IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY,	)	
Plaintiff,	)	
	)	No. 16-259C
v.	)	Judge Sweeney
UNITED STATES OF AMERICA,	)	
Defendant.	)	

THE UNITED STATES' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress controls the power of the purse. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Accordingly, the Supreme Court has recognized that "payments of money from the Federal Treasury are limited to those authorized by statute." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416 (1990).

In this case, plaintiff Health Republic Insurance Company ("Health Republic"), on behalf of itself and a class of other insurers, seeks billions of dollars in payments from the Treasury that Congress has not authorized. As part of the Patient Protection and Affordable Care Act (the "Act" or "ACA"), Congress established Health Benefit Exchanges ("Exchanges") on which insurance companies could compete for customers and take calculated business risks. The Act did not make the taxpayers the guarantor of profits for the health insurance industry. In fact, Congress found that the ACA would reduce the federal deficit.

To mitigate some of the risk attendant with the new opportunities available to insurers on the Exchanges, the ACA established three premium-stabilization programs, informally known as the "3Rs," under which payment adjustments are made among insurers. There is no dispute that two of the 3Rs programs (reinsurance and risk adjustment) are funded solely by the amounts that insurers or plans pay into each program. Risk corridors, the program at issue here, is likewise a self-funded program to distribute gains and losses between insurers that under- and over-estimated their costs-to-premiums ratio. The text and structure of the statute and Congress's express appropriations restrictions for the years at issue demonstrate that Congress did not authorize the payments Health Republic seeks.

In section 1342 of the ACA, Congress directed the Secretary of Health and Human Services ("HHS") to "establish and administer a program of risk corridors," which would be "based on" a similar program under Medicare Part D. Under the temporary risk corridors program, HHS collects "payments in" from insurers that were more profitable and uses those funds to make "payments out" to insurers who priced their plans too low and were more unprofitable. As this Court recognized, nothing in the ACA provides an appropriation for these "payments out." Indeed, nothing in section 1342 or the ACA authorizes appropriations for these payments, in contrast to dozens of other provisions of the ACA. And in contrast to the Medicare Part D program on which the risk corridors program is based, nothing in section 1342 provides an authorization in advance of appropriations or creates an obligation on the part of HHS to make payments.

In short, no payments under the risk corridors program could be made without further congressional action in the appropriations process. Fiscal year 2015 was the first year in which monies could be paid under the risk corridors program. (By law HHS could not make payments before that time because the ACA requires HHS to use a full year's data to calculate payment and collection amounts, and the program did not begin until January 1, 2014.) In the appropriations legislation for fiscal year 2015, Congress allowed HHS to use "payments in"—amounts collected from insurers under the program—as a source of funding for "payments out." At the same time, Congress expressly prohibited HHS from using other funds for those "payments." That legislation, which Congress subsequently reenacted, guarantees that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect."

Congress's constitutional exercise of its power of the purse definitively limits the liability of the United States under section 1342 to the aggregate amount of risk corridors collections.

STATEMENT OF THE ISSUE

Whether section 1342 of the ACA entitles insurance companies to billions of dollars in taxpayer funds where section 1342 neither provides an appropriation nor authorizes the use of appropriated funds, and where Congress, in appropriating funds to make risk corridors payments, prohibited HHS from using funds other than collections to make those payments.

STATEMENT OF UNDISPUTED FACTS

A. The Affordable Care Act

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, in March 2010.[1] The Act adopted a series of measures designed to expand coverage in the individual health insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the Act provides billions of dollars of subsidies each year to help individuals buy insurance.[2] *Id*. at 2489. Second, the Act generally requires each individual to maintain coverage or pay a penalty. *Id*. at 2486. Third, the Act bars insurers from denying coverage or charging higher premiums based on an individual's health status. *Id*. Notwithstanding the various subsidies and other initiatives included in the Act, Congress found that the Act would "reduce the Federal deficit between 2010 and 2019" and would "extend the solvency of the Medicare [Hospital Insurance] Trust Fund." ACA § 1563(a), Appendix at A15-A16.

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[1] HHS is responsible for overseeing implementation of major provisions of the Act and for administering certain programs under the Act, either directly or in conjunction with other federal agencies. *See, e.g.*, 42 U.S.C. §§ 18041(a)(1)(A), (c)(1). HHS delegated many of its responsibilities under the ACA to the Centers for Medicare & Medicaid Services ("CMS"), which created the Center for Consumer Information and Insurance Oversight ("CCIIO") to oversee implementation of the ACA. Except where noted, CMS and CCIIO are referred to in this motion as "HHS."

[2] Federal insurance subsidies are advanced directly to issuers on behalf of qualified enrollees and are only available as part of an individual QHP obtained through an Exchange. *See generally* 26 U.S.C. § 36B(c)(2)(B); 42 U.S.C. § 18071(f)(2).

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

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

The ACA's Exchanges created business opportunities for insurers electing to participate. Like most business opportunities, risk was involved—here, in the form of pricing uncertainty arising from the unknown health status of an expanded risk pool and the fact that insurers could no longer charge higher premiums or deny coverage based on an enrollee's health (*i.e.*, expected cost). *See generally* HHS, Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,931-932 (July 15, 2011), A102-A103. To mitigate the pricing risk and incentives for adverse selection arising from this system, the ACA established three premium-stabilization programs modeled on preexisting programs established under the Medicare program. *Compare* 42 U.S.C. §§ 18061-18063 *with id.* §§ 1395w-115(a)(2), (b), (c), (e); *see also id.* §§ 18062(a); 18063(b); 42 C.F.R. § 423.329(b)-(c); *see also* Compl. ¶ 29 (noting that the risk corridors program "was modeled after a similar program enacted under President George W. Bush"). Informally known as the "3Rs," these ACA programs began in the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.

The 3R programs distribute risks among insurers. Each of the 3R programs is funded by amounts that insurers or plans pay into the program. *See* 76 Fed. Reg. 41,948 ("The payments and receipts in risk adjustment, reinsurance, and risk corridors are financial transfers between issuers.").

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

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

The risk corridors program, the program at issue here, was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 calendar years under which amounts collected from profitable insurers are used to fund payments to unprofitable insurers. *Id*. § 18062.

Section 1342 directed HHS to "establish and administer a program of risk corridors" under which insurers offering individual and small group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). Under the "payment methodology" set forth in the statute, if an insurer's "allowable costs" (essentially, claims costs) for the year are less than a "target amount" (premiums minus allowable administrative costs) for that year by more than three

percent, the plan shall pay a specified percentage of the difference to HHS. *Id*. § 18062(b)(2).[3] The statute refers to these payments as "payments in." *Id*. Conversely, if an insurer's allowable costs exceed the target amount by more than three percent, HHS shall pay a specified percentage of the difference. *Id*. § 18062(b)(1). The statute refers to these payments as "payments out." *Id*.

Reinsurance and risk adjustment payments affect the risk corridors calculations. Payments an issuer receives under the reinsurance and risk adjustment programs reduce the issuer's allowable costs for that year. 42 U.S.C. § 18062(c)(1)(B). Thus, risk corridors payments and charges cannot be determined until after the close of the calendar year and after final reinsurance and risk adjustment payments for that year are made. Risk corridors payments and charges, however, do not factor into the other two programs.

As this Court has recognized, "[n]either section 1342 . . . nor any of the Act's other provisions appropriated funds specifically for the risk corridors program." *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 762 (2017); *see also Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 104-05 (2016), *appeal docketed* No. 2017-1224 (Fed. Cir. Nov. 16, 2016); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 443 (2017). By contrast, in dozens of other ACA provisions, Congress appropriated or authorized the appropriation of funds for various programs. *See* p.15 n.8, *infra* (citing examples). "Payments in" from insurers are the only source of funds referenced in section 1342. *See Land of Lincoln*, 129 Fed. Cl. at 91 (noting that section 1342(b) is "silent regarding deficits or excess funds under the risk-corridors program").

[3] "Allowable administrative costs" include administrative costs and profit up to 20% of total premiums collected. 45 C.F.R. § 153.500.

When the Congressional Budget Office ("CBO") estimated the effect of the ACA on the federal budget, it included estimates for the risk adjustment and reinsurance programs. *See* Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010) ("CBO Cost Estimate"), A81-A82. The CBO estimated that for the risk adjustment and reinsurance programs payments and collections for each program would be equal in the aggregate, but noted that risk adjustment payments lag revenues by one quarter, thus potentially affecting the federal budget in a given fiscal year. *Id.* The CBO did not, however, attribute any costs to the risk corridors program when it estimated the ACA's impact on the federal budget shortly before the Act's passage. *See Id.* (omitting risk corridors from the budgetary scoring). Congress specifically referenced the CBO Cost Estimate in the ACA, in a provision that emphasized the Act's fiscal responsibility. *See* ACA § 1563(a) ("Sense of the Senate Promoting Fiscal Responsibility"), A15-A16.

C. Congress's Appropriations for the Risk Corridors Program

Congress made no provision for appropriating funds for the risk corridors program when the ACA was enacted in 2010. The program began in the 2014 calendar year, 42 U.S.C. § 18062(a), and the first set of payments could not be made before the 2015 calendar year, which corresponded to the 2015 and 2016 fiscal years.

Anticipating the upcoming appropriations process, in early 2014, Members of Congress took up the question of funding for the risk corridors program. In January 2014, the Congressional Research Service issued a memorandum concluding that section 1342 did not contain its own appropriation because it did not specify a source of funds for payments. Memorandum to House Energy and Commerce Committee, *Funding of Risk Corridor Payments Under ACA § 1342* (Jan. 23, 2014), A129. The memorandum also noted that it was too early to predict whether an

appropriation would provide a source of funding because payments would not be made until fiscal year 2015. *Id.*

Members of Congress also asked the Government Accountability Office ("GAO") to address potential sources of funds that might be used for risk corridors payments when such payments came due in 2015. *See Dep't of Health & Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, *1 (Sept. 30, 2014) ("GAO Op."), A141 (noting requests). The GAO, in turn, solicited the views of HHS, which identified only the risk corridors collections, which would not begin until 2015, as a source of funding for payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), A134-A135.[4]

In its opinion released on September 30, 2014, the GAO recognized that "Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)." *GAO Op.*, 2014 WL 4825237, at *2. The GAO then considered HHS's fiscal year 2014 appropriations then in effect, and identified only the 2014 CMS Program Management appropriation as a potential source of funding for risk corridors payments, provided Congress reenacted the same language in subsequent years when payments would be made. *Id.* at *3-*4, *5.

The annual CMS Program Management appropriation provides funding "for carrying out" enumerated programs administered by CMS, such as Medicare and Medicaid, and for "other responsibilities of [CMS]." *See generally* Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374

[4] The same Members also requested HHS's analysis of funding for risk corridors payments. *See* Letter from Fred Upton, House of Representatives, and Jeff Sessions, U.S. Senate, to Sylvia Mathews Burwell, Secretary, HHS (June 10, 2014), A136. HHS responded with the analysis it had earlier provided to GAO. Letter from Sylvia Mathews Burwell, Secretary, HHS, to Jeff Sessions, U.S. Senate (June 18, 2014), A139.

(Jan. 17, 2014), A23. The Program Management appropriation includes a lump sum amount derived from specified trust funds, including the Medicare Hospital Insurance Trust Fund, as well as "such sums as may be collected from authorized user fees and the sale of data." *Id.* While the appropriated user fees collected during one fiscal year remain available for the next five fiscal years, *id.*, the lump sum amount expires at the end of the fiscal year. *See* Pub. L. No. 113-76, div. H, tit. V, § 502, 128 Stat. 408 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."), A25. Nothing in any CMS Program Management appropriation enacted since 2010 mentions risk corridors payments.

The GAO concluded that the term "other responsibilities" in the 2014 Program Management appropriation was broad enough to encompass risk corridors payments, but it did not conclude that the appropriation *was* available for risk corridors payments. Instead, the GAO merely concluded that it "*would have been* available for making the payments pursuant to section 1342(b)(1)." *Id.* at *3 (emphasis added). The GAO agreed with HHS that "payments in" collected from insurers under the risk corridors program could be used to make "payments out" to insurers because those collections would constitute "user fees" under the appropriation, *id.* at *4, but noted that HHS would not begin collections or payments under section 1342 until fiscal year 2015, *id.* at *5 n.7. Because "[a]ppropriations acts, by their nature, are considered nonpermanent legislation," Congress would need to reenact the same language in future appropriations acts for the Program Management appropriation to supply a source of funds in future fiscal years for risk corridors payments. *GAO Op.*, 2014 WL 4825237, at *5.[5]

[5] The 2014 fiscal year ended and the 2014 CMS Program Management appropriation expired on September 30, 2014. *See* Pub. L. No. 113-76, div. H, tit. V, § 502, 128 Stat. 408, A25. Congress funded government operations, including HHS, past this date through a continuing resolution,

Congress did not reenact the same appropriations language. On December 16, 2014—months before any payments could have been claimed or made under the risk corridors program—Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015, specifically addressing funding for the risk corridors program. That law provided a lump sum amount for CMS's Program Management account for fiscal year 2015 to be derived from CMS trust funds and also continued to include a user fee provision. Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477, A43. Congress included a rider, however, that expressly limited the availability of Program Management funds for the risk corridors program, as follows:

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

Id. § 227, A45. The GAO had identified only the Program Management appropriation as the potential source of available funding for risk corridors payments, and the effect of this rider was to eliminate the lump sum amount as a source, leaving only the user fees, *i.e.*, risk corridors collections. An accompanying Explanatory Statement explained that the rider was added "to prevent the CMS Program Management appropriation account from being used to support risk

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which appropriated "[s]uch amounts as may be necessary . . . for continuing projects or activities . . . that were conducted in fiscal year 2014" as provided in the 2014 fiscal year appropriation, including the 2014 CMS Program Management appropriation. Pub. L. No. 113-164, § 101, 128 Stat. 1867 (Sept. 19, 2014), A26. The continuing resolution further provided that "no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2014." *Id.* § 104, A27. The funds made available in the continuing resolution were only available until the earlier of (1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution; (2) the enactment into law of the applicable appropriations Act for fiscal year 2015 without any provision for such project or activity; or (3) December 11, 2014. *Id.* § 106. Congress twice extended the December 11 deadline until December 17, 2014. *See* Pub. L. No. 113-202, 128 Stat. 2069 (Dec. 12, 2014), A37; Pub. L. No. 113-203, 128 Stat. 2070 (Dec. 13, 2014), A38.

corridors payments." 160 Cong. Rec. H9307-1, H9838 (daily ed. Dec. 11, 2014), A47. The Explanatory Statement further observed that, "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." *Id.*[6]

On December 18, 2015, Congress enacted an identical funding limitation in the annual appropriations act for fiscal year 2016. Pub. L. No. 114-113, div. H, title II, § 225, 129 Stat. 2242, 2624, A53. The Senate Appropriations Committee Report states:

> The Committee is proactively protecting discretionary funds in the bill by preventing the administration from transferring these funds to bail out ACA activities *that were never intended to be funded through the discretionary appropriations process*. * * * * The Committee continues bill language requiring the administration to operate the Risk Corridor program *in a budget neutral manner* by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program.

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74, at 12 (2015) (emphasis added), A57.[7] Congress subsequently enacted continuing resolutions that retained the same funding limitation, which remains in effect. *See, e.g.*, Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, 130 Stat. 857, 909 (2016); Pub. L. No. 114-254, 130 Stat. 1005 (2016).

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[6] Section 4 of the 2015 appropriations law refers to the Explanatory Statement and provides that it "shall have the same effect with respect to the allocation of funds and implementation of [the Act's provisions] as if it were a joint explanatory statement of a committee of conference." Pub. L. No. 113-235, § 4, 128 Stat. 2132, A42.

[7] The time period from September 30, 2015 (the end of fiscal year 2015) until the enactment of the fiscal year 2016 appropriations law on December 18, 2015, is covered by continuing resolutions, which incorporate the restriction on risk corridors payments. *See* Pub. L. No. 114-53 § 101(a), 129 Stat. 502, 505 (2015); Pub. L. No. 114-96, 129 Stat. 2193 (2015); Pub. L. No. 114-100, 129 Stat. 2202 (2015).

D. HHS's Implementation of the Risk Corridors Program

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

In March 2014, HHS informed insurers that it would "implement th[e] program in a budget neutral manner." 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014). In April 2014, HHS released guidance explaining that CMS would operate risk corridors as a three-year program and if the total amount that insurers paid into the risk corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula, payments to insurers would be reduced pro rata to the extent of any shortfall. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014), A131. The guidance further explained that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the current year. *Id*.

HHS implemented its payment methodology when collections in fact proved insufficient to pay the full amounts calculated under the statutory formula. In November 2015, HHS announced that for 2014 (the program's first year), the total amount that insurers were expected to pay in ($362 million) was $2.5 billion less than the total amount that insurers requested ($2.87 billion). Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015), A149. As a result, HHS indicated that it would at that time make pro-rated payments of approximately 12.6 percent of the amount requested for 2014. *Id*. The following year, HHS announced that it would apply the total amount that insurers were expected to pay in for 2015 ($95 million) to outstanding payment requests for 2014. Risk Corridors Payment and Charge Amounts for the 2015 Benefit

Year (Nov. 16, 2016), A188. HHS has made two annual payments, one in 2015 and one in 2016, for the three-year program. Insurers have not yet submitted their data for 2016, which are due July 31, 2017. To date, the total amount of "payments in" for 2014 and 2015 is approximately $8.3 billion less than the total amount calculated as "payments out" for those years.

E. Health Republic's Participation on the Exchanges

Health Republic offered QHPs on the Oregon Exchange in calendar years 2014 and 2015. Compl. ¶ 16. HHS calculated for the 2014 benefit year a risk corridors payment for Health Republic in the amount of $7,894,886.15. Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015), A172. Due to a shortfall in the risk corridors collections, HHS announced a prorated payment to Health Republic of $994,904.41. *Id.* HHS calculated for the 2015 benefit year a risk corridors payment for Health Republic in the amount of $13,000,493.30, and announced that Health Republic would receive another $261,922.66 towards its 2014 payment. To date, Health Republic has received $1,200,540.34 for benefit year 2014. HHS currently lacks funding to pay benefit year 2015 amounts.

SUMMARY JUDGMENT STANDARD

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1283 (Fed. Cir. 2008). In considering a motion for summary judgment, the Court's role is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

ARGUMENT

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

A. Section 1342 of the ACA Did Not Appropriate Funds for Risk Corridors Payments or Make Such Payments an Obligation of the Government

The risk corridors program is one of three premium stabilization programs created by the ACA (together known as the "3Rs"). There is no dispute that the other two 3Rs programs—the reinsurance and risk adjustment programs created by sections 1341 and 1343 of the ACA, respectively—are funded solely by amounts paid by insurers or plans. Plaintiff's Motion for Summary Judgment ("Pl. Br."), Docket 47, at 17. Health Republic contends that the risk corridors program created by section 1342 of the ACA uniquely obligates the government to use taxpayer dollars to make up shortfalls in amounts collected from insurers. But the text, structure, history, and purpose of the risk corridors program demonstrate that the program was to be self-funded.

Section 1342 directed HHS to "establish and administer" a system of payment adjustments among insurers for the 2014, 2015, and 2016 calendar years, 42 U.S.C. § 18062(a), based on a retrospective analysis of insurers' data for a prior full year, *id*. § 18062(b). Insurers that overpriced their premiums relative to costs make "payments in" at specified percentages; insurers that underpriced their premiums relative to costs receive "payments out" at corresponding percentages. *Id*. The "payment methodology" provision, which states that HHS "shall pay" amounts calculated under the statutory formula, *id*. § 18062(b)(1), does not refer to any potential funding source other than "payments in," *id*. § 18062(b)(2).

Nothing in the text of section 1342 obligated—or indeed permitted—the government to use taxpayer dollars to make massive, uncapped payments to insurance companies. In dozens of other ACA provisions, Congress appropriated funds or enacted statutory language authorizing the

appropriation of funds in the future.[8] *See Land of Lincoln*, 129 Fed. Cl. at 104-05 ("Congress also provided appropriations or authorizations of funds for other programs within the Act, but it never has done so for the risk-corridors program.") (citing 42 U.S.C. §§ 18031(a)(1), 18054(i)). In contrast, the only funds referred to in the risk corridors statute are "payments in" by insurers and "payments out" to insurers. Section 1342 makes no reference to appropriations whatsoever. 129 Fed. Cl. at 91 (noting that section 1342 is "silent regarding deficits or excess funds under the risk-corridors program").

Congress omitted from section 1342 any language making risk corridors payments an obligation of the government, in contrast to the preexisting risk corridors program under Medicare Part D on which the ACA risk corridors program was generally modeled. *See* 42 U.S.C. § 18062(a) (stating that the ACA's risk corridors program "shall be based on" the risk corridors program under Medicare Part D); *see also* Pl. Br. 17 n.12. The Medicare Part D statute, unlike the ACA risk corridors provision, expressly made risk corridors payments an obligation of the government:

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

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

Congress enacted no equivalent language in section 1342 of the ACA, even though, as Health Republic acknowledges, Part D's payment process "had long been in place when Congress

[8] For examples of ACA provisions appropriating funds, *see*, *e.g.*, ACA §§ 1101(g)(1), 1311(a)(1), 1322(g), 1323(c). For examples of ACA provisions authorizing the appropriation of funds, *see*, *e.g.*, ACA §§ 1002, 2705(f), 2706(e), 3014, 3015, 3504, 3505(a), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

included Section 1342 in the ACA." Pl. Br. 17.[9] This contrast is especially notable because Congress did enact equivalent language creating an obligation elsewhere in the ACA. *See* ACA § 2707(e)(1)(B) (for a psychiatric demonstration project, Congress provided, "BUDGET AUTHORITY.—Subparagraph (A) constitutes budget authority in advance of appropriations Act and represents the obligation of the Federal Government to provide for the payment of the amounts appropriated under that subparagraph."), A18.

By omitting from section 1342 the budget language it used in the preexisting Medicare Part D statute and elsewhere in the ACA, Congress ensured that section 1342 would not by itself make risk corridors payments an obligation of the government without further action by Congress. "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Land of Lincoln*, 129 Fed. Cl. at 105 (quoting *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012)). And consistent with the plain text of the statute, the budget estimate that the CBO prepared for Congress when the ACA was under consideration indicated that risk corridors would not increase the federal deficit. *See* CBO Cost Estimate, Tbl. 2 (omitting risk corridors from the budget scoring), A81-A82. When the CBO—which is the legislative branch agency responsible for providing Congress with nonpartisan budget analyses—estimated the budgetary impact of the ACA and identified

[9] Judge Wheeler mistakenly believed that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Moda*, 130 Fed. Cl. at 455. But the Part D statute provides that "the Secretary shall provide for payment," 42 U.S.C. § 1395w-115(a), and that, if risk corridor costs for a plan are greater than a specified threshold, "the Secretary *shall increase the total of the payments* made to the sponsor or organization offering the plan" by a specified amount, 42 U.S.C. § 1395w-115(e)(2)(B)(i), (ii) (emphasis added). Thus, contrary to Judge Wheeler's reasoning, the Medicare Part D statute directs the Secretary to make specific payments to insurers.

"budgetary cash flows for direct spending" from the ACA, A66, it did not mention risk corridors payments, reflecting the understanding that the program would be self-funded.

By contrast, the CBO did score the other 3R programs. The CBO noted that under the risk adjustment program, payments lag receipts by one quarter, which may affect the budget. CBO Cost Estimate at Tbl. 2 note a, A82. And the CBO noted that under the reinsurance program, payments were expected to total $20 billion, *id*., whereas collections were expected to total $25 billion, 42 U.S.C. § 18061(b)(3)(B). The CBO likewise scored ACA § 2707 which, as discussed above, made payments under a psychiatric demonstration project an obligation of the government. *See* CBO Cost Estimate, Tbl. 5 (indicating that section 2707 would increase the federal deficit), A87.

Congress explicitly relied on the CBO Cost Estimate when it enacted the ACA. In an ACA provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the Federal deficit between 2010 and 2019." ACA § 1563(a), A15. That projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010, A61. And it was predicated on Congress's understanding that risk corridors payments would not increase the deficit.

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

If there were any doubt as to whether Congress had established risk corridors as a self-funded program, it was removed by the legislation that provided appropriations for risk corridors payments. In those statutes, Congress appropriated the funds that insurers would pay into the risk corridors program, and expressly barred HHS from using other funds to make risk corridors payments. Those appropriations acts confirm that section 1342 required "payments out" to be

made solely from "payments in." And even if there could be a question as to the meaning of section 1342, the appropriations acts definitively capped "payments out" at the total amount of "payments in."

As discussed above, the risk corridors program began in calendar year 2014. Because section 1342 of the ACA required HHS to use a full year's data to calculate payment amounts, no payments could be made until calendar year 2015, which corresponded to the 2015 and 2016 fiscal years. *Accord Health Republic*, 129 Fed. Cl. at 774 (noting that "Congress required HHS to make separate calculations for each calendar year"). Congress thus addressed the question of appropriations for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015.[10]

Under the Appropriations Clause, Congress controls the power of the purse. U.S. Const. art. I, § 9, cl. 7. Congress exercises that power by providing "budget authority," which grants federal agencies authority to incur financial obligations that are binding on the United States. *See* 2 U.S.C. § 622(2); GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2–1 (4th ed. 2016) (*GAO Red Book*), A181; *see also id.* at 2-55 ("Agencies may incur obligations only after Congress grants budget authority."), A183.[11] The Congressional Budget Act defines the four kinds

[10] The appropriations laws present no constitutional issues. *See* Pl. Br. 23 n.19. As set forth above, section 1342 does not entitle issuers to risk corridors payments in excess of collections, so the appropriations restrictions do not curtail any vested rights issuers may assert under section 1342. Moreover, because issuers could have no right to receive risk corridors payments until after the conclusion of the 2014 calendar year, even if the Court were to conclude that section 1342 had created a right to payment that the appropriations laws modified, issuers would have had no vested rights to receive risk corridors payments until sometime in 2015, and by that time Congress had already exercised its prerogative to preclude any such vesting. In any event, an obligation on the part of the United States to pay money under a statutory benefits program does not give rise to a constitutional claim, *Adams v. United States*, 391 F.3d 1212, 1224 (Fed. Cir. 2004), and Health Republic does not assert a Takings claim.

[11] The *GAO Red Book* is being updated on a chapter-by-chapter basis. Citations are to the 2016

of budget authority:

> **(i)** provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
>
> **(ii)** borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;
>
> **(iii)** contract authority, which means the making of funds available for obligation but not for expenditure; and
>
> **(iv)** offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

2 U.S.C. § 622(2)(A). A claimant seeking to enforce a money-mandating statute or regulation generally "must identify not just a command to make [payment], but an appropriation of . . . money that . . . may [be] use[d] for that purpose." *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005).

The Federal Circuit has repeatedly recognized that statutory language providing that an agency "shall pay" amounts calculated under a statutory formula (or words to that effect) does not, standing alone, create an obligation on the part of the government to provide for full payment. *See Prairie Cty., Montana v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). The threshold inquiry is whether Congress obligated the government to make full payment without regard to appropriations, and as with all statutory questions, the touchstone of that inquiry is congressional intent. *See Prairie Cty.*, 782 F.3d at 690 ("Absent a contractual obligation, the question here is whether the statute reflects congressional

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edition unless otherwise indicated.

intent to limit the government's liability for [Payment in Lieu of Taxes Act (PILT)] payments, or whether PILT imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress."). And when a plaintiff seeks money damages for payments Congress has not funded, courts unfailingly look to the appropriations laws for the years in question to determine whether Congress has authorized the expenditures the plaintiff seeks. *See, e.g.*, *Star-Glo Assocs.*, 414 F.3d at 1352-54; *Highland Falls*, 48 F.3d at 1169.

In September 2014, in response to a request from Members of Congress, the GAO issued an opinion identifying two components of the CMS Program Management appropriation for fiscal year 2014 that, if reenacted in subsequent appropriations acts, could be used to make risk corridors payments. First, the GAO explained that the appropriation for "user fees" would, if reenacted for fiscal year 2015, allow HHS to use "payments in" from insurers to make "payments out" to insurers. *GAO Op.*, 2014 WL 4825237, at *3-4. Second, the GAO explained that, if reenacted, a lump sum appropriation to CMS for the management of enumerated programs such as Medicare and Medicaid as well as for "other responsibilities" of CMS could be used to make risk corridors payments. *Id*. at *3. The GAO stressed, however, that these sources would not be available for risk corridors payments unless Congress enacted similar language in the appropriations acts for subsequent fiscal years. *Id*. at *5.

Congress did not enact the same appropriations language for fiscal year 2015. Congress reenacted the user fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, tit. II, 128 Stat. 2130, 2477 (2014), A43. But Congress added a new provision that expressly barred HHS from using other funds for risk corridors payments:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid

> Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Id. § 227, 128 Stat. 2491, A45. The effect of this appropriations legislation was to ensure that "payments out" would not exceed the total amount of "payments in." The appropriations legislation thus confirmed that the statute would operate as originally designed: the risk corridors program would be self-funded.

Moreover, even assuming that section 1342 had made risk corridors payments an obligation of the government (beyond amounts collected as "payments in"), this specific appropriations legislation, enacted before any risk corridors payments could have been made, definitively capped payments at amounts collected and thus superseded any such obligation. There is no doubt that appropriations legislation can amend a preexisting statutory obligation, as long as Congress's intent to do so is clear. In *United States v. Dickerson*, 310 U.S. 554 (1940), for example, the Supreme Court held that an appropriations act precluding the use of funds to pay military reenlistment allowances superseded permanent legislation providing that an enlistment allowance shall be paid "to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his discharge." Similarly, in *United States v. Will*, 449 U.S. 200, 207, 224 (1980), the Supreme Court held that an appropriations act providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely." And in *United States v. Mitchell*, 109 U.S. 146, 148 (1883), the Supreme Court held that "by the appropriation acts which cover the period for which the appellee claims compensation, [C]ongress expressed its purpose to suspend the operation of [a prior statute fixing salaries] and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum."

The Federal Circuit's decision in *Highland Falls* is squarely on point. In contrast to section 1342, the permanent legislation at issue in *Highland Falls*—section 2 of the Impact Aid Act—provided that school districts "shall be entitled" to payment of amounts calculated under a statutory formula. *See* 48 F.3d at 1168. Moreover, the statute specified that in the event of a shortfall in appropriations for various statutory programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2 of the Impact Aid Act. *Id*. Subsequently, however, Congress earmarked certain amounts for entitlements under various sections of the Impact Aid Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id*. at 1169. In light of that clear limit on appropriations, the Federal Circuit held that the school districts were entitled to only a pro rata share of the amounts calculated under the statutory formula. *Id*. at 1170-71.

Similarly in *Star-Glo*, Congress had established a temporary program directing the Secretary of Agriculture to "pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed to control citrus canker" and appropriated $58 million for these payments. 414 F.3d at 1357 & n.7. Growers brought suit seeking additional payments for trees removed after the $58 million appropriation had been exhausted. *Id.* at 1352-53. Nothing in the statute provided for capping the United States' liability through language like "not to exceed" and "not more than," but the court looked to legislative history and concluded that Congress intended to cap total payments at $58 million. *Id.* at 1354.

The application of *Highland Falls* and *Star-Glo* is clear: Congress has in the appropriations laws removed any doubt that the Secretary is only obligated to make risk corridors payments to the extent of collections. As in *Highland Falls*, it is difficult "imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." 48 F.3d

at 1170. Indeed, the appropriations legislation for risk corridors is materially indistinguishable from the appropriations legislation in *Highland Falls*. As in *Highland Falls*, the agency could not (in light of the shortfall in collections) have paid full amounts calculated under the statutory formula without violating the Anti-Deficiency Act, which states that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation . . . for the expenditure." *Id*. at 1171 (quoting 31 U.S.C. § 1341(a)(1)(A)) (this Court's alterations). And in enacting the express restrictions on funding for risk corridors payments, Congress left no doubt as to its intent, which was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838, A47.

Health Republic makes no attempt to distinguish *Highland Falls*, which its brief does not discuss. Instead, Health Republic asserts that "the passage of an appropriations bill, by a different Congress . . . is irrelevant to the construction of [section 1342.]" Pl. Br. 24 (citation omitted). But that assertion is incorrect when the question before the Court is whether Congress has authorized the very payments a plaintiff seeks. Section 1342 alone did not create a "payment obligation." *Id.* Instead of creating such an obligation (as Congress did in the Medicare Part D statute and elsewhere in the ACA), section 1342 reserved Congress's full budget authority over risk corridors payments.

Second, there was no "mere failure" by Congress to appropriate funds for risk corridors payments. In the only acts that appropriated funds for such payments, Congress appropriated "payments in" but expressly barred HHS from using other funds to make "payments out." And as discussed above, the precedents of the Supreme Court and this Court recognize that even where

(unlike here) permanent legislation creates a government obligation, that obligation can be modified by appropriations legislation of this kind.

C. Health Republic Provides No Basis to Use Taxpayer Funds to Make Up Shortfalls in Collections from Insurers

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

The crux of Health Republic's argument is that language in section 1342(b) stating that the Secretary "shall pay" amounts calculated under the formula is sufficient to create a binding obligation on the government, regardless of appropriations and despite Congress's repeated and express funding limitations. *See* Pl. Br. 23-24. This argument rests on two independent errors. First, the language on which Health Republic relies is embedded in the statute's "payment methodology" provision, section 1342(b). *See* 42 U.S.C. § 18062(b). The operative provision is section 1342(a), which directs the Secretary to establish and administer a program of payment adjustments among insurers. *See* 42 U.S.C. § 18062(a) ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums."). Thus, the language on which the insurers rely simply describes the way the Secretary shall administer the program of payment adjustments among QHPs; it is not a freestanding directive to the agency to make payments.

Second, as explained above, even a freestanding directive to an agency to pay amounts calculated under a statutory formula would not—standing alone—create an obligation on the part of the government to make payments without regard to appropriations. The Federal Circuit's affirmance of this Court's decision in *Prairie County, Montana v. United States*, 113 Fed. Cl. 194

(2013), *aff'd*, 782 F.3d 685 (Fed. Cir. 2015), is illustrative. As this Court is aware, the statute at issue in *Prairie County* directed an agency to make payments to local governments in accordance with a statutory formula, but the Federal Circuit rejected the contention that the statute obligated the government to make full payments regardless of appropriations. The court explained that "if Congress had intended to obligate the government to make full . . . payments, it could have used different statutory language." 782 F.3d at 691. Specifically, the court noted that Congress did use different language in a subsequent amendment to the statute, which provided that each local government "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." *Id.* Because that amendment did not apply to the fiscal years at issue in *Prairie County*, the government had no obligation to make payments in excess of appropriations for those years. *Id*.

The language of "obligation" that the Federal Circuit discussed in *Prairie County* is comparable to the language of "obligation" that Congress used in the Medicare Part D statute and elsewhere in the ACA. But as explained above, Congress omitted that language (or its equivalent) from section 1342. Accordingly, section 1342 did not create a government obligation to make risk-corridors payments without regard to appropriations. Indeed, the insurers' claim here is even weaker than the claim in *Prairie County*, because the permanent legislation in *Prairie County* authorized appropriations, while limiting the scope of that authorization.[12] By contrast,

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

section 1342 does not authorize appropriations in the first place, nor does it provide any other budget authority for risk corridors payments.

Neither Health Republic, nor Judge Wheeler in *Moda*, provide any reason to disregard the plain text of section 1342, which does not obligate the government to use taxpayer funds to compensate unprofitable insurers. Although Health Republic suggests that section 1342 should be interpreted to track Medicare Part D, *see* Pl. Br. 17, plaintiff does not explain how a court could properly do so in light of the crucial differences in the language of the two statutes. As discussed above, Congress made Medicare Part D payments an "obligation" of the government but declined to do so in section 1342.

Following *Moda*, Health Republic argues that section 1342 obligates the Government to pay "certain, defined amounts" without regard to appropriations. Pl. Br. 24; *see also Moda*, 130 Fed. Cl. at 455 (section 1342 "simply directs the Secretary of HHS to make full 'payments out.'"). Under the "straightforward and explicit command of the Appropriations Clause," however, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. Neither the ACA nor section 1342 provides an appropriation for risk corridors payments. *Health Republic*, 129 Fed. Cl. at 762. And as discussed above, a direction to pay does not, standing alone, create an obligation of the government. That is why the Medicare Part D statute not only directs the Secretary to make specified payments to insurers, but also provides budget authority to do so and makes such payments an obligation of the government. In section 1342, by contrast, Congress reserved its power of the purse by withholding both (1) an appropriation or authorization of appropriations, and (2) any language that makes risk corridors payments an obligation of the government.

Health Republic's policy arguments are equally unavailing. The ACA's premium stabilization programs were designed to *mitigate* insurers' risks, not to *eliminate* insurers' risks by creating a government guarantee. Indeed, Health Republic concedes that the other 3R programs—reinsurance and risk adjustment—are self-funded. Pl. Br. 17. And while the programs are "interlocking" insofar as reinsurance and risk adjustment payments are included in the risk corridors formula, risk corridors payments and charges do not factor into the other two programs. Health Republic's contention that the risk corridors program alone creates an uncapped government obligation to indemnify insurers against losses regardless of appropriations thus has no grounding in the statutory text and gives short shrift to the ACA's explicit emphasis on fiscal responsibility. ACA § 1563, A15.

Health Republic's invocation of "the risk corridors' and other 3R programs' fundamental purpose: annual premium stabilization," Pl. Br. 20, also "ignores the complexity of the problems Congress [was] called upon to address," *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Health Republic asserts that full, annual risk corridors payments in the amounts calculated "would have worked to reduce risk on QHP issuers and help them keep insurance premiums . . . stable in the early years of the exchanges." Pl. Br. 20. But the Exchanges created significant business opportunities for insurers, which had an incentive to compete for market share by lowering premiums. Indeed, a recent article noted "the prevalent strategy of deliberately selling policies below cost in the early years of the program in order to gain market share." Seth Chandler, *Judge's Ruling On 'Risk Corridors' Not Likely To Revitalize ACA*, Forbes, Feb. 13, 2017, A201. A government commitment to indemnify insurers against losses would have exacerbated those incentives, but Congress prudently refrained from committing taxpayer dollars to unprofitable insurers.

Judge Lettow rejected the argument that anything less than "full payments annually defeats the purpose of the risk-corridors program[.]" *Land of Lincoln*, 129 Fed. Cl. at 107. As Judge Lettow recognized, "HHS's payments in due course, not necessarily [in full] annually, to the extent funds are available from 'payments in' without resort to appropriated funds, can still serve the program, albeit not to the extent [issuers] urge[]." *Id.* Indeed, reliance on the general purposes of the program cannot overcome Congress's decision to mitigate losses only to the extent of collections. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

2. Neither the FY 2014 appropriation nor the Judgment Fund was available for risk corridors payments

Health Republic also fails to identify any proper basis to disregard Congress's express limitation on funding for risk corridors payments. As discussed above, HHS's fiscal year 2014 appropriation included a $3.7 billion lump sum for the management of enumerated programs such as Medicare and Medicaid and for "other responsibilities" of CMS. Judge Wheeler mistakenly believed that HHS could have used that lump sum to make risk corridors payments during fiscal year 2014, before Congress's express funding limitation took effect in December 2014. *Moda*, 130 Fed. Cl. at 456 (the "fiscal year 2014 CMS Program Management appropriation" was "available" but "HHS chose not to use [it]"). Health Republic similarly misreads the GAO's opinion for the proposition that "the GAO had concluded that HHS program funds were available to make payments under Section 1342." Pl. Br. 23 n.18.

The terms of the ACA foreclose that conclusion. By law, the lump sum appropriation in the FY 2014 appropriation expired at the end of the fiscal year (September 30, 2014). *See* Pub. L. No. 113-76, div. H, tit. V, 128 Stat. 408 (2014), A25.[13] And under the plain terms of section 1342, no risk corridors payments could have been made until the 2015 calendar year. Section 1342 requires that "payments in" and "payments out" be calculated using insurers' data from the entire year. *See* 42 U.S.C. § 18062(b). Indeed, an insurer's allowable costs for the year must be reduced by any reinsurance and risk adjustment payments it receives, and those payments are not made until after the end of the calendar year. *Id*. § 18062(c)(1)(B). Thus, "payments out" for the 2014 benefit year were not an "other responsibility" of CMS in fiscal year 2014. That is why the GAO advised Congress that, for funds to be available for risk corridors payments, subsequent appropriation acts must include language similar to the language included in the appropriation for fiscal year 2014. 2014 WL 4825237, *5. Congress did not include similar language in subsequent appropriation acts; Congress appropriated "payments in" but barred HHS from using other funds for risk corridors payments.

Judge Wheeler alternatively reasoned that Congress must have intended to allow insurers to collect full risk corridors payments from the Judgment Fund because the appropriations acts did not state that no funds "in this *or any other* [*a*]*ct*" are available for risk corridors payments. *Moda*, 130 Fed. Cl. at 462 (emphasis added). But the "general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement," *Richmond*, 496 U.S. at 432, and it has no bearing on the threshold question of liability. Thus, in *Highland Falls*, this Court rejected

[13] Likewise, the continuing resolutions noted by Judge Wheeler, *Moda*, 130 Fed. Cl. at 457 n.13, made funds available only until December 2014, when Congress enacted the FY 2015 appropriations act. *See* Pub. L. No. 113-164, § 106, 128 Stat. 1868 (2014), A27.

a Tucker Act claim for damages from the Judgment Fund, even though Congress had simply capped funds available under an agency's appropriations act without making reference to "any other act." Under Judge Wheeler's reasoning, the claimants in *Highland Falls* should have prevailed rather than lost.[14]

In the acts appropriating funds for risk corridors payments, Congress responded to the analysis in the GAO opinion, which identified only two potential funding sources—"payments in" and the lump sum appropriation for program management. Informed by the GAO's analysis, Congress appropriated "payments in" but barred HHS from using other funds in the program management account. Congress thus ensured that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838, A47. As in *Highland Falls*, that "clear congressional mandate" precludes plaintiff's statutory claim. 48 F.3d at 1171.

To the extent *Moda* relied on *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), its reasoning was foreclosed by the Federal Circuit's decision in *Prairie County*, which held that *Ramah*'s reasoning does not extend to statutory claims. *See Prairie Cty.*, 782 F.3d at 689-90. In holding that "the Government cannot back out of its contractual promise to pay each Tribe's full contract support costs," the Supreme Court relied on "well-established principles of Government

[14] Plaintiff's reliance (Pl. Br. 24) on the Federal Circuit's decision in *Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (en banc), is likewise misplaced. *Slattery* held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. *Id*. at 1321. But as *Highland Falls* and the other cases discussed above demonstrate, Congress's exercise of its power of the purse is of central relevance to the merits question of liability under a statute. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). Until entry of judgment or execution of a settlement, the Judgment Fund's permanent appropriation is unavailable. *See Slattery*, 635 F.3d at 1317 (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims").

contracting law." *Id*. (quoting *Ramah*, 132 S. Ct. at 2188, 2189, 2192). As this Court has noted, gaining rights under a "contractually based program" and "qualifying for participation in a benefits program" are "not equivalent." *Prairie Cty.*, 113 Fed. Cl. at 201. "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). By contrast, a "statutory obligation to pay money, even where unchallenged," does not "create a property interest within the meaning of the Takings Clause," *Adams*, 391 F.3d at 1225, and the extent of a statutory obligation may be determined by appropriations, *Highland Falls*, 48 F.3d at 1170-72.

3. The cases on which Health Republic relies are inapposite

This case bears no resemblance to the cases on which Health Republic relies. In *District of Columbia v. United States*, Congress had transferred a federal hospital to the District of Columbia under the Saint Elizabeths Hospital and District of Columbia Mental Health Services Act, which provided that the United States would bear a share of the costs of the transition of the hospital from the federal government to the District. 67 Fed. Cl. 292, 297 (2005). The Act also provided that HHS "shall initiate . . . and complete . . . such repairs and renovations to such physical plant and facility support systems of the Hospital." Pub. L. No. 98-621, § 4(f)(2)(A), 98 Stat. 3369, 3373 (1984). The Act was later amended to permit HHS to enter into an agreement with the District whereby the District would contract for the repairs and renovations, which HHS would fund. *District of Columbia*, 67 Fed. Cl. at 298 (citing Pub. L. No. 102-150, 105 Stat. 980 (1991). Congress had made several specific appropriations to fund the repair and renovation costs, and those appropriations were paid to the District. *Id.* at 334-35. Those appropriations did not purport to satisfy the Government's existing obligation, which was not to make payments but to "repair[] and renovat[e]." Looking to the legislative history, "all the court is able to conclude . . . is that

Congress had every intention of fully funding repairs and renovations." *Id.* at 336. In contrast, section 1342 alone creates no payment obligation, and Congress twice expressly restricted funding for risk corridors payments.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is equally far afield. The appropriations act in that case stated that "none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services *other than as provided in the* Federal Employees Pay Act of 1945." *Id*. at 48-49 (emphasis added). Because "the 1945 act expressly state[d] . . . that it should not prevent payments in accordance with the 1931 act," the court concluded that the italicized language allowed the plaintiffs to "be paid according to the 1931 act." *Id*. at 50. The risk corridors provisions do not contain any language comparable to the italicized language on which *Gibney* relied.

Nor does *United States v. Langston*, 118 U.S. 389 (1886), support Health Republic's claim. The substantive statute in *Langston* provided that the representative to Hayti "shall be entitled to a salary of $7,500 a year," and "[t]he sum of $7,500" had in fact "been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883." *Id*. at 390. For two subsequent years, Congress appropriated only $5,000 each for the salaries of various ministers including the minister to Hayti, but Congress omitted from these acts proposed language that would have repealed statutes allowing a larger salary. *Id*. at 391. While cautioning that the case was "not free from difficulty," the Supreme Court concluded that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years." *Id*. at 394.

Langston may have been a difficult case, but the risk corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does not make risk corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston*, Congress did not merely fail to appropriate sufficient funds for risk corridors payments, but prohibited HHS from using funds other than collections for such payments.[15]

New York Airways v. United States, 369 F.2d 743 (Ct. Cl. 1966), on which Judge Wheeler relied, is likewise readily distinguishable. In that case, the court addressed a shortfall in appropriations to compensate helicopter companies for delivering the U.S. mail. But unlike section 1342, the statute at issue in *New York Airways* made explicit reference to appropriations, and there was no dispute that payments would be made from the general fund of the Treasury. 369 F.2d at 745 (quoting 49 U.S.C. § 1376(c) (1964)) ("The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft . . ."). Second, the statute expressly provided for compensation for services rendered to the Government, and the court recognized, even when considering the effect of the appropriations law, that payments were a "contract obligation" of the Government. 369 F.2d at 746.

Third, the express appropriations restrictions at issue here bear no resemblance to the appropriations provision in *New York Airways*. That provision, which referenced "Liquidation of Contract Authorization" in its title, simply provided for an appropriation "not to exceed" a specific sum. As noted, the court determined from the legislative history that Congress did not intend that appropriation to limit amounts owed to carriers. 369 F.2d at 749-51. In contrast, Congress

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

appropriated only risk corridors collections and expressly barred the use of other funds to make risk corridors payments, and nothing in the text or legislative history of the Spending Laws or section 1342 itself suggests that Congress understood risk corridors payments to be contractual or that the United States would be liable for any shortfall in collections.

Finally, the *New York Airways* court recognized that "clear and uncontradicted" "proof of congressional inten[t] . . . in the legislative history" to amend permanent legislation through an appropriations restriction would place the restriction "within the ambit of *Dickerson*." *Id.* at 750. But in *New York Airways*:

> Congress was well-aware that the Government would be legally obligated to pay the carriers whatever subsidies were set by the Board even if the appropriations were deficient, [as was] evident in the floor debates during the period from 1961 through 1965. The subsidy was recognized by responsible members of Congress on both sides as *a contractual obligation* enforceable in the courts which could be avoided only by changing the substantive law under which the Board set the rates, rather than by curtailing appropriations.

Id. at 747 (emphasis added). Here, in contrast, the legislative history is "clear and uncontradicted." Congress enacted the appropriations restrictions to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect," 160 Cong. Rec. H9838, A47, and to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner," S. Rep. No. 114-74, at 12, A57.

D. Health Republic's Reliance-Based Arguments Fail as a Matter of Law

For related reasons, Health Republic does not advance its position by relying on HHS's statements allegedly promising to make risk corridors payments without regard to appropriations. *See* Pl. Br. 18-19, 28-31. Although HHS often explicitly recognized that its ability to make such

payments was subject to appropriations,[16] in at least one public statement HHS failed to do so.[17] HHS at various times also stated that the ACA "requires the Secretary to make full payments to issuers," Pl. Br. 19, and described risk corridors payments as "an obligation of the U.S. Government," Pl. Br. 29.[18]

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

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

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[16] *See* 79 Fed. Reg. 30,240, 30,260 (May 27, 2014) (stating that if collections are insufficient to fund payments, "HHS will use other sources of funding for the risk corridors payments, *subject to the availability of appropriations*) (emphasis added); 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (same); CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186 (similar).

[17] *See* 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013) (stating that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act"). In light of the Anti-Deficiency Act, even that statement assumed the availability of appropriations to "remit payments."

[18] *See also* CMS, Risk Corridors Payments for the 2014 Benefit Year (Nov. 19, 2015) (stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligations of the United States Government for which full payment is required"), A149; CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186 (similar).

Id. That would contravene "the straightforward and explicit command of the Appropriations Clause," which provides that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id*. at 424.

It is thus settled that "[a] regulation may create a liability on the part of the government only if Congress has enacted the necessary budget authority." *GAO Red Book* 2-2, A182. Likewise, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." GAO, *Principles of Federal Appropriations Law* (Vol. II) at 7-8 (3d ed. 2004), A60. Any reliance-based arguments founder on these bedrock principles.[19, 20]

Thus, Health Republic's recitation of HHS's statements is legally irrelevant. Moreover, given the agency's repeated recognition of the limits of its budget authority, any reliance on those statements would have been unreasonable and selective, at best.

* * * *

In sum, Congress did not create a statutory payment obligation when it enacted section 1342, and insurers are not entitled to more than their prorated share of collections. Congress reserved its full budget authority over the amount of risk corridors payments, and for the years in question—the only years risk corridors payments could be made—Congress appropriated only risk corridors collections and expressly barred the use of other funds to ensure that the federal

[19] Because the reliance-based arguments fail as a matter of law, the United States agrees that discovery of HHS's statements is unnecessary. Pl. Br. 12 n.10. Moreover, the United States does not seek deference on the question whether the government has a statutory obligation to make risk corridors payments in the absence of appropriations because Congress did not delegate that question to the agency but reserved to itself its full budget authority over the *amount* of risk corridors payments. The narrow question where deference is appropriate, should the Court reach it, is on the *timing* of payments, discussed below.

[20] Similarly, the alleged effects of HHS's Transitional Policy, Pl. Br. 13-14, are immaterial to the question of liability under section 1342. Health Republic does not challenge the policy in its Complaint, nor has it challenged the policy under the Administrative Procedure Act.

government would not pay out under the program more than it collected from profitable insurance companies. The United States is not liable for any shortfall.

II. Should the Court Reach the Issue, the Timing of HHS's Risk Corridors Payments Is Reasonable and Consistent with the Statute

The only remaining issue concerns the timing of risk corridors payments, which the United States explained implicates the Court's jurisdiction. This Court, however, has concluded that the issue of timing goes to the merits of Health Republic's claim. *Health Republic*, 129 Fed. Cl. at 778. To be sure, because final payments are not yet due under HHS's implementation of section 1342, Health Republic and other issuers are not entitled to judgment for those payments. Nevertheless, whether section 1342 permits HHS's three-year payment framework will become moot with the passage of time because the final payment cycle will be complete in 2018. In the interest of efficiency, the Court should first decide whether insurers are entitled to payments in excess of collections.

As this Court is aware, in April 2014, HHS released guidance explaining how it would proceed if the total amount that insurers paid into the risk corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula. CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014), A131. The guidance explained that payments to insurers would be reduced pro rata to the extent of any shortfall, and that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the program year for which they were collected. *Id*.

HHS implemented that three-year payment framework when "payments in" in fact proved insufficient to fund in full the "payments out" calculated under the statutory formula. In 2015, HHS made risk corridors payments for the 2014 year to the extent of its budget authority, that is,

it used the funds that insurers paid in for the 2014 year to make a proportion of the payments calculated for that year. In 2016, HHS used the funds collected from insurers for the 2015 year to reduce outstanding payment amounts from 2014. Insurers have not yet submitted their data for the 2016 year, but HHS has indicated that it will use the total amount collected for 2016 to reduce outstanding payment amounts from 2014 and 2015 and to make payments for 2016 to the extent funds are available. To the extent funds collected from issuers for the 2016 year are insufficient to fund all three years of "payments out," HHS has indicated that it will make additional risk corridors payments if appropriations permit. CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186.

Judge Lettow correctly held that this three-year payment framework is reasonable and consistent with the statute. *Land of Lincoln*, 129 Fed. Cl. at 106-08. Neither section 1342 nor the regulations specify a deadline by which risk corridors payments must be made. *Id.* at 108. Moreover, Congress ratified the agency's three-year payment framework when it enacted legislation appropriating funds for risk corridors payments. Aware of the three-year framework that HHS had announced, Congress appropriated "payments in" but barred HHS from using other funds for risk corridors payments. The agency's implementation of the three-year framework thus enabled it to make annual payments to the full extent of its budget authority, while leaving open the opportunity for additional payments as the three-year program progressed.

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

funds, *id*., and there is no allegation that HHS has failed to make annual risk corridors payments to the extent it has collected risk corridors charges.

The narrow question presented is whether HHS, while making annual payments to the extent of its budget authority, reasonably left open the possibility of additional payments in future years. And it was eminently reasonable for HHS to leave that possibility open. Congress retains its usual prerogative to appropriate additional funds for risk corridors payments if it so chooses, and HHS indicated that it would "work[] with Congress on the necessary funding for outstanding risk corridors payments." CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), A186.

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

CONCLUSION

Health Republic's motion for summary judgment should be denied, and the Court should enter judgment in favor of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 12, 2017, a copy of the attached *United States' Opposition to Summary Judgment and Cross-Motion for Summary Judgment* was served via the Court's CM/ECF system on Plaintiff's counsel, Stephen Andrew Swedlow.

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