2017-1994

In the

United States Court of Appeals for the Federal Circuit

MODA HEALTH PLAN, INC.,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims, Case No. 1:16-cv-00649, Judge Thomas C. Wheeler

BRIEF OF *AMICUS CURIAE* UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

Thomas G. Hungar, *General Counsel*
Counsel of Record
Todd B. Tatelman, *Associate General Counsel*
Kimberly Hamm, *Assistant General Counsel*

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
Thomas.Hungar@mail.house.gov

Counsel for Amicus Curiae
United States House of Representatives

July 17, 2017

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* the United States House of Representatives certifies the following:

1. The full name of every party or *amicus* represented by one or more of the undersigned counsel is:

The United States House of Representatives

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by one or more of the undersigned counsel is:

None

3. All parent corporations and publicly held companies that own 10% or more of stock in the party:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

/s/ Thomas G. Hungar
Thomas G. Hungar

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Foremost among Congress's core constitutional powers is its exclusive control over public funds. This power of the purse was vested in Congress "as the most comple[te] and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, at 394 (James Madison) (Jacob E. Cooke ed., 1961).

A fundamental constitutional basis for Congress's power of the purse is the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, which not only vests Congress with exclusive authority to permit (or decline to permit) government spending, but also affirmatively limits the power of the Executive and the Judiciary by expressly barring the expenditure of any public funds absent enactment of a law appropriating such funds.

The United States House of Representatives has repeatedly passed legislation making clear that the risk corridors program of the Patient Protection and Affordable Care Act ("ACA") must be implemented in a budget-neutral and self-funding manner. It is undisputed that the ACA itself did not appropriate any funds

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

for risk corridors payments, and Congress subsequently has never appropriated funds for such payments in excess of actual risk corridors receipts. Indeed, far from appropriating additional funds for that purpose, Congress has repeatedly legislated to *prohibit* the expenditure of any additional funds. This unambiguous statutory record precludes the recognition of any judicially enforceable obligation to make risk corridors payments in excess of receipts. No appropriated funds are—or ever have been—available for that purpose.

Despite this congressional mandate, several insurers, including Appellee Moda Health, have filed suit seeking billions of dollars in excess program payments—payments that Congress has explicitly barred. Yet "the assent of the House of Representatives is required before *any* public monies are spent." *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (emphasis retained). "Disregard for that reservation [of Congressional control over Treasury funds] works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution." *Id.* at 77. Accordingly, the House has a strong interest in reversal of the judgment below, which is necessary to vindicate one of Congress's core constitutional powers.[2]

[2] The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has authorized the filing of this brief on behalf of the House. The BLAG is comprised of the Honorable Paul Ryan, Speaker of the House, the Hon-

(*Continued . . . .*)

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") (codified at 42 U.S.C. § 18001 *et seq.*) was enacted into law. The ACA establishes "Health Benefit Exchanges" where individuals can obtain health insurance coverage, and included certain risk mitigation provisions for Qualified Health Plans ("QHPs") that agreed to operate on those new exchanges. One of the risk mitigation provisions was the risk corridors program, a temporary measure that directed the Secretary of the Department of Health and Human Services ("HHS") to establish "a payment adjustment system" based on QHPs' expenses. If a QHP's expenses were higher than targeted, it would receive payments from the government; if a QHP's expenses were lower than targeted, it would make payments to the government.

As enacted by Congress, the risk corridors program was self-funding and budget-neutral, i.e., outgoing payments to QHPs had to be offset by incoming receipts from other QHPs. In the first year of the program's operation and beyond, requests for outgoing risk corridors program payments were larger than anticipat-

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orable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the United States House of Representatives, *available at* https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf. The Democratic Leader and Democratic Whip decline to support the Group's position in this case.

ed, and HHS did not receive sufficient incoming receipts to fully fund such outgoing payments pursuant to the formula established by the ACA. Appellee Moda Health, and several other QHPs, then filed suit seeking immediate risk corridors program payments to cover the asserted shortfall under the statutory formula. Under well-settled principles of federal appropriations law, however, the QHPs are not entitled to any excess risk corridors program payments because Congress, in the exercise of its constitutional authority over public expenditures, has declined to appropriate funds for such excess payments.

In furtherance of the important institutional and constitutional issues raised by ACA insurers' attempts to secure excess risk corridors program payments through litigation, the House filed an amicus brief in the companion case, *Land of Lincoln v. United States*, No. 2017-1224 ("House Amicus Br."), ECF No. 114. In the interest of judicial economy, the House will not burden the Court by duplicating arguments advanced in its *Land of Lincoln* brief or by Appellant in its opening brief in this case. Instead, this brief sets forth the House's views with respect to specific points relied upon by the lower court that implicate the House's institutional interests—namely, the legislative history and purpose of the relevant provisions of the ACA and the applicable appropriations acts, and the proper inferences to be drawn from the analyses performed by two legislative branch agencies, the

Congressional Budget Office ("CBO") and the Government Accountability Office ("GAO").

ARGUMENT

The Court of Federal Claims concluded below that because Section 1342 of the ACA "is not budget-neutral on its face" and states that the Secretary of HHS "'shall pay,'" then "full payments out he must make." Op. and Order, *Moda Health Plan, Inc. v. United States,* No. 16-649C (Fed. Cl.) ("Op."), 23-24, ECF No. 23. In reaching this conclusion, the lower court not only ignored the well-settled principle of appropriations law that requires both an authorization and a corresponding appropriation before an obligation to pay money out of the federal treasury can arise (House Amicus Br. 7-17), but also disregarded the plain import of subsequent Congressional actions restricting the use of appropriated funds for excess risk corridors program payments.

I. The Risk Corridors Program Was Intended To Be Budget-Neutral, With Outgoing Risk Corridors Program Payments Funded Exclusively By Incoming Payments.

The clear intent and understanding of Congress was that the ACA would reduce the federal deficit. *See* ACA § 1563(a)(1) ("Based on [CBO] estimates, this act will reduce the federal deficit between 2010 and 2019."); Br. for Appellant, *Moda Health Plan, Inc. v. United States,* No. 2017-1994 (Fed. Cir.) ("U.S. Br."), 21, ECF No. 18; House Amicus Br. 15-16, & n.3 (quoting House Members in sup-

port of the ACA). Regarding the risk corridors program specifically, Congress intended to support deficit reduction by structuring the program in a budget-neutral manner; accordingly, Congress intentionally omitted any language obligating HHS to make risk corridors payments in excess of the amount collected under the program. *See* House Amicus Br. 14-17; U.S. Br. 18-20, 29-31.

As part of the legislative process, CBO performed a pre-enactment assessment of the budgetary impact of the ACA that confirms this understanding of the risk corridors program. CBO's assessment of the risk corridors program did not "score" (i.e., provide a cost estimate for) the program's budget impact because, by design, program payments could never exceed program receipts. *See* Letter from Douglas Elmendorf, Director, CBO to House Speaker Nancy Pelosi (March 20, 2010) ("CBO Cost Estimate"), tbl. 2 at p.2, Estimate of Changes in Direct Spending and Revenue Effects of the Reconciliation Proposal Combined with H.R. 3590 as Passed by the Senate (providing estimates for the other risk mitigation provisions of the ACA, reinsurance and risk adjustment, but not scoring the risk corridors program).[3] Congress expressly relied on CBO's projections in enacting the ACA. *See* ACA § 1563(a)(1); House Amicus Br. 15-16 & n.3 (citing legislative history).

[3] *Available at* http://cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf.

The Court of Federal Claims misunderstood the significance of the CBO assessment, erroneously inferring that CBO intentionally "kept silent" because it "may never have believed the risk corridors program to be budget-neutral." Op. 24, 25. That inference is plainly wrong, and indeed makes no sense. CBO was established to analyze the budgetary impact of proposed legislation, *see* 2 U.S.C. § 602, and is obligated to "prepare for each bill … of a public character … an estimate *of the costs which would be incurred in carrying out such bill*…." 2 U.S.C. § 653 (emphasis added).[4] House Rules contemplate that CBO's analysis be obtained before legislation can be reported to the full House. *See* Rules of the U.S. House of Representatives ("House Rules") (114th Cong.), XIII.3(c)(3); House Rule XIII.3(c)(3) (111th Cong.). For those reasons, it is inconceivable that CBO would decline to analyze the budgetary impact of a statutory benefits program if it "may … have believed" (Op. 25) that the program would have a budgetary impact—particularly a program that, under the lower court's erroneous interpretation, would subject the government to potentially massive and uncapped liability. Indeed, CBO expressly denominated its pre-enactment analysis "[a]n estimate of the

[4] CBO explains that is cost estimates are intended to "show how federal outlays and revenues would change if legislation was enacted *and fully implemented as proposed*[.]" Congressional Budget Office, Frequently Asked Questions About CBO Cost Estimates (emphasis added), *available at* https://www.cbo.gov/about/products/ce-faq.

budgetary effects" of the draft legislation, which would have been an inaccurate description of CBO's own work product if the trial court's assumption were correct. *See* CBO Cost Estimate at 1. Thus, the trial court's understanding of the CBO analysis is wholly implausible.

In any event, the crucial point for purposes of properly construing the ACA is that *Congress*, in enacting the ACA, expressly relied on CBO's analysis, necessarily including its decision not to score the risk corridors program. ACA § 1563(a)(1); *cf.* House Rule XIII.3(c)(3) (111th Cong.).[5] CBO's lack of scoring is consistent with and reflective of Congressional intent—which clearly evidenced a goal of budget-neutrality and self-funding for the ACA's premium-stabilization programs, including the risk corridors program.

The trial court contrasted CBO's decision not to score the risk corridors program with its decision to score the ACA's risk adjustment and reinsurance programs, which were also to be operated in a budget-neutral manner, suggesting that this difference in treatment supports the conclusion that the risk corridors program was not intended to be budget-neutral. But the reason for CBO's decision to score those other two programs is self-evident from a review of the legislation itself: for

[5] CBO's post-enactment comment that the risk corridor program "can have net effects on the budget" (Op. 9) obviously sheds no light on Congress's intent in enacting the ACA, and is accordingly irrelevant.

the risk adjustment program, payments would lag receipts and could therefore have a budget impact, *see* 42 U.S.C. § 18063(a) (describing charges to, and payments from, QHPs based on actuarial risk calculated after one year); and for the reinsurance program, CBO understood that the program would have a budget impact insofar as State collections for the reinsurance program were estimated to exceed outgoing receipts. *Id.* at § 18061(b)(3)(B)(iii), (iv); *see id.* at § 18061(b)(4) (requiring deposit to the Treasury of $5 billion in collections). *See also* U.S. Br. 20-21.

II. There Has Never Been an Appropriation For Any Outgoing Risk Corridors Program Payments In Excess of Incoming Payments.

The court below did not dispute that the ACA itself contains no appropriation for risk corridors program payments. Op. 25. Nevertheless, the court rejected the position of the United States that "'payments in' to the program" are "the only source of … funds available for risk corridors payments," concluding that two other sources of appropriated funds were available for excess program payments. Op. 25. That conclusion—which is essential to the judgment below—is fundamentally flawed.

The first alleged source of appropriated funds identified by the court below was the lump-sum portion of the CMS Program Management account. Op. 25. The court's reliance on that lump-sum appropriation, however, rests entirely on a misreading of a September 2014 GAO opinion, which the court mistakenly con-

strued as authorizing HHS to make risk corridors program payments from the FY 2014 lump-sum appropriation in that account. Op. 25. The court's interpretation of the GAO opinion is demonstrably wrong.

The CMS Program Management account is made available to HHS each fiscal year "[f]or carrying out" the "responsibilities" of CMS in that year. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (2014) ("2014 Appropriations Act"). The account includes both a lump-sum amount and sums collected from authorized user fees.[6] *Id.* The $3.6 billion lump-sum appropriation for FY 2014 expired on September 30, 2014, the last day of the 2014 fiscal year. *Id.* at 408, § 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."). The incoming user fees, by contrast, "remain available until September 30, 2019." *Id*. at 374.

Responding to a congressional inquiry "regarding the availability of appropriations to make [risk corridors] payments," GAO concluded, in September 2014, that both the incoming program receipts (which it deemed to be user fees) and the lump-sum appropriation in the CMS Program Management account for FY 2014

[6] A user fee is "[a] fee assessed to users for goods or services provided by the federal government." GAO, GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process (2005), at 100.

"would have been available" to make risk corridors payments if such payments had been due in FY 2014. GAO, B-325630, Dep't of Health and Human Services Risk Corridors Program ("GAO Op.") 1, 6 (Sept. 30, 2014). The trial court construed this statement to mean that HHS actually could have used the FY 2014 lump-sum appropriation to make risk corridors payments, but simply "chose not to." Op. 25. In the court's view, HHS's alleged ability to make such payments from the FY 2014 lump-sum appropriation proved that "Congress did not restrict the funding for the risk corridors program to the 'payments in' under the program." Op. 25; *see* Op. 25 n.12.

But that is not what GAO said. As the rest of the GAO's discussion (which the trial court ignored) makes clear, GAO's point was instead that the language used in the FY 2014 appropriations act, *if reenacted in subsequent appropriation acts* for years (unlike FY 2014) when risk corridors payments were actually payable, would *then* permit use of those hypothetical future lump-sum appropriations to make such future payments. That is why GAO used the subjunctive tense (stating that the lump-sum appropriation "*would have been* available") in characterizing the effect of the appropriations act language. GAO Op. 6 (emphasis added). GAO was well aware that no risk corridors payments were due in FY 2014, so its analysis of the potential sources of appropriated funds for such payments was purely hypothetical. *See id*. at 6 n.7 ("HHS informed us that it intends to begin collections

and payments for this purpose in FY 2015."). And to eliminate any possible doubt about the fact that the FY 2014 lump-sum appropriation was *not* itself available to fund risk corridors payments, GAO expressly added that "[a]ppropriations acts, by their nature, are considered nonpermanent legislation. Language appropriating funds for 'other responsibilities of the Centers for Medicare and Medicaid Services' *would need to be included in the CMS P[rogram] M[anagement] appropriation for FY 2015 in order for it to be available for payments to qualified health plans under section 1342(b)(1) [i.e., the risk corridors program]*." *Id*. at 6 (emphasis added) (internal citations omitted).

The plain language of the ACA likewise confirms this understanding. Directly contradicting the trial court's reasoning (Op. 25 n.12), the ACA makes clear that HHS could *not* have used its FY 2014 appropriation to make risk corridors payments, because no such payments could even have been calculated, let alone paid, in FY 2014. Risk corridors payments are calculated based on insurers' "allowable costs for" a given "plan year," 42 U.S.C. § 18062(b)(1), and the first year of the risk corridors program was "*calendar year[] 2014*," 42 U.S.C. § 18062(a) (emphasis added), which did not end until three months *after* the FY 2014 lump-sum appropriation expired on September 30, 2014. *See* 2014 Appropriations Act, 128 Stat. at 408, § 502. Thus, the trial court's conclusion that the FY 2014 lump-

sum appropriation was actually available to make risk corridors payments is simply wrong as a matter of law. *See also* U.S. Br. 33-35.[7]

The only other alleged source of appropriated funds identified by the trial court as support for its ruling is the Judgment Fund, which the court deemed to be a separate appropriation available for excess risk corridors program payments. Op. 33. As explained in the House's amicus brief in *Land of Lincoln*, however, the Judgment Fund cannot supply the necessary appropriation here, for two independently sufficient reasons. *See* House Amicus Br. 24-27. First, the Judgment Fund is available only to pay "final judgments," 31 U.S.C. § 1304(a), not to serve as an operating appropriation to fund existing programs. The trial court's reasoning would transform the Judgment Fund into a free-ranging appropriation for any and all program expenses that Congress chose not to fund, completely eviscerating Congress's exclusive constitutional authority over government spending. No other court has ever reached such an absurd conclusion, and this Court should reject it.

[7] For the same reasons, the trial court was equally wrong in concluding that the continuing resolutions in effect during the first two-and-a-half months of FY 2015 provided a lump-sum appropriation for risk corridors program payments. Op. 27 n.13. Those continuing resolutions were superseded by the FY 2015 appropriations act on December 16, 2014, and that act expressly barred the use of the lump-sum appropriation to make risk corridors payments. Op. 12-13. Thus, by the time the first risk corridors payments accrued after the conclusion of calendar year 2014, Congress had expressly rejected the use of the lump-sum appropriation for such payments, thereby confirming that such payments are limited to program receipts. *See also* U.S. Br. 34-35.

Second, even if there were a final judgment here, the Judgment Fund would still be unavailable, because it applies only when "payment is not otherwise provided for." 31 U.S.C. § 1304(a)(1). Here, Congress has "otherwise provided for" risk corridors payments through the appropriation for user fees, so the Judgment Fund is inapplicable. *See* House Amicus Br. 26-27 (citing authorities).

Finally, the trial court also erred in assessing the import of Congress's express prohibitions against using the CMS Program Management account's lump-sum appropriation to make risk corridors payments. In the trial court's view, these legislative enactments were intended only to bar payments from that specific account, and Congress "did not believe it was depriving the risk corridors program of funding from other accounts." Op. 33. That rationale is patently wrong.

As an initial matter, it disregards the central tenet of appropriations law that an appropriation may not be inferred. *See* 31 U.S.C. § 1301(d); House Amicus Br. 9. In addition, the court's reasoning ignores the crucial significance of the legislative backdrop against which Congress first enacted the prohibition against use of the lump-sum appropriation. In September 2014, GAO responded to congressional inquiries by expressing its view that the language of the FY 2014 appropriations act, if reenacted for FY 2015, would provide two (and only two) sources of appropriated funds to make risk corridors payments: (1) user fees (i.e., program receipts), and (2) the lump-sum appropriation. *See* GAO Op. 1, 6. In response,

Congress added language to the FY 2015 appropriations act to expressly preclude use of the lump-sum appropriation for that purpose. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, tit. IV, § 227, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act … or transferred from other accounts funded by this Act to the '[CMS] Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)."). The only possible inference to be drawn from this legislative action is that Congress intended to and did confirm that risk corridors payments must not exceed program receipts, because Congress had taken explicit steps to preclude use of the only other possible source of funds that might otherwise have been available to make such payments.

Contrary to the trial court's reasoning (Op. 32-33), moreover, the relevant legislative history confirms this understanding of the unambiguous sequence of events. In discussing the effect of the new language in the FY 2015 appropriations act, the then-Chairman of the House Committee on Appropriations explained that because the risk corridors program was "budget neutral," "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. H9307, H9838 (daily ed. Dec. 11, 2014). Accordingly, Congress added "new bill language [in the FY 2015 appropriations act] to prevent the CMS Program Management appropriation account from being

used to support risk corridors payments." *Id.* at H9838. Similarly, the Senate Committee on Appropriations described the effect of the additional language in the same manner: "The Committee continues bill language requiring the administration to operate the Risk Corridor program in a budget neutral manner…." S. Rep. No. 114-74, at 12 (2015). Congress unambiguously mandated that the risk corridors program would be self-funding, and the trial court's contrary conclusion should be rejected.

It is perhaps telling that the trial court's analysis of the purportedly relevant case law regarding the import of congressional funding restrictions completely overlooks this Court's most directly controlling precedent. As explained in the House's amicus brief in *Land of Lincoln*, this Court's decision in *Highland Falls–Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), is directly on point, and compels reversal here. *See* House Amicus Br. 12, 21-23.

CONCLUSION

The ACA risk corridors program was intended to be budget-neutral and self-funding, and Congress took repeated steps to reinforce its original intent. This Court should reverse the judgment below, and thereby preserve Congress's exclusive constitutional authority over the expenditure of federal funds.

Respectfully submitted,

/s/ Thomas G. Hungar

THOMAS G. HUNGAR
General Counsel
Counsel of Record
TODD B. TATELMAN
Associate General Counsel
KIMBERLY HAMM
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
Thomas.Hungar@mail.house.gov

Counsel for the United States House of Representatives

July 17, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 and Federal Circuit Rule 32 because this brief contains 3,770 words excluding the parts exempted by Fed. R. App. P. 32(f) and Federal Circuit 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced type-face using Microsoft Word 2016 in a 14-point Times New Roman type.

/s/ Thomas G. Hungar
Thomas G. Hungar

CERTIFICATE OF SERVICE

I certify that on July 17, 2017, I filed the foregoing document by the U.S. Court of Appeals for the Federal Circuit's CM/ECF system.

/s/ Thomas G. Hungar
Thomas G. Hungar