2017-1224

In the

United States Court of Appeals for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims,
Case No. 16-744C (Lettow, J.)

BRIEF OF *AMICI CURIAE* HIGHMARK INC., HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, BLUE CROSS OF IDAHO HEALTH SERVICE, INC., AND BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE JUDGMENT BELOW

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or *amicus* represented by me is:

Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service., Inc., and Blue Cross and Blue Shield of Kansas City.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

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/s/ Lawrence S. Sher

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INTEREST OF *AMICI CURIAE* [1]

Amici Curiae Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City respectfully submit this brief in support of Plaintiff-Appellant Land of Lincoln Mutual Health Insurance Company (Lincoln) and in support of reversal of the decision by the U.S. Court of Federal Claims (COFC) dismissing Lincoln's claim for monetary relief under Section 1342 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), 42 U.S.C. § 18062.

Amici provide health care insurance to nearly 10 million customers throughout the United States, including over 450,000 on various ACA health insurance exchanges. In 2010, Congress enacted the ACA, a "series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Congress structured the ACA to prevent an economic "death spiral" from the expansion of coverage to a new group of insureds, in which "premiums rose higher and higher,

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2); Fed. Cir. R. 29(c).

[ ] the number of people buying insurance sank lower and lower[,] [and] insurers began to leave the market entirely." *Id.* at 2486.

A critical component of the ACA is its "risk corridors" program, one of the statute's three risk-stabilization programs. Through this program, the government agreed to share the uncertain risk of providing expanded coverage to a new pool of previously uninsured policyholders with health insurers, such as *Amici*, by compensating them for losses beyond a statutorily prescribed amount. For their part, insurers with profits beyond a statutorily prescribed amount were required to pay a portion of those gains to the government.

Based on the government's promise to make up for their potential losses, *Amici* and numerous other insurers entered into agreements with the government to become "Qualified Health Plans" (QHPs) under the ACA. As explained in Lincoln's opening brief, however, the government—as it has done with *Amici*—now refuses to honor its promise and make the required risk corridors payments, which it acknowledges are owed.

Lincoln brought suit under ACA § 1342 and the Tucker Act, 28 U.S.C. § 1491(a), to recover its risk corridors payments, but the COFC dismissed that claim (and Lincoln's related non-statutory claims). Applying the Administrative Procedure Act's (APA) deferential standard of review under 5 U.S.C. § 702, the COFC concluded that the government's position—that § 1342 is "budget neutral"

and requires risk corridors payments to unprofitable QHPs only to the extent of risk corridors payments received from profitable QHPs—was not "contrary to law" under the APA. *See* COFC's *Land of Lincoln* Opinion (COFC Op.) at 28.

Amici have a direct and substantial interest in Lincoln's appeal of that ruling. They have raised similar claims for unpaid risk corridors payments against the government—including a statutory claim under § 1342—in proceedings currently before the COFC. *See First Priority Life Ins. Co., Inc., et al. v. United States*, No. 16-587C (Fed. Cl.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl.); *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Fed. Cl.); *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C (Fed. Cl.). By any measure, the combined monetary relief *Amici* seek in these cases is significant: nearly $1 billion dollars.

Unlike the proceedings below, however, *Amici* have not sought (and will not seek) the fabrication of an "administrative record" under COFC Rule 52.1 (RCFC), which the COFC here ordered the government to compile, and which the court reviewed under the APA's highly deferential-to-the-government standard. Instead, *Amici's* claims will be considered under the substantially less-deferential standards applicable to motions to dismiss under RCFC 12(b)(6) or motions for summary judgment under RCFC 56. *Amici* submit this brief to assist the Court in resolving

the issues on appeal in light of the unique procedural context of this case, the record the COFC considered, and the standard of review the COFC applied.

PRELIMINARY STATEMENT

This appeal implicates critically important issues with significant ramifications for the health insurance industry. In reliance on the government's statutory promise to protect against the unpredictable risks of insuring an enormous group of previously uninsured consumers, Lincoln—like *Amici* and plaintiffs in the 18 other pending risk corridors cases—undertook to effectuate Congress's intention to expand the provision of health insurance.

The government now insists, however, that it has no obligation to make annual risk corridors payments to Lincoln, *Amici*, or the many other insurers who sustained substantial losses—or, indeed, to make any such payments at all unless and until: (a) sufficient payments are received from profitable risk corridors participants, or (b) Congress specifically appropriates the funds to cover them. That, manifestly, is contrary to what § 1342 requires, what Congress intended in enacting the ACA, and what the government itself has repeatedly acknowledged.

Due to its deteriorating financial condition, Lincoln sought in this case to expedite the COFC's disposition of its statutory claim. It did so by asking, under RCFC 52.1, for judgment on an "administrative record," even though no such record existed because there were no agency proceedings or action for the COFC

to review. The COFC, in turn, committed two threshold errors. It first ordered the government to create an "administrative record" of an agency proceeding and decision that did not exist. Then, the COFC reviewed that agency "record" and "decision" under the APA's highly deferential-to-the-government standard in analyzing Lincoln's statutory claim—which the court lacked jurisdiction to do, and which was contrary to RCFC 52.1 and settled precedent. The COFC's dismissal of Lincoln's statutory claim thus was jurisdictionally and procedurally flawed and should be reversed.

If this Court considers the merits of the dismissal of Lincoln's statutory claim, the outcome should be the same because the COFC misconstrued § 1342's risk corridors provisions and improperly deferred to the government's unreasonable construction under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). On the erroneous construction, the COFC ignored the unambiguous text of § 1342, overlooked the relevant agency's own repeated statements that the risk corridors program is not "budget neutral," and erroneously relied on appropriation riders passed by Congress in 2015 and 2016—years after the ACA was enacted.

As for the *Chevron* deference ruling, the COFC fundamentally erred in deferring to the Department of Health and Human Services' (HHS) construction of § 1342 because: (a) that reading threatens to destroy, not improve, the health

insurance marketplace (contrary to the Supreme Court's *King v. Burwell* decision); (b) there is no indication Congress intended to assign to HHS responsibility over such a question of "deep 'economic and political significance' that is central to this [statute's] statutory scheme" (*King*, 135 S. Ct. at 2489); and (c) it improperly ignores the fact that QHPs relied heavily on the government's promise to make risk corridors payments in agreeing to participate in the ACA marketplace in the first place.

If, despite these errors, this Court affirms the COFC's dismissal of Lincoln's statutory claim, it should make clear that its decision is confined to the particular procedural context here—where the COFC applied the APA's deferential standard of review to an "administrative record"—and thus should not bind the COFC in resolving the statutory money-mandating claims in *Amici's* and other plaintiff-insurers' pending cases, to the extent those claims are reviewed under the more liberal Rule 12(b)(6) and Rule 56 standards.

ARGUMENT

I. The COFC's Dismissal Of Lincoln's Statutory Claim Should Be Reversed Because That Court Lacked Jurisdiction To Apply The APA And Erroneously Confined Its Review To A Constructed-After-The-Fact "Administrative Record."

A. The COFC Lacked Jurisdiction To Apply The APA And Misapplied The Controlling Rule Of Procedure.

1. The COFC lacked jurisdiction to apply the APA to Lincoln's statutory claim under § 1342 and the Tucker Act. The COFC "is an Article I court with

specific jurisdiction granted by the Congress that must be strictly construed." *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 472 (1993) (citation omitted). "The jurisdiction of the [COFC] is set forth in the Tucker Act, 28 U.S.C. § 1491 (2006)." *Mendez-Cardenas v. United States*, 88 Fed. Cl. 162, 165 (2009).

As a general rule, however, the COFC has no APA jurisdiction. *See, e.g.*, *Martinez v. United States*, 333 F.3d 1295, 1313 (Fed. Cir. 2003) (*en banc*) ("[T]he Court of Federal Claims lacks APA jurisdiction."); *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (same); *Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993) (same). Unlike the Tucker Act—which waives sovereign immunity for claims seeking money damages from the government (*see Estes Exp. Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014))—the "APA waives sovereign immunity only for claims seeking 'relief other than money damages….'" *Banjerlee v. United States*, 77 Fed. Cl. 522, 534 (2007) (citation omitted). Statutory money-damage claims such as Lincoln's thus are "outside the scope of the [APA's] waiver of sovereign immunity…." *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 604 (2011) (distinguishing Tucker Act money-damage claims from APA claims for the return of property).

Subsection (b)(4) of the Tucker Act does allow for application of the APA, but only in very narrow circumstances, such as the review of an agency's decision on a government contract bid protest. *See* 28 U.S.C. § 1491(b)(1), (4); *Phoenix*

Mgmt., Inc. v. United States, 127 Fed. Cl. 358, 363 (2016) (noting subsection (b)(4) provides for APA review in bid protest cases). But subsection (b)(4) does ***not*** apply to Lincoln's monetary-relief claim here, which arises under subsection (a) of the Tucker Act and the money-mandating provisions of ACA § 1342.

Indeed, the Tucker Act's explicit (but narrow) allowance of APA review in actions arising under subsection ***(b)***, contrasted with the absence of such a provision extending APA review to actions (like Lincoln's) that arise under subsection ***(a)***, reinforces the conclusion that APA review is foreclosed here. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning."). Accordingly, the cases involving bid protests that the COFC cited to support its application of the APA—where, unlike here, jurisdiction was expressly predicated on subsection (b) of the Tucker Act—are inapposite. *See Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009) (cited at COFC Op. at 21); *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037-38 (Fed. Cir. 2009) (same).[2] The COFC therefore erred in applying the APA, and this Court should reverse the dismissal of Lincoln's statutory claim.

[2] The other two cases cited by the COFC to support its application of the APA are equally irrelevant. *See* COFC Op. at 21 (citing *Meyer v. United States*, 127 Fed. Cl. 372 (2016); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345

2. Separately, even if the COFC had jurisdiction to apply the APA, its ruling rests on a fundamental misapplication of the APA, RCFC 52.1, and settled precedent. It is well-established that review under the APA based on an administrative record is only proper where there is no other adequate remedy in court and there is an existing record of an agency proceeding. Neither of these prerequisites is present here.

First, the APA's express terms provide that APA review is only permitted where—***unlike here***—"there is no other adequate remedy in a court." 5 U.S.C. § 704; *see also Sackett v. EPA*, 566 U.S. 120, 127-28 (2012) (same). But a fully adequate judicial remedy does exist here: monetary relief on Lincoln's claim under § 1342's money-mandating provisions, a claim which lies within the COFC's exclusive Tucker Act jurisdiction. *See Suburban Mortg. Assocs., Inc. v. HUD*, 480 F.3d 1116, 1126 (Fed. Cir. 2007) ("'The availability of an action for money damages under the Tucker Act … is presumptively an 'adequate remedy' for § 704 purposes.'") (citations and alterations omitted); *Straughter v. United States*, 120 Fed. Cl. 119, 125 (2015) (noting that under Tucker Act, COFC has "exclusive jurisdiction over claims exceeding $10,000") (citation omitted).

F.3d 1334 (Fed. Cir. 2003)). *Paralyzed Veterans* involved a petition for review under 38 U.S.C. § 502, which, unlike subsection (a) of the Tucker Act, expressly permits review "in accordance with" the APA. 345 F.3d at 1339. And in *Meyer*, unlike here, the COFC reviewed an agency decision—a ruling by the Army Board for Correction of Military Records. 127 Fed. Cl. at 381.

Second, there was no agency proceeding involving Lincoln, and therefore no administrative record to review. Given its severe financial difficulties, Lincoln sought expeditious consideration based on an "administrative record" under RCFC 52.1(c). COFC Op. at 2, 12, 21; *Bannum v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005) (noting that a "judgment on an administrative record is properly understood as intending to provide for an expedited trial on the record"). The government indicated it was "not sure if an administrative record" exists "or what … would be included in" it. *See* Transcript of COFC Hearing (Aug. 12, 2016) at 21:7-11. The COFC itself questioned the appropriateness of using RCFC 52.1's administrative record procedure, *id.* at 10:24-13:19, but nevertheless ordered the government "to issue what it thinks the administrative record is." *Id.* at 29:5-7.

Even in the narrow circumstances where the COFC does have Tucker Act jurisdiction to review agency decisions under the APA, *see* 28 U.S.C. § 1491(b), the use of an administrative record is permitted only where there were "proceedings before an agency" that "are relevant to a decision in a case." RCFC 52.1; *see also Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009) (in reviewing agency determination, noting that the "'task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court'") (citation omitted). In such a case, "'the focal point for judicial review should be the

administrative record already in existence, not some new record made initially in the reviewing court.'" *Walls*, 582 F.3d at 1367 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985)) (internal citations omitted). In short, "parties must make the administrative record before the agency"—not before the COFC. *Id.* at 1367-68 (citation omitted).

Here, the COFC's authorization and use of an "administrative record," despite the absence of any prior agency proceedings or orders involving Lincoln to review, violated these settled rules. The COFC was presented with a statutory claim for monetary relief that no agency previously had adjudicated—or could adjudicate, because the COFC had "exclusive jurisdiction" over the claim. *See Straughter*, 120 Fed. Cl. at 125. In a case like this, where the plaintiff brings its claims "for the first time" in the COFC, that court must review the claims *de novo*, not deferentially based on some administrative record. *See, e.g.*, *Lippman v. United States*, 127 Fed. Cl. 238, 250 (2016) (noting that COFC "has recognized on numerous occasions that [it] reviews such claims *de novo* and that no administrative record is appropriate under these circumstances"); *Lewis v. United States*, 114 Fed. Cl. 682, 684 n.1 (2014) (same); *Helferty v. United States*, 113 Fed. Cl. 308, 322 n.12 (2013) (same), *aff'd*, 586 F. App'x 586 (Fed. Cir. 2014).

In *Lippman*, for example, the plaintiff filed a military pay action. The government moved for judgment on the administrative record, but the COFC

converted the motion to one for summary judgment, reasoning that a "plain reading of the complaint and the documents that the government has filed as the 'administrative record' make clear that the Court is not reviewing a prior decision of the Coast Guard or a military corrections board in considering this matter." *Lippman*, 127 Fed. Cl. at 250. "Rather, plaintiff brings his claims … for the first time in this litigation." *Id.*

So too here. There was no final agency decision following any administrative proceeding involving Lincoln for the COFC to review. Instead, as in *Lippman*, Lincoln raised its statutory claim for the first time before the COFC. That claim was not previously presented to or decided by HHS or any other agency—nor, as noted, could it have been. The COFC's dismissal of Lincoln's statutory claim should be reversed for this reason as well.

B. The COFC'S Application Of The APA's Deferential "Contrary To Law" Standard To The "Administrative Record" Gave Undue Weight To The Government's Erroneous Construction Of § 1342 And Was Highly Prejudicial To Lincoln.

As a result of its erroneous review of the "administrative record" created by the government, the COFC considered Lincoln's statutory claim under the APA, which precludes courts from setting aside agency action unless—as relevant here—it is "not in accordance with law." COFC Op. at 21. Application of that deferential standard directly affected the COFC's consideration of the merits of Lincoln's statutory claim, tilting the balance heavily in favor of the government

and prejudicing Lincoln. Because no true administrative record existed, the COFC should have instead proceeded under motion to dismiss (RCFC 12) or summary judgment (RCFC 56) standards, and ruled in Lincoln's favor.

1. The APA's "contrary to law" standard, 5 U.S.C. § 702, is highly deferential to the federal agency. As the government asserted below, the standard "requires the Court to sustain HHS's pro-rata payments so long [as] they 'evince[ ] rational reasoning and consideration of relevant factors.'" Doc. 22, Gov't Mot. to Dismiss & Mot. for Judg. on Admin. Record on Count I at 22 (quoting *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013)).

In determining whether an agency's action is "contrary to law," the "task for" the court is "not to interpret the statute [at issue] as it thought best but rather the narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31, 39 (1981) (citations omitted). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 39 (citations omitted). This Court likewise has observed that the "contrary to law" standard "is highly deferential,'" *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000), and that as long as there is "a

reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion." *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (citation omitted); *see also Res-Care*, 735 F.3d at 1390 (same).

2. The COFC's erroneous application of the APA to the "administrative record" was highly prejudicial to Lincoln. The "administrative record" itself was incomplete, lacking relevant materials in the government's possession that strongly support Lincoln's (and *Amici's*) construction of § 1342. For example, the record did not include the February 2014 report of the Congressional Budget Office (CBO), which expressly stated that the risk corridors program is ***not*** budget neutral. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014) ("[R]isk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit."). It also lacked several presentations, updates and bulletins that the Centers for Medicare and Medicaid Services (CMS) provided to QHPs, which confirmed that the government's risk corridors payments were to be made annually.[3] And it omitted other materials that similarly support Lincoln's

[3] *See, e.g.*, HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011) (http://web.archive.org/web/20110720093202/http:/www.healthcare.gov/news/factsheets/exchanges07112011e.html); Presentation, CMS, "Reinsurance, Risk Corridors, and Risk Adjustment Final Rule" (Mar. 2012)

interpretation of § 1342. *See, e.g.*, CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014*, at 17 (Apr. 2014) ("Under the temporary risk corridor program, the government will make payments during the next few years to companies…."); Email and Letter from Kevin Counihan of CMS to QHPs (Oct./Nov. 2015) ("[HHS] recognizes that the [ACA] requires the Secretary to make full payments to issuers, and … HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required.").

Additionally, the APA standard apparently led the COFC to give undue weight to the government's crabbed interpretation of § 1342. *See* COFC Op. at 21 (noting application of APA's "contrary to law" standard to Lincoln's statutory claim); *id.* at 28 (holding that "HHS's interpretation of the ambiguous statute [is] reasonable" and its "decision not to make full payments annually cannot be

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(https://www.cms.gov/cciio/resources/files/downloads/3rs-final-rule.pdf); Letter from CMS to Issuers on Federally-facilitated Exchanges and State Partnership Exchanges (Apr. 5, 2013) (https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/ 2014_letter_to_issuers_04052013.pdf); Bulletin, CMS, "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors" (Apr. 14, 2015) (https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads /2015-Key-Dates-QHP-Certification-in-the-FFM-Rate-Review-and-3Rs-final.pdf); Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016) (https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF) (all last visited Feb. 2, 2017).

considered contrary to law"). Thus, the COFC purported to review a non-existent agency "decision," based on an agency proceeding that never occurred and a record that never existed, and then applied the APA's highly deferential standard to Lincoln's statutory claim. This was reversible error.

3. Had the COFC instead applied the RCFC 12(b)(6) or RCFC 56 standards that it will apply in many of the pending risk corridors cases—standards which are far ***less*** deferential to the moving party (here, the government), and instead favor the non-moving party—the outcome likely would have been different. "[U]nlike a summary judgment motion brought pursuant to RCFC 56, the existence of genuine issues of material fact does not preclude judgment upon the administrative record under RCFC 52.1." *SOS Int'l LLC v. United States*, 127 Fed. Cl. 576, 586 (2016). "Rather, the Court's inquiry is whether, 'given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.'" *Id.* (citations omitted). As this Court has explained, there are "several reasons to differentiate between a summary judgment and a judgment on the administrative record"—namely, that the two involve different "burden-shifting and presumptions" and are subject to "different standard[s] of review…." *Bannum*, 404 F.3d at 1355-56.

Likewise, "[w]hen deciding a motion to dismiss … pursuant to RCFC 12(b)(6), this Court must assume that all undisputed facts alleged in the complaint

are true and draw all reasonable inferences in the non-movant's favor." *Lippman*, 127 Fed. Cl. at 243 (citation omitted). When "'there are well-pleaded factual allegations, a court should assume their veracity' and determine whether it is plausible, based upon these facts, to find against defendant." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

Had the COFC applied these standards to a complete record, it likely would not have dismissed Lincoln's statutory claim. Given the COFC's jurisdictional and procedural errors, this Court should reverse and remand for further proceedings.

II. If This Court Reaches The Merits Of The COFC's Dismissal Of Lincoln's Statutory Claim, It Should Reverse.

A. The COFC Erred In Finding That § 1342 Is Ambiguous.

As demonstrated in Lincoln's opening brief, the COFC's finding that § 1342 is ambiguous on the question of annual risk corridors payments is wrong. Several aspects of the COFC's erroneous reasoning bear particular emphasis here.

1. As an initial matter, the COFC ignored § 1342's plain text, which provides that if a QHP qualifies for risk corridors payments in a plan year, then "the [HHS] Secretary shall pay to the plan an amount" set forth in the statute's prescribed formula. 42 U.S.C. § 18062(b)(1). Section 1342 contains no language limiting the "shall pay" obligation to appropriations specifically provided by Congress.

The COFC likewise overlooked the fact that § 1342 does not contain "budget neutrality" language or create any link between risk corridors "payments in" from QHPs and "payments out" to QHPs. *See* 42 U.S.C. § 18062; 45 C.F.R. § 153.510. And while the COFC acknowledged that under § 1342, the HHS Secretary "shall establish and administer" the program "for calendar years 2014, 2015, and 2016," it failed to give that language proper effect, finding instead that "it does not specify the timing of the various payments over those three years." COFC Op. at 22; *compare Health Republic Ins. Co. v. United States*, No. 16-259C, --- Fed. Cl. ----, 2017 WL 83818, at *14 (Fed. Cl. Jan. 10, 2017) (Sweeney, J.) (finding that the "fact that Congress required HHS to make separate calculations for each calendar year" "lend[s] credence" to the view that "Congress intended for HHS to make annual payments").

Further, in a related and neighboring ACA provision governing the "reinsurance" risk-stabilization program, Congress expressly provided that the program be administered in a budget-neutral fashion. *See* 42 U.S.C. § 18061(b)(1) ("[T]he applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A)."). Section 1342 contains no such language, however, reinforcing the construction that the risk corridors program—unlike the reinsurance program—is not budget neutral. *See Loughrin*, 134 S. Ct. at 2390

("[W]hen 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning.") (citation omitted); *Heartland By-Products, Inc. v. United States*, 568 F.3d 1360, 1366 (Fed. Cir. 2009) (holding that related statutory provision including express language on the "prospectivity" of judicial decisions "show[ed] that Congress knew how to provide for prospectivity, and the absence of prospectivity language in" statutory provision at issue "suggests that Congress did not intend to provide for it").

2. The COFC also mentioned once, but gave no weight to, HHS's initial interpretation in 2013 of § 1342 and the risk corridors program. There, HHS explicitly stated that the "program is not statutorily required to be budget neutral" and that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342." HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013). But the COFC did not consider this in its own interpretation of the statute. Rather, it elected to follow HHS's contrary and adopted-for-litigation position, later set forth in March 2014. *See* COFC Op. at 6, 8, 25, 26 (citing 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014) and 79 Fed. Reg. 30,239, 30,260 (May 27, 2014)).

3. The COFC further erred in relying on Congress's HHS appropriations riders—enacted ***five years after*** Congress passed the ACA and § 1342—

prohibiting the use of specified CMS annual appropriations to make risk corridors payments. It is well-settled that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) (citation omitted). This is especially true where, as here, the later legislative action occurred years after the enactment of the statute in question, and was undertaken by a different Congress under the control of a different political party. For this reason alone, the later-enacted riders shed no light on what the Congress that enacted the ACA intended in 2010.

The COFC's reliance on the appropriation riders likewise runs afoul of the "long [ ] established" principle "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." *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (citing *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)); *see also TVA v. Hill*, 437 U.S. 153, 190 (1978) (rule against repeals by implication "'applies with full vigor when … the subsequent legislation is an *appropriations* measure'") (citations omitted).[4] Indeed, even when Congress

[4] Notably, the so-called "Judgment Fund," established by federal statute, is fully available "to facilitate the payment by the United States of its obligations" without "the need for specific appropriations." *Slattery v. United States*, 635 F.3d 1298, 1303, 1317 (Fed. Cir. 2011).

does revise a particular statute—and its 2015 and 2016 appropriations riders did no such thing to § 1342—courts may ***not*** "presume" that Congress "worked a change in the underlying substantive law 'unless an intent to make such a change is clearly expressed.'" *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136 (2008) (citations and internal quotation marks omitted).

Had the Congress that enacted the riders intended to amend § 1342 to restrict risk corridors payments in the way the government now advocates, the law presumes that Congress would have said so explicitly—but it did not. *See Hymas v. United States*, 810 F.3d 1312, 1320 (Fed. Cir. 2016) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.") (citation and internal quotation marks omitted). There is, for example, no language in the statute using the phrase "subject to the availability of appropriations," or "[a]mounts are available only as provided in appropriations laws," or anything of the sort—language "commonly used to restrict the government's liability to the amounts appropriated by Congress for the purpose." *Greenlee Cnty.*, 487 F.3d at 878. Yet, the COFC did not discuss these controlling precedents and principles in dismissing Lincoln's statutory claim.

4. Finally, the COFC placed substantial reliance on the fact that a March 2010 CBO report did not mention the risk corridors program. But the court's reliance on that report is particularly hard to fathom given that the COFC ignored

the CBO's more recent, and first substantive, discussion of risk corridors, which demonstrates that the CBO understood risk corridors would ***not*** be budget neutral. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014) ("[R]isk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes…. As a result, those payments and collections can have no net effect on the budget deficit. In contrast, risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit.").

Despite the absence of any evidence revealing why the CBO omitted risk corridors from its 2010 report, the COFC inferred from the report's silence that Congress intended § 1342 to be "budget neutral." COFC Op. at 23-24. Even if that inference were supportable (and it is not), "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009); *see Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005) (Easterbrook, J.) (CBO's "view—on which Congress did not vote, and the President did not sign—cannot alter the meaning of enacted statutes"). The government itself recently argued as much in an ACA case—when it was advantageous for it to do so. *See* Br. of United States, *State of Ohio v. United States*, No. 16-3093, 2016 WL 3383119, at *29 (6th Cir. June

2016) (asserting that the "CBO's mission is not to interpret statutes, but to estimate the costs of proposed or enacted legislation") (citing *Ameritech Corp.*, 403 F.3d at 913).

Accordingly, the COFC's finding that § 1342 is ambiguous was error and its dismissal of Lincoln's statutory claim should be reversed.

B. The COFC Erred In Finding That The Government's Interpretation Of § 1342 Is Entitled To *Chevron* Deference.

In addition to its flawed interpretation of § 1342, the COFC erred in giving deference to the government's construction under *Chevron* because its reading is not reasonable. Again, Lincoln comprehensively details the court's errors, but a few points merit special emphasis.

1. First, the COFC contravened the Supreme Court's admonition in *King v. Burwell* that courts should not give *Chevron* deference to agency interpretations of the ACA where the issue involves "a question of deep 'economic and political significance' that is central to this [statute's] statutory scheme," as well as "billions of dollars in spending each year and [which] affect[s] the price of health insurance for millions of people." *King*, 135 S. Ct. at 2489. As the Court in *King* made clear, in a dispute of this magnitude—where billions of dollars in risk corridors payments are owed to insurers—"had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* (citation omitted). Nevertheless, and despite HHS's and CMS's undisputed lack of expertise in

making budget-neutrality determinations regarding federal statutes, the COFC deferred to those agencies' construction of § 1342. That was error.

2. Second, the COFC's deference finding contradicts Congress's clearly expressed intent in enacting the risk corridors program. *See King*, 135 S. Ct. at 2493 ("'We cannot interpret federal statutes to negate their own stated purposes.'") (citation omitted). Indeed, construing the risk corridors provisions to provide that the government need not make full, annual payments to QHPs undercuts the principal aim of § 1342 and the ACA as a whole: "to improve health insurance markets, not to destroy them." *Id.* at 2496. Thus, as the Supreme Court stressed in *King*, "[i]f at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *Id.*; *see also Health Republic*, 2017 WL 83818, at *15 (finding it "nonsensical to suggest that Congress, in enacting provisions meant to ensure the success of the Affordable Care Act, drafted those provisions to cause the opposite effect").

Here, the COFC ignored the clear dictates of *King* and instead found that Congress's intent was only relevant if it showed that the government's interpretation of § 1342 would lead to a "'bizarre' result." COFC Op. at 27. But in *King*, the Supreme Court held that interpretations of the ACA that contravene Congress's intent by threatening to "destroy … health insurance markets" should be rejected. *King*, 135 S. Ct. at 2496. Moreover, the COFC erroneously conflated

mere "policy considerations" with Congress's intent. To be sure, policy considerations "cannot override [courts'] interpretation of the text and structure of" a statute. COFC Op. at 27 (citations omitted). But *Amici's* argument here—like Lincoln's below—is based on Congress's intent in passing the ACA, not "policy considerations." Courts must ascertain congressional intent and effectuate the statute's purpose. *See Contender Farms, L.L.P. v. U.S. Dept. of Agriculture*, 779 F.3d 258, 268 (5th Cir. 2015) (in applying *Chevron*, the "goal at all times is to effectuate congressional intent"). Such clearly expressed legislative purpose—as authoritatively articulated by the Supreme Court itself—cannot simply be disregarded in the fashion the COFC did here.

3. Third, the COFC ignored the history of HHS's own understanding of the risk corridors program. Specifically, it overlooked the fact that HHS's later adopted-for-litigation assertions—that (i) the risk corridors program must be administered in a budget-neutral manner (first stated in March 2014) and (ii) no risk corridors payments are due until sometime in 2017 or later (stated in October 2015)—were directly contrary to HHS's previously stated positions upon which *Amici* and other QHPs relied in committing to the ACA Exchanges in September 2013. Giving effect to HHS's abrupt, unexplained, and made-for-litigation change violates fundamental precepts of administrative law and *Chevron* deference.

Indeed, the law is clear that if an agency's policy creates "serious reliance interests," then a subsequent change is facially arbitrary and capricious—and "receives no *Chevron* deference"—absent a reasoned explanation from the agency. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) ("[T]he APA requires an agency to provide more substantial justification … 'when its prior policy has engendered serious reliance interests.'") (citation omitted). In March 2012, HHS and CMS stated in their final rule in the Federal Register that "QHP issuers who are owed these [risk corridors payment] amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 Fed. Reg. at 17,238 (Mar. 23, 2012). One year later, those agencies explicitly stated that the "risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342." 78 Fed. Reg. at 15,473 (Mar. 11, 2013).

No dispute exists on this record—or likely any other record established in the pending risk corridors cases—that QHPs, including *Amici*, relied on HHS's and CMS's final rulemaking statements in March 2012 and March 2013 in making their decision to participate in the program. Yet, as noted, HHS and CMS later made a 180-degree, made-for-litigation change, staking out the position they have taken in this and other risk corridors cases: the seemingly "convenient litigating

position" (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)) that § 1342 is budget-neutral and that risk corridors payments are limited to amounts collected. This dramatic shift for litigation purposes is entitled to no *Chevron* deference.

III. If This Court Affirms The COFC's Dismissal Of Lincoln's Statutory Claim On The Merits, The Court Should Clarify That Its Ruling Is Based On The Deferential APA Review Standard And The Limited Administrative Record.

As the foregoing shows, the COFC lacked jurisdiction to apply the APA in deciding Lincoln's statutory claim under § 1342, and committed reversible error in resting its decision on the fabricated and incomplete "administrative record." The COFC also incorrectly resolved the merits of that claim, both by misconstruing § 1342 and by giving *Chevron* deference to the government's unreasonable interpretation of that provision.

If, nevertheless, this Court determines that it should review the COFC's dismissal of Lincoln's statutory claim under the APA's deferential-to-the-government standard, and affirms, *Amici* respectfully request that the Court clarify that its decision is limited to the unique factual record and procedural context of this case. That will give guidance to the COFC judges presiding over *Amici's* and other QHPs' § 1342 claims, who will be charged with resolving the government's various dispositive motions regarding those claims *de novo* under the more liberal

standards of RCFC 12(b)(6) and 56. It will also give guidance to future panels of this Court tasked with reviewing such decisions *de novo*.

CONCLUSION

Amici request that the COFC's judgment be reversed. Alternatively, if the Court applies the APA standard of review and affirms based on the limited administrative record, *Amici* request that it clearly limit the precedential effect of that ruling in the risk corridors cases still pending in the COFC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I certify that this brief is proportionately spaced and contains 6,571 words, excluding parts of the document exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

/s/ Lawrence S. Sher

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2017, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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