Case 17-1224

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Land of Lincoln Mutual Health Insurance Company,

Plaintiff/Appellant,

v.

the **United States of America,**

Defendant/Appellee.

On Appeal from the United States
Court of Federal Claims (Hon. Charles F. Lettow)

BRIEF OF BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA AND BLUECHOICE HEALTHPLAN OF SOUTH CAROLINA, INC., AS AMICI CURIAE IN SUPPORT OF LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY AND REVERSAL

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CERTIFICATE OF INTEREST

Counsel for Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc., certifies the following:

1. The full names of the parties I represent are Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc.

2. The names of the real parties in interest I represent are Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc.

3. BlueChoice HealthPlan of South Carolina, Inc., is a wholly owned subsidiary of Blue Cross and Blue Shield of South Carolina. No parent corporations or publicly held companies own ten percent of the stock of Blue Cross and Blue Shield of South Carolina.

4. Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc., are represented in this matter by Ankur J. Goel, M. Miller Baker, and Joshua David Rogaczewski of McDermott Will & Emery LLP.

Dated: February 7, 2017

/s/Ankur J. Goel
Ankur J. Goel

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INTRODUCTION AND STATEMENT OF AMICI CURIAE

Blue Cross and Blue Shield of South Carolina ("BCBS South Carolina") is a South Carolina mutual insurer and an independent licensee of the Blue Cross and Blue Shield Association. It and its wholly owned subsidiary, BlueChoice HealthPlan of South Carolina, Inc. ("BlueChoice South Carolina"), provided health-insurance coverage through certified qualified health plans ("QHPs") offered through South Carolina's federally facilitated exchange marketplace for 2014, 2015, and 2016 and likely will be directly affected by this Court's decision.

The Patient Protection and Affordable Care Act ("ACA") attempted to minimize and protect against pricing uncertainty in the new market it created by enacting several premium-stabilization measures, including the risk corridors that are at issue here. Risk corridors are a risk-sharing mechanism that limited participating health insurers' losses, requiring the government to share a portion of a plan's losses if the plan's costs were more than 103% of revenue, while simultaneously requiring that a plan share a portion of its gains with the government if the plan's costs were less than 97% of its revenue. ACA § 1342(b), 42 U.S.C. § 18062(b) (2012).

Through this risk-corridor system,[1] the ACA protected against inaccurate pricing in the early years of the law.[2]

In 2014, amici had gains in excess of the threshold, and accordingly paid a portion of those gains to the government—totaling $8.1 million.[3] For 2015, however, amici suffered losses above the statutory threshold. Although they are entitled to $19 million in risk-sharing payments, they have not received *any* payment. BCBSSC Compl., *supra* note 3, ¶ 82; *see also* ACA § 1342(b)(1), 42 U.S.C. § 18062(b)(1) ("payments out"). Nevertheless, the government has recorded the unpaid amounts as "obligation[s] of the United States Government *for which full payment is required*."[4] As a result,

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[1] The word "corridors" refers to the bands with varying levels of risk sharing: in the ACA, for example, less than 92%; 92% to 97%; 97 to 103%; and so on.

[2] *See* Am. Academy of Actuaries, "Fact Sheet: ACA Risk-Sharing Mechanisms," at 1–2 (2013), *available at* http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf.

[3] Complaint ¶ 80, *Blue Cross & Blue Shield v. United States*, Case 1:16-cv-01501-LKG (Fed. Cl. Nov. 14, 2016) (ECF No. 1) ("BCBSSC Compl."); *see also* ACA § 1342(b)(2), 42 U.S.C. § 18062(b)(2) ("payments in").

[4] Memorandum from Center for Consumer Information & Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS) 1 (Nov. 19, 2015) ("2015 CCIIO Mem.") (emphasis added), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.

the risk-sharing mechanism in the statutory risk-corridor program has failed to provide *any* protection against the losses amici experienced and, indeed, has deprived them of a portion of their gains.

Like Land of Lincoln Mutual Health Insurance Company, amici have sued for payment of the amounts due to them. *See* BCBSSC Compl., *supra* note 3, at 1–26. Consequently, amici are likely to be directly affected by the outcome of this appeal and file this amicus-curiae brief addressing Land of Lincoln's statutory claim.[5]

SUMMARY OF THE ARGUMENT

In this case, section 1342(b)(1) of the ACA created an unambiguous obligation to pay QHPs. The government's statutory obligation to pay this obligation is not limited by Congress's failure to appropriate funds and exists independent of appropriations.

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[5] All parties have consented to the filing of BCBS South Carolina and BlueChoice South Carolina's brief. *See* Fed. R. App. P. 29(a)(4)(D). No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than BCBS South Carolina and BlueChoice South Carolina, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *See id.* R. 29(a)(4)(E).

In 2015 and 2016, Congress attached riders to appropriations bills prohibiting any expenditure of funds authorized in those acts for purposes of satisfying the government's risk-corridor payment obligations under section 1342(b)(1). Those riders did not prohibit expenditures of other appropriated funds—such as funds appropriated to pay for judgments against the government and to satisfy the government's statutory payment obligations under section 1342(b)(1), nor did they alter the government's payment obligation.

The claims court's conclusion that the Department of Health and Human Services responded reasonably to an appropriations shortfall to fund the statutory payment obligation under section 1342(b)(1) is beside the point in this litigation. The only relevant question here is whether the government had an obligation to pay Land of Lincoln once the statutory loss criteria were satisfied. As the government has repeatedly acknowledged, the answer to that question is, "Yes," notwithstanding the government's inability to pay the amounts owing due to lack of funds. That obligation can and should be satisfied by the Judgment Fund.

ARGUMENT

I. Section 1342(b)(1) Created an Unqualified Obligation To Pay Land of Lincoln and Other QHPs Irrespective of Whether Congress Appropriated Funds To Satisfy the Obligation.

The only relevant issue in this case is whether the government must make full risk-corridor payments to health insurers that, like amici, experienced costs that exceeded their "target amounts" over the course of a particular year or whether that obligation is limited in some fashion. Section 1342(b)(1) resolves the issue because it creates an unqualified obligation on the part of the government to pay:

> The Secretary *shall provide* under the [risk-corridor program] 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.

ACA § 1342(b)(1), 42 U.S.C. § 18062(b)(1) (emphasis added). The foregoing statutory language requiring the government to pay qualifying insurers is mandatory and absolute.

To be sure, the lack of an *appropriation* to satisfy the statutory obligation, combined with the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (2012) (which prohibits executive officers from disbursing funds without an appropriation), may explain HHS's nonpayment of the risk-corridor payments. But the law is clear that it does not extinguish the government's statutory payment obligation. Accordingly, eligible health insurers like Land of Lincoln and amici are entitled to money judgments in their favor, which can be satisfied pursuant to the permanent and unlimited appropriation contained in the so-called "Judgment Fund." *See* 31 U.S.C. § 1304(a) (2012) (appropriating "[n]ecessary amounts" to pay final judgments entered by courts against the government).

Ten years ago, this Court explained the dispositive difference between the government's statutory obligations and congressional appropriations to satisfy those obligations:

> "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the

> substantive law, does not in and of itself defeat a Government obligation created by statute." *N.Y. Airways, Inc. v. United States,* 177 Ct.Cl. 800, 369 F.2d 743, 748 (1966). . . . Rather than limiting the government's obligation, a "failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights [remain] enforceable in the Court of Claims." *N.Y. Airways,* 369 F.2d at 748; *see also* GAO, *A Glossary of Terms Used in the Federal Budget Process* 57 (3d ed. 1981) ("Authorization for entitlements constitute a binding obligation on the part of the Federal Government, and eligible recipients have legal recourse if the obligation is not fulfilled.").

Greenlee Cnty., Arizona v. United States, 487 F.3d 871, 877–78 (Fed. Cir. 2007).

Section 1342(b)(1) does not make the payment obligation "subject to the availability of appropriations," nor does it provide that payments are "available only as provided in appropriations laws," as would be necessary for the obligation to be limited to appropriated amounts. *Greenlee Cnty.*, 487 F.3d at 878; *see also Prairie Cnty., Montana v. United States*, 782 F.3d 685, 691 (Fed. Cir. 2015). The government recently asserted this very principle, arguing in another case involving the ACA that "[t]he Act requires the government to pay cost-sharing reductions to issuers" and "[t]he absence of an appropriation would not prevent the insurers from seeking to enforce

that statutory right through litigation."[6] The government's contrary position in this litigation is inexplicable.

II. The 2015 and 2016 Appropriation Riders Did Not Repeal the Government's Statutory Obligation To Pay Under Section 1342(b)(1).

The 2015 and 2016 appropriations riders cited by the claims court provided only that the funds appropriated pursuant to those particular laws could not be used to make risk-corridor payments:

> 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).[7]

These appropriation riders did not amend section 1342(b)(1)'s risk-corridor payment-obligation language, nor did they preclude the use of any other sources of appropriations to fulfill the obligation. Accordingly,

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[6] *Cf.* Defendants' Memorandum in Support of Their Motion for Summary Judgment at 20, *U.S. House of Representatives v. Burwell*, Case 1:14-cv-01967-RMC (D.D.C. Dec. 2, 2015) (ECF No. 55) (citation omitted).

[7] Consolidated and Further Continuing Appropriations Act, 2015, div. G, § 227, Pub. L. No. 113-235, 128 Stat. 2130, 2491 (2014) (emphasis added); Consolidated Appropriations Act, 2016, div. H, § 225, Pub. L. No. 114-113, 129 Stat. 2242, 2624 (2015) (emphasis added).

the appropriation riders do not defeat the statutory payment claims of Land of Lincoln and amici.

Calloway v. District of Columbia, 216 F.3d 1 (D.C. Cir. 2000), illustrates the principle that appropriation riders denying funding out of a particular appropriations act do not extinguish a statutory obligation to pay. *Calloway* involved an appropriations provision that, like the ones relevant to this case, barred the use of funds from *that* appropriation to pay attorney's fees in Individuals with Disabilities Education Act cases above a specific amount. 216 F.3d at 9. The D.C. Circuit rejected the District of Columbia government's argument that the appropriations rider limited the amounts of attorney's fees that courts could award in IDEA cases, holding that the appropriations law "limits only District authority to pay fees from FY 1999 appropriations, not court authority to award fees under IDEA." *Id.*

Calloway's analysis applies with equal force here: Congress elected to not appropriate funds for risk-corridor payments from specified appropriations laws in 2015 and 2016, but that does not prevent QHPs from recovering what is owed to them from another available source, like the Judgment Fund. *Cf. Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232–33 (2011) (applying expressio unius canon to read vaccine-manufacturer liability-

limitation statute to apply to two products-liability theories mentioned by the statute but not to a third theory not mentioned).

III. The Reasonableness of HHS's Cash-Management Response to the Appropriation Shortfall Is Immaterial to the Government's Unambiguous and Undisputed Obligation To Pay Under Section 1342(b)(1).

Congress's apparent failure to appropriate funds for risk-corridor payments necessarily limited the government's ability to make such payments to satisfy its statutory obligations under section 1342(b)(1), but it did not limit the scope of those obligations. HHS responded to that reality and the constraints of the Anti-Deficiency Act by devising a system to pay out only those funds for which it had an appropriation: funds that the agency received from participating health insurers as "payments in."[8] The claims court below focused on this cash-flow-management system and concluded that the agency's approach was reasonable and therefore entitled to *Chevron* deference. *See Land of Lincoln Mut. Health Ins. Co. v.*

[8] When implementing section 1342, HHS promulgated a regulation (that remains in force) specifying that "QHP insurers *will receive payment* from HHS in the" amounts set forth in the statute, i.e., the full amounts. 45 C.F.R. § 153.510(b) (2016). This regulation acknowledges the government's unqualified statutory obligation to pay.

United States, 129 Fed. Cl. 81, 103–08 (2016) (R. 47 at 22–28) (Appx22–Appx28).

Here, however, the only relevant issue is not whether section 1342 appropriated funds to make the payment, or whether the agency acted properly in deferring payment to manage its cash flow consistent with its (insufficient) appropriations. Instead, the only relevant issue is whether section 1342(b)(1) on its own terms created an immediate obligation to pay in full once an insurer's losses for any given year were established. If it did—and the government has never disputed that it does—then any discretion accorded to HHS regarding how or when the *agency* might respond in the *absence* of congressional appropriations to satisfy that obligation is immaterial to Land of Lincoln's suit in the claims court for a judgment to be satisfied out of the Judgment Fund.

Far from disputing its risk-corridor payment obligations, HHS has repeatedly acknowledged them, even as it postponed payment over three years (like any debtor with insufficient funds to pay debts due and owing) because of the appropriations shortfall.

The government's "budget-neutral" methodology, announced in 2014, addressed the appropriations issues that had arisen.[9] It did not "interpret" the government's payment obligation, as the claims court incorrectly suggested, and it never claimed to have done so. In this context, in the spring of 2014, 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.[10]

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[9] Following HHS's initial regulations in 2013, questions arose about the available appropriations to pay the risk-corridor obligations. In January 2014, the Congressional Research Service issued a report concluding that the statute provided no appropriation for payment of the risk-corridor funds, Memorandum from Edward C. Liu, Congressional Research Service, to House Energy and Commerce Committee 2 (Jan. 23, 2014), *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20140123CRSMemo.pdf., and the United States Government Accountability Office began analyzing the appropriations question in response to a congressional inquiry in February 2014, U.S. Gov't Accountability Office, GAO B-325630, *Department of Health and Human Services – Risk Corridors Program* 1 (2014), *available at* http://www.gao.gov/assets/670/666299.pdf.

[10] *See* Letter from William B. Schultz, HHS General Counsel, to Julia C. Matta, GAO Assistant General Counsel, at 1–3 (May 20, 2014), *available at* https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140619HHS-GAOResponse.pdf; *see also* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) ("[R]isk

HHS thus announced its intent to administer risk corridors in a "budget-neutral" way in the spring of 2014 to address this appropriations issue. In announcing its intent to administer risk corridors in this way (which resulted in postponing payments to plans), HHS *never* asserted that it was not *obligated* to immediately make additional payments beyond the amounts paid in, that the government's obligation to make risk-corridor payments was ultimately subject to a budget-neutrality requirement, or that it would not increase its payments beyond the amounts paid in, if additional appropriations became available to it.

Indeed, HHS understood fully that "in the event of a shortfall for the 2015 program year, . . . the Affordable Care Act requires the Secretary to make full payments to issuers."[11] Far from maintaining that its payment obligation would be limited to being "budget-neutral" (i.e., limited to amounts paid in), HHS said that, in the event of a shortfall, it "will use

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corridors collections are a user fee to be used to fund premium stabilization under risk corridors . . . .").

[11] Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014).

other sources of funding for the risk corridors payments," subject to the availability of appropriations." *Id.*

HHS's subsequent statements have confirmed its obligation. In November 2015, HHS again confirmed "that the Affordable Care Act requires the Secretary to make full [risk-corridor] payments to issuers," acknowledging that because of inadequate appropriations by Congress it would not make full payments, and explained that it was "recording those amounts that remain unpaid following [the incomplete] payment . . . as fiscal year 2015 obligation of the United States Government *for which full payment is required*." 2015 CCIIO Mem., *supra* note 4, at 1. HHS repeated these admissions last autumn—even after this lawsuit was filed.[12] The government's conduct in recording the unpaid risk-corridor amounts as an

[12] *See also* Memorandum from Center for Consumer Information & Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS) 1 (Sept. 9, 2016) ("[I]n the event of a shortfall for the 2016 benefit year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments. HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required."), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF.

existing government obligation establishes fully that the government understands that it *currently* owes plans like amici the full amount, even though it lacks appropriations to make timely payment. Accordingly, the claims court's focus on the issue of statutory appropriations, and the government's cash-flow-management response to the appropriations shortfall, was a distraction from the only relevant issue in this case: Did section 1342(b)(1) impose an unqualified obligation to pay QHPs? As the government repeatedly acknowledged as it attempted to manage the cash-flow problems created by the absence of appropriations, the answer is, "Yes." Because of the government's unqualified statutory obligation to pay, Land of Lincoln was entitled to a judgment in the court of claims to be satisfied by the Judgment Fund.

CONCLUSION

For the foregoing reasons, BCBS South Carolina and BlueChoice South Carolina urge the Court to reverse the decision below and enter judgment for Land of Lincoln on the government's statutory payment obligation.

Dated: February 7, 2017

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that the foregoing **Brief of Blue Cross and Blue Shield of South Carolina and BlueChoice HealthPlan of South Carolina, Inc., as Amici Curiae in Support of Land of Lincoln Mutual Health Insurance Company and Reversal**, was filed on February 7, 2017, using the Court's Electronic Case Filing system, which automatically generates and sends by email a Notice of Docket Activity to all registered attorneys participating in this case.

/s/ Ankur J. Goel
Ankur J. Goel

CERTIFICATE OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type–volume limitation of Federal Rules of Appellate Procedure 29(a)(5) because it contains 3,023 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule of Appellate Procedure 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word (version 14.0.7172.5000 (32-bit)) with 14-point Book Antigua.

Dated: February 7, 2017

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