IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,	)	
	)	
Plaintiff,	)	**No. 16-967C**
	)	
v.	)	
	)	**Judge Bruggink**
THE UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	
	)	

UNITED STATES' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution and Statutes

Legislative Materials

Other

UNITED STATES' SUPPLEMENTAL BRIEF

Pursuant to this Court's March 9, 2017 order (the Order), Dkt. 30, the United States submits supplemental briefing on Maine Community Health Options' (Maine) claim for statutory entitlement to payment under the Risk Corridors Program (RCP) created under section 1342 of the Affordable Care Act (ACA), 42 U.S.C. § 18062 (2012).

In the Order, the Court identified two bases for the United States' Rule 12(b)(6) motion to dismiss:

- First, defendant argues that the RCP was intended to be implemented in a "budget neutral" manner, meaning that section 18062 limits payment obligations to those amounts collected from insurers whose costs are below the target amount and who must pay into the RCP. If HHS collects less from insurers who must pay in to the program than it owes to insurers who are due payment, then, according to defendant, the government is under no obligation to make up the difference from other funding sources.

- Second, defendant argues that appropriations riders in 2015 and 2016 prevent HHS from using appropriated funds to meet RCP payment obligations, leaving insurers without recourse to the Judgment Fund to enforce any possible obligation.

Order at 2.

Regarding the first basis, as we explained in our briefing, Congress planned section 1342 to be self-funding as demonstrated by the text and structure of the statute, which directs HHS "to establish and administer a program of risk corridors" and by Congress's omission of any appropriation or authorization of funding, in contrast to the Medicare Part D program on which the ACA risk corridors program is based. Def. MTD Rep., Dkt. 26, at 14-19. Regarding the second basis, as we also explained in our briefing, to the extent there could be any ambiguity about Congress's intent in passing section 1342, Congress removed all doubt in the only legislation it has enacted which addresses appropriations for risk corridors payments. Specifically, when Congress enacted the 2015 and 2016 Spending Laws, it appropriated risk corridors collections as the only source of funding for payments and expressly barred the use of

other funds. Def. MTD Rep. at 14, 19-24. We supplement both of these assertions below, and address specifically why the Court's ruling in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017), was erroneous and should not be followed.

We begin, however, by addressing the specific questions this Court posed in the Order:

> What is the effect of a subsequent Congressional bar to using appropriated funds to meet a previously-created statutory payment obligation with regard to any right to seek judicial enforcement of that obligation? Does the Judgment Fund preserve the right of recourse under the Tucker Act?

We will expand in detail below, but, in short, the United States answers the Court's questions as follows:

1. Section 1342, standing alone, did not create a statutory payment obligation. Through the Spending Laws, Congress created an obligation to remit risk corridors collections to issuers eligible to receive risk corridors payments, and that is the full scope of the United States' obligation.

2. Even if section 1342 did create a statutory payment obligation, there is no doubt that appropriations legislation can modify a preexisting statutory payment obligation, as long as the purpose is clear. *United States v. Dickerson*, 310 U.S. 554 (1940); *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 2000). In the 2015 and 2016 Spending Laws, which were passed *before* any obligation for HHS to pay risk corridors payments could have arisen, Congress appropriated only risk corridors collections and expressly restricted HHS's use of other appropriated funds to make such payments. The purpose of these restrictions was to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014), Appendix (A_) at 69. Thus, even if section 1342 created a statutory payment obligation, the Spending Laws definitively capped payments at amounts collected and thus superseded any such obligation.

3. The Judgment Fund does not create a "right of recourse" that otherwise does not exist. The presence of Tucker Act jurisdiction is not concurrent with entitlement to recovery. Instead, where Congress has defined the appropriations that shall be available for a given program, it is the duty of the Court to recognize that a party's rights are as defined by Congress. In the case of risk corridors, Congress has limited the appropriations available to the amounts collected, and resort to the Judgment Fund would not "preserve" recourse but rather expand and create recourse not authorized by Congress. As the Supreme Court has recognized, the Judgment Fund is not a back-up source of appropriations, nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds

> from the Treasury. "Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990).

The ACA created a self-funded risk corridors program to distribute gains and losses between insurers that under- and over-estimated premiums. The Act did not make the taxpayers the guarantor of profits for the health insurance industry, and insurers should not be permitted to circumvent Congress's power of the purse by demanding billions of additional dollars from the Treasury. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In *Land of Lincoln Mutual Health Insurance Co. v. United States*, the Court recognized that "Section 1342 . . . does not obligate HHS to make annual payments or authorize the use of any appropriated funds." 129 Fed. Cl. 81, 107 (2016), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016).

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

As the United States demonstrated in its motion to dismiss briefing, the text, structure, history, and purpose of the risk corridors program demonstrate that the program was to be self-funded. Nothing in the text of section 1342 obligated the government to use taxpayer dollars to make potentially massive, uncapped payments to insurance companies. Maine essentially argues that the language in section 1342's "payment methodology" provision stating that the Secretary "shall pay" specified amounts calculated under the formula created a binding obligation on the government. *See, e.g.*, Pl. MSJ, Dkt. 9, at 24. However, the Federal Circuit has recognized that statutory language directing an agency to pay amounts calculated under a statutory formula does not, without more, create an obligation on the part of the government to provide for full

payments in the absence of appropriations. *See, e.g.*, *Prairie County, Montana v. United States*, 782 F.3d 685 (Fed. Cir. 2015).[1]

In dozens of other ACA provisions, Congress appropriated funds or enacted statutory language authorizing the appropriation of funds in the future. *See* Def. MTD, Dkt. 22, at 31-32 & n.17; Def. MTD Rep. at 15 n.4. In contrast, the only funds referred to in the risk corridors statute are "payments in" by insurers and "payments out" to insurers. There is no dispute that neither section 1342 nor the ACA contains an appropriation to make risk corridors payments. *See Land of Lincoln*, 129 Fed. Cl. at 104-05 ("Congress provided appropriations or authorizations of funds for other programs within the Act, but it never has done so for the risk-corridors program."); *Health Republic Ins. Co v. United States*, 129 Fed. Cl. 757, 762 (2017); *Moda*, 130 Fed. Cl. at 442; *Dept. of Health & Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, at *2 (Sept. 30, 2014) ("*Government Accountability Office (GAO) Op.*"), A77.

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

[1] At oral argument, apart from reliance upon (a) Congress's instruction that risk corridors be "based on" Medicare Part D and (b) statements made by HHS, Maine notably did not identify any appropriation allegedly made by section 1342.

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

42 U.S.C. § 1395w-115(a)(2). Thus, in Medicare Part D, Congress made risk corridors payments an "obligation" of the government regardless of amounts contributed by insurers.[2] *Id*. Congress enacted no equivalent language in section 1342 of the ACA. Although Maine asserts that section 1342 should be interpreted no differently than Medicare Part D, *see e.g.*, Transcript of Argument – Motion to Dismiss and Motion for Summary Judgment, Feb. 15, 2017 ("Motions Argument Tr."), at 86:9 – 88:22, Maine does not explain how a court could properly do so in light of the crucial differences in the language of the two statutes.[3]

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[2] At oral argument, Maine asserted that the GAO Redbook demonstrates that section 1342 created an "obligation" of the United States. Motions Argument Tr. 57:4 – 59:7; *see id.* at 78:3-9 (relying upon GAO–06–382SP, Principles of Fed. Appropriations Law (GAO Redbook), Vol. II, Ch. 7, page 7-3 (3d ed. 2006), A86). Chapter 7 is titled "Obligation of Appropriations" and follows Chapter 6, which is titled "Availability of Appropriations: Amount." Chapter 6 focuses on *how* Congress appropriates. It explains that "certain forms of appropriation language have become standard" and then "point[s] out the more commonly used language with respect to amount," differentiating between lump sum and line-item appropriations. GAO Redbook, Vol. II, Ch. 6, page 6-5 (3d ed. 2006), A83. Chapter 6, Section C focuses on the Anti-Deficiency Act, explaining: "Government officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the 'bank' to cover the cost in full. The 'bank,' of course, is the available appropriation." *Id.* at 6-37, A84.

Then, Chapter 7 begins with the following: "The concept of 'obligation' is central to appropriations law . . . because of the principle, one of the most fundamental, that an obligation must be charged *against the relevant appropriation* in accordance with the rules relating to purpose, time, and amount." GAO Redbook, Vol. II, Ch. 7, page 7-3 (emphasis added), A86. The Redbook makes clear that an "obligation" requires an existing appropriation, except as authorized by law (*e.g.*, with the exception of Congressional intent, such as that demonstrated in Medicare Part D, to establish an obligation in advance of appropriations; *see* 31 U.S.C. § 1341(a)(1)(B) (allowing obligation in advance of appropriation when authorized by law)). Maine's reliance on Chapter 7's discussion of obligation is meritless because Maine cannot identify an existing appropriation or demonstrate that Congress authorized by law HHS to incur an obligation to make risk corridors payments in excess of collections.

[3] At oral argument, Maine asserted that "the Government would like to run very, very far from Medicare Part D." Motions Argument Tr. 89:16-17. Nothing could be further from the truth.

In *Moda*, 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." 130 Fed. Cl. at 455. Based on that premise, the *Moda* court opined that "the stronger payment language in Section 1342 obligates the Secretary to make payments and removes his discretion, so a further payment directive to the Secretary is unnecessary." *Id*.

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

Second, Judge Wheeler erred in concluding that the "payment language in Section 1342 obligates the Secretary to make payments" in the absence of appropriations. *Moda*, 130 Fed. Cl. at 455. Under the "straightforward and explicit command of the Appropriations Clause," "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424. "A direction to pay without a designation of the source of funds is not an appropriation." GAO Redbook, Ch. 2, page 2-24 (4th ed. 2016), A89. Unlike section 1342 or anywhere in the ACA with respect to risk corridors, the Medicare Part D statute not only

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Comparison with Medicare Part D demonstrates that section 1342 does not create a payment obligation in the absence of an appropriation.

directs the Secretary to make specified payments to insurers, but it 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.

The language that Congress included in the Medicare Part D statute—but omitted from section 1342—is precisely the type of language that this Court has identified as establishing a government obligation to pay. *Prairie County*, 782 F.3d at 691 (rejecting the argument that a statute directing an agency to make payments to local governments in accordance with a statutory formula obligated the government to make full payments regardless of appropriations). Section 1342 does not authorize appropriations, nor does it provide any other budget authority for risk corridors payments. *See generally* 2 U.S.C. § 622(2) (defining four types of budget authority, none of which was granted in section 1342).

At oral argument, this Court asked whether the United States' argument, or the decision in *Land of Lincoln*, "turn[ed] on whether or not there was an assumption that [section 1342] would be self-funding." Motions Argument Tr. 94:19-20. As explained in our briefing and at oral argument, Def. MTD at 22-23; Def. MTD Rep. at 16; Motions Argument Tr. 26, when the CBO scored the ACA, it did not attribute any costs to the risk corridors program. *See* Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010), A18-19 (omitting risk corridors from the budget scoring). Congress expressly relied on that scoring in the ACA. ACA § 1563(a); *see also Land of Lincoln*, 129 Fed. Cl. at 104 & n.21 ("Congress explicitly relied upon the CBO's findings when enacting the Affordable Care Act."). But whether Congress or the CBO correctly

"assumed" that collections would, in fact, equal or exceed payments calculated under the statutory formula is not relevant for the question at issue before this Court: Did section 1342 create an obligation to pay risk corridors in excess of collections? That is a question of congressional intent, and Congress's intent not to create an obligation to pay risk corridors in the absence of an appropriation, as described above, is evident from the language of section 1342, bolstered by comparison to other provisions of the ACA and to Medicare Part D.

II. 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 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."

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 corresponds to the 2015 and 2016 fiscal years. At oral argument, Maine conceded that the earliest a claim could accrue for risk corridors payments was July 2015. Motions Argument Tr. 54:24 – 55:7.

Congress addressed the question of appropriations for the first time in December 2014, when it enacted appropriations legislation for fiscal year 2015. In early 2014, Members of Congress requested from the GAO an analysis of what sources of appropriations might be available when risk corridors payments came due. *See* GAO Op., 2014 WL 4825237, *1 (noting

requests), A76. In September 2014, the GAO issued an opinion identifying two components of the CMS Program Management appropriation for fiscal year 2014 that, if reenacted in subsequent appropriations acts, could be used to make risk corridor payments.[4] First, the GAO explained that the appropriation for "user fees" would, if reenacted for fiscal year 2015, allow HHS to use the "payments in" from insurers to make the "payments out." *Id*. at *3-4, A78. 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 corridor payments. *Id*. at *3, A78. 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, A79.

Congress did not enact the same appropriations language for fiscal year 2015. On December 16, 2014 – months before any payments could have been claimed or made under the risk corridors program – Congress reenacted the user fee appropriation and thus allowed HHS to use "payments in" to make "payments out." Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, title II, 128 Stat. 2130, 2477 (the "2015

[4] Each year, Congress generally makes a CMS Program Management appropriation, "for carrying out" enumerated programs administered by CMS, such as the Medicare and Medicaid programs, and for "other responsibilities of [CMS]." The Program Management appropriation includes a lump sum amount derived from specified trust funds, as well as "such sums as may be collected from authorized user fees and the sale of data." *See generally* Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (Jan. 17, 2014), A40. 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 id.* at title 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."), A42. Nothing in the CMS Program Management appropriation explicitly mentions risk corridors payments.

Spending Law"), A56-62.[5] But Congress 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, A62.

On December 18, 2015, Congress enacted an identical funding limitation in the annual appropriations act for fiscal year 2016 (the "2016 Spending Law"). Pub. L. No. 114-113, div. H, title II, § 225, A75. The Senate Committee Report to the 2016 Spending Law 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.

[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, title V, § 502, 128 Stat. 408, A42. Congress funded government operations, including HHS, past this date through a continuing resolution, 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), A43. 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, A44. The funds made available in the continuing resolution were only available until the enactment into law of the applicable appropriations Act for fiscal year 2015 or until December 11, 2014. *Id.* § 106, A44. Congress twice extended the December 11 deadline until December 17, 2014. *See* Pub. L. No. 113-202, 128 Stat. 2069 (Dec. 12, 2014), A54; Pub. L. No. 113-203, 128 Stat. 2070 (Dec. 13, 2014), A55. Congress then enacted the 2015 Spending Law on December 16, 2014.

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), A66.[6] 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 a self-funded program.

In *Moda*, Judge Wheeler erroneously concluded that "fiscal year 2014 CMS Program Management appropriation" was available but "HHS chose not to use it." *Moda*, 130 Fed. Cl. at 456. In fact, as Maine conceded at argument, no claim for 2014 payments accrued until July 2015, long after the 2014 appropriation expired.

Even assuming for the sake of argument that section 1342 had made risk corridors payments an obligation of the government (beyond amounts collected as "payments in"), the 2015 Spending Law, 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. *Dickerson*, 310 U.S. at 556. "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883). In *Dickerson*, 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

[6] The time period from September 30, 2015 (the expiration of the 2015 Spending Law) until the enactment of the 2016 Spending Law on December 18, 2015, is covered by continuing resolutions, which incorporate the rider in the 2015 Spending Law. *See* Pub. L. No. 114-53 § 101(a) (Sept. 30, 2015); Pub. L. No. 114-96 (Dec. 11, 2015); Pub. L. No. 114-100 (Dec. 16, 2015). Continuing resolutions enacted since the September 30, 2016 expiration of the 2016 Spending Law incorporate that law's rider as well. *See* Pub. L. No. 114-223, div. C (Sept. 29, 2016); Pub. L. No. 114-254 (Dec. 10, 2016).

within a period of three months from the date of his discharge." 310 U.S. at 554-55. Similarly, in *United States v. Will*, 449 U.S. 200, 224 (1980), the Supreme Court held that an appropriations act providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely."

The Federal Circuit's decision in *Highland Falls* is particularly instructive. *See* MTD at 37, MTD Rep. at 22; Motions Argument Tr. 46:3-21. In contrast to section 1342, the permanent legislation at issue in *Highland Falls* – section 2 of the Impact Aid Act – gave funding recipients an "entitlement" to payment of amounts calculated under a statutory formula. 48 F.3d 1168 (statute provided that school districts "shall be entitled" to payment of such amounts). Moreover, the permanent legislation specified that in the event of a shortfall in appropriations for various statutory programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2 of the Impact Aid Act. *Id*. Subsequently, however, Congress earmarked certain amounts for entitlements under various sections of the Impact Aid Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id*. at 1169. In light of that clear limit on appropriations, 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. Maine has made no attempt to distinguish *Highland Falls*, either in briefing or at oral argument.[7]

[7] Similarly, in *Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), *see* Motions Argument Tr. at 102, 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. *Id.* 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

Here, as in *Highland Falls*, it is difficult "imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id*. at 1170. Indeed, the appropriations legislation for risk corridors is materially indistinguishable from the appropriations legislation in *Highland Falls*. As in *Highland Falls*, the agency could not have paid (in light of the shortfall in collections) 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)) (the Court's alterations). And in enacting the express restrictions on funding for risk corridors payments, Congress left no doubt that the purpose of the restrictions 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." *See* 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014), A69.

III. The Judgment Fund Is Not a Back-Up Appropriation for Every Money-Mandating Statute

The Judgment Fund is not a back-up source of appropriations, nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. "The general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432. The express terms of section 1342, however, do not provide for payment without regard to collections or appropriated funds. Moreover, the

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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.

Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). *See also Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (*en banc*) (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").[8] Thus, until entry of judgment, the permanent appropriation of the Judgment Fund is as irrelevant to the determination of liability as is the existence of any other unrelated appropriation.

Judge Wheeler improperly relied on the existence of the Judgment Fund to supply the necessary appropriation in the absence of an annual appropriation by Congress for risk corridors payments. *Moda*, 130 Fed. Cl. at 461-62. Contrasting the Spending Laws' limitation with the limitation in *Dickerson*, 310 U.S. 554, 555 (1940), which provided that "no part of any appropriation . . . or any other Act" would be available, Judge Wheeler reasoned that by specifying only the CMS Program Management appropriation in the Spending Laws, Congress "left open" the Judgment Fund for risk corridors payments. *Moda*, 130 Fed. Cl. at 462. But no case holds that Congress must specify "any other Act" or similar language in order to preclude liability in the Court of Federal Claims. Indeed, this reasoning squarely conflicts with *Highland Falls*, where the appropriations acts merely "'earmarked' certain amounts for entitlements" under the Impact Aid Act, 48 F.3d at 1169, without making reference to the availability of funds under any other act. Nonetheless, the Federal Circuit affirmed the Court of Federal Claims' dismissal of the school district's complaint for additional funds under the Tucker Act from the

[8] At oral argument, Maine conceded that "the Judgment Fund doesn't create the obligation . . . it services liabilities that flow from or stem from obligations created by other law." Motions Argument Tr. 60:13-16. Maine suggested reliance on *Slattery*, Motions Argument Tr. 60:11, but *Slattery* held only that the appropriation status of a governmental agency is not relevant to Tucker Act jurisdiction. 635 F.3d at 1321.

Judgment Fund. Under Judge Wheeler's reasoning in *Moda*, the school district should have prevailed.

Moreover, Judge Wheeler's reasoning turns the appropriations process on its head. Congress is not presumed to have appropriated funds, via the Judgment Fund, for every money-mandating statute, unless it each year specifies otherwise. Rather, Congress exercises the power of the purse through both substantive legislation and the annual appropriations process, and it is the duty of the Courts to decide how Congress has exercised that power by discerning Congress's intent in both forms of legislation.

IV. The Cases on Which Maine and *Moda* Rely Are Inapposite

This case bears no resemblance to the cases on which Maine and *Moda* rely. *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), *see* Pl. MSJ at 26, 37; Pl. MSJ Rep., Dkt. 23, at 12, 22; Motions Argument Tr. at 59, 61, 91, which concerned compensation that the government owed to helicopter companies for delivering the U.S. mail, does not apply here for at least four significant reasons. First, 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 court recognized that "clear and uncontradicted" "proof of congressional intent in the legislative history" to amend permanent legislation through an appropriations restriction would place the restriction "within the ambit of *Dickerson*." *Id.* at 750. 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, A69, and to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner," S. Rep. 114-74, at 12, A66. Finally, the appropriations provision itself in *New York Airways* bears no resemblance to the express restrictions here. 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 legislative history that Congress did not intend that appropriation to limit amounts owed to carriers. 369 F.2d at 749-51. In contrast, Congress appropriated only risk corridors collections and expressly barred the use of other funds.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is equally far afield. *See* Pl. MSJ at 34, 40; Pl. MSJ Rep. at 22; Motions Argument Tr. at 59, 61, 77-78, 91. The appropriations act in that case stated that "none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services *other than as provided in the*

Federal Employees Pay Act of 1945." *Id*. at 48-49 (emphasis added). Because "the 1945 act expressly state[d] . . . that it should not prevent payments in accordance with the 1931 act," the court concluded that the italicized language allowed the plaintiffs to "be paid according to the 1931 act." *Id*. at 50. Although Maine asserts that the appropriation provision in *Gibney* contains "language nearly identical to the language" restricting funding for risk corridors," Pl. MSJ Rep. at 22, 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 Maine's claim. *See* Pl. MSJ at 33-34; Motions Argument Tr. at 59, 61, 77. The substantive statute in *Langston* provided that the representative to Hayti "shall be entitled to a salary of $7,500 a year," and "the sum of $7,500" had in fact "been annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883." *Id*. at 390. For two subsequent years, Congress appropriated only $5,000 each for the salaries of various ministers including the minister to Hayti, but Congress omitted from these acts proposed language that would have repealed statutes allowing a larger salary. *Id*. at 391. While cautioning that the case was "not free from difficulty," the Supreme Court concluded that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years." *Id*. at 394.

Langston may have been a difficult case, but the risk corridors cases are straightforward. In contrast to the substantive statute in *Langston*, section 1342 does not make risk corridors payments an "entitlement" of insurers. And in contrast to the appropriations act in *Langston,*

Congress did not merely fail to appropriate sufficient funds for risk corridors payments, but prohibited HHS from using funds other than collections for such payments.[9]

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Respectfully submitted,

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[9] 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2017, I electronically filed the foregoing UNITED STATES' SUPPLEMENTAL BRIEF with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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