.

For making payments to States or in the case of section 1928 on behalf of States under title XIX of the Social Security Act for the first quarter of fiscal year 2016, $113,272,140,000, to remain available until expended.

Payment under such title XIX may be made for any quarter with respect to a State plan or plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.

PAYMENTS TO HEALTH CARE TRUST FUNDS

For payment to the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as provided under sections 217(g), 1844, and 1860D–16 of the Social Security Act, sections 103(c) and 111(d) of the Social Security Amendments of 1965, section 278(d)(3) of Public Law 97–248, and for administrative expenses incurred pursuant to section 201(g) of the Social Security Act, $259,212,000,000.

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2020: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes

of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2015 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $672,000,000, to remain available through September 30, 2016, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $477,120,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $67,200,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $67,200,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $60,480,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided,* That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2015 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation: *Provided further*, That of the amount provided under this heading, $311,000,000 is provided to meet the terms of section 251(b)(2)(C)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, and $361,000,000 is additional new budget authority specified for purposes of section 251(b)(2)(C) of such Act.

ADMINISTRATION FOR CHILDREN AND FAMILIES

PAYMENTS TO STATES FOR CHILD SUPPORT ENFORCEMENT AND FAMILY SUPPORT PROGRAMS

For carrying out, except as otherwise provided, titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, $2,438,523,000, to remain available until expended; and for such purposes for the first quarter of fiscal year 2016, $1,160,000,000, to remain available until expended.

For carrying out, after May 31 of the current fiscal year, except as otherwise provided, titles I, IV–D, X, XI, XIV, and XVI of the Social Security Act and the Act of July 5, 1960, for the last 3 months of the current fiscal year for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

LOW INCOME HOME ENERGY ASSISTANCE

For making payments under subsections (b) and (d) of section 2602 of the Low Income Home Energy Assistance Act of 1981,

of all funds used by the Centers for Medicare and Medicaid Services specifically for Health Insurance Marketplaces for each fiscal year since the enactment of the Patient Protection and Affordable Care Act (Public Law 111–148) and the proposed uses for such funds for fiscal year 2016. Such information shall include, for each such fiscal year—

(1) the amount of funds used for each activity specified under the heading "Health Insurance Marketplace Transparency" in the explanatory statement described in section 4 (in the matter preceding division A of this Consolidated Act) accompanying this Act; and

(2) the milestones completed for data hub functionality and implementation readiness.

SEC. 227. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

SEC. 228. (a) Subject to the succeeding provisions of this section, activities authorized under part A of title IV and section 1108(b) of the Social Security Act shall continue through September 30, 2015, in the manner authorized for fiscal year 2014, and out of any money in the Treasury of the United States not otherwise appropriated, there are hereby appropriated such sums as may be necessary for such purpose. Grants and payments may be made pursuant to this authority through September 30, 2015, at the level provided for such activities for fiscal year 2014, except as provided in subsections (b) and (c).

(b) In the case of the Contingency Fund for State Welfare Programs established under section 403(b) of the Social Security Act—

(1) the amount appropriated for section 403(b) of such Act shall be $608,000,000 for each of fiscal years 2015 and 2016;

(2) the requirement to reserve funds provided for in section 403(b)(2) of such Act shall not apply during fiscal years 2015 and 2016; and

(3) grants and payments may only be made from such Fund for fiscal year 2015 after the application of subsection (d).

(c) In the case of research, evaluations, and national studies funded under section 413(h)(1) of the Social Security Act, no funds shall be appropriated under that section for fiscal year 2015 or any fiscal year thereafter. 42 USC 613 note.

(d) Of the amount made available under subsection (b)(1) for section 403(b) of the Social Security Act for fiscal year 2015—

(1) $15,000,000 is hereby transferred and made available to carry out section 413(h) of the Social Security Act; and

(2) $10,000,000 is hereby transferred and made available to the Bureau of the Census to conduct activities using the Survey of Income and Program Participation to obtain information to enable interested parties to evaluate the impact of the amendments made by title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

CONSOLIDATED APPROPRIATIONS ACT, 2016

Public Law 114–113
114th Congress

An Act

Dec. 18, 2015
[H.R. 2029]

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2016.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2016".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 17, 2015 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2016.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2016, new budget authority provided in appropriations Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2016 shall be made by the Director of the Office of Management and Budget in the amount of the excess but the total of all such adjustments shall not exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. CORRECTIONS.

The Continuing Appropriations Act, 2016 (Public Law 114–53) is amended—

(1) by changing the long title so as to read: "Making continuing appropriations for the fiscal year ending September 30, 2016, and for other purposes.";

(2) by inserting after the enacting clause (before section 1) the following: "**DIVISION A—TSA OFFICE OF INSPECTION ACCOUNTABILITY ACT OF 2015**";

In addition, for making matching payments under section 1844 and benefit payments under section 1860D–16 of the Social Security Act that were not anticipated in budget estimates, such sums as may be necessary.

PROGRAM MANAGEMENT

For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2021: *Provided,* That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: *Provided further,* That the Secretary is directed to collect fees in fiscal year 2016 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

HEALTH CARE FRAUD AND ABUSE CONTROL ACCOUNT

In addition to amounts otherwise available for program integrity and program management, $681,000,000, to remain available through September 30, 2017, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act, of which $486,120,000 shall be for the Medicare Integrity Program at the Centers for Medicare and Medicaid Services, including administrative costs, to conduct oversight activities for Medicare Advantage under Part C and the Medicare Prescription Drug Program under Part D of the Social Security Act and for activities described in section 1893(b) of such Act, of which $67,200,000 shall be for the Department of Health and Human Services Office of Inspector General to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act, of which $67,200,000 shall be for the Medicaid and Children's Health Insurance Program ("CHIP") program integrity activities, and of which $60,480,000 shall be for the Department of Justice to carry out fraud and abuse activities authorized by section 1817(k)(3) of such Act: *Provided*, That the report required by section 1817(k)(5) of the Social Security Act for fiscal year 2016 shall include measures of the operational efficiency and impact on fraud, waste, and abuse in the Medicare, Medicaid, and CHIP programs for the funds provided by this appropriation: *Provided further*, That of the amount provided under this heading, $311,000,000 is provided to meet the terms of section 251(b)(2)(C)(ii) of the

ACA, and the amendments made by that Act, in the proposed fiscal year and each fiscal year since the enactment of the ACA.

(b) With respect to employees or contractors supported by all funds appropriated for purposes of carrying out the ACA (and the amendments made by that Act), the Secretary shall include, at a minimum, the following information:

(1) For each such fiscal year, the section of such Act under which such funds were appropriated, a statement indicating the program, project, or activity receiving such funds, the Federal operating division or office that administers such program, and the amount of funding received in discretionary or mandatory appropriations.

(2) For each such fiscal year, the number of full-time equivalent employees or contracted employees assigned to each authorized and funded provision detailed in accordance with paragraph (1).

(c) In carrying out this section, the Secretary may exclude from the report employees or contractors who—

(1) are supported through appropriations enacted in laws other than the ACA and work on programs that existed prior to the passage of the ACA;

(2) spend less than 50 percent of their time on activities funded by or newly authorized in the ACA; or

(3) work on contracts for which FTE reporting is not a requirement of their contract, such as fixed-price contracts.

SEC. 223. The Secretary shall publish, as part of the fiscal year 2017 budget of the President submitted under section 1105(a) of title 31, United States Code, information that details the uses of all funds used by the Centers for Medicare and Medicaid Services specifically for Health Insurance Exchanges for each fiscal year since the enactment of the ACA and the proposed uses for such funds for fiscal year 2017. Such information shall include, for each such fiscal year, the amount of funds used for each activity specified under the heading "Health Insurance Exchange Transparency" in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).

SEC. 224. (a) The Secretary shall provide to the Committees on Appropriations of the House of Representatives and the Senate:

(1) Detailed monthly enrollment figures from the Exchanges established under the Patient Protection and Affordable Care Act of 2010 pertaining to enrollments during the open enrollment period; and

(2) Notification of any new or competitive grant awards, including supplements, authorized under section 330 of the Public Health Service Act.

(b) The Committees on Appropriations of the House and Senate must be notified at least 2 business days in advance of any public release of enrollment information or the award of such grants.

SEC. 225. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Public Law 114–223
114th Congress

An Act

Making continuing appropriations for fiscal year 2017, and for other purposes.

Sept. 29, 2016
[H.R. 5325]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act".

SEC. 2. TABLE OF CONTENTS.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2017.

SEC. 5. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall

PERSONAL SERVICE CONTRACTORS

Consultation. Notification.

SEC. 302. Funds made available by this division may be used to enter into contracts with individuals for the provision of personal services (as described in section 104 of part 37 of title 48, Code of Federal Regulations (48 CFR 37.104)) to support the purposes of titles I and II of this division, within the United States and abroad, subject to prior consultation with, and the notification procedures of, the Committees on Appropriations: *Provided*, That such individuals may not be deemed employees of the United States for the purpose of any law administered by the Office of Personnel Management: *Provided further*, That the authority made available pursuant to this section shall expire on September 30, 2017.

Expiration date.

DESIGNATION RETENTION

SEC. 303. Any amount appropriated by this division, designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 and subsequently so designated by the President, and transferred pursuant to transfer authorities provided by this division shall retain such designation.

EFFECTIVE DATE

SEC. 304. This division shall become effective immediately upon enactment of this Act.

This division may be cited as the "Zika Response and Preparedness Appropriations Act, 2016".

Continuing Appropriations Act, 2017.

DIVISION C—CONTINUING APPROPRIATIONS ACT, 2017

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2017, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2016 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2016, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2016 (division A of Public Law 114–113), except section 728.

(2) The Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (division B of Public Law 114–113).

(3) The Department of Defense Appropriations Act, 2016 (division C of Public Law 114–113).

(4) The Energy and Water Development and Related Agencies Appropriations Act, 2016 (division D of Public Law 114–113).

(5) The Financial Services and General Government Appropriations Act, 2016 (division E of Public Law 114–113), which

for purposes of this Act shall be treated as including section 707 of division O of Public Law 114–113.

(6) The Department of Homeland Security Appropriations Act, 2016 (division F of Public Law 114–113).

(7) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 (division G of Public Law 114–113).

(8) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016 (division H of Public Law 114–113).

(9) The Legislative Branch Appropriations Act, 2016 (division I of Public Law 114–113).

(10) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (division K of Public Law 114–113), except title IX.

(11) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2016 (division L of Public Law 114–113), except section 420.

Rate reduction.

(b) The rate for operations provided by subsection (a) is hereby reduced by 0.496 percent.

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2016 or prior years; (2) the increase in production rates above those sustained with fiscal year 2016 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P–1 line item in a budget activity within an appropriation account and an R–1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2016.

Contracts.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2016.

SEC. 105. Appropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this Act.

Expiration date.

SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2017, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this Act; (2) the enactment into law

Public Law 114–254
114th Congress

An Act

Making appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Dec. 10, 2016
[H.R. 2028]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Further Continuing and Security Assistance Appropriations Act, 2017.

SECTION 1. SHORT TITLE.

This Act may be cited the "Further Continuing and Security Assistance Appropriations Act, 2017".

SEC. 2. TABLE OF CONTENTS.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in division B of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. AVAILABILITY OF FUNDS.

(a) Each amount designated in this Act, or in an amendment made by this Act, by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

(b) Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

DIVISION A—FURTHER CONTINUING APPROPRIATIONS ACT, 2017

Further Continuing Appropriations Act, 2017.

SEC. 101. The Continuing Appropriations Act, 2017 (division C of Public Law 114–223) is amended by—

Ante, p. 910.

(1) striking the date specified in section 106(3) and inserting "April 28, 2017";

(2) striking "0.496 percent" in section 101(b) and inserting "0.1901 percent"; and

(3) inserting after section 145 the following new sections:

"SEC. 146. Amounts made available by section 101 for 'Department of Agriculture—Farm Service Agency—Agricultural Credit Insurance Fund Program Account' may be apportioned up to the rate for operations necessary to fund loans for which applications are approved.

"SEC. 147. Amounts made available by section 101 for 'Department of Agriculture—Food and Nutrition Service—Child Nutrition Programs' to carry out section 749(g) of the Agriculture Appropriations Act of 2010 (Public Law 111–80) may be apportioned up to the rate for operations necessary to ensure that the program can be fully operational by May, 2017.

"SEC. 148. Section 26(d) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1769g(d)) is amended in the first sentence by striking '2010 through 2016' and inserting '2010 through 2017'.

"SEC. 149. Amounts made available by section 101 for 'Department of Agriculture—Rural Utilities Service' may be transferred between appropriations under such heading as necessary for the cost of direct telecommunications loans authorized by section 305 of the Rural Electrification Act of 1936 (7 U.S.C. 935).

"SEC. 150. Amounts made available by Section 101 for 'Department of Agriculture—Rural Housing Service—Rural Housing Insurance Fund Program Account' for the section 538 Guaranteed Multi-Family Housing Loan Program may be apportioned up to the rate necessary to fund loans for which applications are approved.

"SEC. 151. Amounts made available by section 101 for 'Department of Commerce—National Oceanic and Atmospheric Administration—Procurement, Acquisition and Construction' may be apportioned up to the rate for operations necessary to maintain the planned launch schedules for the Joint Polar Satellite System.

"SEC. 152. Amounts made available by section 101 for 'Department of Commerce—Bureau of the Census—Periodic Censuses and Programs' may be apportioned up to the rate for operations necessary to maintain the schedule and deliver the required data according to statutory deadlines in the 2020 Decennial Census Program.

"SEC. 153. Amounts made available by section 101 for 'National Aeronautics and Space Administration—Exploration' may be apportioned up to the rate for operations necessary to maintain the planned launch capability schedules for the Space Launch System launch vehicle, Exploration Ground Systems, and Orion Multi-Purpose Crew Vehicle programs.

"SEC. 154. In addition to the amount otherwise provided by section 101, and notwithstanding section 104 and section 109, for 'Department of Justice—State and Local Law Enforcement Activities—Office of Justice Programs—State and Local Law Enforcement Assistance', there is appropriated $7,000,000, for an additional amount for the Edward Byrne Memorial Justice Assistance Grant program for the purpose of providing reimbursement of extraordinary law enforcement overtime costs directly and solely associated with protection of the President-elect incurred from November 9, 2016 until the inauguration of the President-elect as President: